The Reinstatement Dilemma: The Legacy of the Hiss Case in Massachusetts

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A generation ago, in his classic work on the subject of professional responsibility,1 Henry Drinker set forth what he considered to be the consensus of thought among judges, practitioners and academicians concerning the reinstatement of a disbarred attorney:

While it is, of course, always possible that a disbarred lawyer may be reinstated, this, it is believed, should almost never occur except where the court concludes that the disbarment was erroneous. For a lawyer who has been found guilty of an act warranting disbarment to be reinstated justly creates an impression on the public which is very bad for the reputation of the Bar, the conclusion being that this is because of friendship, pity, or political influence; which is not infrequently the case.2

As the profession moved into the succeeding decades, this attitude, if it ever did exist, appeared to weaken, with members of the profession no longer consistent in their attitude toward disbarment and the reinstatement of the disbarred lawyer. In fact, by the time that the American Bar Association Special Committee on the Evaluation of Disciplinary Enforcement published the final draft of its report, Problems and Recommendations in Disciplinary Enforcement, in June 1970, it was necessary to state that "[c]ourt policy toward reinstatement of disbarred attorneys varies widely from jurisdiction to jurisdiction."3 The Special Committee found that some jurisdictions provide by rule of court that a disbarred attorney shall never be readmitted to practice,4 and others preclude those individ-

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1. H. DRINKER, LEGAL ETHICS (2d ed 1953) [hereinafter cited as DRINKER].
2. Id. at 49.
3. ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS & RECOMMENDATION IN DISCIPLINARY ENFORCEMENT [hereinafter cited as DISCIPLINARY ENFORCEMENT], 150 (June 1970).
4. Id.
uals convicted of felonious conduct from reinstatement unless the conviction is reversed or a pardon is obtained. A number of jurisdictions, however, apparently do reinstate disbarred attorneys as a matter of course without requiring the passage of a specific period of time. In at least one instance, prior notice is not even required to be given to the agency that conducted the disbarment proceeding or to other segments of the organized bar. Therefore, under the strict approach maintained by a minority of jurisdictions disbarment is, either by statute or judicial construction, a permanent condition; while at the other extreme some states consider disbarment to be little more than an extreme form of suspension, limited in both impact and duration.

The majority of jurisdictions today, treading the middle ground between absolutism and permissiveness, have attempted to adopt a standard which “while not categorically rejecting the possibility that a disbarred attorney may merit reinstatement, requires him to make a strong, affirmative showing in support of his application to be restored to practice.” Unfortunately, the majority position on the reinstatement issue lends itself to the adoption of rather vague and amorphous standards. An applicant for reinstatement to the bar in such a jurisdiction must demonstrate that he or she has the necessary moral qualifications, as well as the competency and learning in the law required for admission to practice, so as to persuade the court that reinstatement will not be detrimental to the integrity and standing of the bar, the administration of justice, or the public interest.

Such a broad approach provides the particular court or disciplinary agency charged with the responsibility for acting upon a petition for reinstatement with tremendous flexibility in dealing with the problems of readmission on a case by case basis. An open approach of this sort, however, produces at least two troublesome side affects, the first legal and the second societal. The result from the

5. E.g., N.Y. JUDICIARY LAW § 90 (5) (McKinney 1968).
6. DISCIPLINARY ENFORCEMENT, 150. At the time of the publication of the report of the ABA Special Committee on Evaluation of Disciplinary Enforcement, Louisiana and Illinois did not require a disbarred attorney to wait any specific period of time before applying for reinstatement. The Special Committee reported also that South Dakota had no specific notice requirement on a petition for reinstatement to members of the organized bar. Id.
7. Id. at 151.
perspective of disciplinary enforcement renders the present majority approach unsatisfactory in terms of the needs of the profession, the public and the system of justice. These effects are well illustrated by an examination of matters involving Alger Hiss and Charles W. Colson. At this juncture, however, certain specific issues deserve further examination.

A Question of Standards

A lack of definite substantive standards in bar disciplinary matters produces legal issues which are constitutional in nature. Criteria established for determining reinstatement are in most jurisdictions at least as strenuous as those required of an original applicant to the bar.9 As such, the standards may properly be compared with those established for admission and may be subjected to the same due process and equal protection requirements to which the United States Supreme Court has spoken regarding applicants to the bar. Two cases decided by the Court, Schware v. Board of Bar Examiners of New Mexico,10 and Konigsberg v. State Bar of California11 deal directly with the vague standards often adopted by jurisdictions in establishing the good moral character of an applicant for admission to the bar. These cases point out the need for determining specific evidentiary standards which would lead to the rejection or admission of the applicant based upon a rational examination of his or her moral character.

In Schware, for example, the New Mexico Board of Bar Examiners refused the applicant permission to take the bar examination because of his use from 1933 to 1937 of certain aliases, arrests in 1934 and 1940 resulting from unionist activities, recruitment of individuals to serve the Loyalist Cause in Spain, and, finally, membership in the Communist party from 1932 to 1940.12 The applicant in Konigsberg was denied admission to the bar in California, although he had satisfactorily passed the bar examination, because evidence presented to the California Committee of Bar Examiners tended to show that he had attended meetings of a Communist party unit in 194113 and had written a series of editorials in 1950 which criticized

9. DISCIPLINARY ENFORCEMENT, 151-52.
11. Id. at 252.
12. Id. at 240-46.
13. Id. at 266.
participation of the United States in the Korean War. This evidence, coupled with Konigsberg’s refusal to answer questions before the Bar Examiners concerning his political affiliations, editorials and beliefs, was sufficient for the agency to find a lack of good moral character on the part of the applicant.

In reversing the decisions of the lower courts, Justice Black, delivering the opinions in both Schware and Konigsberg, criticized the respective state bars, not because they required “high standards of qualification such as good moral character or proficiency in its law,” but because any such “qualification[s] must have a rational connection with the applicant’s fitness or capacity to practice law.” Both petitioner Konigsberg and petitioner Schware maintained that there was no evidence in the record which could rationally support a finding of doubt about their respective characters or loyalties. In the face of such lack of evidence against them, the petitioners argued that they had been arbitrarily denied due process and equal protection of the laws in the denial of their applications to the bar.

In upholding the cause of the applicants, Justice Black served notice on each of the agencies concerned with admission that any standard expressed as “good moral character” is by itself “unusually ambiguous” and “can be defined in almost an unlimited number of ways . . . [reflecting] the attitudes, experiences and prejudices of the definer.” It must be carefully applied to avoid the pitfalls raised by the instant cases. As Justice Black said: “Such a vague qualification, which is easily adapted to fit personal views and predilections can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.”

Within the context of reinstatement, the Schware and Konigsberg cases indicate that proper moral qualifications for readmission to the practice of law in those jurisdictions maintaining a flexible approach toward disbarred attorneys must neither be so arbitrary nor so vague as to defy rational definition. Rather, they must necessarily demand some criteria for measuring improvement or rehabilitation of character, or repentence of wrong on the part of

14. Id. at 268.
15. Id. at 269.
16. Id. at 239.
17. Id. at 256, 238.
18. Id. at 263.
19. Id.
the petitioner from that condition which generated the disbarment in the first place.

The due process and equal protection requirements suggest the second troublesome side effect which arises from allowing a jurisdiction and its disciplinary agency the most latitude possible in determining the issue of reinstatement following disbarment. As Mr. Drinker noted more than three decades ago, absent a showing of extraordinary circumstances, the public and members of the profession perceive reinstatement following disbarment, as opposed to a suspension of limited duration, to be an act of generosity motivated by influence, friendship, pity, or a combination of these factors.\(^{20}\) Although lawyers and judges sitting to determine these matters claim that they are concerned about the image of the profession and the need to protect the public from unscrupulous practitioners, it cannot be denied that the public has sensed a lowering of standards within the bar in passing upon applicants for reinstatement.\(^{21}\) Political considerations, economic conditions, family relationships and the effect of deprivation of a source of livelihood appear to be ever present and confusing factors in the reinstatement process.\(^{22}\)

All of these controversial problems in disciplinary enforcement were handed to the then recently created disciplinary agency of the Supreme Judicial Court for the Commonwealth of Massachusetts, the Board of Bar Overseers,\(^ {23} \) in the form of two politically sensitive matters, the Petition of Alger Hiss for Reinstatement to the Bar\(^ {24} \) and the Petition for Discipline of Charles W. Colson.\(^ {25} \)

**The Board of Bar Overseers and Bar Counsel**

In September 1974, by order of the Supreme Judicial Court of the Commonwealth of Massachusetts,\(^ {26} \) a disciplinary agency to handle matters in which attorneys were charged with violations of the Canons of Ethics and Disciplinary Rules Regulating the Practice

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20. Drinker, 40.
22. Id.
of Law\textsuperscript{27} in Massachusetts was established in the Commonwealth. Its purpose was to facilitate the unified registration and discipline of attorneys.\textsuperscript{28} Prior to the establishment of the Board, the disciplinary function in Massachusetts, as in many other states, had been carried out on a voluntary and decentralized basis which required individual members of the bar to take upon themselves the task of investigating and reporting to the Supreme Judicial Court alleged acts of misconduct on the part of practicing attorneys.\textsuperscript{29} In Massachusetts, as in several other states including California,\textsuperscript{30} Illinois,\textsuperscript{31} Michigan,\textsuperscript{32} and Pennsylvania,\textsuperscript{33} the establishment of a centralized disciplinary agency by the Supreme Judicial Court was an attempt to unify and to add strength to a rather haphazard and impressionistic system of self regulation by the legal profession.\textsuperscript{34} The result in Massachusetts has been the establishment of a nine-member administrative panel, the Board, which receives findings and recommendations from designated hearing committees in each of six Disciplinary Districts throughout the state.\textsuperscript{35} The hearing committees, made up of local lawyers chosen by the Supreme Judicial Court, sit essentially as trial masters to determine the facts in each particular

\textsuperscript{27} Id. 3:22 (1972).
\textsuperscript{28} Id. R.4:01 (1974). The Court provided for the establishment of the Board of Bar Overseers \textit{(Id. at § 5(3)(b))}, and established six Disciplinary Districts in the Commonwealth for the investigation and discipline of an attorney found to have violated the Canons of Ethics and Disciplinary Rules Regulating the Practice of Law. \textit{Id. at § 2 (1)(2)}. The procedural and substantive standards upon which the Board of Bar Overseers and Supreme Judicial Court will consider the petition of a suspended or disbarred attorney for reinstatement are also provided. \textit{Id. at 4:01 § 18}.
\textsuperscript{29} Id. R.3:01 (6) (1967) (amended by MASS. SUP. JUD. R., CH. 4 (1974)).
\textsuperscript{30} R. P. STATE BAR OF CAL. 80 (1967).
\textsuperscript{31} ILL. ANN. STAT. CH. 110A, § 753 (Smith-Hurd 1976).
\textsuperscript{32} MICH. COMP. LAWS ANN. § 600.904-7 (1970).
\textsuperscript{33} R. SUP. CT. OF PA. 17 (1974).
\textsuperscript{34} DISCIPLINARY ENFORCEMENT, 150. The Special Committee found that the disciplinary structure in the states was in need of drastic reform including more centralization, greater power and swifter action. \textit{Id. at 3}. In many jurisdictions, the Special Committee reported that the disciplinary structure was so fragmented that members of small local communities were required to discipline each other. \textit{Id. at 5}. As a result, the disciplinary agencies were reluctant to proceed against prominent lawyers. They often failed to submit even serious cases to the court having disciplinary jurisdiction, and the local court when a case was submitted to it was reluctant to impose substantial discipline. \textit{Id.}
\textsuperscript{35} MASS. SUP. JUD. CT. R. 4:01 §§ 2, 5, 6, 8 (1974).
instance of alleged misconduct. A record is made of the proceedings and this record, including a transcript of witness testimony, serves as the basis upon which any appeal of a recommendation made by a local hearing committee is first reviewed by the Board and then by a single justice of the Supreme Judicial Court. The functioning of the administrative trial and appeal process allows for a complete presentation of evidence and cross-examination of witnesses by both the Bar Counsel and the accused. Admissibility of evidence in these proceedings is governed by the liberal rules of the State Administrative Procedure Act which permits the introduction of all relevant testimony, including that which would normally be hearsay under formal rules of evidence. After review by the Board, the disciplinary matter, if found to warrant public discipline in the form of censure, suspension, or disbarment, or a decision regarding readmission in the case of a petition for reinstatement, is then referred along with the report and recommendations of the Board directly to the Supreme Judicial Court for final disposition.

In addition to the adjudicatory administrative panels, Rule 4:01 of the Massachusetts Supreme Judicial Court provides for the designation of a Bar Counsel and a professional staff under the office of Bar Counsel. The effect of the Rule is to provide for the appointment of a Bar Counsel who after approval by the Court is designated the chief disciplinary officer of the Court. The Bar Counsel receives complaints and investigates alleged acts of misconduct in violation of the Canon of Ethics and Disciplinary Rules. Where necessary the Bar Counsel and his staff are empowered to prosecute those accused before various hearing committees, the Board and the Court, and to act as a party in all matters arising from a petition for reinstatement.

The approach of the Massachusetts Court in establishing such a disciplinary officer and professional staff is consistent with the report of the Special Committee on Disciplinary Enforcement of the American Bar Association. This report found that many jurisdic-

36. Id. §§ 5(3)(c), 6(2).
37. Id. § 8; Rules, Bd. Bar Overseers Mass. §§ 3.47-56.
41. Id. § 5(3)(b).
42. Id. § 7(1).
43. Id. § 7(1)-(4).
The Special Committee found that, under the prior procedure, the public and the profession had suffered from delay, non-uniform standards, lack of expertise, inadequate investigation and recordkeeping, and in some cases procedures which clearly violated due process in the disposition of disciplinary matters. A well-funded, well-trained and full-time disciplinary staff was considered to be one way to reduce the lack of public trust and confidence in the ability of lawyers to police their own profession. The experience in Massachusetts under the new disciplinary system, although not without its critics, appears to have corrected during the past two years the problems created by a decentralized and non-professional disciplinary structure, while, at the same time it has provided the necessary due process safeguards and consistency in the application of ethical principles which were lacking under the prior system.

In the winter and spring of 1975, the hindsight with which it is now possible to view the effect of the new rules regarding disciplinary procedure in Massachusetts was lacking. Yet it was during this period that the new system would receive its most severe tests to date as a result of its involvement in two politically sensitive cases. Ironically, both matters centered around aspects of the rise and fall of the former President of the United States, Richard M. Nixon. The two cases—the Petition of Alger Hiss for Reinstatement to the Bar and the Petition for Discipline of Charles W. Colson—presented remarkably similar and complex problems to the new disciplinary agency in Massachusetts.

On January 25, 1950, Alger Hiss was convicted of two counts of perjury stemming from his testimony before a Federal Grand Jury that he had never, nor had his wife in his presence ever, turned over

44. DISCIPLINARY ENFORCEMENT, 48.
45. Id. at 49-56.
documents or copies of documents belonging to the United States Department of State or of any other organization of the Federal government to one Whittaker Chambers or to any other unauthorized person. In addition, Mr. Hiss was convicted on a second count of falsely testifying before the Committee on Un-American Activities of the House of Representatives that he had not seen Chambers, an admitted former Communist party member and his principal accuser during the House hearings, after January 1, 1937.\textsuperscript{49}

Prior to the House Un-American Activities Committee's hearings and subsequent indictment, Mr. Hiss had enjoyed a distinguished career in the Department of State. After receiving his degree from Harvard Law School in 1929, he served as law clerk to Mr. Justice Holmes of the Supreme Court of the United States.\textsuperscript{50} In the years following, he was admitted to the bars of Maryland and Massachusetts, and he practiced law in New York City and Boston. During the New Deal, Hiss went to Washington where he served first as assistant general counsel to the Agricultural Adjustment Administration, then on the staff of the Solicitor General of the United States and, finally, for over a decade from 1936 to 1947, in the Department of State.\textsuperscript{51} After instrumental work in the formation of the United Nations, Alger Hiss assumed the position of President of the Carnegie Endowment for International Peace, in which capacity he was serving at the time of his indictment.\textsuperscript{52} After one mistrial in which the jury could not agree on a verdict, Hiss was tried and convicted on the two counts of perjury.\textsuperscript{53} He was sentenced to concurrent confinement on each count of the indictment and served three and one-half years at the United States Penitentiary at Lewisberg, Pennsylvania.\textsuperscript{54} Following his conviction and exhaustion of his rights of appeal, an information was filed with the Massachusetts Supreme Judicial Court requesting his disbarment. The matter was set down for hearing by the Court, but on the advice of

\textsuperscript{49} United States v. Hiss, 185 F.2d 822 (2d Cir. 1950), cert. denied, 340 U.S. 948 (1951); United States v. Hiss, 107 F. Supp. 128 (S.D.N.Y. 1952), aff'd per curiam, 201 F.2d 372 (2d Cir.), cert. denied, 345 U.S. 942 (1953) (Motion for new trial).

\textsuperscript{50} Findings and Recommendations of the Board of Bar Overseers, Civil No. 74-151 at 11 (Mass. Sup. Ct., Nov. 4, 1974).

\textsuperscript{51} Id.

\textsuperscript{52} Id.

\textsuperscript{53} See, supra. note 49.

counsel, Hiss failed to enter an appearance. On August 1, 1952, after arguments by counsel, judgment was entered by a single justice of the Court removing Hiss “from the office of attorney-at-law in the courts of this Commonwealth.”

As in the case of Alger Hiss during the years prior to World War II, the professional star of Charles Wendell Colson appeared to be rising dramatically in the late sixties and early seventies. After obtaining his law degree, Mr. Colson rapidly achieved prominence in the legal and political spheres in Massachusetts. He served on the campaign staffs of the Republican senators from Massachusetts and, after significant involvement in the Nixon presidential campaign, was appointed counsel to President Nixon in November, 1969.

On June 3, 1974, Colson entered a plea of guilty to a violation of Title 18, Section 1503, United States Code in response to an

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55. Id. at 2485, 333 N.E.2d at 432.
57. Id.
58. 18 U.S.C. § 1503 (1968) states as follows:

Influencing or Injuring, Juror, or Witness Generally

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.
information filed by the special prosecutor which charged that Colson:

Did corruptly endeavor to influence, obstruct and impede the due administration of justice in connection with the criminal trial of Daniel Ellsberg under indictment in the case of United States v. Russo, Criminal Case No. 9373, United States District Court, Central District of California by devising and implementing a scheme to defame and destroy the public image and credibility of Daniel Ellsberg and those engaged in the legal defense of Daniel Ellsberg with the intent to influence, obstruct and impede the conduct and outcome of the criminal prosecution then being conducted in the United States District Court for the Central District of California.59

Colson was sentenced to serve a prison term of one to three years in the United States Penitentiary at Montgomery, Alabama and to pay a fine of 5,000 dollars.60 After serving seven months of this sentence both in Alabama and in a prison near Washington, D.C., testifying before various Congressional Committees and appearing before the Watergate Special Prosecutor, Colson was released by order of Judge Gesell because of immediate family problems.61 During this period Colson was disbarred by the Supreme Court of the Commonwealth of Virginia62 and suspended, pending further disciplinary proceedings, by the Supreme Judicial Court of the Commonwealth of Massachusetts.63

On November 3, 1974, Alger Hiss, then age 69, filed for the first time a Petition for Reinstatement to the Bar of Massachusetts.64 On January 20, 1975, the Bar Counsel filed a Petition for Discipline under Rule 4:01 requesting that the Board and Supreme Judicial Court determine whether the public discipline of Charles W. Colson was required.65 Thus, two men, tied ironically at different points in history and in different ways to the fortunes of Richard M. Nixon, both convicted felons, stood before the Board of Bar Overseers and the Court in Massachusetts for different purposes, one for reinstatement.

60. Id. at 1.
61. Id. at 7.
62. Id. at 1-2.
63. Id. at 1.
ment, the other for removal, but each nevertheless presenting similar and crucial problems to the developing patterns in disciplinary enforcement.

Reinstatement

For Alger Hiss and his counsel, overcoming the hurdles of the reinstatement procedure in Massachusetts required more than a mere factual showing that, as a petitioner, Hiss currently possessed the requisite moral qualifications, competency and learning in the law to justify the conclusion that his readmission to practice would not be detrimental to the integrity and standing of the bar, to the administration of justice or to the public interest. In this particular instance an even more difficult burden had to be borne because although Massachusetts, unlike New York, has no absolute bar against the reinstatement of convicted felons, the Supreme Judicial Court had not in recent history readmitted an individual found to have been guilty of a crime as serious as perjury. In fact, at the time of the Hiss petition the weight of precedent against the approval of an application for reinstatement was extremely heavy.

In particular, two decisions of the Massachusetts Court, Matter of Keenan and Matter of Centracchio, appeared to block the path to reinstatement. In the first of the two cases, Wilfred Keenan was disbarred as a result of an investigation into public complaints of widespread corruption among members of the Trial Bar in Massachusetts. These complaints turned out to be justified and Keenan was found to be among those who had engaged in the bribery of jurors. Five years after his disbarment, Keenan petitioned for reinstatement. More than sixty lawyers, judges and friends testified to...
his excellent moral character and to the highly ethical nature of his subsequent activities. Nevertheless, the Massachusetts Court denied reinstatement because, in its view, the petitioner had made an insufficient showing that he would not victimize people again in a manner that had resulted in his disbarment. The Court held that there was insufficient assurance after the passage of the five-year period that if the petitioner were allowed to exchange the obligations and standards of the marketplace for those of the bar, he would not again fall victim to the same weakness that was his first undoing. The Court concluded that Keenan’s conviction and subsequent disbarment were conclusive evidence of his lack of moral character at the time of his removal from office, and consequently “little less than absolute assurance of a complete change of moral character” and “guaranty against its [the conduct] repetition” had to be shown before a petitioner met the burden allowing reinstatement.

The Court recognized that one convicted of jury tampering or perjury had committed a direct attack upon the foundations of the judicial system and that public opinion would neither readily accept nor condone the return of that individual to a position of official trust. The Court rejected the notion that the question in a reinstatement case was whether the disbarred attorney had been punished enough. Such a test would emphasize the attorney’s private interest over more important public interests. Any balancing of values in this area would always have to be resolved in favor of the public welfare. The Court had in fact stated the point quite con-

74. 314 Mass. at 549, 50 N.E.2d at 788.
75. Id. at 555, 50 N.E.2d at 789.
76. In re Bennethum, 278 A.2d 831 (Del. 1971); Wolf’s Petition, 257 So. 2d 547 (Fla. 1972); In re Braverman, 271 Md. 196, 316 A.2d 246 (1974); In re Alger Hiss, 75 Mass. Adv. Sh. 2483, 333 N.E.2d 429 (1975); Application of Sharpe, 499 P.2d 406 (Okl. 1972); Petition of Simmons, 71 Wash. 2d 316, 428 F.2d 582 (1967). The above cited cases recognized the nature and character of the charge for which the petitioner was disciplined as pertinent to his application for reinstatement.
77. 314 Mass. at 547, 50 N.E.2d at 787. Specifically, the court’s analysis proceeded this way:

In deciding a case of this kind considerations of public welfare are wholly dominant. The question is not whether the respondent has been “punished enough.” To make that a test would be to give undue
cisely when considering the issue in the context of disbarment following the conviction of a crime:

A conviction of a crime, especially a serious crime, undermines public confidence in [the attorney]. The average citizen would find it incongruous for the . . . [Federal Government] on the one hand to adjudicate him guilty and deserving of punishment, and then on the other hand while his conviction and liability to punishment still stand [for the Commonwealth] to adjudicate him innocent and to retain his membership in the bar.78

In the Matter of Centracchio, the only other reported Massachusetts decision prior to Hiss dealing with the reinstatement question, the Court echoed the stand it had taken earlier in Keenan and denied reinstatement. The Petitioner was an attorney, who, while serving as Special Justice of the District Court, had been found guilty of fee splitting and attempting to influence witnesses. He was subsequently disbarred for this offense.79 The Centracchio Court, jealously guarding the prerogative of the Court to determine the worthiness of an applicant for reinstatement, interpreted the Keenan decision as holding that there could be offenses so serious that an attorney who had committed them could never satisfy the court that he was once again worthy of trust; nor could he prove that one previously adjudged guilty of a serious offense could again inspire the necessary public confidence to perform the duties of an attorney.80

Therefore, after Keenan and Centracchio, Massachusetts appeared to fall squarely within that group of jurisdictions which appeared to make virtually impossible the readmission of an attorney previously adjudged guilty of a felony. Nothing short of a complete change of moral character and a guarantee against the repetition of future misconduct would apparently warrant readmission. Even with these conditions satisfied, however, the possibility remained that there would be some offenses so heinous that they would forever weight to his private interests, whereas the true test must always be the public welfare. Where any clash of interest occurs, whatever is good for the individual must give way to whatever tends to the security and advancement of public justice. Id.

80. 314 Mass. at 548-549, 50 N.E.2d at 788.
bar an individual from once again assuming the mantle of an officer of the court.

It is from this point of departure that the Board considered the Hiss Petition. Underlying their consideration of the matter were the gnawing issues of due process and equal protection raised by *Schware* and *Konigsberg*. Were the standards set down by Section 18(4) of the Supreme Judicial Court Rule 4:01 (namely, sufficient moral qualifications, along with competency in the law, to establish that readmission would not be detrimental to the integrity and standing of the bar, the administration of justice or to the public interest) so vague as to threaten the upset of the proceedings on Constitutional grounds? Added to the delicate issues of due process and equal protection was the politically sensitive nature of the case. The internal upheavals of the period following World War II were being exposed in the 1970's to increasing scrutiny and intellectual criticism in light of contemporary disenchantment with government and politics. Finally, Hiss, in his own testimony before the Board, pinpointed the troublesome quandry between his crime and the standards applicable to reinstatement: "In my case the charge was far worse than perjury as you must be aware . . . I had two other charges worse than perjury, which I regard as absolutely reprehensible in the lawyer . . . failure of trust and failure of confidence, which is even worse for a lawyer."

Faced with these delicate problems, the Board took an extremely philosophical approach based, it argued, upon precedent established by the *Keenan* and *Centracchio* cases. If it had been asked to find evidence of present good moral character and competence only, the Board would have been able to do so unanimously. A number of prominent attorneys, professors of law and judges, including a former Solicitor General of the United States and retired justice of the United States Supreme Court, testified and submitted affidavits in Mr. Hiss' behalf persuading the Board of the petitioner's present good moral character and legal ability. Having

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82. *Id.* at 258.
84. *Id.* at 28, 32.
determined these points, however, there remained the ever present fact that the judgment of conviction on which Hiss' disbarment was based had never been set aside nor had he been pardoned for the offense. This fact, coupled with the holding in Massachusetts, as in other jurisdictions, that the judgment of disbarment is evidence against the person so removed upon his subsequent petition for readmission to the bar,\textsuperscript{86} created the logical paradox which prevented the Board from recommending approval of the Hiss Petition to the Court.

If the Board was required to accept the finality of the judgment and verdict against Hiss, as it felt it must,\textsuperscript{87} then it was confronted with a dilemma. As long as a petitioner continued to assert his innocence, he was questioning the appropriateness of the decision which resulted in his conviction and subsequent disbarment; but, in asserting his innocence, it would become logically impossible for a petitioner to show that he had repented or reformed from earlier conditions. Yet this was the position taken by Alger Hiss. In his testimony before the Board, Hiss made the dilemma clear: “I have not had any complete change in moral character. I am the same person I have been throughout my life.”\textsuperscript{88}

The very same assertion of innocence was presented in the Keenan case where the court found that the petitioner seemed to recognize the binding nature of the court's adjudication of guilt but that he would not also allow admission of guilt or repentance.\textsuperscript{89} A strictly logical approach to this point of view caused the Board to conclude that such an assertion suggested not only a lack of moral improvement but the further disconcerting thought that the petitioner “gives evidence of his present lack of moral character when he again testifies to his innocence of the original charge, in the face
of a conviction which this board, for the purposes of its deliberations, must accept as establishing the fact of his guilt."^90 (emphasis added).

In a jurisdiction that had heretofore required evidence of nothing more than a "complete change in moral character" prior to permitting reinstatement, repentance and reform appeared to be essential prerequisites to reinstatement."^91 Even Mr. Hiss recognized the conflict raised by his protestations of innocence in light of the Keenan and Centracchio decisions. He remarked in his testimony that "[i]f that's the law in Massachusetts, I am excluded."^92

Upon this syllogistic argument, the Board found that it would be impossible to recommend the reinstatement of Mr. Hiss as long as Keenan and Centracchio stood as the law in Massachusetts. In fact, however, an examination of the two cases indicates that the Court did not apply the notion of repentance as mechanistically as the Board reported. This notion was only one of several factors of relevance which were to be used in determining whether an applicant for reinstatement had shown sufficient proof of reformation in the years subsequent to disbarment to overcome the presumption of bad character. Indeed, Chief Justice Field, who was a member of the Court in Keenan, had written some years before that:

\[\text{[e]vidence of penitence for offenses proved may have weight as tending to show a change in character. But I do not rule that there may not be circumstances in which such a change may be shown without evidence of penitence. . . . .}
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\[\text{. . . . [I do not] regard admission of guilt as necessarily a condition of his readmission to the bar. Clear and convincing evidence of fitness for readmission may exist though the petitioner protested innocence of the charges of which he was found guilty and the adjudication of guilty stands as a legal and binding adjudication . . . .}
\]
\[\text{. . . . I do not regard assertions of innocence of adjudicated guilt and consequential lack of penitence therefore as necessarily fatal to readmission if the evidence of present fitness without the aid of penitence is clear and convincing.}^{93}\]

90. Hiss, Findings and Recommendations of BBO, at 19-20.
91. A number of jurisdictions maintain the view that a showing of reformation or moral rehabilitation is essential to reinstatement. \textit{E.g.}, \textit{In re Bennethum}, 278 A.2d 831 (Del. 1971); Florida Bar v. Johnson, 241 So. 2d. 161 (Fla. 1970); Wolf's Petition, 257 So. 2d. 547 (Fla. 1972); 70 A.L.R.2d 268 (1960).
Other jurisdictions faced with similar protestations of innocence on the part of the petitioner for reinstatement have realized that “. . . to be reinstated, one need not express `contrition' which is inconsistent with a position to which he honestly and sincerely adheres.” While repentance can, indeed, be evidence in favor of an applicant and can provide support for his claim of good moral character, it is not the policy of the several states . . . nor the country from which we inherited our laws and institutions, to require a person to testify in a civil or criminal case, so as to make out a criminal offense against himself. If [a petitioner] had testified that his former evidence was false and corruptly given, or admitted that it was false with knowledge of the facts, he would have opened the doors to the penitentiary instead of the doors of reinstatement to the practice of law.

The “intellectual honesty” of an individual protesting innocence apparently must be given equal weight with what might well be the easier and more expedient route of confession and contrition.

In rejecting the position of the Board, the Supreme Judicial Court removed any implication that might have remained after the Keenan and Centracchio decisions that “[n]either the controlling case law nor the legal standard for reinstatement to the bar requires that one who petitions for reinstatement must proclaim his repentance and affirm his adjudicated guilt.” The Court recognized that which the Board may have seen but felt bound not to report because of the suggestions to the contrary in both Keenan and Centracchio. Since “mere words of repentance are easily uttered and just as easily forgotten,” it is perhaps more important that the petitioner establish his ability to distinguish right from wrong in the conduct of men toward each other so as to indicate to the court that he is a fit and safe person to engage in the practice of law.

The flexibility of this approach is necessary, the Court argued, because although prior judgments are dispositive of all factual issues and prevent attorneys from relitigating issues of guilt in rein-

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95. Ex Parte Marshall, 165 Miss. 523, 551-52, 147 So. 791, 797 (1933).
98. Id. at 2499, 333 N.E.2d at 436.
99. Id. at 2498, 333 N.E.2d at 436; see, In re Koeing, 152 Conn. 125, 127, 204 A.2d 33, 35 (1964); In re Stump, 272 Ky. 593, 598-99, 114 S.W.2d 1094, 1096 (1938).
The Reinstatement Dilemma

statement proceedings, miscarriages of justice are possible;\textsuperscript{100} and simple fairness in fundamental justice requires that the person who believes he is innocent though convicted should not be required to confess guilt to a criminal act he honestly believes he did not commit.\textsuperscript{101} To have held otherwise would have been to view the system of justice as incapable of error and to raise an impossible paradox for the petitioner:

\ldots He may stand mute and lose his opportunity; or he may cast aside his hard retained scruples and, paradoxically, commit what he regards as perjury to prove his worthiness to practice law. Men who are honest would prefer to relinquish the opportunity conditioned by this rule \ldots . Honest men would suffer permanent disbarment under such a rule. Others, less sure of their moral positions, will be tempted to commit perjury by admitting to a nonexistent offense (or to an offense that they believe is nonexistent) to secure reinstatement.\textsuperscript{102}

Yet the solution to this paradox, as stated by the Court, only suggests a further problem in the eyes of the public in whom trust is to be established prior to reinstatement. Unless the miscarriage of justice is apparent or can be demonstrated, the applicant for reinstatement is not coming to the bar as an honest man except to the extent that he has reformed and will definitely not engage in the future in the conduct which produced the conviction. To expect less injures the public perception of the system of justice and, instead of establishing trust and confidence, reinforces a cynical approach to crime, punishment, and reinstatement to positions of authority within society.\textsuperscript{103}

This concern for the effect upon the public, the profession and the system of justice resulting from a reinstatement following conviction of a felony led the Bar Counsel to argue an issue separate from that of the Board, namely, that there may be offenses so serious as to forever bar reinstatement.\textsuperscript{104} The notion that there are

\textsuperscript{100} 75 Mass. Adv. Sh. at 2499, 333 N.E.2d at 436.
\textsuperscript{101} Id. at 2500, 333 N.E.2d at 437.
\textsuperscript{102} Id. at 2500-501, 333 N.E.2d at 437.
\textsuperscript{103} In re Bennethum, 278 A.2d 831, 832 (Del. 1971); In re Application of Smith, 220 Minn. 197, 202, 19 N.E.2d 324, 326(1945).
\textsuperscript{104} 75 Mass. Adv. Sh. at 2489, 333 N.E.2d at 433; In re Petition of Coakley, Civil No. 32484 (Mass. Sup. Ct. 1934). In that case, Chief Justice Field held, despite the extreme seriousness of the offenses: "I do not rule that the offenses of which petitioner was proved guilty were such that in no circumstances could they
offenses "... of such heinous character that under no circumstances could [a petitioner] demonstrate sufficient contrition and atonement to justify his reinstatement as a member of the profession ..." appears to be consistent with the Keenan and Centracchio decisions and with the position taken by the ABA Special Committee on Evaluation of Disciplinary Enforcement:

"The nature of the offense and the circumstances surrounding it should be considered in evaluating an application for reinstatement. Thus the more serious the offense, the nearer it strikes at the heart of the administration of justice, the greater the affirmative proof that should be required of the applicant for readmission. For example, it is difficult to conceive of circumstances that would justify the reinstatement of an attorney who has been disbarred for bribing a juror."

Mr. Hiss appeared before the Board and the Court convicted of perjury. By his own account he was burdened by a failure of trust and confidence in him as an attorney and tainted by the suggestion of espionage. Certainly it is arguable that of all the crimes a lawyer may commit the presentation of false testimony under oath is one which strikes most deeply at the heart of trust and confidence in the system of justice. Considering this point, there would seem to be "no room in the profession of law for those who commit deliberate falsehood in court."

In fact, in the Centracchio case, the court denied reinstatement even after the Petitioner showed that he had conducted himself honorably and ethically in business matters following his disbarment; that he had refrained from the practice of law; that he had thoroughly recognized the gravity of his conduct and was sincerely repentent; that he was not resentful of the punishment imposed upon him for his misconduct; that there had been a fundamental change in his character and personality; that he had a genuine be outweighed after a lapse of time by evidence of good moral character, but I rule that they were so serious that they can be outweighed only by clear and convincing evidence." Id. at 6-7. Coakley was not readmitted, having not met this standard.

106. See also, In re Sleeper, 251 Mass. 6, 146 N.E. 269 (1925); In re Coakley Civil No. 32484 (Mass. Sup. Ct. 1934).
107. DISCIPLINARY ENFORCEMENT, 165. See, People v. Buckles, 164 Colo. 64, 453 P.2d 404 (1969); In re Application of Van Wyck, 225 Minn. 90, 29 N.W.2d 654 (1947).
108. 251 Mass. at 20, 146 N.E. at 274.
desire to regain the public trust and confidence that he once enjoyed. In view of the circumstances of Centracchio's deliberate misconduct, similar in gravity to that of Alger Hiss, and in light of his high public position, which, like Hiss', was one of great public trust at the time of the commission of the crime, the Court found Centracchio to be precluded from readmission "notwithstanding the findings of present good moral character" because of the nature of the offense committed.109

Yet the Hiss Court, reviewing these earlier decisions, came to an entirely different conclusion and

could no longer say that any offense is so grave that a disbarred attorney is automatically precluded from attempting to demonstrate through ample and adequate proofs, drawn from conduct and social interactions, that he has achieved a "present fitness"... to serve as an attorney and has led a sufficiently exemplary life to inspire public confidence once again, in spite of his previous actions. (citations omitted)110

The Court felt such automatic preclusion of reinstatement to be "foreign to our system of reasonable, merciful justice. It denies any potentiality for reform of character. A fundamental precept of our system... is that men can be rehabilitated."111

However, rehabilitation need not necessarily result in reinstatement to a formerly held position of trust and power. This warning is suggested in the statement of the ABA Special Committee and is incorporated in the decisions of those states which still hold certain crimes to be so serious as to preclude reinstatement. Once rehabilitation becomes a possibility in any circumstance, then the factors to be weighed in determining the worthiness of the petitioner inevitably reduce themselves to a consideration of the passage of time and an examination of the experiences of the applicant during the period of banishment from the bar. In fact, the Court notes that a long time span between disbarment and a petition for reinstatement, during

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109. 345 Mass. at 346, 187 N.E.2d at 386.
111. Id. at 2493, 333 N.E.2d at 434.
which the petitioner's conduct was exemplary, reinforces his claim of rehabilitation\textsuperscript{112} and contributes to a finding of present good moral character which, the Court would have us believe, in and of itself demonstrates rehabilitation.\textsuperscript{113}

In the \textit{Hiss} case, however, the Court is saying something more concerning the Petitioner when it comments that "[t]ime and experience may mend the flaws of character which allowed the immature man to err."\textsuperscript{114} The effect of the passage of time apparently weights not only on the petitioner, but on those who sit in judgment on him. When the Court looks back over the years to judge the event in light of present political and social realities and when it argues that justice and those responsible for its administration may often err, it is not looking so much at the repentance and rehabilitation of the Petitioner, Alger Hiss, but at a changing climate of opinion which has forced it to reconsider the propriety of its original judgment.

This situation is nowhere more apparent than in the Maryland decision, \textit{In re Braverman}, which appeared shortly before the \textit{Hiss} case.\textsuperscript{115} Braverman was convicted in 1952 of conspiracy to teach and advocate the overthrow of the government of the United States by force or violence, a crime under Section 2 of the Smith Act.\textsuperscript{116} He was fined 1,000 dollars and sentenced to imprisonment for three years. At the time of his conviction, Braverman was a member of the Maryland Bar. The conviction, a felony, resulted in his disbarment in 1955. Eighteen years later, Braverman petitioned the Maryland Court for his reinstatement. He maintained during the entire period, as did Mr. Hiss, that he was innocent of the crime for which he was convicted.\textsuperscript{117}

A panel of three lower court judges reported their evidentiary findings to the Maryland Supreme Court, and in so doing devoted considerable attention to the very problem which concerned the Board and the Court in the \textit{Hiss} case, namely, how Braverman could prove his reformation when he refused to recognize the exist-

\begin{itemize}
\item \textsuperscript{112} \textit{Id.} at 2503 n.19, 333 N.E.2d at 438-39 n.19.
\item \textsuperscript{113} \textit{Id.} at 2505 n.22, 333 N.E.2d at 438 n.22.
\item \textsuperscript{114} \textit{Id.} at 2493, 333 N.E.2d at 434.
\item \textsuperscript{115} 271 Md. 196, 316 A.2d 246 (1974).
\item \textsuperscript{116} U.S.C.A. § 2385 (1948) (West).
\item \textsuperscript{117} The Maryland Supreme Court referred the petition to a panel of three Maryland lower court judges for an evidentiary hearing. See, \textit{In re Braverman}, 269 Md. 661, 309 A.2d 468 (1973).
\end{itemize}
ence of any misconduct from which to reform. Like Hiss, Braverman was adamant in his belief in his innocence, and the Court found an honorable consistency in this attitude:

As to Petitioner's reformation, the Baltimore Bar Association raises the philosophical question of how Petitioner has proven his reformation when he refuses to recognize the existence of any misconduct from which to reform. Since Petitioner is adamant in his belief in his innocence, he is consistent in not expressing any repentance. While he seems to hinder his cause by not taking what might be the easier way of confession and contrition, the intellectual honesty of his position must be recognized. Reform has been defined as: a change from worse to better, to bring from a bad to a good state. We believe Petitioner has demonstrated his reformation without an expression of contrition from him. Starting from the premise that his guilt was conclusively proven, we find his conduct since conviction to be a completed turnabout from that which resulted in his conviction. We find his conduct since conviction to be totally inconsistent with the probability of repetition of his previous misconduct. We believe this constitutes reformation as this term is used in the present proceedings.\(^{118}\)

The Maryland Court was, however, in a better position than was the Hiss tribunal to accept reformation without the need for contrition on the part of the Petitioner. With the decline of the anti-American witch hunts of the fifties, for example, application of the Smith Act fell by the wayside and was ignored by the very prosecutors who had once cherished it so much. By the first half of this decade, the American public appeared to have come full circle from the days of Joe McCarthy and was expressing sympathy for those who had suffered under the anti-communist hysteria of the post-war period. Such complete turnabout and discredit of the legislation which formed the basis of the crime for which Braverman was convicted enabled the Maryland Court to view contrition as unnecessary.\(^ {119}\)

\(^{118}\) 271 Md. at 202-03, 316 A.2d at 249.

\(^{119}\) Id. at 201-203, 316 A.2d at 248. The court found that several factors made contrition unnecessary:

. . . Petitioner's misconduct which resulted in his conviction was largely political in nature and should be viewed in the light of present realities. Although we do not consider court decisions rendered after the Petitioner's conviction as undermining the conclusive proof of his guilt,
Although the factors of political and social change which persuaded the Maryland Court to accept rehabilitation on the part of the Petitioner in Braverman were to be found in the Hiss case, one central element was lacking. Perjury, unlike conviction under the Smith Act, is a criminal offense of the utmost seriousness to the profession, the courts and the public. No policy argument by the Supreme Judicial Court could change this even though there was a tremendous sense that Hiss had been caught in the same uncontrollable whirlwind that had ruined the lives of so many. Little, therefore, could be said by the Massachusetts Court about changes in prosecutorial attitudes, the right to dissent, or detente with communist nations, because no matter how much the Court desired to take judicial notice of the changes which had occurred in society generally, the underlying problem would not wash away: Alger Hiss was guilty of perhaps the most serious crime a lawyer could commit, perjury.

This point was argued by the Bar Counsel. But the Court, sensitive to all of the social and political pressures felt by the Maryland Court in the Braverman case, nevertheless went one step further and, without taking judicial notice of the changes represented by those pressures, logically found that “present and good moral character” itself “demonstrates rehabilitation.”\(^\text{120}\) Certainly, such a view seems inconsistent with the Keenan and Centracchio decisions.\(^\text{121}\) In fact, the Court in its enthusiasm to right a possible wrong

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\(\text{120. 75 Mass. Adv. Sh. at 2505 n.22, 333 N.E.2d at 438 n.22.}\)

\(\text{121. Id. at 2490, 333 N.E.2d at 433.}\)
committed at an earlier point in our history appears to have worked a substantial change in the standards by which lawyers are to be disciplined in Massachusetts.

Although the very term disbarment suggests permanency in the eyes of the public, it is no longer clear that there may be crimes committed by lawyers serious enough to warrant permanent disbarment. Instead, disbarment appears to be a condition which invites rehabilitation. "Time and experience," the Court says, "may mend the flaws of character which allowed the immature to err. The chastening effect of disbarment may ultimately redirect the energy and reform the values of even the mature miscreant. There is always the potentiality for reform. . . ."  

In the case of Alger Hiss, the mere passage of time was apparently a testimonial to this principle. During the years following disbarment he lived a simple and honorable life, maintaining a good reputation, writing and teaching. In the humble position of a salesman, he maintained his intellectual competency and earned the respect of his employers and former peers in the profession. Based upon these facts, the Massachusetts Court found no reason to feel that his readmission would be detrimental to the public trust and confidence in the legal profession and therefore reinstated his name to the roll of those entitled to practice law in the Commonwealth.  

Yet, apart from adding one more attorney to the approximately eighteen thousand already practicing in Massachusetts, what effect does the Hiss decision have with respect to current trends in disciplinary enforcement? Certainly, for those attorneys disbarred in Massachusetts and perhaps in other states, the decision suggests that the simple passage of time may itself be a factor in determining whether past evidence of bad moral character may be erased and sufficient rehabilitation established to warrant reinstatement of an attorney convicted of a serious crime. But of even greater significance is the fact that the Court, by emphasizing the time factor, may have unwittingly blurred the distinction between suspension from practice and disbarment. After Hiss, neither penalty can be regarded as a permanent disability, but rather discipline limited in duration, subject only to the proof of decent conduct on the part of the petitioner for a sufficient period of time following removal from practice.

122. Id. at 2493-94, 333 N.E.2d at 434.
123. Id. at 2506-14, 333 N.E.2d at 439-41.
The Legacy

The indefiniteness of this approach raises problems for those involved in disciplinary enforcement as well as for the public, which may perceive the need for some absolute standard beyond which the profession of law refuses to open its arms once again to the erring practitioner. If disbarment is merely a severe form of suspension, then when, if ever, is a recommendation of disbarment warranted? The dilemma raised by this reasoning was nowhere more apparent than in the disciplinary proceedings involving Charles W. Colson, which followed the Hiss case by several months.

On July 18, 1974, Charles W. Colson was suspended from practicing in the courts of the Commonwealth of Massachusetts pending further disciplinary proceedings. By the time he appeared before the Massachusetts Court again, he had pleaded guilty under Title 18 Section 1503 of the United States Code. He admitted that he unlawfully, willfully, knowingly and corruptly endeavored to influence, obstruct and impede the due administration of justice in connection with the criminal trial of Daniel Ellsberg by devising and implementing a scheme to defame and destroy the public image and credibility of Ellsberg and those engaged in Ellsberg's defense. By the spring of 1975, Colson had served his prison term and had also been disbarred by the Supreme Court of Virginia. On notice of this prior discipline, Mr. Colson appeared directly before the Court in Massachusetts without hearing and recommendation by the Board and became subject to the imposition of reciprocal discipline by the Court.

127. Mass. Sup. Jud. Ct. R. 4:01 § 16 permits the Court to enter such order as the facts may justify when a record is received of an order in another jurisdiction which subjects a Massachusetts attorney to discipline. This section further provides, in effect, that the court may impose identical discipline, without a rehearing by it of the facts related to the misconduct, unless the particular circumstances show that identical discipline would be unfair or inappropriate. Among those possible circumstances is the fact that the procedure in the other jurisdiction did not provide reasonable notice or opportunity to be heard. [Id. at (3)]. In the instant case the court concluded that the procedure in Virginia may not have provided Mr. Colson with a reasonable opportunity to be heard because he was then under a Federal Court order not to discuss certain matters relating to a pending criminal
The case appeared on its face to contain offenses which warranted disbarment. Colson had committed a serious Federal felony, i.e., he had obstructed justice. He did not and could not properly deny the guilt in this crime. Nevertheless, he took a position similar to that of Hiss in protesting the righteousness of his actions. Colson testified that he believed sincerely that Ellsberg's publication of the *Pentagon Papers* threatened a vital national security interest, and to the extent that the President ordered him to proceed in a certain fashion to protect this interest, he regarded it to be his job to carry out presidential directives without substantial attention to the ethical propriety of his conduct.\(^{128}\)

Yet, in a case having all the earmarks of the facts reported in *Keenan*, *Centracchio* and *Hiss*, the judge, citing all these former decisions as precedents, nevertheless found that disbarment in the face of this serious crime was not necessary. He stated:

> In bar disciplinary matters “public confidence in the courts . . . and general respect for membership in the bar” also must be considered. *Centracchio*, *Petitioner* . . . cf. *Matter of Welansky; Matter of Hiss*. Here we have a member of the bar who is guilty of obstructing justice in violation of a Federal statute making his action a felony. This is a serious offense bearing on the administration of justice . . . .\(^{129}\)

> . . . In mitigation, Mr. Colson has shown the unusual nature of the relationship he had with the President at the time of the offense. Such a situation is not likely to arise again in Mr. Colson’s career. Certainly, it would not arise in the representations of clients in the regular practice of law. A suspension will be sufficient to protect the public in its reliance upon the presumed integrity and responsibility of lawyers . . . . (citations omitted)\(^{130}\)

Although Judge Wilkins paid homage to the *Keenan* notion of the “public welfare” and the “security in advancement of public justice” above any particular individual interest,\(^ {131}\) on facts suggesting an offense of equal gravity he failed to order disbarment and, in-prosecution and the Virginia Attorney General would not assent to a continuance of the disciplinary proceedings. Charles W. Colson, Findings of Fact, at 4-5.

131. *Id.* at 10; 314 Mass. 547, 50 N.E.2d at 787.
stead, instituted a suspension granting the respondent the right to apply for reinstatement in 1979.\textsuperscript{132}

This process of judicial reasoning, rather than overruling earlier decisions, produced a new interpretation of the earlier Keenan and Centracchio decisions in light of the Hiss case. If the court felt, as it apparently did, that Keenan required the character of the attorney to be determined at the time of the hearing, with due disregard of prior conduct, in order to decide whether the attorney should have membership in the bar,\textsuperscript{133} then evidence of present good moral character is apparently sufficient in the eyes of the Court to remove the taint of the most serious crime.

By adopting this position, a court assists itself in retaining the utmost possible flexibility in fashioning disciplinary judgments differently on a case-by-case basis. The unfortunate effect of this flexible approach for the bar and public alike is that the terms used to define discipline come to have a less consistent meaning; so much so that the concept of discipline itself is threatened, at least to the extent that it represents an attempt to protect the public and the system of justice from those who are not worthy of assuming the responsibility and calling of attorney-at-law.

The Massachusetts Supreme Judicial Court chose to avoid presenting a statement of the underlying political and social currents which motivated its decision in the Hiss case. In doing so, it may have unwittingly opened the door to many, perhaps less worthy individuals presently under the disability of disbarment to reapply and to gain reinstatement to positions of public trust. A profession weakened so recently by scandal and lack of confidence cannot withstand the image of the easily revolving door.\textsuperscript{134} As an eminent Southern jurist has appropriately concluded:

\begin{quote}
I believe with my brothers, that no man is “beyond redemption” if their reference be to the biblical teaching of redemption of the soul or redemption from sin into Everlasting Life. But that redemption is solely God’s. I deem it fully within the mortal limitations of judicial determination entrusted to us, to conclude that an attorney’s past actions, misdeeds and betrayals of
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\textsuperscript{132} Charles W. Colson, Findings of Fact, at 15.
\textsuperscript{133} 313 Mass. at 219, 47 N.E.2d at 32.
\textsuperscript{134} Following the Hiss decision, Anthony A. Centracchio was reinstated to the Bar on re-petition. In re Anthony A. Centracchio, Civil No. 75-33 (Mass. Sup. Ct., filed March 9, 1976).
trust and of his profession can in appropriate circumstances warrant his complete banishment from the law’s “Garden of Eden” without absolution.

The Bar should not be forever burdened with reevaluating a clear case of disbarment and determining whether or not in another field the attorney has appeared to have redeemed himself sufficiently to come back into the law.\textsuperscript{135}

In the present instance where the petitioner has done well in another field, which is most commendable, I think he deserves to remain there to serve that arena and not to be brought back into the tempting surroundings in which he first found trouble and may well do so again.\textsuperscript{136}

\textsuperscript{135} In re Rassner, 265 So. 2d 363, 365 (Fla. 1972) (Delke, J., dissenting).
\textsuperscript{136} Id. at 366.