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## CERTIFICATION OF TRIAL LAWYERS— THE JUDICIOUS STRUCTURING OF THE AMERICAN LEGAL PROFESSION

*Harry Cohen\**

Although lawyers have been the object of a great deal of disparagement in the past,<sup>1</sup> there are particular criticisms more in style from time to time. Today, the specific areas of condemnation are twofold. On the one hand, a few powerful and vocal members of the federal judiciary have taken the view that many lawyers are incompetent, especially in the area of trial advocacy.<sup>2</sup> These critics have urged a certification system for courtroom advocates. At the same time, other critics have branded lawyers and the legal profession "elitist," and have urged strong lay regulation.<sup>3</sup>

The certification issue has gained notoriety,<sup>4</sup> probably because its proponents are a powerful, entrenched minority. The issue of the "elitism" of the legal profession, however, has not received

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1. For a recent statement of the probable inherent nature of unpopularity and criticism of lawyers, see Manning, *If Lawyers Were Angels: A Sermon in One Canon*, 60 A.B.A.J. 321 (1974). According to Dean Manning, people do not want to hear the bad news lawyers often must convey. Lawyers interpret the law, which makes demands on people who do not wish to abide by it. To a large segment of the population, the adversary system is perceived as a process of competitive lying, and the legal profession is viewed as an intricate part of this system. In addition, critical media coverage of the legal profession continually places lawyers in a defensive and delicate position. *Id.*

2. See notes 5-9 *infra* and accompanying text.

3. See notes 24-31 *infra* and accompanying text.

4. Chief Justice Warren Burger, the leading exponent of the courtroom incompetence of American attorneys, was recently the subject of a proposed resolution at the annual midyear meeting of the American Bar Association held in New Orleans in February 1978, calling on him either to substantiate or withdraw his low estimate of trial lawyers' performance. The Illinois State Bar Association, backed by the New Jersey State Bar Association and other influential leaders of the American Bar Association, formally called on the Chief Justice to repudiate his contention that one-half of all American lawyers are unqualified for courtroom appearances or to substantiate his contention with facts. Although this resolution was ultimately defeated, temporarily ending the unusual confrontation with the Chief Justice, the issue was widely reported by the news media. See, e.g., N.Y. Times, Feb. 14, 1978, at 1, col. 3; N.Y. Times, Feb. 11, 1978, at 1, col. 3.

much attention. Nevertheless, both criticisms are important; investigation and analysis of these charges, as well as weighing the consequences of any meaningful action which may be forthcoming, are warranted.

#### LEGAL COMPETENCE AND STRUCTURING THE PROFESSION— THE ENGLISH COMPARISON

For the past few years, we have been hearing and reading Chief Justice Burger's criticism of lawyers.<sup>5</sup> Some time ago, he predicted dire consequences for the profession if sterner disciplinary processes and measures were not instituted.<sup>6</sup> Thereafter, he called for rooting out incompetence in the trial courts by allowing only *certified* advocates to appear.<sup>7</sup> Following his lead, lower federal court judges have criticized the level of competence of courtroom advocates.<sup>8</sup> For example, Chief Judge Irving R. Kaufman of the

5. Most recently, in testimony before a British commission in 1977, Chief Justice Burger estimated the number of American lawyers with adequate courtroom skills, those qualified to represent their clients properly, midway between 25% and 75%; this estimate was based on many discussions with trial judges in recent years. See N.Y. Times, Feb. 14, 1978, at 1, col. 3; N.Y. Times, Feb. 11, 1978, at 1, col. 3.

6. Chief Justice Burger's criticisms are categorized and discussed in Cohen, *Lawyer Certification, Civility, "Good Moral Character," and Pressures for Conformity*, 1 J. LEGAL PROFESSION 59, 60 (1976).

7. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 238-39 (1973).

8. For example, Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit was reported to view the issue of courtroom incompetence similarly to Chief Justice Burger. However, Chief Judge Kaufman was also reported to have complained that lawyers leave too much of their work to judges. Another complaint Chief Judge Kaufman put forth was that lawyers do not know how to evaluate a case, for while turning down settlements, they may get nothing from a jury. See Wall St. J., Feb. 24, 1975, at 1, col. 1. It has also been reported that many judges agree with Chief Judge Kaufman. See N.Y. Times, Mar. 11, 1975, at 16, col. 1. However, the question arises whether courtroom skills can be obtained in an academic setting. In this vein, former federal judge and experienced trial lawyer Simon H. Rifkind was quoted as stating that no law school can teach "an appetite for work, endurance, an elephantine memory, instant recall, uncanny perception of behavior, the gift of tongue, commanding presence and good voice." See N.Y. Times, Sept. 12, 1975, at 19, col. 3. See also MacCrate, *Populist and Elitist Conceptions of the Bar* (pt. 2), ALI-ABA CLE REV., March 8, 1974, at 4:

Both Chief Justice Burger and Chief Judge Kaufman have inveighed against on-the-job training and advocated new limitations upon those who may plead in court. But every lawyer must argue his or her first case. A fortunate few may serve an apprenticeship with great advocates in large causes, but more will win their places at the bar primarily by their individual hard-won experience shaped by the hand of discipline that the bench itself can impose. If counsel do not comply with court rules and if they

United States Court of Appeals for the Second Circuit has taken up the competency issue from Chief Justice Burger and has vigorously espoused it.<sup>9</sup>

Those who argue for certification of lawyers are probably thinking of adopting something akin to the English structuring of the legal profession.<sup>10</sup> Under this approach, only trial advocates are certified, and only they may appear in court. Thus, inquiry into the nature of the English structuring of the legal profession, as well as into the disadvantages inherent in that system, is merited.

The English system sets apart a small minority of the legal profession called the bar, whose members are known as barristers. Barristers practice only as solo practitioners, and may not enter direct lawyer-client relationships without being retained by a solicitor, a lawyer who deals with the public and who is normally not a trial advocate. Solicitors may not appear as advocates in higher trial courts or in appellate courts; this right is reserved for barristers, who must be members of one of the ancient Inns of Court. Barristers are the only lawyers who may become judges in the higher courts, and even as judges, they continue as members of the Inns of Court, so that barristers and judges remain unified. The barristers are the most powerful segment of the English legal profession and their brother-colleagues, the judges, bolster this power.<sup>11</sup> The solicitors must hire barristers for their clients

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submit inadequate and shoddy briefs, a few firm admonitions from the bench or requests for further briefing can have a salutary effect on complacent counsel who abuse the judicial process in this fashion.

*But see, e.g.,* Wall St. J., Feb. 24, 1975, at 1, col. 1, where Judge Weinstein of the United States District Court for the Eastern District of New York is reported to have stated that "the quality of representation in my court [is] generally high." *Id.*

9. See Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175, 177-78 (1974). Chief Judge Kaufman has appointed a committee to devise qualifications for lawyers seeking to practice in the Second Circuit and has lectured on the subject. See N.Y. Times, Mar. 11, 1975, at 16, col. 1.

10. Chief Justice Burger is apparently enamored with the English barrister. He has written of the high quality, see Burger, *supra* note 7, at 229, and of the tight regulation and discipline in the Inns of Court, see Burger, *The Necessity for Civility*, 52 F.R.D. 211, 215 (1971). Chief Justice Burger, however, explicitly disclaims a desire that the English system be transplanted in the United States, believing it "impossible" to do so. Burger, *supra* note 7, at 227. It remains questionable, however, whether certifying trial advocates would, in fact, create a system different in kind from the English legal system.

11. Within the bar, status and conduct is controlled by a small group at the top, especially the Lord Chancellor, and selection to the rank of Queen's Counsel ("silk"), and thus to the judiciary are often based on subjective rather than objective standards. It comes as no surprise, therefore, that the English bar is homogeneous and conformist, with a "lack of inclination to

both for briefing on the law and for litigation. In addition a solicitor may often pay a fee for a barrister's legal opinion because the system breeds deep insecurity on the part of the solicitor concerning his legal acumen. The result is that a client must hire two lawyers.

The English call theirs a divided profession, as in fact it is. In this context, the American system is fused because the American lawyer acts as a unit for his client. Only one fee need be paid, and communication between the client and lawyer is direct. The American lawyer, unlike the barrister, may personally interview and counsel his client; thus nothing is lost in the transmission from lawyer to client.<sup>12</sup>

Not the least of the many disadvantages in the English system is the waste caused by the division of the lawyer's functions. Often barristers are underemployed, and some find that they may be better suited for a solicitor's office practice than for litigation.<sup>13</sup> Similarly, solicitors may discover that they are really better suited for advocacy and/or specialization in a particular legal subject.<sup>14</sup> Yet, movement from one branch to another is difficult.<sup>15</sup> In contrast, the American fused profession allows lawyers to be utilized to the fullest extent necessary for client needs. If a lawyer finds that he has tired of doing trial work, there is nothing to stop him from pursuing another type of legal work.

Another disadvantage in the English legal system involves its amorphous concepts of status and prestige. There is little doubt

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criticize either fellow lawyers or legal institutions." In addition, the English barristers do not follow many of their own highly praised ethical precepts. Cohen, *supra* note 6, at 72-73.

12. It is sometimes argued that the English people have a relatively compact, competent group of legal specialists from which to choose, while the lack of formal division in the American system creates great difficulties when a legal specialist is necessary. The American legal profession has never been formally divided between advocates and nonadvocates or between various specialized practices. At the same time, voluntary specialization, in many areas, even separation of advocates and nonadvocates, has occurred to some extent for generations. Beginning with the emergence of the large New York law firms in the 1880's, law firms have compartmentalized their lawyers into specialty areas, at times even to the point of delineating trial advocates from appellate advocates. Also, there is a great deal of referral work, where one lawyer will associate with another who is considered a specialist in a particular field of law. It has been suggested that not enough work is referred in the United States, while solicitors in England tend to overrefer to barristers. See Q. JOHNSTONE & D. HOPSON, *LAWYERS AND THEIR WORK* 547 (1967).

13. *Id.* at 393.

14. *Id.*

15. *Id.*

that barristers enjoy greater prestige in English society than do solicitors. It has even been argued that the higher status of barristers as a group vis-à-vis solicitors is justified because barristers' activities involve greater "skill and responsibility."<sup>16</sup> Although some American lawyers and groups of American lawyers have enjoyed greater prestige than others, their status is not governmentally institutionalized. Because of the formal legal distinction between barristers and solicitors, a somewhat artificial barrier is placed between the two branches of the English legal profession. This lowering of the status of one group of lawyers has occurred even though the solicitor's legal education is more demanding than that of the barrister's, and even though there is no evidence that barristers are more intelligent or more capable than solicitors.

What Chief Justice Burger and those who agree with him would bring to the American legal profession is a kind of legal caste system analogous to the English system.<sup>17</sup>

American federal judges are appointed to the judiciary with life tenure in much the same quasi-political fashion as are English judges. Some federal judges may now wish to create a system in which the only trial advocates who could appear before them would be those certified by the judges themselves. Demanding this monopoly, the next step might be the appointment of federal judges exclusively from this group of certified practitioners.<sup>18</sup>

16. *Id.* at 394.

17. See note 10 *supra* and accompanying text.

18. See Cohen, *supra* note 6, at 73-74. This earlier article by the present author dealt with another aspect of the certification problem and the comparison between the American and British legal professions:

The British model set for the American legal profession is replete with contrived and exaggerated myths, even though many English trial and appellate barristers are extremely fine lawyers. They are, on the whole, however, no better or worse than a similar type group of American lawyers. In fact barristers may be uniformly less competent in representing their clients than their American counterparts. They indulge in what could be called a great deal of "nonethics." Their so-called expeditiousness in the trial of cases probably is a result of what has been called being "easy-going with each other." This may mean that the counsel who is concerned mostly with manners and offending his opponent and the judge is not paying enough attention to his client's interests. By taking the concept of "officer of the court" to an extreme, it is quite probable that the society and the judicial system suffer.

*Id.* at 73-74 (footnotes omitted). When discussing the barristers, the Chief Justice relies only on his own experience and gives no other views. For example, the Chief Justice stated: "I have heard it said occasionally by critics of the English legal system that it tends to be 'clubby' and 'establishment-oriented.' For twenty years, I have watched advocates conduct trials in more than a dozen countries, and nowhere have I

## ELITISM, UNEQUAL JUSTICE, AND LAWYER STEREOTYPES

At one time, a relatively small but powerful segment of the legal profession distinguished the "true professionals" from the "tradesmen" among lawyers,<sup>19</sup> and tried to seclude themselves from what they thought to be a lower caste of lawyers.<sup>20</sup> In keeping with this philosophy, this group sought to stifle admission to the bar<sup>21</sup> as well as to exact harsh penalties from those lawyers whom they perceived as not from the appropriate social level of American society.<sup>22</sup> Despite this history, the American legal profession has been slowly democratized, and at least since the 1930's, there has

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seen more ardent, more effective advocacy than in the courts of England. English advocacy is generally on a par with that of our best lawyers." Burger, *supra* note 7, at 229 (footnote omitted). In a footnote, the Chief Justice indicated that concern resulted when solicitors could not transfer to the barristers' profession, but this has now "dissipated since transfer from solicitor to barrister was made possible." *Id.* at 229 n.5. One solicitor-law teacher, however, examined the problems of such a transfer and found them to be vast and complex. See M. ZANDER, *LAWYERS AND THE PUBLIC INTEREST* 56-58 (1968) (footnote omitted), where the author noted:

The difficulties of transfer are, in fact, considerable. Barristers wishing to become solicitors first have to become disbarred from their Inn of Court and then have to undergo a two year period as articled clerks unless they have been in practice as barristers for five years . . . Barristers who have been in practice for more than five years . . . are only required to pass the Part II Examination. For the barrister, therefore, the obstacles are undergoing indignity of translating oneself into a lowly articled clerk and/or passing an examination. Although the examination can be taken in sections, it is a formidable undertaking and the failure rate is high.

The solicitor or solicitor's articled clerk wishing to become a barrister faces obstacles that are even more severe. The first problem is created by the fact that to become a barrister one must join an Inn and that no solicitor or solicitor's articled clerk can become a student member [if qualified for less than five years]. [The solicitor] is therefore effectively deprived of the possibility of earning as a lawyer on either side of the profession for at least two and usually two and a half years. Either before or after Call . . . he must do his full stint of a year as a pupil . . . [I]f he has been qualified as a solicitor for more than five years he has to sever all connection with his firm and then give six months notice (not including August or September) of his intention to seek Call to the Bar during which again he cannot work on either side of the profession. He must also take the Bar Examinations though he will normally be exempt from Part I.

In light of these restrictive rules it is not surprising that transfer to the other side of the profession is rare.

19. See A. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 237-39 (1921). See also J. AUERBACH, *UNEQUAL JUSTICE* 110-13 (1976).

20. See J. AUERBACH, *supra* note 19, at 110-13.

21. *Id.* at 106-07, 116, 127. For discussion of an admission system which was devoid of due process, see Douglas, *The Pennsylvania System Governing Admission to the Bar*, 54 A.B.A. REP. 701 (1929).

22. J. AUERBACH, *supra* note 19, at 49-53, 125.

been a steady movement of socially and economically disadvantaged persons into positions of responsibility and economic well-being within the profession.<sup>23</sup> Yet, apparently due to these early manifestations of sociological stratification in the profession, present-day critics continue to charge that there is elitism within the legal profession.

Exactly what this elitism concept encompasses is not entirely clear, but it is increasingly utilized in referring to successful persons or groups, to access to opportunity of any kind, or to an individual or group which either controls or wishes to control decisionmaking processes. It becomes apparent that the suggestions for creating a specialized, truly elite corps of trial lawyers in this country come when the legal profession, as well as other professions and institutions, are being attacked as "elitist."

In this vein, *Unequal Justice*,<sup>24</sup> a recent book by Professor Jerold Auerbach, takes as its theme the notion that all economically successful lawyers are elitist; it further asserts that their "national" bar association, the American Bar Association, has a history of trying to bar from the profession applicants who do not fit the classic majority mold of white Anglo-Saxon, Protestant, "patriotic," and conservative. The profession, it is said, has never been a public profession because a substantial part of it has failed to serve the masses.<sup>25</sup> The majority of lawyers, Professor Auerbach alleges, are an elite group captured by powerful economic and social forces.<sup>26</sup> This group has warped our system of justice to the point where it is more process-oriented than result-oriented and where means are more important than ends. Professor Auerbach thus states:

[T]he lawyer's obsession with craft and process, which liberated his skills, also dominated his values and inhibited his social goals.

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23. *Id.* at 6. Professor Auerbach's discussion of the New Deal demonstrates that, despite his own economic and social prejudices, he had to admit that the legal profession ultimately allowed the inclusion of all types of people, even in lucrative law practices. *Id.* at 224-30.

24. J. AUERBACH, *supra* note 19. Professor Auerbach argues that American lawyers and judges have created a system which is based on social values oppressive to large segments of the population. *Id.* at 285. The profession, according to Professor Auerbach, is symbolized by the ABA. The ABA's history is intrinsically entwined with all that is wrong with the American legal profession. The book purports to trace the history of the organized bar, emphasizing its close relationship with institutions of legal education, its "merging capitalism, boosterism, and Americanism with legalism," *id.* at 133, its fear of the New Deal, *id.* at 191-92, and its anti-Communist loyalty oath harassment of nonestablishment lawyers, *id.* at 238-40.

25. *Id.* at 308.

26. *Id.* at 292.

. . . They assumed that how results were reached, not what results were reached, was the only test of responsible government. They appreciated that substantive results without fair process were procedurally unconscionable. But they failed to understand that process isolated from substance transformed lawyers into mere technicians in the service of power. Responding to the existing allocation of power, most of them were not prepared to consider the wisdom of redistributing it.<sup>27</sup>

Thus, it is argued, inasmuch as most lawyers do not really care about the results of their work, their actions are guided by, and serve only, the dominant economic and social groups.<sup>28</sup> Professor Auerbach therefore declares that it is foolish for us to be pleased when large firms and successful lawyers take minority group newcomers into their practices, because these people will also become part of a professional elite whose values are those of a deeply conservative, antilibertarian group.<sup>29</sup> As a prime example, it is shown that although the New Deal served as an effective vehicle for social mobility and political power for many young lawyers who were not of the majority type, such as Jews and Irish-Catholics, it accomplished little because these lawyers merely became part of the legal profession elite, assuming its values and views.<sup>30</sup>

To those with Professor Auerbach's attitude, it seems that only lawyers who go into solo practices and do not represent business enterprise or propertied interests will not fall into the prevailing capitalistic and individualistic foundations of our legal system.<sup>31</sup> To the *Unequal Justice*-type critic, lawyers who, for example, draft wills and handle the estates of their clients are but part of the system, trapped as mere servants of a dominant economic and social class.

Professor Auerbach's view of the legal profession should be compared with that of Chief Justice Burger. Chief Justice Burger,

27. *Id.* at 227.

28. *Id.* at 260-61.

29. *Id.* at 229. Professor Auerbach's position is an economic one: that the profit system is incorporated into the practice of law and that this itself taints the profession. He has thus stated: "If profit divorced from social responsibility is a central problem in American society, will that problem be alleviated by affirmative action and preferential hiring? The answer, clearly, is no. Once outsiders enjoy the earnings, status and privileges of elite partnerships they will inevitably defend the system that rewards them—and discriminates against still other groups of marginal, disadvantaged people." N.Y. Times, Apr. 13, 1976, at 33, col. 2.

30. J. AUERBACH, *supra* note 19, at 229-30.

31. *See id.* at 279-84.

and others who advocate his position, would counter Professor Auerbach's criticism by maintaining that lawyers should know what they are doing, and because a great number of them do not handle the "craft and process" in a clean and facile fashion, we should attempt to assure that our courtroom advocates will be more finely honed craftsmen. Essentially, supporters of the Chief Justice assert a need for *another* select group from the profession *already selected*,<sup>32</sup> to assure that the craft of trial advocacy is carried out well. Quite likely, they perceive many "rough honed" lawyers who represent individuals and small interest groups in our diverse ethnic, racial, and religious society not fitting the counselor or trial advocate stereotypes which they envision. The judges may be branding as incompetent many lawyers who are accessible to the public. The persons who serve to democratize the American legal profession are thus labeled incompetent by a select group within the profession.

#### PLURALISM IN THE AMERICAN LEGAL PROFESSION

A great deal of the discussion about the legal profession in the United States assumes that most lawyers follow the majority of their colleagues at the bar. Strange compatriots though they may be, Chief Justice Burger and Chief Judge Kaufman, along with Professor Auerbach, are united in one assumption: that the American legal profession is a unified and cohesive entity. The Judges are lamenting the low level of trial court advocacy in the United States, while Professor Auerbach assumes that most lawyers, whatever their race, creed, or political persuasion, are swallowed up by the predominant white Anglo-Saxon, Protestant monolithic majority in the profession. These generalities, as with others of the same genre, have some truth to them. There are some incompetent lawyers, and at times many lawyers agree with their colleagues about a subject of importance to the profession. Most American

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32. *But see* MacCrate, *Populist and Elitist Conceptions of the Bar* (pt. 2), ALI-ABA CLE REV., March 8, 1974, at 4. Mr. MacCrate, while the immediate past president of the New York State Bar Association, suggested that although the great technical skills of the barrister may be admirable, the American bar has remained closer to the people, and thus we should

approach with the greatest caution any suggestion that we try to limit trial and appellate advocacy to an elitist segment of the bar. Whatever the bench and members of that elite might gain from such a division [between lawyer advocates and lawyer nonadvocates], I fear that the public and the profession as a whole would lose.

*Id.*

lawyers accept the capitalistic and individualistic nature of our society. But to assume that a majority of lawyers are mere dupes of the system who fail to address vital issues is erroneous. The best answer to this charge is the statement of Professors Heinz Eulau and John Sprague in their classic *Lawyers in Politics*:<sup>33</sup>

The charge of the legal profession's captivity by business and financial interests is still common and often appears in a highly vulgar and biased form. Such conspiratorial approaches ignore altogether the fact that the lawyer has also become, to use the invidious term, the "captive" of labor unions and the government bureaucracy. Undoubtedly, the meaning of "independence" has changed; but if the lawyer has become an "organization man," it is all the more important to study rather than condemn the profession's relationship to the organizations in which he performs his functions. As Talcott Parsons has pointed out in a comment on the approach of the late sociologist C. Wright Mills, especially with regard to the *control* processes in the business world:

Mills tends to assume that the relation between law and business is an overwhelming one-way relation; lawyers there to serve the interests of businessmen and essentially have no independent influence. This, I think, is an illusion stemming largely from Mills' preoccupation with a certain kind of power. His implicit reasoning seems to be that since lawyers have less power than businessmen, they do not really count.<sup>34</sup>

Research has demonstrated that the legal profession in the United States, unlike other professions, is not a monolithic whole to be considered as a unified entity.<sup>35</sup> Lawyers reflect their religious, racial, and ethnic backgrounds, as well as the communities in which they live and practice. It has been shown, for example, that lawyer-state legislators do not consistently support legal-profession-oriented legislation just because they are lawyers,<sup>36</sup>

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33. H. EULAU & J. SPRAGUE, *LAWYERS IN POLITICS* (1964).

34. *Id.* at 134-35 (footnotes omitted) (quoting T. Parsons, *The Distribution of Power in American Society*, in *STRUCTURE AND PROCESS IN MODERN SOCIETIES* 219 (1960)).

35. See Q. JOHNSTONE & D. HOPSON, *supra* note 12, at 33-35; Cohen, *Pluralism in the American Legal Profession*, 19 *ALA. L. REV.* 247, 260-62 (1967); Lortie, *Laymen to Lawmen: Law School, Careers, and Professional Socialization*, 29 *HARV. EDUC. REV.* 352 (1959).

36. H. EULAU & J. SPRAGUE, *supra* note 33, at 21 (citing D. Derge, *The Lawyer as Decision-Maker in the American State Legislature*, 21 *J. POL.* 427 (1959)).

Moreover, high lawyer cohesion, when it occurred, was not characteristic of any particular type of bill. . . .

instead mirroring the communities they represent.<sup>37</sup> A study of lawyers, engineers, and university professors demonstrates that lawyers are the most "independent" of the three groups because they are ranked high on "client orientation" while ranked only medium on "colleague constraints" or professional organization controls while practicing law.<sup>38</sup> The various ethnic and religious-oriented bar associations, among others, are symbols that the legal profession is still a pluralistic collection of people.<sup>39</sup>

### SOME JUDICIOUS ANSWERS

What an objective observer must do is discern the subtle goals and purposes of these various critics. *Unequal Justice*-type critics use expressions like "elite" to characterize those they distrust. These critics would prefer that their political, social, and economic philosophy be applied by a legal profession of their own making. On the other hand, many lawyer and judicial critics think in terms of a legal profession structured similarly to the American medical profession, where entry into the profession is tightly controlled. Their conception of the legal profession is one where all lawyers fit

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. . . [David R.] Derge produced even stronger evidence in examining the voting behavior of lawyers on roll calls directly affecting their profession—six on bills relating to the fee structure for legal services in various areas of civil practice, and nine on bills concerning the organization of the judicial system. On all but one of these roll calls, the lawyers divided in approximately the same way as the nonlawyers did. Derge concludes that "there is no 'lawyer bloc' in roll-calls involving public policy intimately related to the practice of the law."

*Id.*

37. Professors Eulau and Sprague also found: "Lawyers in legislatures will also reflect the larger social environment of which the legislature is a microcosm." *Id.* at 26. "For all practical purposes, then, lawyers and nonlawyers do not differ in their ideological stance; and, certainly, in these four [studied] legislatures in 1957 at least, lawyers were not more conservative than nonlawyers." *Id.* at 27. See also Cohen, *Confronting Myth in the American Legal Profession: A Territorial Perspective*, 22 ALA. L. REV. 513, 526-28 (1970); Wells, *The Legal Profession and Politics*, MIDWEST J. POLITICAL SCI. 166, 186-90 (1964). It has also been demonstrated that lawyers differ in income, experience, type of practice, and clientele according to their location. York & Hale, *Too Many Lawyers? The Legal Services Industry: Its Structure and Outlook*, 26 J. LEGAL EDUC. 1, 16-22 (1973).

38. Wilensky, *The Professionalization of Everyone?*, 70 AM. J. SOC. 137, 154-55 (1964).

39. Numerous lawyer groups, including the Lithuanian-American Lawyers Association, the Catholic Lawyers Guild, the Italian-American Lawyers Association, the Filipino-American Bar Association, the Mexican-American Bar Association, the Southern California Chinese Bar Association, and others, are symbols that the legal profession is still pluralistic.

into a mold, usually like that of the large firm types in the United States, or even like the English barristers. The stereotype of a monolithic, unified legal profession is probably responsible for the criticism of lawyer advocates. Our trial courts are full of diverse advocate-types who do not play the advocacy game the way some lawyers and judges would like, but who are available to their various ethnic, religious, racial, economic, political, and social circles. This explosive diversity does invade the sense of human symmetry which pervades the stereotype many have of the "ideal lawyer" in the large, urban firm.

The judiciary has many and varied powers. If judges find incompetent lawyers in their trial courts, they have the power to do something about such advocates. In criminal cases, they have the right to hold such advocacy ineffective. In addition, they have enormous powers over the ethics of the legal profession. They have the power to bring disciplinary charges against lawyers who are negligent or inadequate in court. In addition, they can specify to bar associations the type of conduct which is incompetent and request that discipline follow under the applicable rules of conduct. If the bar fails to act, the final authority over such matters lies with the judiciary.

If there is incompetence in the legal profession, it is time for the judiciary to act. Professor Monroe H. Freedman stated in 1975:

If one-third to one-half of the litigating lawyers are inadequate, and if it "happens regularly" that attorneys are unable to handle criminal cases assigned to them, and if Chief Justice Burger in eighteen years on the Bench has indeed seen hundreds, if not thousands, of "miscarriages of justice", caused by incompetent lawyers, then who is best able to do something about it? Who, in fact, has a constitutional and an ethical responsibility to do something about it? The answer is obvious: Chief Justice Burger, and his colleagues on the bench.

On the contrary, however, not the Chief Justice nor virtually any other judge has accepted that fundamental responsibility. It is, indeed, extraordinary for a judge to seek disciplinary action against an attorney on grounds of incompetence, even though it is unprofessional for a lawyer to accept a case that he or she is not competent to handle, and even though a judge is bound to prevent unprofessional conduct and to guard against the violation of constitutional guarantees such as the right to effective assistance of counsel.

In fact, the courts have gone in precisely the opposite direction. They have placed such a "heavy burden" upon a defendant

to maintain a claim of ineffective assistance of counsel, that innumerable cases are never appealed, and in most of those that are appealed, the inadequate attorney is "vindicated."<sup>40</sup>

The creation of more committees and perhaps a bureaucracy to certify trial advocates would not only waste resources, but could effectively negate the democratizing tendencies we find at work in the American legal profession. Many within the legal profession might come to fear those who would be chosen to certify lawyers for the advocate's role. One of the advantages to our fused system is the right of the client to have both a solicitor and a barrister in the same lawyer. It is hoped we will have the good sense to continue such a system.

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40. M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 101 (1975) (footnotes omitted).

