

January 1998

## To Be the Change: Finding Higher Ground in the Law

Paula A. Franzese

Follow this and additional works at: <https://digitalcommons.minelaw.maine.edu/mlr>



Part of the [Law and Society Commons](#), and the [Legal Profession Commons](#)

---

### Recommended Citation

Paula A. Franzese, *To Be the Change: Finding Higher Ground in the Law*, 50 Me. L. Rev. 11 (1998).

Available at: <https://digitalcommons.minelaw.maine.edu/mlr/vol50/iss1/3>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact [mdecrow@maine.edu](mailto:mdecrow@maine.edu).

# TO BE THE CHANGE: FINDING HIGHER GROUND IN THE LAW

*Paula A. Franzese\**

We are living in a time when soul is being drained from the very social institutions that are supposed to be preserving life and values. We see signs of this drain in language that has become manipulative and empty, in the anemic condition of ethics and morality, and in the hunger for real pleasure and meaningful lives that even affluent and successful people confess to.<sup>1</sup>

The law is the cornerstone of our society, one of the pillars of civilization, the very “witness . . . of our moral life.”<sup>2</sup> In the words of former Chief Justice Earl Warren, “[t]he greatest issue before the world today is law.”<sup>3</sup> He continued: “But throughout history, and never more than in our own day, the great question has been whether that law was to be compatible with the basic instinct of all human beings for freedom, for opportunity, for dignity and for peace.”<sup>4</sup>

At a time when the challenge to realize this essential congruity has never been more pronounced, the soul of the law is suffering.<sup>5</sup> Studies document that, more than ever before, there is an extraordinary decline in civility among lawyers.<sup>6</sup> Other symptoms of institutional distress include the languid condition of ethics and professional responsibility,<sup>7</sup> and the increasingly contentious, win-at-all-cost battles fought in

---

\* Professor of Law, Seton Hall University School of Law. B.A., Barnard College; J.D., Columbia University School of Law. The Author wishes to thank Kathleen Fuentes, Carole Elizabeth Jones, and Jennifer Rossi for their invaluable research assistance.

1. Thomas Moore, *Forward* to BENJAMIN SELLS, *THE SOUL OF THE LAW* 9 (1994).

2. Address by Oliver Wendell Holmes, *The Path of the Law* (Jan. 8, 1897), *reprinted in* COLLECTED LEGAL PAPERS 167 (1920).

3. Earl Warren, Remarks at the unveiling of the cornerstone at Fordham University School of Law, in *A.B.A. INT’L & COMP. L.B.*, July 1960, at 36.

4. *Id.* at 36-37.

5. This point is made well in a provocative book by lawyer and psychotherapist Benjamin Sells. See generally BENJAMIN SELLS, *THE SOUL OF THE LAW* (1994). Sells poignantly explores the loss of meaning in the law as well as the feelings of alienation and depression experienced by many attorneys. In *The Lost Lawyer*, a very different but similarly compelling book, Professor Anthony T. Kronman begins his critique of the American legal profession by noting that it “now stands in danger of losing its soul.” ANTHONY T. KRONMAN, *THE LOST LAWYER* 1 (1993). Most recently, Ambassador Sol Linowitz’s fine work chronicles the profession’s ills while providing meaningful prescriptions for reform. See SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994). See also Paula A. Franzese, *Back to the Future: Reclaiming Our Noble Profession*, 25 *SETON HALL L. REV.* 488 (1994) (reviewing LINOWITZ, *supra*).

6. See, e.g., David C. Weiner, *Civility*, *LITIG.*, Fall 1994, at 1 (reporting on disturbing findings of the Seventh Circuit Committee on Civility, citing potent examples of attorney incivility and conduct demonstrating lack of integrity).

7. See, e.g., Warren E. Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949 (1995) (describing broad decline in attorney professionalism and corresponding decline in public perception of lawyers).

courtrooms, boardrooms, and even within law firms.<sup>8</sup>

Well-established firms are disintegrating as long-forged alliances and loyalties yield to individual interests, which are often associated with profit motives.<sup>9</sup> Backlogged dockets render “swift justice” an oxymoron.<sup>10</sup> Meanwhile, public leaders and commentators warn that there are too many lawyers,<sup>11</sup> and that we are suing ourselves into economic and institutional disaster.<sup>12</sup>

The individual lawyer is also showing symptoms of considerable malaise. A poll of more than one hundred occupations placed attorneys “first on the list in experiencing depression.”<sup>13</sup> Studies conducted nationwide reveal that at least one-third of all attorneys suffer from either depression or substance abuse.<sup>14</sup> Alcohol or drug abuse is so

8. See, e.g., Laurie P. Cohen & Alix M. Freedman, *Smoke and Mirrors: The Tobacco Industry's Response to Health Fears*, WALL ST. J., Feb. 11, 1993, at A6, available in 1993 WL-WSJ 71334 (describing, in the words of an R.J. Reynolds tobacco company attorney, the hostile litigation tactics used to compel plaintiffs to drop suits: “The aggressive posture we have taken regarding depositions . . . continues to make these cases extremely burdensome and expensive for plaintiffs’ lawyers . . . . To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds’s money, but by making that other son of a bitch spend all his.”); Ellen Joan Pollock, *Divorce Lawyers Often Shortchange, Overcharge Women Clients, Study Finds*, WALL ST. J., Mar. 13, 1992 at B3, available in 1992 WL-WSJ 661485 (quoting New York City Consumer Affairs Commissioner Mark Green’s description of litigation war games in divorce proceedings: “It’s a war of attrition where the loser is the one whose assets have been exhausted. Usually, that’s the woman.”).

9. See, e.g., Ronald J. Fleury, *The Worst May Be Yet to Come*, 137 N.J. L.J. 1152 (1994) (chronicling partner and associate defections at major New Jersey law firms).

10. See, e.g., Randall Samborn, *Courting Solutions: Rising Caseloads Spur Judiciaries to Seek Solutions*, NAT’L. L.J., July 1, 1991, at 1 (chronicling backlog and courts’ struggle with burgeoning caseloads); Joseph A. Baum, Letter to the Editor, *If Government Protected Us, We’d Sue Less*, N.Y. TIMES, Sept. 4, 1992, at A20, available in LEXIS, News Library, NYT File) (paraphrasing then-Vice President Dan Quayle as remarking that “the nation’s financial woes and overloaded court calendars were the fault of the legal profession”).

11. It is estimated that by the year 2000, there will be one million attorneys in the United States, “a quadrupling in fifty years.” William T. Braithwaite, *Hearts and Minds: Can Professionalism Be Taught?*, A.B.A. J., Sept. 1990, at 70, 71, available in 1995 WL 3113259. See also Herb Jaffe, *Too Many Grads Cranked Out by Law Schools*, STAR-LEDGER, Dec. 20, 1994, available in 1994 WL 9391365 (noting that with lawyer population approaching one million, the U.S. will soon be home to two-thirds of all lawyers in the world). But see Roger Abrams, *Are There Too Many Lawyers?*, 139 N.J. L.J. 635 (1995) (Dean Abrams of Rutgers Law School argues that there are not too many attorneys, but rather “too many lawyers trying to serve the same clients.”).

12. It bears noting that, according to some legal scholars and statistical data compiled by the National Center for State Courts, the “litigation explosion” that many politicians are crusading to curb simply does not exist. See Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 56 (noting, however, that “while there may not be an explosion of litigation, there is an epidemic of injustice”); see also Gary Hengstler, *At the Seat of Power*, A.B.A. J., 1995, at 70 (chronicling Sen. Orrin Hatch’s “lawyer-like assault on what he thinks is wrong with the nation’s legal system,” including, most notably, the rise in litigation and specious claims).

13. SELLS, *supra* note 5, at 17.

14. See *id.* at 17; see also *Lawyers Under Stress in Record Numbers*, N.J. LAW., May 2, 1994, at 7, 7 (citing study by Johns Hopkins University finding that “lawyers are four times more likely to suffer from clinical depression than other professionals”); Laura Duncan, *More States*

pervasive that attorney disciplinary groups estimate that substance abuse accounts for or is implicated in upwards of seventy percent of all proceedings brought against lawyers.<sup>15</sup>

To put it simply, many lawyers are miserable.<sup>16</sup> Statistics indicate that lawyers are leaving the profession in greater numbers than ever before.<sup>17</sup> Statewide polls, such as a survey conducted recently in California, report that lawyers are “‘profoundly pessimistic’” about the law, with seven in ten attorneys indicating that they would change careers if they could.<sup>18</sup>

Significantly, more than sixty percent of lawyers indicate that they would not recommend to their children the pursuit of a career in the law.<sup>19</sup> Two polls of women attorneys, the first conducted in 1967 and the second in 1992, are especially telling. The surveys asked whether the attorney would have selected law as her chosen career if she had known ten years ago what she knew now. In 1967, a striking ninety-four percent of the respondents said yes; in 1993, only fifty-four percent said yes.<sup>20</sup> The accompanying analysis of the findings attributed the present and pervasive dissatisfaction to “‘the competitive and acrimonious atmosphere at many law firms.’”<sup>21</sup>

A central difficulty is that in this “‘law-is-business age’” the typical practitioner no longer has the luxury of choosing his or her battles. For that matter, as stated by one disaffected practitioner, “[a]spects of myself that I like weren’t being called upon enough. . . . There was perhaps an

*Offering to Help Lawyers Overcome Mental Health Problems*, CHI. DAILY L. BULL., Sept. 29, 1993, at 1, available in 9/29/93 CHIDL B 1 (Westlaw) (explaining that bar association and substance abuse groups are increasing their efforts to assist attorneys suffering from depression).

15. See Charles J. Santangelo & Donald W. Morrison, *Alcohol Abuse on the Rise Among Lawyers*, 209 N.Y. L.J. 5, 5 (1993) (noting that in New York and California, fifty to seventy percent of all complaints against lawyers involve alcohol abuse). See also SELLS, *supra* note 5, at 17 (noting estimates that “‘seventy-five percent of all complaints against lawyers involve substance abuse’”).

16. See generally KRONMAN, *supra* note 5 (exploring deep dissatisfaction within legal profession); Maura Dolan, *Miserable With the Legal Life More and More Lawyers Hate Their Jobs, Surveys Find*, L.A. TIMES, June 27, 1995, at A1, available in 1995 WL 2060203 (tracing attorney disillusionment to the practice of law itself); Amy Stevens, *Why Lawyers Are Depressed, Anxious, Bored Insomniacs*, WALL ST. J., June 12, 1995, at B1, available in 1995 WL-WSJ 8729372 (citing study finding that eleven percent of attorneys in North Carolina have considered suicide).

17. See, e.g., Dolan, *supra* note 16 (noting high attrition rate as lawyers leave the profession to become, for example, teachers, real estate agents, or even psychotherapists); Liz Balmaseda, *Stress and the Lawyer's Treadmill; Billable Hours Get Longer in an Increasingly Competitive Field*, WASH. POST, Jan. 19, 1989, at C19, available in 1989 WL 2077531 (“[B]urned out, disenchanted or simply distracted, lawyers are looking elsewhere for professional satisfaction.”).

18. See Dolan, *supra* note 16 (citing 1994 RAND Corp. study and 1992 poll conducted by *California Lawyer* magazine).

19. See SELLS, *supra* note 5, at 17.

20. Laura Mansnerus, *Why Women Are Leaving the Law*, WORKING WOMAN, Apr. 1, 1993, at 64, available in 1993 WL 2953240.

21. *Law Notes*, WALL ST. J., Mar. 26, 1993, at B12, available in 1993 WL-WSJ 707323.

overemphasis of the intellectual, the combative and the competitive.”<sup>22</sup> A leading researcher who studied the high incidence of depression among lawyers believes that the problem “might be the result of operating in a moral ambiguity. They might be representing positions they may not like or believe in.”<sup>23</sup>

The model of lawyer as statesperson—as an individual of good, independent judgment and practical wisdom, a peacemaker as well as a problem solver—seems to have become the exception rather than the norm. Instead, today’s prototype in many respects is that of lawyer as hired gun, skilled technician and/or business getter.<sup>24</sup> This shift has come at a high price. In *The Lost Lawyer*, Professor Anthony Kronman speaks poignantly to the legal profession’s “crisis of morale,”<sup>25</sup> noting “the growing sense, among lawyers generally, that their yearning to be engaged in some lifelong endeavor that has value in its own right can no longer be satisfied in their professional work.”<sup>26</sup>

Against this backdrop, it perhaps adds insult to injury (or is somehow fitting) that we have become the butt of popular culture’s jokes, disdain, and increasing disrespect. With alarming frequency, the public finds itself questioning the character, competence, and honesty of attorneys.<sup>27</sup> A recent national poll reported that sixty-nine percent of Americans believe that lawyers are “only sometimes honest or not usually honest,” and fifty-six percent think that attorneys manipulate the system only to protect the powerful and enrich themselves.<sup>28</sup>

In a milieu of soundbites and sensationalism, any coverage of the good that is accomplished by lawyers typically yields to far more tantalizing tales of attorney misconduct, fighting, trickery, and deceit. From the glib to the poignant, jabs aimed at lawyers and the legal system

22. Dolan, *supra* note 16 (quoting Richard Gottfried, an attorney who left the legal profession and is now a psychotherapist); *see also* Stevens, *supra* note 16 (quoting psychoanalyst’s perception that “[m]any lawyers go into the field for idealistic reasons, then discover they have to distort their personalities . . . to become more nasty and aggressive than they would normally be, and the hidden, sensitive self can’t bear that”).

23. Andrew Herrmann, *Depressing News for Lawyers*, CHI. SUN TIMES, Sept. 13, 1991, at 1, available in 1991 WL 8720774 (reporting on Johns Hopkins University study finding lawyers to be most depressed group of 12,000 persons surveyed).

24. In his last public address, former Chief Justice Warren E. Burger spoke compellingly of the decline of attorney professionalism. He noted that the foundation of the legal profession is the ideal of “the lawyer as an officer of the court, compelled as such to maintain a standard of conduct that rises above the standard we would expect from a tradesman engaged in what many now call ‘the business of law.’” He continued, “The law is not and never has been a ‘business.’ But we are well on the way to making it less than a profession.” Chief Justice Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 949 (1995).

25. KRONMAN, *supra* note 5, at 2.

26. *Id.* at 3.

27. *See, e.g.*, Joe Holleman, *Poor Lawyers: Attorneys Aren’t Liked Much, Survey Shows*, ST. LOUIS POST DISPATCH, Apr. 20, 1995, at 13A, available in 1995 WL 3316445 (“The local bar association asked 1,975 lawyers what the public thinks of them. The answer: not much.”).

28. Budiensky, *supra* note 12.

have become routine in a remarkably diverse array of contexts.<sup>29</sup> In the words of a recent commentary, “[b]eing a lawyer, particularly one engaged in private practice, seems suddenly an embarrassment rather than a source of pride.”<sup>30</sup>

In the midst of all this antagonism, it is easy to ask the wrong questions, simply resign oneself to “the way things are,” or submit to the lures of some quick, easy fix. None of these responses will do. Soul cannot be regained without hope. And hope will not spring from the superficial or the jaded. As contemporary writer Thomas Moore<sup>31</sup> has noted, soul “returns only when deep vision has been restored, when imagination revivifies, and when we allow ourselves to feel the soul’s complaints so that we can find our way back to necessary sensitivities.”<sup>32</sup>

Finding our way back to the honor, principle, and sacred trust that represents the very best of what the law and its practitioners could be, sometimes are, and perhaps once were, demands first that we take the time to imagine and then dwell on such a possibility. Individually, as well as collectively, we must revive our noblest intentions and aspirations to come to a model for these difficult times. More difficult still, it will require real courage and a leap of faith to actually believe in that ideal’s realization. But we must imagine and we must believe, mindful that what we think about most we move towards. As the philosopher Erich Heller once remarked, “Be careful how you interpret the world; it *is* like that.”<sup>33</sup>

In defining ourselves and our craft, we have a choice. We can either fear that the profession is falling apart or we can hold tight to a vision of our chosen life’s work as noble, important, and good. Either way, our expectation will tend to bring about the end we perceive.

Choosing to define our mission mightily will take significant strength of spirit. It is always easier to endorse the status quo, mock along with the pundits, or do nothing at all. Yet, ironically, there is no such thing as living a neutral life. To indulge the naysayers, whether by complicity or silence, is to be part of the problem. To view our context and our

---

29. In the course of a public debate on “lawyer bashing,” former Arizona Congressman Sam Steiger quipped, “[S]ophisticates, like me, do lawyer jokes.” Brent Whiting, *Heard a Good Joke About Lawyers? Bar ‘Debates’ Bashing*, ARIZ. REPUBLIC, Jan. 14, 1994, at A21, available in 1994 WL 6419768. Hollywood brought us, among other less than flattering portrayals of attorneys, the film *Regarding Henry*, showing how an aggressive, morally bankrupt, lewd, and wildly successful (no doubt, in the script writers’ minds, because of those unpalatable attributes) lawyer becomes gentle, sensitive, and principled only after being shot in the brain. In the movie *Jurassic Park*, audiences cheered as an attorney was devoured by a Tyrannosaurus Rex. See Gary A. Hengstler, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60 (citing instances of lawyer bashing).

30. Timothy P. Terrell & James H. Wildman, *Rethinking “Professionalism,”* 41 EMORY L.J. 403, 403 (1992).

31. Author of *Care of the Soul* (1992) and *Soul Mates* (1994).

32. Moore, *supra* note 1, at 9.

33. ERICH HELLER, *THE DISINHERITED MIND* 26-27 (1959).

work as something to endure, a necessary evil, a rat race,<sup>34</sup> is to capitulate. In the process, we forget who we are and what we could be.

To give up on the profession that once, maybe too long ago, sparked the best of our intentions and piqued our imaginations would be tragic. There is too much that remains good and just about the law and many of its practitioners, and too many worthy people and causes depending on us. The challenge is to see this good and recognize this potential, mindful and respectful of the power that we wield.<sup>35</sup> To make the contributions that only we can make, we must take a stand for, and thereby create, (or recreate) that which represents the very best of our craft.

It is incumbent upon us to think very deliberately about the kind of profession that we wish to serve and about the kind of professionals that we wish to be. In the struggle to find a model, history is instructive and inspirational, but also limited. We cannot turn back the clock. Nor can we recover and make many of our profession's past traditions applicable to today's economic and marketplace realities. For that matter, we would not want to embrace wholesale the historical norms. Notwithstanding its many finer points, the legal profession's past has had its despicable aspects as well, such as its racial, gender, and religious exclusivity.

The limitations of "the good old days," however, should not blind us to their more noble aspects, nor prevent us from reclaiming their more honorable and still timely virtues. For example, the ideals upon which professional responsibility and service have been predicated—dignity, mutual respect, cooperation, peacemaking, independence, and prudence—should be perceived and appreciated as something more than historical relics or mere curiosities of a simpler place and time. They are vitally relevant as well as attainable, and must be at the forefront of our agenda for reform.

Reclaiming the nobler, and even visionary, elements of the legal practice and profession has never been more urgent. As we conclude the millenium, the communities that we serve are in crisis. People are turning against one another; people are turning against themselves.

To a very real extent, the problems that plague us as members of the legal community reflect a much larger social, economic, and political malaise. Roscoe Pound's remarks, as later recalled by Felix Frankfurter, illustrate this point: "[L]aw isn't something that exists as a closed system within itself, but draws its juices from life."<sup>36</sup> In too many contexts and quarters, life is harsh. We find contemporary discourse laden with the yearning to return to a gentler time, a better day, a kinder

---

34. As Lily Tomlin is said to have observed: "The problem with the rat race is that, even if you win, you're still a rat."

35. See generally Paula A. Franzese, *Reclaiming Our Noble Profession*, 22 SETON HALL L. REV. 307 (1992) (encouraging new attorneys to embrace their craft and wield with generosity and vision the law's power).

36. HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 168 (1960).

nation.<sup>37</sup> Meanwhile, the wars at home, in the workplace, in the courtrooms, in the boardrooms, and over the airwaves become the wars in the streets. In our daily lives, incivilities abound with strangers, colleagues, and even friends, treating one another with disrespect, ridicule, or indifference.

It is time for a healing. If it is to be, it is—in significant measure—up to us. We are the lawyers, the judges, the policymakers, the guides, and the gatekeepers. We are ushering in the twenty-first century, equipping those we serve to do the same. To grow in stature as we nurture strength of spirit, we must prepare ourselves.

That preparation begins by going within. Each of us must find the quiet time to ascertain and to define what we want, what we stand for, and what kind of world we wish to serve. It behooves us to ascertain, indeed, to remember, why we chose this setting in the first place, and what it is we intend to achieve as a consequence. What kind of impact are we having? What kind of impact do we want to have? Our lives are shaped most not by what we take with us but by what we leave behind. When all is said and done, how would we want to be remembered? What will we have left behind?

The vision we embrace collectively should include a view of our calling as virtuous and dignified. It is a vision that finds us all healers. The true challenge is to embrace this fact. We heal with our words and with our actions. In the face of so much to be done, we heal with one generous impulse, one compassionate response, one kind deed, rendered one minute, one hour, one day at a time. Mother Teresa once said, “We can do no great things—only small things with great love.”<sup>38</sup>

Consider the parable of the boy on the beach. The tide precipitously pulls out, leaving thousands of starfish stranded on the shore. If not thrown back, they will dry up and die. The boy begins picking them up, one at a time, and throwing them back to sea. A man comes by and says, “Hey, give it up. There are thousands of them out here. You can’t possibly make a difference. It doesn’t matter what you do.” The boy looks down at the starfish he is about to throw back and replies, “But it does matter to this starfish.”

At this very moment, each of us is holding a starfish in our hands. Hopefully, we have the presence of mind to see that it is there, and the goodness of heart to respond with compassion. Let the measure of our success be, as Harry Emerson Fosdick said, that “even one life has

---

37. For example, in August of 1996, Republican Presidential nominee Bob Dole gave an acceptance speech which urged the nation to reclaim the honor and integrity of its past. He asserted that the country is ailing because of the way today’s Americans have been living their lives. “Permissive and destructive behavior must be opposed,” [he] said, “honor and liberty must be restored.” Peggy Noonan, *Welcome to Hard Truths*, TIME, Aug. 26, 1996, at 19, available in 1996 WL 10668589 (quoting acceptance speech of Republican Presidential nominee Bob Dole).

38. MOTHER TERESA OF CALCUTTA, LOVE, A FRUIT ALWAYS IN SEASON 121 (Dorothy S. Hunt ed. 1987).



breathed easier because [we] lived.”<sup>39</sup> To concede, by contrast, to doomsday assessments or to our own self-defeating thoughts is to abdicate our power and relinquish our role.

It is our professional and moral imperative to make the difference that only we can make. Let us do it *now*. As the elder Don Juan said to Carlos Castaneda, “There is one simple thing wrong with you—you think you have plenty of time.”<sup>40</sup> Let us embrace this moment, and each moment to come, as if our lives, and countless other lives, depended on it—because they do.

As healers, we must ask the right questions and encourage others to do the same. To ask, “What’s in it for me?” is to ask the wrong question. To ask, in the face of popular cynicism, need, and greed, “How can I possibly make a difference?” is to ask the wrong question. Instead, we must ask, “How can I possibly dare not to?” Edmund Burke said, “The only thing necessary for the triumph of evil is for good men to do nothing.”<sup>41</sup> There *is* no such thing as living a neutral life. As attorneys, each of us is powerful, no matter what we may have been told or may have felt to the contrary. Let us proceed, then, to define our calling carefully as well as mightily.

We must promise never to allow our association or partnership with anyone or anything to silence or diminish us. To cower as a consequence of the judgments of others, or because of the negative fiends in our own minds, is an abdication of personal power and influence that we simply cannot afford. Each and every one of us has a vital and important contribution to make. Each and every one of us is entitled to do well and, much more essentially, to do good. In the days ahead, we must not let anyone or anything convince us otherwise.

Let us think the best, work for the best, and expect the best from ourselves and from others, mindful that what we think about most expands. Let us be governed by our admirations rather than our disgusts, so that we despise nothing except meanness and cowardice. As we chart our course, it will be up to us to ask, “Does this path have a heart?” Let us hope that we will always have the wisdom to choose that road. Our doing so will transform for the better the shape of this world, far more than any courtroom or boardroom victory ever could.

We must take the path with heart as we endeavor to heal ourselves. Rehabilitation and reform of our profession remain a collective responsibility. Unfortunately, the colloquy on how best to restore and repair our craft too often tends to smack of idle pinings or “us against them” diatribes, with various groups within and without the law faulting the other. Lawyers blame the law schools, law schools inculcate the

---

39. R. MILLER, HARRY EMERSON FOSDICK: PREACHER, PASTOR, PROPHET 274 (1985).

40. CARLOS CASTANEDA, JOURNEY TO IXTLAN: THE LESSONS OF DON JUAN 108 (1972).

41. Emily Morison Beck, *Preface to the Fifteenth Edition* of JOHN BARTLETT, FAMILIAR QUOTATIONS at vii, ix (Emily Morison Beck ed., 15th ed. 1980) (ascribing quotation to Edmund Burke).

practitioners, and judges cite the attorneys, who respond that the duty owed to their clients compelled their actions. In turn, the contentious, ethically-impaired culture that we serve is held up as both a cause and a mirror of our professional shortcomings. The truth is, all of these sources have contributed to our malaise, and all have a role to play in our restoration.

The role played by legal education is crucial. Our profession's future depends in significant measure on developing, nurturing, and sustaining in law school, and then beyond, the idealism and generosity that many students bring to their decision to pursue a career in the law. Law schools must do more to prepare students for the actual rigors of practice and the ethical quandaries that await. Theoretically—as well as practically—applied considerations of right and wrong, of prudence and fairness, and of what the law *should* be, must play a role in all course offerings, and must not be relegated exclusively to the domain of professional responsibility classes.

For that matter, the business of legal education too often tends to divorce humanity and, indeed, our own humanness, from the study of the subject matter at hand. This tendency is tragic. Lawyers are not automatons, technicians, or hired guns. We are people, representing people in need. To separate virtue from education sets a terrible example and establishes bad precedent. The separation of heart from mind may explain why so many law students and later lawyers are miserable.

The Socratic method of teaching, as practiced strictly and dispassionately, often does not do enough to foster a sense of how the attributes of justice, honor, and compassion are—and should be—relevant in practice. Too frequently, the people and human problems behind the cases remain there, with moral concerns yielding to abstractions.<sup>42</sup> Moreover, classroom exchange that is cold, impersonal, and contentious powerfully conveys the message that these are the attributes valued in the law and its practitioners.

The commitment to humanity must be evident in the law school classroom. That commitment is inseparable from the recognition that student and teacher are people first, and that the obligation of the lawyer is to people first. It is only when we see as well as honor our own humanness that we find the wisdom and courage to do the same for others. A classroom environment predicated on mutual respect, compassion, and genuine concern for each individual ought to be the norm and not the exception.

---

42. Legal educators sometimes abdicate responsibility for developing their students' ethical or moral sensitivities on the belief that most law students already have a moral code firmly and impenetrably in place by the time they enter law school. Studies indicate, however, that this assumption is erroneous and results in "legal education malingering with respect to one of its most important responsibilities." Elliott M. Abramson, *Puncturing the Myth of the Moral Intractability of Law Students: The Suggestiveness of the Work of Psychologist Lawrence Kohlberg for Ethical Training in Legal Education*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 223, 223 (1993).

Certainly, as Karl Llewellyn observed, "Compassion without technique is a mess; and technique without compassion is a menace."<sup>43</sup> Wisdom and compassion are indivisible. As educators, we must be concerned with facilitating and nurturing the development of integrated practitioners, whose commitment to excellence is accompanied by and inseparable from high moral standards of virtue, integrity, and generosity.

Still, law schools cannot by themselves make law an esteemed profession and lawyers great women and men. One's perspectives on the practice of law are shaped in significant part by one's early experiences at the bar. Practitioners, particularly the partners of firms, bear an important responsibility for the acculturation of the young lawyers who come to them.<sup>44</sup>

New attorneys are vulnerable as well as impressionable. Most are salary-dependent because of the typically huge debts that they have incurred to finance their college and law school educations.<sup>45</sup> For that matter, many law school curricula leave recent graduates ill-prepared for the practical and ethical challenges of life in the trenches. Important norms as to acceptable standards of conduct will therefore be set by the more senior practitioners and firm elders.<sup>46</sup> So will priorities and value judgments as to the "worthiness" of particular causes, efforts, and clients. If the sole criteria for success are points scored and hours billed,<sup>47</sup> associates are encouraged to become one-dimensional billing machines.<sup>48</sup> Moreover, a system that places a premium on the billable hour does not leave much time for the sort of mentoring that nurtures the mind and spirit.<sup>49</sup>

43. Roger C. Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509, 510 (1987).

44. This point is developed compellingly in the fine work of Ambassador Sol Linowitz. *See generally* LINOWITZ, *supra* note 5.

45. *See id.* at 195.

46. As Ambassador Linowitz notes in his assessment of law firms' failure to serve people in need, "[Y]oung people still come out of law school wanting to be helpful, then go into law firms and see how the 'successful' lawyers operate." *Id.* at 202.

47. Former New York City mayor and attorney John V. Lindsay summed up the present-day law profession as

a bottom-line business, with most lawyers, young and old, strapped to the rack of chargeable time and engulfed in computer printouts. The only thing that counts is winning. Anything else is losing. There's no such thing as standing for a principle that's going to lose. We live in a "me" not a "we" society today.

Peter Megargee Brown, *Narcissism, Manners, and Morals: Can Grace and Collegiality Be Salvaged?*, LITIG., Winter 1987, at 17-18.

48. *See generally* William H. Rehnquist, *The State of the Legal Profession*, LEGAL ECONOMICS, Mar. 1988, at 44, 44-46, wherein the Chief Justice sharply criticizes the expectation of the larger law firms that associates bill upwards of 2000 or 2100 hours per year. This expectation, he notes, leaves no room for the discharge of community obligations, pro bono efforts, or well-roundedness. *See id.* at 45-46. Indeed, the Chief Justice adds, one might argue that firms so concerned with profit maximization treat the associate "very much as a manufacturer would treat a purchaser of 100 tons of scrap metal: If you use anything less than the 100 tons you paid for, you simply are not running an efficient business." *Id.* at 46.

49. *See, e.g.*, Marcia Chambers, *Sua Sponte*, NAT'L L.J., Feb. 1, 1993, at 17-18. Chambers

Notwithstanding the economic pressures of today's law practice, an attorney's value as a professional should not be measured by so narrow a standard as that of hours billed. Undue reliance on such a system tends to be inconsistent with, among other things, sensitive assessment of the merit and value of the professional services rendered.<sup>50</sup> Further, it can convey the message, tacitly or otherwise, that hours devoted to community service or pro bono work do not "count."

We are the custodians of the larger community's ethical sense. The law remains "the witness and external deposit of our moral life."<sup>51</sup> As its practitioners, we represent the greatest hope for the attainment of equal access to justice. As such, it is our obligation to serve the community, and to devise incentives and systems to help those junior to us to do the same. When we gauge each other's measure, qualities such as integrity, leadership, independence, and commitment to people should count for more than hours billed or hourly rate.

Finally, we regain our souls when we have the courage to liberate and to put into practice the so-called gentler virtues—the attributes of sensitivity, nurturance, intuitiveness, compassion, and caring. This is not easy, and we are apt to be misunderstood in the process. We serve a profession that for too long has relied on domination, control, aggression, competitiveness, and manipulation as the primary ingredients for success. Gentleness, by contrast, is often mistaken for weakness. Yet, in truth, gentleness is to be expected only from the strong. Cruelty comes from the weak.

These are not quixotic musings inapplicable to life in the trenches. Yes, they are high ideals, and yes, it is true that one cannot stay on the summit forever. So why bother to climb in the first place? Just this: What is above knows what is below, but what is below does not know what is above. As the poet and traveller René Daumal wrote, "One climbs; one sees. One descends, one sees no longer but one *has* seen. There is an art to conducting oneself in the lower regions by the memory of what one saw higher up. When one can no longer see, one can at least still know."<sup>52</sup>

---

notes the decline in mentoring at law firms. In the words of litigator Louise A. LaMothe, then head of the American Bar Association's litigation section:

Higher salaries encourage firms to expect young associates to perform at 100 percent efficiency and with no allowance for learning time. There is no such thing as a free lunch—high starting salaries drive the firm's overhead, and all lawyers have to work harder so the partners will make the same profits as before.

*Id.* at 18. See also Steven Keava, *Good Act to Follow*, A.B.A. J., Mar. 1995, at 74 (noting importance and benefits of attorney mentoring).

50. This point is made well in a recent critique of the billable hour made by a former managing partner of a prominent Manhattan law firm. See Francis H. Musselman, *Abandon the Billable Hour!*, 7 N.Y. ST. B.J., July-Aug. 1995, at 28.

51. Holmes, *supra* note 2, at 170.

52. RENÉ DAUMAL, *LE MONT ANALOGUE* (Editions Gallimard, Paris 1952), excerpted in JEAN BIÈS, *RENÉ DAUMAL* 140 (Editions Pierre Seghers, Paris 1967).

On monte, on voit. On redescend, on ne voit plus; mais on a vu. Il y a un art de se

This knowledge is available to us now. Receiving it and living it requires that we accept our individual and collective power and come together to reshape the destiny of our profession. If we can do this, and I believe that we can, then the very best, for our craft and the world we serve, is yet to be.

---

diriger dans les basses régions, par le souvenir de ce qu'on a vu lorsqu'on était plus haut.  
Quand on ne peut plus voir, on peut du moins encore savoir.

*Id.*