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## Lawyers' Ethics in an Adversary System. By Monroe H. Freedman

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## BOOK REVIEW

LAWYERS' ETHICS IN AN ADVERSARY SYSTEM. By MONROE H. FREEDMAN.\* New York: The Bobbs-Merrill Company, Inc. 1975. Pp. 270. \$12.50.

Reviewed by *William M. Kunstler*\*\*

Since Watergate, most Americans have entertained serious doubts about the ethical standards of lawyers. As scores of attorneys, many in highly prominent positions, were revealed to be either outright crooks or, at the very least, easily corruptible human beings, public confidence in the integrity of the bar visibly waned. It is probably not out of line to speculate that at no other time in the country's history have lawyers been less in favor than they are today.

While Dean Freedman's book is devoted primarily to one aspect of legal ethics, namely those of the trial lawyer, it comes at a most fortuitous time. If it does nothing else, it may well stimulate heated discussion, both in and out of the profession, at a moment in our national experience when such colloquy is the very minimum we can expect. While I do not believe, for an instant, that much if anything will change because of this hoped-for dialogue, I think that it is good for it to take place, if only to slow down the dry rot somewhat.

The adversary process that characterizes the Anglo-American system of jurisprudence has been universally extolled as the most efficient nonscientific method of isolating the truth of any matter in dispute. In reality, it is simply a convenient *modus operandi* by which competing theoretical illusions are presented to so-called factfinders for their selection. To phrase it another way, it amounts to a highly stylized version of grab bag, with high pressure salespersons vociferously pushing their unseen wares on confused shoppers. What emerges so often is rarely truth but that which one side or the other seeks to palm off as truth.

In essence, this is the corner of the law which Freedman has chosen to examine, almost microscopically. With the exception of

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some rambling excursions to such provocative topics as, to use the shorthand of chapter headings, "Certification of Trial Lawyers," "The Myth of British Superiority" and "The Duty to Chase Ambulances," he steadfastly pursues his major thesis, namely, that the trial attorney's duty to the client transcends any he or she might owe to the court, good manners, or the truth itself. Since I subscribe wholeheartedly to this concept, and, indeed, am one of the examples he uses to prove his point, I can hardly be expected to be critical of it. But I do think that I have some sort of an obligation to advance the rationale for my conclusions, even though, as I suspect, it may differ markedly from that motivating the author, who seems to have a bedrock faith in the system that I cannot bring myself to share.

In a relatively ideal society, I suppose that I would prefer that the trial process actually be a mutual search for the truth, conducted cooperatively by the defense and prosecution with grace and civility. Under our present system, however, the exclusionary rules of evidence, the prompting of perjury, and the deft use of cross-examination to destroy the honest opposing witness, to name but a few roadblocks mentioned by the author, serve to obfuscate truth and create the present charade of deceptive courtroom competition. I firmly believe that the American legal institution is deliberately designed and maintained in order to inhibit, by any means necessary, anyone who even vaguely threatens the status quo. Thus, I think that attorneys representing individuals who do challenge society's conventional wisdom must be fully prepared to pit fire against fire if they are to have any chance to save their clients.

In other words, the legal institution is just as reformable as the overall system of which it is a major component. Its role, as Charles Reich eloquently points out in the first part of his book, *The Greening of America*,<sup>1</sup> is to control all those who might conceivably upset the apple cart by altering existing social, political or, most of all, economic norms. The methods by which such control is exercised are frequently barbaric, inhumane, and cold-blooded, and no amount of tinkering by liberals has ever been able to prevent their widespread application. If any proof of this was necessary, it can be seen in the origins of Senate Bill S-1,<sup>2</sup>

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1. C. REICH, *THE GREENING OF AMERICA* 87-128 (1970).

2. S.1, 94th Cong., 1st Sess. (1975).

known colloquially as "Nixon's Revenge," which will, if enacted, legalize a form of neofascism.

So what then is the trial lawyer, who honestly believes that he or she understands the true nature and intent of the institution, to do when asked to defend someone who in all likelihood is about to be crushed by its strictures? One obvious answer, of course, is to avoid the problem entirely by refusing to represent such pariahs. Another is to suppress your sensibilities and play the game for as long as you can stand it or until you become so jaded that you lose sight of the true nature of what you are doing. Then there are those whose principles are stronger than their instinct for self-preservation who decide to take the high road of client representation that must, under existing conditions, exclude every other interest.

Freedman presents one particularly graphic hypothetical to illustrate the moral dilemmas and legal duties involved in proper client representation.<sup>3</sup> The case involves a woman who is allegedly raped by a service station attendant. As the defense lawyer you find that your client has been tried and acquitted for a similar crime in California some time ago, that the story he is going to tell the court of her acquiescence to the sexual intercourse is untrue, and that the woman's account of the facts substantiating a forcible rape is correct. In addition, the woman is 22 years old, is the upstanding daughter of a local banker, and is engaged to marry a young minister in town.

Now the tough part. You discover that this woman has had two previous romances. Her first boyfriend refuses to tell you anything relevant about their relationship. The second, however, is a very bitter former suitor who appears eager to testify that they had sexual intercourse frequently and that, during their time together, she behaved in a provocative fashion toward strange men. He comments, "She got what she deserved." The question is whether you as a defense attorney put this man on the stand to present testimony which will suggest strongly that the complainant is lying when, in actuality, you know that her testimony is truthful and accurate. Freedman indicates, and I agree, that the lawyer who is doing a proper job of representing the client must put this second individual on the stand, no matter how personally reprehensible the lawyer finds the testimony and re-

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3. Pp. 43-49.

regardless of the probable disastrous effect that it will have on the reputation of the woman, her family, and friends. This is not a particularly pleasant dilemma to face, and those who, like myself, do not feel they can elect such a choice should not attempt to represent clients in these types of cases. If one does take such a case, however, to do anything less than attempt to destroy the truthful witness would be to defend the client's interests improperly. On the personal side, however, I must state that because of my own sensibilities I could never take such a case. I would refuse to do so if asked.

As Freedman points out, with this and other perplexing examples, the road of proper client representation is a rocky one indeed. Lawyers who decide to walk it so often find themselves hauled before grievance committees, sidetracked by disciplinary proceedings, indicted for crime, or, at the very least, ostracized by their fellow practitioners who fear the leper's touch. The bar, organized or not, is quick to recognize the mailed fist inside the velvet gloves worn by the hands that feed it, and reacts accordingly.

In order to disguise the real nature of this process, the legal establishment has surrounded itself with a panoply of high-sounding canons, codes, and standards. More than half of Dean Freedman's book is devoted to a presentation and analysis of these rather pretentious rules of conduct,<sup>4</sup> some of which, such as the proscriptions against public comment about pending cases,<sup>5</sup> are blatantly unconstitutional. While they do not make for the most interesting of reading to anyone but a devotee of paradox in human affairs, they do illustrate the degree to which a rather tawdry trade has been glorified into a profession, and how zealous are its overseers to avoid any slippage.

But the real meat of the book, it seems to me, lies in its stripping away of some of the protective camouflage which has so successfully hidden the system from meaningful public scrutiny for centuries. Unfortunately, lay criticism has almost uniformly been confined to the alleged unethical activities of certain lawyers and not to those of the institution itself. The tendency has been to point the finger at the erring individual and to accept the bar's self-policing procedures as proof positive of the validity of its own

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4. Pp. 127-238, 249-63.

5. Pp. 217-19.

morality claims. As a result, a handful of small-time fast buck operators, some political figures whose unlawful activities have been widely disclosed, and the attorneys for the unpopular have generally been the only ones to have felt the lash of suspension or disbarment. On the other hand, lawyers who assist giant corporations in finding ways around the antitrust or pure food and drug laws, prosecutors who have suppressed or fabricated evidence, and judges who have openly violated their oaths of office not only do not have to worry about deserved retribution, but are always found among the most highly respected members of their communities.

In his recent film, *Special Section*, Constantin Costa-Gavras notes, with somewhat ingenuous surprise, that none of the Vichy judges who openly subverted fundamental French law in order to placate their Nazi occupiers during World War II was ever punished, even though their actions resulted in the legal lynchings of hundreds of their compatriots. Americans, whose most pervasive national characteristics seem to be their lack of memory and isolation from reality, would probably be just as naively shocked at the virtual blanket immunity that shields lawyers, prosecutors, and judges from punishment for acts which belie every professed creed of our society. Even when the tip of the iceberg is momentarily visible, as during the Watergate crisis, our collective inactivity more than proves the essential validity of one commentator's quip that nothing constructive would come out of the Nixon debacle—and, inferentially, from any other revelations of power or money corruption in high places—because, in America, "it's always darkest before the yawn."<sup>6</sup>

Earlier in this review, I mentioned that lawyers who do not bend to the system run serious risks in remaining upright. While I wish that Dean Freedman had devoted much more space to this issue, he does roundly condemn the practice of utilizing ostensibly ethical principles to punish those who most exemplify the professed ideals of the legal establishment.<sup>7</sup> In his words: "In attacking zealous advocacy, we not only do damage to the public interest, but we also endanger a precious safeguard that any one of us may have occasion to call upon if we should come to need our own champion against a hostile world."<sup>8</sup> I am not sure that

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6. Safire, *The Pendulum*, N.Y. Times, May 17, 1973, at 43, col. 1.

7. Pp. 16-24.

8. P. 24.

his warning will have any currency among, say, those who run the American Bar Association, but, with S-1 lurking in our future,<sup>9</sup> it should not be taken lightly by the rest of us.

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9. See, e.g., Voorhees, *The Battle Over the Criminal Code*, 59 JUDICATURE 268 (1976).