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## American Principles and the Evolving *Ethos* of American Legal Practice

Harrison Sheppard

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# American Principles & the Evolving *Ethos* of American Legal Practice

Harrison Sheppard\*

We find ourselves under the government of a system of political institutions, conducing more essentially to the ends of civil and religious liberty, than any of which the history of former times tells us. . . . Let reverence for the laws . . . become the *political religion* of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars.

While ever a state of feeling, such as this, shall universally, or even, very generally prevail throughout the nation, vain will be every effort, and fruitless every attempt, to subvert our national freedom.<sup>1</sup>

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\* The author, a Fellow of the American Bar Foundation, is a member of the State Bar of California, the principal of Harrison Sheppard, Law & Public Relations (San Francisco), and Chairman of Alaythia, Inc., a law practice management consulting firm with offices in San Francisco and New York. He is a graduate of St. John's College, Annapolis, Md. (B.A. 1961) and Hastings College of the Law, University of California, San Francisco (J.D. 1967). Following a government career with the Antitrust Division of the U.S. Department of Justice in Washington, D.C. (1967-69) and the Federal Trade Commission (Washington D.C., Seattle, Washington, and San Francisco, 1969-89), Mr. Sheppard entered private practice as Of Counsel to the San Francisco law firm of Lagarias & Masson (1989-93) and began his solo law practice in San Francisco in 1993. He is a frequently published essayist and Editor of *Effective Closing Argument* (1989).

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## I. INTRODUCTION

The subject of my talk this afternoon is *American Principles & The Evolving Ethos of American Legal Practice*, but I don't intend it to be an academic talk.<sup>2</sup> The facts of contemporary American life make this subject a practical one that concerns all of us, directly, not only as members of our profession, but as individual men and women, citizens of this state and the United States.

The *ethos* of legal practice is a difficult subject. In considering it, I have tried to apply the best of my education and experience in nearly thirty years of public and private law practice. If anything I have to say in this talk is disturbing, I hope you will recognize that it is said with great respect for our profession, and out of a desire to share with you the best I am able to distill from my life as a lawyer.

My experiences as a lawyer, considered in light of the guiding purposes of our fundamental legal institutions, as well as contemporary social, economic, and political facts, have led me to conclude *that our typical professional practices do not serve either our clients or the general public nearly as well as they should; that commonly expressed public criticisms of lawyers have a sound basis in fact; and that the every day pressures of the practice of law have led many lawyers to forget the significance of their oath to support the*

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1. Abraham Lincoln, *The Perpetuation of Our Political Institutions*, Address Before the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838) (emphasis added), in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 76, 81 (Roy P. Basler ed., Kraus Reprint Co. 1969) (1949) [hereinafter *Young Men's Lyceum*].

2. This article is the formalized text of a talk, followed by a question and answer period, given by the author to the leadership of the California State Bar on October 10, 1996, at the State Bar's 1996 Annual Meeting in Long Beach, California for a Continuing Legal Education (CLE) program titled "The Ethos of Practicing Law." There are, of course, important differences between a live talk and a polished text which need to be considered in assessing either. JACOB KLEIN, *LECTURES AND ESSAYS* 139-53 (1985) (explaining that "[t]he subject of this lecture is, as announced, *The Problem and the Art of Writing*. And that is what I am going to talk about. My real theme, however, the theme that prompts me to deliver this lecture, is—*Reading*."). See also GERTRUDE STEIN, *WHAT ARE MASTERPIECES (AND WHY THERE ARE SO FEW OF THEM)* 83-104 (1970). Stein writes:

I was almost going to talk this lecture and not write and read it because all the lectures that I have written and read in America have been printed and although possibly for you they might even being read be as if they had not been printed still there is something about what has been written having been printed which makes it no longer the property of the one who wrote it and therefore there is no more reason why the writer should say it out loud than anybody else and therefore one does not . . . . One of the things that I discovered in lecturing was that gradually one ceased to hear what one said one heard what the audience hears one say . . . .

*Id.* at 83-86.

*Constitution and laws of the United States and this state, with potentially serious consequences for our democratic society.* Even so, I am optimistic about the future of our profession. I am convinced that we lawyers now have an unprecedented opportunity, not only to regain a high standing in the public's perception and increase the demand for our services, but to make an indispensable contribution to resolution of one of the most pressing domestic problems our country has ever faced: harmonization of increasing diversity in American society. It is my belief that the times uniquely call upon us lawyers to help rescue this country from escalating social turbulence and violence, and help preserve for Americans that domestic tranquility which is one of the declared purposes of our Constitution.

## II. A CASE IN POINT

I first want to tell you a true story to illustrate an important part of the basis for the conclusions I have just summarized.<sup>3</sup>

A client came to me troubled about the injustice of his situation. He had recently been fired from an executive position with a small business. The circumstances of his termination involved not only possible violation of his employment contract, but breach of related business contracts that involved a great deal of money. The client was considering whether to accept a modest termination package in settlement of his claims, or to pursue his legal rights.

We discussed his situation in some detail. I described to him the stresses, struggles, expense, and life dislocations he would probably have to go through to win, through litigation, what has been called in another context "an adequate award,"<sup>4</sup> even on the assumption that his case was meritorious. I suggested he discuss the matter thoroughly with his wife before he made his decision. After a weekend had intervened, he called to tell me he had decided to accept the modest separation package he had been offered. But then his former employer had a change of heart and withdrew his original offer of settlement. The client returned to my office, extremely agitated by the double injustice he now felt. He asked me to look into his case more fully and, if justified, prepare it for litigation.

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3. The facts of the following case have been sufficiently generalized to maintain the anonymity of the parties and the confidentiality of the settlement agreement to which this anecdote refers.

4. Melvin Belli, *The Adequate Award*, 39 CAL. L. REV. 1 (1951) (criticizing low verdicts in personal injury cases for not adequately compensating a person).

Following my further investigation and research, I conferred with the potential defendant's attorney. I tried to persuade him of the merits of my client's case, providing him with the key evidence in support of my client's claim and a copy of the complaint we intended to file if we could not reach a settlement. He agreed to a mediation. But then, through circumstances outside of the control of either of us, the mediation failed.<sup>5</sup> We then filed our complaint, seeking substantial damages. The complaint was answered, and formal discovery began.

Defendant's counsel and I met again to discuss the possibility of resuming settlement discussions. He agreed to resume such discussions on the condition that I enter into business negotiations with a second attorney representing the defendant, while he aggressively continued his formal discovery. I agreed to this arrangement, and met with the negotiating attorney to work out a business deal. In about eight hours of intensive negotiations over a two day period, we arrived at a substantially complete agreement and settlement.

Between the time I first presented our evidence to defendant's counsel to the point of execution of the settlement agreement, nearly six months had elapsed. During that time we engaged in intense formal discovery, including the taking of depositions. After the agreement was signed, I asked the defendant's original attorney why we could not have arrived at the same agreement six months earlier, when we already had before us all the facts that led to the settlement. He replied: "I am a litigator; I know litigation. I didn't think I knew business well enough to work out the kind of a deal that would adequately protect my client's interests."

It may be, of course, that the attorney's response was not the whole story. It may have been the case, for example, that his client was reluctant to negotiate the matter after the failed mediation, and instructed him to take an aggressive stance. Whether or not that was so, his candid admission illustrates what is perhaps the greatest problem in the *ethos* of legal practice today. It is not only *acceptable* in our profession to equate lawyering skills with the skills of a litigator, it is both a popular and professional stereotype. To be considered a "real" lawyer means to many people, both within and outside the profession, to be a litigator. Considering the fact that over 90% of all filed civil cases in the United States are resolved without a jury trial,<sup>6</sup>

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5. Without prior notice, the mediator failed to appear at the mediation. His absence led to a discordant exchange between counsel, who were meeting face to face for the first time since the possibility of litigation had developed.

6. Well over 90% of all filed civil cases are resolved without a jury trial, and the great

and over 80% are resolved by voluntary settlement, arbitration, or summary judicial determinations, this stereotype is hardly reflective of the realities of dispute resolution. The case I described represents one among many thousands of like situations that occur annually in the United States. Given the statistics relating to the way filed lawsuits are actually resolved, discovery and other litigation procedures that take place between the filing of a civil complaint and its final resolution represent an enormous waste of resources, unnecessary stress for all parties to a civil conflict, and, particularly where extensive motion practice is involved, tremendous unnecessary strains upon our civil and criminal court system.<sup>7</sup>

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majority of all non-jury cases are settled before a verdict is reached. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT, CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES I (July 1995) [hereinafter BUREAU].

7. Most people are unaware of the real damage discovery abuse causes to both individuals and the legal system itself. The subject receives little attention in the media, who generally view it as an arcane topic, of interest only to law professors and judges, one guaranteed to make the eyes of 'real people' glaze over with boredom. But discovery abuse is one of the central ailments of the legal system . . . [I]t is now so entrenched that even some legal ethicists have become desensitized and wink at the practice . . . Stephen Gillers, a leading legal ethicist and professor of law at New York University, says that discovery abuse is one of the two worst ethical problems currently facing the legal profession. (The other [is] billing abuses) . . . Discovery abuse is a major drain on our system of justice. Constant and unremitting fights over discovery are a major cause of court congestion . . . When the orderly process of discovery goes awry, it can delay a case for years . . . Discovery wars create a chain reaction that is inimical to the purposes of justice. The disputes keep cases from getting to trial, but they also delay settlements of cases . . .

RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 104-05 (1996) [hereinafter NADER & SMITH].

For the twelve month period ending June 30, 1992, out of 762,000 tort, contract, and real property cases filed in the nation's 75 largest counties, only 12,000 cases (1.5%) were tried by jury; 470,000 cases (61.7%) were disposed of by an agreed settlement without trial; 82,000 cases (10.8%) were dismissed; and 61,000 (8%) were resolved by summary judgment, directed verdicts, arbitration awards, or bench trials. BUREAU, *supra* note 6, at 1.

These statistics suggest that a very large portion of the conflicts that lead to formal civil complaints could be settled without any litigation at all (or at least without costly formal discovery) if counsel for the parties conducted good faith settlement negotiations at the outset on the basis of a dispassionate examination and fair exchange of the known facts, and were capable of successfully counseling their clients to negotiate their disputes.

The same may also be said of criminal cases, as the following letter from a state court judge testifies:

On my desk is a request for a young attorney to be added to the criminal appointment list maintained by the Court. He advises me that he has recently completed '[a]n intense two-week, advanced advocacy seminar' sponsored by the National Criminal Defense College at Mercer Law School in Macon, Georgia. He also states that he attended a three-day seminar sponsored by the

The defendant's attorney in the case I described had his client's business interests at heart. But he had not been adequately schooled by either his training or experience to protect that interest by skillful transactional negotiation or to persuade his client to continue good faith negotiations despite the failure of the mediation. In any case, his admission pointedly indicts the prevalent *ethos* of legal education, both primary and continuing, as well as legal practice in America today. It is, moreover, also an indictment to which almost every practicing lawyer, including myself, would have had at some time in his or her career, to plead guilty. The factual basis for this indictment—excessive and aggressive reliance upon the procedures of litigation to resolve difficult disputes—is also, I believe, an important source of our own widely reported professional discontents. As you may know, a 1994 survey of California lawyers sponsored by this Association showed that only 52% of California lawyers—barely half—would choose to become lawyers again if they had an opportunity to begin their professional lives over.<sup>8</sup> This obviously discloses a sadly experienced difference between the hopes we have as beginning lawyers, and the realities of experienced legal practice. This is not only a California phenomenon; it is a national one. Since 1984, there have been increasing signs of lawyer dissatisfaction and burnout. Moreover, lawyers as a group are among the most clinically depressed in the nation.<sup>9</sup>

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National Association of Criminal Defense Lawyers in Las Vegas, Nevada entitled 'cross-examination . . . the last word' and that he has earned 126 hours of CLE in criminal defense matters. I queried this young man regarding how much he had received in negotiation and settlement of criminal cases or in managing a criminal defense client while preparing a case for settlement. He indicated that maybe one or two hours might have been devoted to this 'general area.'

It is the experience in the Court system that cases settle at the rate in the range of high ninety percent, yet very little CLE time or law school instruction focuses upon helping lawyers prepare a case or the client for the inevitable settlement negotiations.

Letter from James P. Buchele, District Judge, Third Judicial District, District Court of Kansas, Topeka, Kansas, to Harrison Sheppard (June 19, 1996) (on file with author).

8. A 1994 Rand Corporation Study "reported nearly half of [California's] 142,000 practicing attorneys wish they had chosen another field. A mere 52% of the respondents would have become attorneys if they were picking a new career." *Lawyers Who Wish They Weren't*, S.F. CHRON., Nov. 25, 1994, at A46.

9. See SOL M. LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 242 (1994) (citing Andrew Herrmann, *Depressing News for Lawyers*, CHI. SUN TIMES, Sept. 13, 1991, at 1). See *infra* note 49.

### III. THE ORIGINAL *ETHOS* OF AMERICAN LAW

Given this highly critical state of affairs, the subject of the *ethos* of American law is an especially important one.

The word "ethos" is conceptually related to the word "ethics." Its original meaning refers to the customs, or morality, of a people.<sup>10</sup> In theory, the guiding *ethos* of American law is articulated in this country's two founding documents: the Declaration of Independence and the United States Constitution. The Declaration of Independence<sup>11</sup>

10. "Ethos, n. [Gr. ethos, an accustomed place or habitation; hence, habit, custom, character] 1. the characteristic and distinguishing attitudes, habits, etc. of a racial, political, occupational, or other group." WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED ENCYCLOPEDIA EDITION 628 (1977). "*Ethic*, n., derives . . . from Gr[reek] *ethika, ethike* . . . the moral art . . . from *ethos*, character, whence L[atin] *ethos*, adopted by E[nglish], esp in sense 'character and spirit of a people': intimately akin to G[reek] *ethos*, custom . . ." ERIC PARTRIDGE, ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH 188 (2d ed. 1959).

Use of the ancient term "*ethos*" in the title of this talk and article, rather than its contemporary cognate "ethics," was deliberately chosen by the author to reflect an ancient usage in traditional Western discourse about ethical matters that is broader in meaning than the narrower, more technical modern term. Aristotle, for example, spoke of the *ethos*, *pathos*, and *logos* of an argument as the three key elements of the art of persuasion:

The proofs furnished by the spoken word are of three kinds. The first depends upon the moral character of the speaker [*ethos*], the second upon putting the hearer into a certain frame of mind [*pathos*], and third upon the speech itself, insofar as it proves or seems to prove [*logos*].

ARISTOTLE, RHETORIC, I, 2, in PETER C. LAGARIAS, EFFECTIVE CLOSING ARGUMENT 99 (1989).

A deliberate retention of older terms facilitates—it does not guarantee—reliable access to the grand tradition of discourse in the West about ethical and political issues. For example, Richard P. McKeon pointed out in 1930 that 'the mass of commentary on Aristotle will be rendered more difficult, if not impossible, of understanding if the terms of the discussion are changed arbitrarily after two thousand years.' Do we not cripple, rather than liberate ourselves by presuming to start from scratch every generation? Innovations in the vocabulary and rhetoric of ethics should be highly suspect, even when ventured by high-minded moralists.

George Anastaplo, Book Review, THE GREAT IDEAS TODAY 464 (1996) (reviewing STEPHEN L. CARTER, INTEGRITY (1996)).

For a more complete and enlightening account of the prevalent *ethos* of contemporary American legal practice than is possible to survey in this article, see William T. Braithwaite, *On Legal Practice and Education at the Present Time*, in THE GREAT IDEAS TODAY 44 (Mortimer J. Adler ed., 1989) [hereinafter Braithwaite, *Legal Practice*]; William T. Braithwaite, *Why Lawyers Lie*, in THE GREAT IDEAS TODAY 231 (Mortimer J. Adler ed., 1994) [hereinafter Braithwaite, *Why Lawyers Lie*].

11. Thomas Jefferson himself characterized the *Declaration of Independence* as an amalgam of "'harmonising [sic] sentiments of the day,' reproduced without particular thought of their source and melded into 'an expression of the American mind'." Letter from Thomas Jefferson to Henry Lee (May 8, 1825), as quoted in EVA T. H. BRANN, PARADOXES OF EDUCATION IN A REPUBLIC 96 (1979).



was regarded by Abraham Lincoln, one of America's greatest lawyers, as the "leading principle" of the American *ethos*,<sup>12</sup> at least as important as the Constitution.<sup>13</sup> Our unique American political *ethos* was first declared by us as a separate people with these words: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." This world-shaking and world-shaping political testament is reflected in the stated purposes of the establishment of our Constitution,<sup>14</sup> whose too seldom

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12. Lincoln's view that our Declaration of Independence states this country's guiding political *ethos* is made explicit in the following two exemplary statements:

I say this is the *leading principle—the sheet anchor of American republicanism*. Our Declaration of Independence says: "We hold these truths to be self evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

Abraham Lincoln, Speech Given in the Lincoln-Douglas Debates in Peoria, Illinois (Oct. 16, 1854), *reprinted in THE LIVING LINCOLN* 170 (Paul M. Angle & Earl Schenck Miers eds., Barnes and Noble 1992) (1955) (emphasis added).

I have never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence . . . . I have often inquired of myself, what great principle or idea it was that kept this confederacy so long together. It was not the mere matter of the separation of the colonies from the mother land; but something in the Declaration giving liberty, not alone to the people of this country, but hope to the world for all future time. It was that which gave promise that in due time the weights should be lifted from the shoulders of all men, and that *all* should have an equal chance. This is the sentiment embodied in that Declaration of Independence.

Abraham Lincoln, Speech for Washington's Birthday at Independence Hall, Philadelphia, Pennsylvania (Feb. 22, 1861), *reprinted in THE LIVING LINCOLN, supra*, at 379.

13. Lincoln equated the importance of support Americans were bound to give to the *U.S. Constitution* to support owed to the principles of the *Declaration of Independence*: "As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor . . ." Young Men's Lyceum, *supra* note 1, at 81.

14. See GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 13-25 (1989) (analyzing the relationship between the Declaration of Independence and the Preamble to the U.S. Constitution and analyzing the relationship among the several purposes stated in the Preamble for establishment of the Constitution). Anastaplo explains that:

The 1776 Declaration of Independence, which was the foundation for both the 1777 Articles of Confederation and the 1787 Constitution . . . states, in an authoritative manner, the enduring ends of American government rooted in the inalienable rights of men. . . . The Preamble confirms several key teachings of the Declaration of Independence, especially with respect to both the consent of the governed and the purposes of government. It restates in this context the political principles set forth in the Declaration of Independence.

cited Preamble declares:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence [sic], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.<sup>15</sup>

Every one of us has sworn an oath, on admission to the Bar, to uphold both our State and Federal Constitutions. Such an oath implies that, in the exercise of our professional duties, we will do all that we reasonably can do to promote the *guiding and paramount purposes* of those Constitutions.<sup>16</sup> More compelling even than the widely accepted view of the legal profession “as a link between public and private interests,”<sup>17</sup> is the fact that the principles of the Supreme Law of the Land are supposed to shape the *ethos*, or morality, of American legal practice.<sup>18</sup>

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*Id.* at 14. See also MORTIMER J. ADLER, *WE HOLD THESE TRUTHS: UNDERSTANDING THE IDEAS AND THE IDEALS OF THE CONSTITUTION* 129 (1987) (referring to the Preamble of the Constitution as “echoing in part the language of the Declaration of Independence, which breathe spirit into the rest of the Constitution”) (*quoted in* ANASTAPLO, *supra*, at 24).

15. U.S. CONST. preamble. See Braithwaite, *Legal Practice, supra* note 10, at 61 (quoting and commenting on the Preamble and its ordering of the priorities of government: “In the American polity, justice is second only to the Founding of government itself: [quoting the first 16 words of the Preamble] . . . This order suggests that in the understanding of the Constitution’s authors justice is the supreme task of government . . .”).

16. The prescribed form of oath for attorneys on admission to the California Bar is: “I solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability.” CAL. STATE BAR ACT, art. 4, § 6067 (Jan. 1996). Under the provisions of the *California State Bar Act*, it is the first of the “Duties of Attorney,” “To support the Constitution and laws of the United States and of this state.” *Id.* at § 6068.

17. David Luban, *The Noblesse Oblige Tradition in Practice of Law*, 41 VAND. L. REV. 717, 724 (1988). Luban goes on to state, in describing the “Progressive Professionalist” view shared by public-minded lawyers such as Louis Brandeis, that “because of this unique position, members of the legal profession have an ethical responsibility to counsel clients and modify laws for the common good.” *Id.*

18. Henry L. Stimson, the twentieth-century doyen of the modern corporate attorney, who served in high government positions under six presidents, wrote passionately of the necessity of the American lawyer to be a defender of the laws and Constitution. “I felt,” he wrote in his co-authored book *On Active Service in War and Peace*, “that if the time should ever come when this tradition faded out and the members of the Bar had become merely the servants of business, the future of our liberties would be gloomy indeed.”

NADER & SMITH, *supra* note 7, at xvii.

For a recent work explicating a moral reading of the Constitution and the moral imperatives of law under the U.S. Constitution, see RONALD DWORKIN, *FREEDOM’S LAW:*

That is the theory. But what about its practice? Unfortunately, there are many people in the United States today who would be inclined to laugh at any linkage between the two words "morality" and "lawyer." Even firm believers in capitalism, and American business, and the profit motive, are saying that too many lawyers now go too far both in their own self-seeking, and in their abandonment of service to their clients' and the public interest.<sup>19</sup> More ardent lawyer-bashers not only point out common lawyer abuses, but also the fact that the typical practices of lawyers are condemned in the *Bible*<sup>20</sup> and in the classical secular writings, both ancient<sup>21</sup> and modern,<sup>22</sup> of the greatest wits,<sup>23</sup>

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THE MORAL READING OF THE AMERICAN CONSTITUTION (1996). In his introduction, Dworkin points out that:

[T]here is nothing revolutionary about the moral reading [of the Constitution] in practice. So far as American lawyers and judges follow any coherent strategy of interpreting the Constitution at all, they already use the moral reading. . . . Lawyers and judges, in their day-to-day work, instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments. As I shall argue later in this Introduction, they have no real option but to do so.

*Id.* at 2-3. He later adds that "[t]he American ideal of government not only under law but under principle as well is the most important contribution our history has given to political theory." *Id.* at 6. Compare this statement to Lincoln's statement, quoted in note 12, *supra*, that the Declaration of Independence not only gave liberty "to the people of this country, but hope to the world for all future time."

19. See, e.g., the following recent books criticizing prevalent practices of American lawyers: GEORGE ANASTAPLO, *The Moral Foundation of the Law*, in THE AMERICAN MORALIST: ON LAW, ETHICS AND GOVERNMENT 185-98 (1992); MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY (1994); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994); DANIEL J. KORNSTEIN, KILL ALL THE LAWYERS: SHAKESPEARE'S LEGAL APPEAL (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); LINOWITZ, *supra* note 9; NADER & SMITH, *supra* note 7. See also RICHARD A. POSNER, OVERCOMING LAW 64-70 (1995) (for an economic analysis of changes in the conditions and techniques of contemporary legal practice that are sources of public discontent). In a more popular vein, see M. SCOTT PECK, A WORLD WAITING TO BE BORN: CIVILITY REDISCOVERED (1993); BENJAMIN SELLS, THE SOUL OF THE LAW (1994).

20. See, e.g., Luke 11:46 (King James): "Woe unto you also, ye lawyers! for ye load men with burdens grievous to be borne and ye yourselves touch not the burdens with one of your fingers." Compare Jesus's admonition in *Matthew* 5:25 (King James): "Agree with thine adversary quickly, while thou art in the way with him, lest at any time the adversary deliver thee to the judge, and the judge deliver thee to the officer, and thou be cast into prison."

21. See, e.g., PLATO, THEATETUS 172-73 (M.J. Levitt trans., Hackett Publishing Co. 1990):

But . . . the man of law courts is always in a hurry when he is talking. . . . The talk is always about a fellow-slave, and is addressed to a master, who sits there holding some suit or other in his hand. And the struggle is never a matter of indifference; it always directly concerns the speaker, and sometimes life itself is at stake.

Such conditions make him keen and high-strung, skilled in flattering the master and working his way into favour; but cause his soul to be small and warped. His early servitude prevents him from making a free, straight growth; it forces him into doing crooked things by imposing dangers and alarms upon a soul that is still tender. He cannot meet these by just and honest practice, and so resorts to lies and to the policy of repaying one wrong with another; thus he is constantly being bent and distorted, and in the end he grows up into manhood with a mind that has no health in it, having now become—in his own eyes—a man of ability and wisdom.

There is your practical man, Theodorus.

*Id.*

22. See, e.g., JONATHAN SWIFT, *GULLIVER'S TRAVELS* 265-66 (Alfred A. Knopf pub. 1991):

I said there was a society of men among us, bred up from their youth in the art of proving by words multiplied for the purpose, that *white* is *black*, and *black* is *white*, according as they are paid. To this society the rest of the people are slaves.

For example, if my neighbor hath a mind to my cow, he hireth a lawyer to prove that he ought to have my cow from me. I must then hire another to defend my right; it being against all rules of Law that any man should be allowed to speak for himself. Now in this case, I who am the true owner, lie under two great disadvantages. First, my Lawyer being practiced almost from his cradle in defending falsehood; is quite out of his element when he would be an advocate for justice, which as an office unnatural, he always attempts with great awkwardness [sic], if not with ill-will. The second disadvantage is, that my lawyer must proceed with great caution: Or else he will be reprimanded by the judges, and abhorred by his brethren, as one who would lessen the practice of law. And therefore, I have but two methods to preserve my cow. The first is, to gain over my adversary's lawyer with a double fee; who will then betray his client, by insinuating that he hath justice on his side. The second way is for my lawyer to make my cause appear as unjust as he can; by allowing the cow to belong to my adversary; and this if it be skillfully done, will certainly bespeak the favor of the bench . . . .

It is a maxim among these lawyers, that whatever hath been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice, and the general reason of mankind. These, under the name of *precedents*, they produce as authorities to justify the most iniquitous opinions; and the Judges never fail of directing accordingly.

In pleading, they studiously avoid entering into the *merits* of the cause; but are loud, violent, and tedious in dwelling upon all *circumstances* which are not to the purpose . . . .

It is likewise to be observed, that this society hath a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood, of right and wrong; so that it will take thirty years to decide whether the field, left me by my ancestors for six generations, belong to me, or to a stranger three hundred miles off.

*Id.*

23. For example, “[a] lawyer is someone who protects us against robbers by taking away the temptation.” H.L. MENCKEN, *SENTENTIAE* (1916), *quoted in* JONATHAN GREEN, *THE CYNIC'S LEXICON* 138 (1984). Ambrose Bierce's *DEVIL'S DICTIONARY* includes a half

playwrights,<sup>24</sup> novelists,<sup>25</sup> and philosophers<sup>26</sup> of our civilization.

dozen definitions skewering lawyers; the following two are illustrative: "LAWYER, *n.* One skilled in circumvention of the law." "LIAR, *n.* A lawyer with a roving commission." AMBROSE BIERCE, *THE DEVIL'S DICTIONARY*, in *THE COLLECTED WRITINGS OF AMBROSE BIERCE* 189, 289-91 (Citadel Press 1948).

24. The most famous of these, of course, is Shakespeare's "[t]he first thing we do, let's kill all the lawyers." WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2, line 86 (The Yale Shakespeare ed. 1923). This often miscited quotation, uttered by "Dick the Butcher" in the context of a revolt against the power and luxury of the English upper classes, does not necessarily reflect Shakespeare's own attitude toward lawyers. For a recent detailed examination of the significance of this most commonly quoted lawyer-bashing line, including its possible implications in an examination of Shakespeare's view of law and lawyers, see KORNSTEIN, *supra* note 19. A passage more likely to reflect Shakespeare's view of lawyers—with whom he had some personal experience—may be found in Hamlet's speech on examining one of the skulls thrown up by the gravedigger in *Hamlet*:

Why, might that not be the skull of a lawyer? Where be his quiddities [subtle arguments or quibbles] now, his quillets [verbal niceties], his cases, his tenures [corpus of a legal instrument containing only the substance or purport], and his tricks? Why does he suffer this rude knave to knock him about the sconce [head] with a dirty shovel, and will not tell him of his action of battery? Hum! This fellow might be in's time a great buyer of land, with his statutes, his recognizances, his fines [final agreement for possession of land], his double vouchers, his recoveries. Is this the fine of his fines, and the recovery of his recoveries, to have his fine pate full of fine dirt? Will his vouchers vouch him no more of his purchases, and double ones too, than the length and breadth of a pair of indentures [the agreements of two or more parties, with exact copies of a single document]? The very conveyances of his lands will hardly lie in this box; and must the inheritor himself have no more, ha?

WILLIAM SHAKESPEARE, *HAMLET* act 5, sc. 1, lines 98-112 (The Yale Shakespeare ed. 1923).

25. One of the most quoted of these is Charles Dickens' characterization of English law courts in *Bleak House*, stating that:

On such an afternoon, some score of members of the High Court of Chancery bar ought to be . . . mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities . . . and making a pretence of equity with serious faces, as players might. On such an afternoon, the various solicitors in the cause . . . ought to be . . . ranged in a line . . . between the registrar's red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to . . . masters' reports, mountains of costly nonsense, piled before them . . . This is the Court of Chancery . . . which gives to monied might, the means abundantly of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honourable man among its practitioners who would not give—who does not often give—the warning, 'Suffer any wrong that can be done you, rather than come here!'

CHARLES DICKENS, *BLEAK HOUSE* 2 (Gordon N. Ray ed., The Riverside Press 1987) (1853).

26. See, e.g., ADAM SMITH, *THE WEALTH OF NATIONS*, bk. V, ch. I, pt. II, at 677 (The Modern Library ed., Random House 1937):

Justice, however, never was in reality administered gratis in any country.

Even so, most people in our democratic society would admit that they cannot live *without* law and lawyers;<sup>27</sup> and no talk about the *ethos* of practicing law would be complete without commenting on the better angels of a practicing American lawyer's nature.

Most of us lawyers at least began the study of law thinking less about "plaintiffs" and "defendants" and more about the real people who may put their faith in us as counselors with skills to help them find decent solutions to their problems. As most of us entered law school, we didn't think much about what we might *get away with* after we had passed the bar, through mere cleverness, or artful and contentious use of procedures,<sup>28</sup> or uncivil tactics of delay and

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Lawyers and attorneys, at least, must always be paid by the parties; and, if they were not, they would perform their duty still worse than they actually perform it. The fees annually paid to lawyers and attorneys amount, in every court, to a much greater sum than the salaries of the judges.

*Id.* See also PLATO, *supra* note 21, at 300 (hypothesizing that the "slavish" condition of lawyers from an early age prevents them from being upright).

27. In support of this proposition, see *Lawyers, Can't Live With Them, Can't Live Without Them*, *Either*, NEWSWEEK, Mar. 20, 1995, at 36 [hereinafter *Lawyers, Can't Live With Them*].

28. It is no secret that the legal system . . . is in disarray. Indeed, courts and government agencies are increasingly seen by the public, commentators, cultural observers, and lawyers alike as dysfunctional and in need of reform. Michael S. Josephson is a lawyer who runs a Southern California-based ethics institute that advises federal and state governments, among others, on ethics issues. He believes that the way some attorneys approach their work is a major cause of the problem. "Lawyers are competitors . . . . They tend to look at what they do as a sport. The way law is practiced today is to get away with what you can . . . ."

NADER & SMITH, *supra* note 7, at 16.

Complaints about contentious use of procedures by American lawyers in particular are not new; they have only become more exaggerated in recent years. As early as the turn of the century, Harvard's Dean Roscoe Pound complained that:

The sporting theory of justice . . . is so rooted in the profession in America that most of us take it for a fundamental legal tenet . . . . So far from being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law; and it has been strongly curbed in modern English practice. . . . The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. . . . The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it . . . . Thus the courts, instituted to administer justice according to law, are made agents or abettors of lawlessness.

Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 29 A.B.A. REP., pt. 1, 395 (1906), reprinted in LANDMARKS OF LAW 180, 186-87 (Ray D. Henson ed., 1960).

harassment. We thought far more about what our learning might enable us to *bring to situations* to help solve clients' problems.<sup>29</sup> We thought less, in short, about the letter of the law and sophisticated techniques of legal practice, and more about the spirit of American law and its moral purposes.

The *ethos* of the practice of law that brought most of us to the bar has been the prospect of *service*. We expected to be members of a profession that is supposed to serve not only its clients, but also the community in all that it does, and not only in some theoretical abstract "for the long term" way attributable to a providential "invisible hand."<sup>30</sup> It has become evident, however, that this tradition has been seriously eroded, if not altogether forgotten, in the practices of far too many lawyers. The dilution of this tradition is a significant factor contributing to the erosion of public respect for lawyers and loss of confidence in our legal institutions.<sup>31</sup> This loss of confidence is not only a matter of our public *image*. Rather, a 1993 poll by the American Bar Association showed that "[t]he more contact people have

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The same *ethos* of legal practice that disturbed Dean Pound has more recently been described as follows, with the suggestion that "deep down" most lawyers

believe that law does not displace war (because it cannot) but only imitates it—an opinion that is not simply wrong. In their rule of law, accordingly, words are weapons, due process means the rules of the game, and trials are rather like a working-class soccer match—bloody and rough and tumble. In litigation so conceived, lying is in effect, if not intention, a form of violence—a way to get what you fear you might not if you eschewed chicane for candor and civility. For lawyers (and their clients) who understand the law and litigation this way, justice means to win, to keep what you have or get more than you give, and winning is everything.

Braithwaite, *Why Lawyers Lie*, *supra* note 10, at 232.

29. See *infra* note 39 for recent unsolicited testimony on these points in letters from two young lawyers, one in civil and the other in criminal practice.

30. See Luban, *supra* note 17, at 723. Luban describes the view of functionalist sociologists that "the professional's specialized knowledge itself mandates certain behavior that has nothing to do with the professional's economic enrichment." This view expresses a different perspective than that of an unqualified faith in the providential guidance of an "invisible hand" which, in the long term, promotes the public good:

By preferring the support of domestic to that of foreign industry, [every individual] intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention . . . . By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.

SMITH, *supra* note 26, at 423.

31. See *supra* note 19 (illustrating this point by way of book titles); see also *infra* note 48 (ABA's findings in a poll of public attitudes about lawyers).

with lawyers, the less favorably they look upon the legal profession.”<sup>32</sup> Such rising distrust is extremely serious—even dangerous—because, as Abraham Lincoln suggested, “reverence for the laws” is indispensable to preservation of our civic liberties.<sup>33</sup> Law itself, it has been said, is a mere “skeleton of social order” which “must be clothed upon by the flesh and blood of morality.”<sup>34</sup> How can “reverence for the laws” be preserved in the United States without wide public faith that the skeleton of American law is clothed by American lawyers with the flesh and blood of morality?<sup>35</sup> As Dr. James H. Rutherford has pointed out in his book, *The Moral Foundations of United States Constitutional Democracy*:

The future of American government still rests on public opinion. It rests on our understanding and support for the moral foundations of constitutional democracy and our ability to communicate and preserve such an understanding effectively . . . . [T]he enjoyment of individual freedom and progress of human liberty are not inevitable. They are contingent, to a large degree, on our willingness and ability as moral agents to place our free will within ethical constraints. It is indeed the self-imposed ethical or moral foundations of government that change mere obedience to the coercive powers of government into a sense of consensual responsibility for a moral duty, a just order, the common good, or human rights.<sup>36</sup>

In light of the increasing diversity of our society, the task we lawyers have to restore public trust in our profession now requires us to remember, and to remain aware in all that we do, of the great moral purposes of our Constitution: to promote greater union among our people, more visible private and public justice, and domestic

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32. See *infra* note 48.

33. Young Men’s Lyceum, *supra* note 1, at 81.

34. Pound, *supra* note 28, at 193.

35. Few peoples, if any, have shown such a devout reverence for the law and the processes of the law as Americans. But also—in another of those paradoxical polarities of the American character—few peoples have been so indifferent to, and disrespectful toward, the prescriptions of the law. Lawlessness—including private and group violence and a tradition of direct action—has been just as much a characteristic of Americans as respect for the law.

1 GREAT ISSUES IN AMERICAN LIFE: A CONSPECTUS 286 (Mortimer J. Adler et al. eds., 1968). See also *Lawyers, Can’t Live With Them*, *supra* note 27. The author of this article hypothesizes that these apparently contradictory strains in the American character are reconcilable by reference to the typical moral sensibilities of Americans, and their simultaneous respect for civil order and individual liberty, each of which is prominently reflected in both the Declaration of Independence and the Preamble to our Constitution.

36. JAMES H. RUTHERFORD, *THE MORAL FOUNDATIONS OF UNITED STATES CONSTITUTIONAL DEMOCRACY* 7 (1992).



tranquility. The urgency of this task faces us *immediately*. Carrying it out effectively may be essential if we lawyers are to help prevent our society from becoming thoroughly balkanized, fragmented, fearful, and increasingly violent.<sup>37</sup> If this is indeed at least one of the most

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37. In 1990, the National Institute for Dispute Resolution sponsored a six month study, conducted by the Institute for Alternative Futures, to explore how cultural trends are likely to affect conflict in the United States in the 1990s. The study concluded that:

The U.S. will be more fragmented along lines of race, culture, nationality of origin, wealth, age and interests—so that the “melting pot” concept will be replaced by one of “the mosaic society,” and increasing polarization may occur between various groups . . . . Turbulence and rapid change is likely to characterize the 1990s decade.

Madeleine Crohn, Address Before the U.S. House of Representatives Subcommittee on Intellectual Property and Judicial Administration (May 19, 1992) in CONG. INFORMATION SERVICE 5 (May 20, 1992). Ms. Crohn’s Executive Summary emphasized that “[c]onflicts will remain a kind of growth industry in the 1990s,” a fact that has been all too visible during this decade in, for example, the activities of private militia groups, church bombings, the burning of abortion clinics, and other kinds of civic terrorism arising from different social, political, religious, racial, ethnic, and cultural viewpoints. *Id.* at 2.

The following items noted by chance in the July 16, 1996, edition of the *San Francisco Chronicle* exemplify conflicts related to the diversity of our American population and their increasingly polarized expression, as well as higher American sentiments about our national diversity: Don Lattin, *Racism’s Spark Glows in Church Ashes*, S.F. CHRON., July 16, 1996, at A1 (reporting on firebombed black churches in Alabama, “one of dozens of black churches damaged or destroyed by a recent wave of Southern arson”); *Prosecutors Win Ruling on Bomb Case Evidence*, S.F. CHRON., July 16, 1996, at A3 (reporting on legal proceedings against Oklahoma City bombing suspect Timothy McVeigh); Louis Freedberg, *Feinstein’s Stance on Immigration Bill*, S.F. CHRON., July 16, 1996, at A3 (reporting on California U.S. Senator Dianne Feinstein’s opposition to proposed legislation that would deprive the children of illegal immigrants of public schooling, noting that similar state legislation had been “struck down in a federal court”); Molly Brown Sestanovich, *Immigrants: Unpopular From the Beginning*, S.F. CHRON., July 16, 1996, at A16, stating:

Re: E.J. Dionne Jr.’s column on unpopular immigrants (*Chronicle*, July 9)  
 -Large waves of immigrants have always been unpopular. The first large wave of immigrants were the Scots Irish Presbyterians from Northern Ireland. In the 1720s, 50,000 came to our shores. By 1776, 250,000 had come.

They were most unpopular with the local folk, mostly English Protestants. They said, ‘The Scots Irish are uneducated, pugnacious and they drink too much.’ But George Washington loved them. Said he could not have won without the hard-fighting, brave Scots Irish. As to their all being uneducated, 25 years after the first Scots Irish came to our shores, some educated Scots Irish founded Princeton University.

One hundred years later a great wave of Irish Catholics from Southern Ireland came to America—4.7 million. They were very unpopular. The local folk said, “They’re uneducated, pugnacious and they drink too much.”

By that time the Scots Irish could boast of having had four presidents -Andrew Jackson, James Buchanan, Chester A. Arthur and James K. Polk.

So, to people who are members of an unpopular immigrant group we say, “Work hard and make friends with your American neighbors. In time your neighbors will see that you’re good people.”

important duties of our profession now, at this moment in our nation's evolution, then more of us lawyers may need to be re-inspired to remember what the true spirit of American law is. And those of us who cannot be *inspired* to remember it, should perhaps be *shamed* for forgetting it.<sup>38</sup>

#### IV. RECOMMENDATIONS FOR RESTORATION

I have three recommendations to help remedy the ethical misdirections that the practice of law has taken during the past thirty

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Two days later, in its July 18, 1996 edition, *The San Francisco Chronicle* had the following story headlined on its front page: *State's Tolerant Image Tarnished—Yearlong Hate Crime Study Suggests Relations are Tense*. The story began with this report:

More than 2,600 Californians were victims of crimes motivated by their race, religion or sexual orientation in 1995, Attorney General Dan Lungren announced yesterday, as the most diverse state in the nation became one of the last to issue a yearlong hate crime report. More than 69% of the 1,754 hate crimes were related to the victims' race or ethnicity, about 18% were related to sexual orientation and about 12.5% were related to religion.

Aurelio Rojas, *State's Tolerant Image Tarnished—Yearlong Hate Crime Study Suggests Relations are Tense*, S.F. CHRON., July 18, 1996, at A1.

38. The United States from the first was called a great "experiment." In his first address to Congress on April 30, 1789, the first presidential Inaugural, George Washington said that "[t]he preservation of the sacred fire of liberty, and the destiny of the Republican model of government, are justly considered as *deeply*, and perhaps as *finally* staked, on the *experiment* entrusted to the hands of the American people." WILLIAM LEE MILLER, *THE BUSINESS OF MAY NEXT: JAMES MADISON & THE FOUNDING* 250 (1992) (last emphasis added). Likewise, in his first Inaugural Address, Thomas Jefferson said that the United States was then "in the full tide of successful *experiment*." Thomas Jefferson, Inaugural Address (Mar. 4, 1801), in *SPEECHES OF THE AMERICAN PRESIDENTS* 39 (Janet Podell & Steven Anzovin eds., 1988) (emphasis added). Similarly, in his *Gettysburg Address*, Lincoln said that the Civil War tested whether this nation, or any nation "conceived in Liberty, and dedicated to the proposition that all men are created equal" could "long endure." Abraham Lincoln, *Gettysburg Address* (Nov. 19, 1863), in *GEORGE ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY* 300 (1989).

The survival of the United States as a great democratic republic is unprecedented in world history. After more than 200 years, our "experiment" in democracy still endures, though Lincoln's words remind us that *it may yet fail*. At the base of our democratic political institutions is a common belief in the justice of the rule of law. See *supra* text accompanying note 1 (quoting from Abraham Lincoln's Address to the Young Men's Lyceum). From the beginning of our history until only very recently, the American people have demonstrated great faith in the rule of law as the chosen regulator of our national civic life and in the appropriateness of choosing American lawyers as this country's political leaders. See *Lawyers, Can't Live With Them*, *supra* note 27. The increasing erosion of American confidence in the integrity of lawyers and the justice of the rule of law in the United States has made it all too obvious that the continued viability of our democratic institutions, and even of our civil liberties, may now depend upon restoration of American confidence in our legal institutions, and, therefore, in lawyers. This is a goal that is only likely to be achieved if there is a basis *in reality* for improvement in the way the American public *perceives* the behavior of its lawyers.

years. The first of these grows out of what I have repeatedly heard from young practitioners who have not yet forgotten why they wanted to become lawyers, and who have been dismayed and frustrated by what they have found in actual practice.<sup>39</sup> It is up to the *senior partners* of law firms, large and small, and senior executives in the public service, to create in our firms and legal institutions an unmistakable *ethos of problem-solving and civil, non-adversarial conflict resolution* as the hallmark of what it means to call ourselves “lawyers,” “attorneys,” and “counselors at law.” Associates and

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39. Two young lawyers wrote letters to me commenting with approval on an opinion editorial, *Cashing in on Conflict*. Harrison Sheppard, *Cashing in on Conflict*, WASH. POST, June 5, 1996, at A23. One lawyer wrote:

I wanted to tell you how much I agree with the points you made. . . . Law school definitely did not prepare me to be a lawyer who can solve my client's problems or resolve matters in any way other than litigation. I have met many attorneys who are the spittin' image of your 'gun for hire' lawyer. It often seems that the interests that they serve are their own, not their client's. I must admit that it has been a rude awakening. . . . Now that I have passed the bar and am a practicing attorney, I have attempted to follow your philosophy as much as I can in my own practice. It is not always easy, especially in a law firm type environment, but I have a couple of my own clients that I treat in this manner.

Letter from a Young Virginia Lawyer to Harrison Sheppard (June 19, 1996) (on file with author).

The other lawyer said:

Having practiced as an Associate Deputy Public Defender in \_\_\_ County for the past 2-3 years, I have experienced my share of frustration with the adversarial nature of our legal system. While I realize your article was probably directed more toward the civil aspect of American jurisprudence, I think it applies just as easily to the criminal aspect. In my line of work, reasonableness and zealous representation often seem mutually exclusive . . . .  
 . . . As an attorney, and as a young person increasingly concerned about the world I live in, I am very interested in helping to reform the legal system. I have some general ideas and opinions, but lack direction.

Letter from a Young California Lawyer to Harrison Sheppard (June 25, 1996) (on file with author). This public defender informed the author of his impression that the O.J. Simpson case persuaded many criminal defendants that, regardless of the actual facts of their situation, the *only* thing preventing their acquittal is the absence of enough money to engage a lawyer clever enough to get them off. In his opinion, public perception of the Simpson case has increased the pervasiveness of the cynical view, already long stimulated by movies and television, that the outcome of cases (and, hence, the character of American “justice”) is *solely* a matter of money and has little to do with the merits.

The letters just quoted closely parallel similar sentiments previously expressed by a graduate of this law school:

When I graduated from Loyola's law school, I had the feeling that the law profession could serve the public good. I believed in my Jesuit education and the values my parents taught me . . . . [But] from day one, you hear rumors about cases being fixed . . . [and] it was my feeling that cases were sometimes being decided for reasons other than the evidence.

Braithwaite, *Legal Practice*, *supra* note 10, at 57 (citation omitted).

junior partners generally can't do it, and junior government lawyers generally won't do it. The senior lawyers among us can and must do it, not only *despite*, but *because* of the bottom line; and, in the case of public lawyers, because of what the public interest now requires. Some law firms are aware of this ethical and business necessity, and have begun to take steps in this direction.<sup>40</sup> These developments indicate that law firms may increasingly be compelled to implement as a matter of firm policy the model of legal practice that Anthony T. Kronman, Dean of Yale Law School, has called "the lawyer-statesman ideal,"<sup>41</sup> and to communicate this policy to their members and

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40. One lawyer testified to this trend when he said:

Let me give you some thoughts about my Firm's approach to a problem-solving model of legal practice . . . . I suspect most of the large firms in the country are about where we are. First, I think you would be pleased with the extent to which most major law firms have actively incorporated ADR [Alternative Dispute Resolution] and similar problem-solving approaches to client legal problems in all areas of their practice . . . . Further, the need to consider cost-reducing/controversy-reducing approaches to problems is something that all of our associates are exposed to from the outset of their tenure, both in terms of working with partners to develop strategies for solving particular client problems, and in in-house and outside CLE training.

All of this activity, however, is not driven so much by an internal lawyer's 'ethos' as it is by external forces, i.e., our clients' demands for cost-efficient, problem-solving approaching [sic] in lieu of the scorched-earth litigation tactics of the past. There is clearly a 'market' at work here—clients demanding that legal services be rendered in a certain manner, and law firms competing to be responsive to that demand.

Letter from Caswell O. Hobbs, Morgan Lewis & Bockius LLP, Washington, D.C., to Harrison Sheppard (July 19, 1996) (on file with author). Internal documents accompanying Mr. Hobbs' letter, including a November 1995 in-house program ("ADR: Processes, Advocacy & Suitability"), and an announcement of appointment within the firm of an Alternative Dispute Resolution Practice Group, confirmed the detailed attention Mr. Hobbs' firm has been giving to ADR. The emphasis of these efforts was, however, heavily on arbitration as opposed to less formal methods of alternative dispute resolution, although mediation as an alternative was not overlooked.

41. See KRONMAN, *supra* note 19, at 109-62. Kronman identifies the three principal characteristics of the "lawyer-statesman" (which refers to lawyers in private practice as well as to lawyers in public service): (1) practical wisdom or "prudence," as opposed to mere technical skill; (2) civic-mindedness (an awareness of the lawyer's responsibility to the community in all that he or she does as a lawyer); and (3) empathy (both sympathy for the client's position and an ability to view the client's situation with detachment). *Id.* at 14-17. As to the virtues of prudence and civic-mindedness in matters affecting both private and public interests, see GEORGE ANASTAPLO, *THE AMERICAN MORALIST: ON LAW, ETHICS, AND GOVERNMENT* (1992). Prof. Anastaplo's book is "a cogent and discursive compendium of the principled foundations and perennially recurring challenges to American civil life." *Id.* Hindsight discloses that Anastaplo *prophetically* applies his guiding principles to issues of the day. Harrison Sheppard, *American Principles, Prudence, and Practice*, *THE REVIEW OF POLITICS* 723 (1993). As to the skills of empathy and the related skill of careful listening, see OFFICE OF LEGAL EDUCATION, STATE BAR OF CALIFORNIA, *THE LAW PRACTICE MANAGEMENT PRIMER* 32-36

associates. In other words, I call upon ethical practitioners in our larger leading law firms, and ethical practitioners in solo and smaller law firms, to form a new alliance of leadership to promote, both within our practices and in the organized bar, a problem-solving model of legal practice. We can no longer act as if nothing is wrong in American legal practice and we must move in concert to right what is wrong.

Second, the leaders of the organized bar in this state should work to include in this state's continuing legal education requirements not only the *ethics* requirements already in place, but requirements for enhancing practitioners' skills of *negotiation, problem solving, humanistic client relations, principles of client service, and maintenance of civility even in the midst of heated legal battle*. Neither the client's interest nor the public interest is well-served any longer by continuing *primarily* to reinforce lawyers' skills of battle, or by additional instruction in the minutiae of technical legal developments. Both public and private interests will now be best served by emphasizing continuing legal education of practitioners in advanced skills of civility, conciliation, and non-adversarial conflict resolution, and by *requiring* that these skills be kept fresh, vital, and imaginative. Such continuing legal education (CLE) courses are already promoted by the State Bar of California; more of them need to be made part of what is *mandatory* in California Continuing Legal Education.

Third—and, in my view, most important for the long term—the leaders of the bar must begin an organized effort to reform legal education—and *reform it radically*—by making law schools the primary training grounds for *skilled peacemakers*, not technocratic warriors and hired guns. *Fewer than five per cent of American law schools presently require their students to take any course at all in negotiation.*<sup>42</sup> *That means that American law students are permitted to*

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(1993), stating:

Sympathy—feeling an emotional identification with the needs of the client—can be a powerful motivator to accept a case. But empathy—the intellectual capacity to understand the feelings of the client without fully experiencing them personally—is a better, long range capacity in analyzing your ability to deliver legal services. Sympathy is often an involuntary response; empathy is intellectually driven, and many practitioners believe that if [the client's situation] cannot generate empathy, the case is not for you.

*Id.* at 36. As to latent emotions between lawyer and client, see Dr. Thomas C. Greening, *Special Applications of Humanistic Learning: A Workshop on Attorney-Client Relationships*, 2 INTERPERSONAL DEVELOPMENTS 194 (1971-72) (reprints available from Dr. Thomas C. Greening, 1314 Westwood Blvd., Los Angeles, CA 90024).

42. In late June, 1996, Alaythia, Inc., a consulting firm for the legal profession

*spend three years of study learning how to be tough partisan advocates without having to take even one hour to learn skills of conciliation and settlement.* In light of the increasing diversity and polarization of American society and the rising threat to domestic tranquility they pose, American law schools can no longer justify the fact that their curricula almost universally continue to emphasize, in both content and instructional method, abstract adversarial skills, while imposing virtually no requirements for our future lawyers and judges to learn practical skills of non-adversarial problem-solving and conciliation.

In summary, my three recommendations are these: (1) promotion within *law firms and governmental agencies* of a problem-solving model of legal practice; (2) establishment of *continuing legal education requirements* in advanced negotiation, civility in the face of conflict, and conciliation skills for practicing lawyers; and (3) reform of *legal education*, in both content and methods of instruction, to require curriculum emphasis generally on a problem-solving model of legal

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based in New York and San Francisco, sent a questionnaire to the 182 members of the Association of American Law Schools ["AALS"] to help ascertain the extent to which law school educational policies and curricula "promote a problem-solving model of legal practice." Letter from Douglas O'Brien, President of Alaythia, Inc., to all AALS accredited law school deans (June, 1996) (on file with author). As of September 10, 1996, 45 law school Deans or Associate Deans (25%) had responded, of whom 41 (22.5%) returned completed questionnaires. Although 29 of these (71% of respondents) ranked "courses designed to develop students' problem-solving skills" as a first or second priority among seven categories, and all but one of them said that they *offered* courses in negotiation, only one (Virginia's College of William & Mary School of Law) stated that negotiation was a *required* course. AMERICAN LAW SCHOOL EDUCATIONAL PRIORITIES RELATING TO A PROBLEM-SOLVING MODEL OF LEGAL PRACTICE: A SURVEY REPORT BY ALAYTHIA, INC. 5-6 (Oct. 10, 1996) [hereinafter SURVEY REPORT]. Eight law schools (19.5%), however, also ranked "courses designed to develop negotiating skills" as a first or second priority. *Id.* at 9.

Among six possible considerations listed as "obstacles to devoting more law school educational resources to a problem-solving, as opposed to an adversarial, model of legal practice," 22 respondents (54%) ranked as first or second among these obstacles, either "faculty resistance to a shift in the model" or "scarcity of expert faculty." *Id.* The single greatest obstacle listed, however, by 22 schools—54%—as a first or second greatest obstacle was "scarcity of funding for related courses." *Id.* Law firm requirements are evidently not the deciding factor in determining the priorities of legal education. The *lowest* ranking reported obstacles to change toward a problem-solving model of legal education were "[l]aw firm (employer) requirements." *Id.*

In light of the overall concerns of this article, it is also worth noting that ten schools (24%) ranked as a first or second priority "courses designed to train students to understand, and counsel clients regarding, the moral, economic, social, and political factors that may be relevant to a client's situation." *Id.* See ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 2.1 (1995).

Copies of the SURVEY REPORT and complete survey results may be obtained from Alaythia, Inc., 550 Battery Street, Suite 1312, San Francisco, CA 94111.

practice and, more particularly, on negotiation and non-adversarial conflict resolution skills.

## V. THE ECONOMICS OF CHANGE

But what about the bottom line? How would a major shift from an adversarial to a problem-solving model of legal practice be likely to affect the *profitability* of legal practice? Let me introduce this issue with a true story.

It is a story about two capitol cities in adjoining states in the south. One of them, Birmingham, Alabama, was the cradle of the Civil Rights movement of the 1960s. The second city is Atlanta, Georgia, with perhaps more right than any other city of the Old South to feelings of bitterness about what the Civil War had done to it.

Despite the emergence of a "New South," and the demands for change that the Civil Rights movement of the 1960s clearly demonstrated, the first of these cities, Birmingham, decided for a generation or so to make as little compromise as possible with its old traditions of segregation. The second of these cities, Atlanta, was sooner blessed by a more cosmopolitan desire for peace and healthy change, in both the moral *and* economic interest of all concerned.<sup>43</sup>

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43. In anticipation of the 1996 Summer Olympics there, many stories were published about Atlanta in the press, including, for example:

Expansion of the mammoth Atlanta Hartsfield International Airport left the city's only prospective rival, Birmingham, Ala., in the dust. Last month, the airport edged ahead of Chicago's O'Hare as the world's busiest . . . Atlantans understandably prefer defining themselves through the uncommonly strong personalities who have influenced the city: . . . Robert Woodruff, the Coca-Cola patriarch who realized that racial discord in his company's home city would bruise Coke's worldwide business interests; Ivan Allen, Atlanta's mayor in the go-go '60s and the only elected Southern official to testify in favor of the Civil rights bill; Martin Luther King, Jr., who among so many other things was the nucleus for an entire generation of black leaders; Ralph McGill, the newspaper editor whose columns mirrored Atlanta's tortuous path forward on race relations . . . Anyone looking for the quintessential Atlanta in 'Gone With the Wind' would be better off studying Rhett Butler and Scarlett O'Hara. They didn't swoon and mope; they picked up the pieces and rebuilt . . . [Atlanta's] Mayor Campbell, 43, is himself an immigrant to Atlanta. The son of a janitor and secretary in Raleigh, N.C., Campbell went on to Vanderbilt University, then to law school at Duke. . . . "Of course I had a lot of choices. Coming out of law school at Duke, there were a number of options. But I wanted to stay in the South. And Atlanta, to me, represented the best of the South—represented the best of the country. Very progressive politics, racially diverse."

John Carmen, *Atlanta's Olympic Quest: Self-Obsessed City Craves World-Class Status*, S.F. CHRON., July 10, 1996, at A1. See GARY M. POMERANTZ, *WHERE PEACHTREE MEETS SWEET AUBURN: THE SAGA OF TWO FAMILIES AND THE MAKING OF ATLANTA* (1996) (indicating that promoting better business was at the root of Atlanta's progressive



Central downtown Birmingham, Alabama—October, 1996



Atlanta, Georgia Cultural Center; skyscraper—October, 1996

photos: Holman Turner 1996



Atlanta therefore did more than merely compromise; it conceived of ways to make its city prosper as it had never prospered before, by drawing wider circles of inclusion instead of exclusion. Although it is now reportedly making significant economic progress, the 1990 census showed that Birmingham was still a relatively depressed city,<sup>44</sup> while Atlanta had become, by 1990, a great city once again—the chosen site of the centennial Olympics.<sup>45</sup>

There is a lesson for us lawyers in the story of Birmingham and Atlanta. If we hold on too long to the arts of battle, and refuse to embrace the arts of conciliation; if we seek too many one-sided victories and too few mutual solutions; if we adhere too long to old habits and refuse to recognize new realities, and new needs, and new opportunities, law firms, particularly large law firms, will no longer grow. Rather, they will continue to shrink. Beginning in 1991, “not just profits but *income* went down at many of the larger firms . . . . In 1992 for the first time since World War II, the total income of large law firms declined.”<sup>46</sup>

The day of keep-the-meter-running lawyering, and competition for more billable hours regardless of results, is drawing to a close. Technological advances in legal research techniques, and the emergence of a new class of young and solo lawyers who do not have to worry about swollen overheads to enjoy large net profits, are likely to make large business-as-usual law practices go the way of the dinosaur. During the past few years, *The Wall Street Journal* has been reporting on the economic implications of research inefficiencies in large firms, which are now threatened by competing low-cost computerized legal research services.<sup>47</sup>

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attitudes).

44. The 1990 U.S. Census included the following relevant statistics for the city of Birmingham, Alabama: Population, 265,968; black population, 63.27%; persons with college education, 13%; per capita income, \$8,618; unemployment rate, 10.3%; population change (1980-86), -2.4%. BUREAU OF THE CENSUS, 1990 CENSUS OF THE POPULATION (Nov. 1993).

45. The 1990 U.S. Census included the following relevant statistics for the city of Atlanta, Georgia: Population, 394,017; black population 67.05%; persons with college education, 20.5%; per capita income, \$9,691; unemployment rate, 7.5%; population change (1980-86), -0.7%. *Id.*

46. LINOWITZ, *supra* note 9, at 43, 183. In 1993, it was reported that “[e]lite law firms were hit hard by the recession and that economic recovery for all large firms may be a long time coming . . . [a]nd law firm management specialists say relief isn’t on the way.” See also Ellen Joan Pollock, *Slump Hits Elite Firms, Survey Shows*, WALL ST. J., June 29, 1993, at B1 (citing *The American Lawyer* magazine’s 1992 survey results “as proof that the rebellion by corporations against spiraling legal costs is finally succeeding.”).

47. See, e.g., Amy Stevens, *Law Firm Fat Threatened by a Lean Network*, WALL ST. J.,

Of course, legal services involve far more than just research. In *some* cases, litigation, with its costly (and highly profitable) discovery procedures, can be the most civil way to resolve serious conflicts. But far too often now, as the ratio of filed to tried cases clearly indicate, most litigation is a failure of one or more lawyers to be wiser than their clients. Given the growing discontents of business, law clients, the general public,<sup>48</sup> and lawyers themselves,<sup>49</sup> with hired gun lawyering, there is going to be a decreasing bottom line for law firms that seek to earn their money from the profits of conflict rather than the profits of peacemaking.

But this is far more than an issue of the necessity for—or the abuse of—the billable hour. As a profession, we can no longer afford to measure our profits only by the firm accountants' bottom line. Rising costs to members of our profession from the pressures of the billable hour, and the stresses of adversarial practice, may be difficult to measure precisely, but they are clearly enormous. And as for its effects upon the general public, adversarial law practice has increased the cost of virtually every product and every service, adding unnecessary billions to the cost of living in the United States. Most important, perhaps, it is imposing, through fear of medical malpractice litigation, unprecedented burdens on our health care delivery system.<sup>50</sup>

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July 8, 1994, at B1 (reporting on the economic implications for large firms of availability of a nationwide network of seasoned attorneys linked by computer who do legal research for a fixed fee at a fraction of the cost for comparable research done under prevalent large law firm methods).

48. See William Carlson, *Lawyers Have More Than Image Problem*, S.F. CHRON., Aug. 28, 1993, at A2.

The more contact people have with lawyers, the less favorably they look upon the legal profession, according to the results of a poll released on August 27, 1993. The poll, commissioned by the American Bar Association, is the latest in a string of surveys in recent years that have found a deepening crisis of public confidence in the legal profession . . . . 'The disturbing finding is that those who deal with lawyers more regularly, namely businessmen, tend to have the most negative perceptions of the profession,' says a September 1993 article in the *ABA Journal* that discusses the poll results.

*Id.* (citations omitted) (emphasis added).

49. A 1991 Johns Hopkins University study showed lawyers to be the most depressed group among 12,000 people surveyed. LINOWITZ, *supra* note 9, at 242 (citing Andrew Herrmann, *Depressing News for Lawyers*, CHI. SUN TIMES, Sept. 13, 1991, at 1). "Since 1984, 'there have been increasing signs of lawyer dissatisfaction and burnout . . . [and] the percentage of lawyers who report they 'frequently feel fatigued or worn out by the end of the work day' rose from 61% in 1984 to 71% in 1990.' [In New York City] more than fifty percent of all lawyer discipline cases result from problems related to alcohol and drugs." William T. Braithwaite, *How Is Technology Affecting the Practice and Profession of Law?*, 22 TEX. TECH. L. REV. 1113, 1153-55 (1991).

50. Sam A. McCourtney, Comment, *Simplifying the Law in Medical Malpractice: The Use of Practice Guidelines as the Standard of Care in Medical Malpractice Litigation*,

This is a serious problem created by *both* the demands of plaintiffs and the litigating tactics of defendants.

In contrast to the frightening possibility of a *post-civil* society in America, we all must hope that the third century of our American republic will be likely to follow its first and second as world-historical miracles of stability, prosperity, and progress. But our hopes, I submit, will ripen into expectations only if enough members of the American legal profession come to recognize in time their critically catalytic role as the *secular ministers of American democracy*.<sup>51</sup> That is in fact the role to which we have been appointed by the American public:

American lawyers work in a society that has chosen to thoroughly legalize itself . . . [Alexis] de Tocqueville noticed over a century ago Americans' temperamental inclination to turn political, economic, and social problems into lawsuits. Thus the diversity and complexity of the lawyer's work simply reflects American law as a political institution . . . [b]ecause of the kind of society twentieth-century Americans have constructed for themselves.<sup>52</sup>

The extraordinary legalization by Americans of their political, economic, and social problems requires American lawyers, in the interests of justice, economy, and domestic tranquility, to be well-equipped to resolve underlying political, economic, and social problems which, in less skilled hands, can too easily lead to unnecessary costly litigation.<sup>53</sup>

## VI. THE PRESENT ETHICAL CHALLENGE TO AMERICAN LAWYERS

I share the optimism of Martin Luther King, Jr., at his highest moment, when he said:

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97 W. VA. L. REV. 491, 492 (1995).

51. St. Thomas Aquinas defined law as 'an ordinance of reason for the common good, made by him who has the care of the community, and promulgated.' . . .  
. On this view, the lawyer is a minister of law concerned with the common good. It is this function that is meant in the lawyer's designation as an 'officer of the legal system.'

Braithwaite, *Legal Practice*, *supra* note 10, at 61 (citations omitted).

52. *Id.* at 54.

53. Such a duty has already been recognized by the organized bar: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1995).

I say to you today, my friends, so even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed, 'We hold these truths to be self-evident, that all men are created equal.'<sup>54</sup>

These words echo the words of our *Declaration of Independence* and reflect the spirit of our *Constitution*; they are not empty or antiquated rhetoric. They represent an enduring expression of our greatest hopes. They indicate the true and original *ethos* of American law and the deepest morality of the American people. This *ethos*, born out of our revolution, aspires to continuing *evolution* toward the most fully civil society. The success of our democracy does not depend alone upon the checks and balances of our *Constitution* and the restraints upon excessive power they are designed to achieve:

Prior to, and giving meaning to, the restraints on power there must be common purposes of an already existing community. Without that commonality and purposiveness the restraining is empty or destructive. That balancing takes place within a prior and supervening mutual engagement, an engagement to each other to make one people, and to serve the shared good, and to define and seek it by mutual persuasion.<sup>55</sup>

Achievement of American hopes for an enduring civil society depends, in other words, upon harmonization into one *community* of the increasing diversity of the people of the United States of America, rather than by combat. Such harmonization, in turn, requires us lawyers to become more expert, not only in the arts of *conciliation*, but in the great civil and political art of *reconciliation*. John K. Simmons, Professor of Religious Studies at Western Illinois University, has articulated the importance and the magnitude of this task:

In evolutionary terms, as we close in on a new century, learning to handle differences in ethnicity, gender, race, sexual orientation, ableness, religion may represent a cultural hurdle on the scale of walking upright, developing language or learning to use tools. Unless we learn to live with our differences, even celebrate our diversity, it is unlikely that, as a species, we will successfully navigate the turbulent cultural waters ahead.<sup>56</sup>

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54. Martin Luther King, Jr., Address Given at the Lincoln Memorial, Washington, D.C. (Aug. 28, 1963), in MARTIN LUTHER KING, JR.: A DOCUMENTARY . . . MONTGOMERY TO MEMPHIS 218 (1976).

55. MILLER, *supra* note 38, at 233.

56. John K. Simmons, *Beyond Multi-Culturalism?—A New Model for Dealing With Difference*, 11 EXPLORATION 5 (1993). See also PHILIP K. HOWARD, THE DEATH OF COMMON SENSE 183-84 (1994) (indicating that "[t]rial and error, not a static monument,

The American legal profession and its most distinguished members, founders and guardians of the rule of law in the United States, have done more than any other profession to help create, stabilize, and bring prosperity to this country. If Professor Simmons' analysis is even approximately correct, the *ethos* of the practice of law now demanded by the nature of our evolving American polity calls American lawyers to understand in a new context their duty to help assure, in Lincoln's words, that "government of the people, by the people, for the people, shall not perish from the earth."<sup>57</sup> All history has shown that the failure of democracies to balance strident competing demands of differing factions eventually leads either to tyranny or to mob rule.<sup>58</sup> The duty of lawyers to help American democracy survive and prosper in the twenty-first century therefore requires that we learn to do more, perhaps more than we ever have before, to help bring together, in harmony, the wonderful diversity of the people of the United States of America. As Professor Simmons has also explained:

[T]he creation of viable models for dealing with differences hinges on communication and understanding . . . . [W]e will never solve our problem in dealing with difference by using models that call for aggressive self-assertion by every group with a perceived difference. If our multicultures are to survive [we must] . . . come to see all our various differences as *opportunities* for identity-supporting interaction with [others].<sup>59</sup>

Faithful practice of the art of reconciliation that this prescription entails, requires *conscientious civic-mindedness*<sup>60</sup> in everything we do

is what makes democracy thrive. Democracy was intended as a dynamic system, ever adjusting toward balance in a diverse society.")

57. Abraham Lincoln, Address at Gettysburg (Nov. 19, 1863), in 1 DOCUMENTS OF AMERICAN HISTORY 429 (Henry Steele Commager ed., 9th ed. 1973). These words may be instructively reflected upon in light of a commentary written by Alexis de Tocqueville about the place of lawyers in America:

I am not unacquainted with the defects which are inherent in the character of that body of men; but without this admixture of lawyer-like sobriety with the democratic principle, I question whether democratic institutions could long be maintained; and I cannot believe that a republic could subsist at the present time, if the influence of lawyers in public business did not increase in proportion to the power of the people.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 301 (Henry Reeve, Esq. trans., Astor House 4th ed. 1845).

58. See PLATO, REPUBLIC, BOOK VIII, line 564 (Mortimer J. Adler ed. & Benjamin Jowett trans., Britannica 1988) for the seminal analysis of the decline of legitimate democratic regimes: "And so tyranny naturally arises out of democracy, and the most aggravated form of tyranny and slavery out of the most extreme form of liberty?"

59. Simmons, *supra* note 56, at 5, 13-14 (emphasis in the original).

60. See KRONMAN, *supra* note 19, at 109 (discussing the importance of public service and civic-minded virtues as integral to the lawyer-statesman ideal).

as lawyers to help reduce the now rising tide of *uncivil* conflict.<sup>61</sup> This task is implicit in the very nature of our American democratic institutions and the method of their creation.

In preparing ourselves to pursue this task of reconciliation with success, the words of a distinguished American lawyer addressing another of this century's greatest civil crises should be remembered: "The only thing we have to fear is fear itself."<sup>62</sup> Few things perhaps are more frightening in our day to day lives than the task of learning new habits to replace old, deeply ingrained habits that, to begin with, we schooled ourselves to work hard to acquire. If, however, we are able to overcome such fears and abandon habits that are potentially so destructive to both our own well-being and the American experiment, and if we accept the challenge of helping to reconcile the increasing diversity of our national life, we lawyers will embark on an enterprise that will make us all prouder to be lawyers in America.

Acceptance of this task has now become the American legal profession's greatest ethical challenge.<sup>63</sup> It is a challenge to think of ourselves, and to act, as peacemakers first, peacemakers second, and

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61. See Luban, *supra* note 17, at 724 (describing the Progressive Functionalist view of law: "The common good will be realized, in a society such as the United States, by blunting or mitigating conflict, specifically class conflict; Brandeis espoused this theme as did de Tocqueville.") (citations omitted).

62. "[L]et me assert my firm belief that the only thing we have to fear is fear itself—nameless, unreasoning, unjustified terror which paralyzes needed efforts to convert retreat into advance." Franklin Delano Roosevelt, Address at Inauguration (Mar. 4, 1933), in 2 DOCUMENTS OF AMERICAN HISTORY 240 (Henry Steele Commager ed., 9th ed. 1973).

63. The reconciliation of conflicting interests "is one of the most ancient conceptions of the function of law, appearing originally in Plato, *The Laws of Plato* . . . Because factionalism and class war will inevitably destroy a city unless it is governed by the rule of law, not of men, . . . the lawmakers must attempt to reconcile the conflicting elements of society . . ." Luban, *supra* note 17, at n.31 (citation omitted).

peacemakers third, and as warriors only as a very last resort.<sup>64</sup> We must meet that challenge, and I believe we will.<sup>65</sup>

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64. In contrast to the stereotype of the lawyer as battling litigator, there is a long American tradition (identified by Dean Anthony Kronman of Yale Law school as the "lawyer-statesman ideal") of the lawyer as peacemaker and conciliator. Many statements reflect this tradition. See, e.g., Abraham Lincoln, Notes For a Law Lecture (July 1, 1850), in *COMPLETE WORKS OF ABRAHAM LINCOLN* 140, 142 (John G. Nilolay & John Hay eds., 1926):

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expense, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

See also DE TOCQUEVILLE, *supra* note 57, at 301 (questioning whether "a republic could subsist . . . if the influence of lawyers in public business did not increase in proportion to the power of the people," alluding to the moderating influence lawyers are expected to have in democratic society); LINOWITZ, *supra* note 9, at 172 ("[o]nce there had been general agreement that an actual lawsuit was a defeat for the lawyers, as war is a defeat for diplomats."). In a letter from M. Scott Peck to Alaythia, Inc., the author explained:

The rapidly escalating adversarialism in the United States bodes ill for our society. We all have a responsibility to participate in the healing of this dangerous disease, but without the leadership of lawyers I see little hope for staving off social demise. Lawyers must learn how to be community builders and peacemakers first and litigators in the last resort.

Letter from M. Scott Peck to Alaythia, Inc. (July 29, 1994) (on file with author).

65. Such optimism is indispensable to future success of the legal profession in helping to redeem this nation's promise to the American people. The first requirement for any sustained achievement is the belief that it is possible: "The Constitution is America's moral sail, and we must hold to the courage of the conviction that fills it, the conviction that we can all be equal citizens of a moral republic. That is a noble faith, and only optimism can redeem it." DWORKIN, *supra* note 18, at 38.

Consider these concluding words of NADER & SMITH, *supra* note 7, at 370:

Lawyers understand . . . what law can mean to the construction of democracy as the best problem-solving mechanism yet developed and as a work in continual progress against authoritarian forces of capital, technology, bureaucracy, and brute force. But they must also understand that from the commons and from the aroused citizenry come the pressure, the trusteeship, the sensitivity, and the challenge for lawyers bent on building the future.

If there are eyes reading these words that belong to members of the legal profession who want to view their lives as moving from success to significance, whether wealthy or not, young or old, and who believe that their finest accomplishments are still ahead of them, then what awaits these lawyers is the greatest work of human beings on earth—justice.