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A Twenty-First Century Ethos for the Legal Profession: Why Bother

A TWENTY-FIRST CENTURY ETHOS FOR THE LEGAL PROFESSION: WHY BOTHER?

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For as long as I can remember, I have believed that members of the legal profession share a common commitment to something greater than their own self-interest—a professional ethos. The seed of this belief undoubtedly was sown when, as a small child, I played under the kitchen table where my father and his law school classmates studied. Then, as I grew, my father nurtured this belief with stories about how the law applied to situations that he encountered in his law practice and, when he became a judge, how the law resolved controversies that he heard.

Despite periodic examples to the contrary, I have held firm to this belief during fifteen years in law practice and another fifteen years on the bench. However, recently, while serving on a curriculum review task force for a local law school, I began to have doubts.

The curriculum review task force was composed of professors, practicing lawyers, and judges. Our task was to consider the recommendations of the 2007 report produced by the Carnegie Foundation for the Advancement of Teaching—*Educating Lawyers*.¹ One of several comparative² studies of professional education, *Educating Lawyers* examined how well law schools met the challenge of preparing law students for their professional lives as lawyers. The report identified three critical components to legal education: instruction in the law (doctrinal instruction), practical experience, and development of a professional identity (ethos). It posited that law schools are particularly strong in doctrinal instruction, but correspondingly weak in providing sufficient practical experience and in instilling a professional identity. The report also made specific recommendations to address these deficiencies.

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1. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 22* (Carnegie Found. for the Advancement of Teaching 2007) [hereinafter *EDUCATING LAWYERS*].

2. This report is part of the Carnegie Foundation's Preparation for the Profession Series. It is based upon the report entitled *Advancement of Teaching's Preparation for the Professions Program*, a comparative study of professional education in medicine, nursing, law, engineering and preparation for the clergy. *Id.* at 15.

My assignment on the task force, along with a member of our state Supreme Court, was to analyze the curriculum and make specific recommendations that would address the ethos component. *Educating Lawyers* ties ethos to professional identity and purpose:

Professional identity is, in essence, the individual's answer to questions such as, "Who am I as a member of this profession? What am I like, and what do I want to be like in my professional role? and What place do ethical-social values have in my core sense of professional identity?"³

Educating Lawyers contends that the answer to these questions and the starting point for professional behavior is the student's understanding and adoption of professional values. A professional ethos defines our purpose and transcends our self-interest. A professional ethos binds lawyers, judges and academics together with a shared identity and commitment to something that is broader than, and the foundation for, the minimal ethical standards set forth in Canons or Codes governing professional conduct.

Consistent with our assignment, my partner and I offered several suggestions that we thought would foster students' understanding of the history and values of the legal profession. In discussing these matters, however, it became apparent that we educators, lawyers and judges could not agree on the components of a professional identity or a common set of values that should be taught to law students. We debated over the profession's purpose, what role lawyers should play in society and whether we had any cohesive professional beliefs. Ultimately, unable to agree on a professional ethos, we reverted to discussing methods for teaching the mandatory provisions of the Code of Professional Responsibility.

The inability of this task force to identify any common commitment or value that constitutes the ethos of the legal profession led me to ponder whether we have one and whether having one matters. This article chronicles my attempt to answer these questions.

I conclude that because American society is unique in its belief in and dependence upon the Rule of Law, the beliefs and behavior of lawyers matter. American society is experiencing a Cycle of Cynicism that threatens public confidence in the law and legal institutions. If we do not find ways to reverse this Cycle of Cynicism and restore public confidence, the cohesiveness of American society and our individual rights and freedoms will be in jeopardy. Lawyers have the ability to combat this Cycle of Cynicism, but only if they are willing, as a profession, to

3. *Id.* at 135.

explore, articulate and adopt a common commitment to a value greater than their self interest—to the Rule of Law.

I. IN AMERICAN SOCIETY, WHAT LAWYERS BELIEVE ABOUT THE LAW AND LEGAL INSTITUTIONS MATTERS

Law is essential to social order and justice: it requires specialized knowledge that only lawyers possess; the public needs lawyers to facilitate their intercourse with one another and to protect them from harm by others and from government; lawyers have a special role in the state as guardians of the legal order.⁴

A. *The existence of American society and government is premised upon law*

Few would dispute that America is unique. We are a heterogeneous nation comprised predominantly of immigrants, and the descendants of immigrants, from every country on the globe. Due to this diversity, we lack the underpinnings that unite and stabilize more homogeneous societies—a common language, ancestral history, culture, religion, traditions or clan/tribal ties. We highly prize individuality, initiative and freedom; indeed, it is such freedom that has attracted immigrants with vastly different backgrounds and values to our shores.

To unite such a diverse population while ensuring individual freedom, we rely on law. Law acts as the mortar that holds the disparate bricks of our society together. Although we may disagree with the wisdom of particular laws, or we may wish that some could be changed or set aside, we accept this system of law because it provides Americans with unparalleled liberty, democratic access, security, stability and economic opportunity.

We come by our reliance on law honestly. Our country's first European immigrants came from societies with strong legal traditions. The sojourners on the Mayflower governed themselves by legal compact, as did other early colonial communities. As the English colonies expanded the scope of their self-government, they formally recognized reciprocal rights and obligations between citizens and the king, and it was the perceived breach of the king's and parliament's obligations to British citizens in the Americas that led to the American Revolution.

Many of our nation's founders were students of the classics. They read Socrates, Aristotle and Cicero. They adopted classical notions found in Enlightenment thinking, among which was the idea that there are certain "natural laws" that govern relationships among people. The political ideals of John Locke set forth in his *Second Treatise of Government* (1690) and Charles-Louis de Secondat, baron de La Brède et de

4. BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END 138 (2006).

Montesquieu, described in the *Spirit of the Laws* (1748) are reflected in the Federalist Papers (1787-88) written by James Madison, Alexander Hamilton and John Jay.

Locke believed that guided by reason, and subject to natural law, individuals could enjoy perfect freedom and equality. He reasoned that natural law requires individuals to do no harm to others in their enjoyment of life, health, liberty and possessions.⁵ By extension of this idea, he thought that individuals could and should bind together to create a government of limited powers that would make, execute and apply laws for the common good. He contrasted dominion by one person over another to a society that was ruled by law. In a society based on law, the law would preserve individual freedom and equality for everyone.

[F]reedom of men under government is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man⁶

Montesquieu reinforced this ideal in the context of individual liberty. He identified "liberty" as living under the rule of law.⁷ He reasoned that if every person was free to do what he or she desired, all would be under threat of others doing the same. Individual liberty would thus be maximized if everyone was restrained from doing harm to others. Law would act as the consensual restraint. In essence, the law would set boundaries within which people could act as they chose. "Liberty is a right of doing whatever the laws permit."⁸

Locke and Montesquieu derived their view of the role of law from what they believed was divinely inspired "natural" law. Embedded in their views is a paradox that was perhaps most concisely stated centuries earlier by Cicero, "[W]e are all servants of the laws, for the very purpose of being able to be freemen."⁹

A paradox is an apparent contradiction. By recognizing the fundamental connection between apparent opposites and holding them in tension with each other, a paradox often embodies a fundamental truth and produces great energy. Here, the apparent contradiction is that the law

5. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 9 (C.B. Macpherson ed., Hackett Publ'g 1980) (1690).

6. *Id.* at 17.

7. See BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 52 (5th ed. 2007) (referring to THOMAS L. PANGLE, MONTESQUIEU'S PHILOSOPHY OF LIBERALISM 109 (Univ. of Chicago Press 1973)).

8. I BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 150 (Thomas Nugent trans., P.F. Collier & Son 1900).

9. II MARCUS TULLIUS CICERO, THE ORATIONS OF MARCUS TULLIUS CICERO 164 (C.D. Yonge trans., G. Bell & Sons 1917).

which restrains individual behavior also guarantees individual freedom. The energy of this paradox was the hope of our nation's founders.

The Declaration of Independence reflects notions of natural law in its announcement that "the Creator" has given every person an "unalienable right to life, liberty and the pursuit of happiness." In drafting the Constitution, our forefathers attempted to translate the paradox recognized by Locke, Montesquieu and other Enlightenment political philosophers into a functioning governmental structure in which a limited government would protect individual interests and maximize individual liberty. Through a careful calibration of what we refer to as "checks and balances," the Constitution was designed to preserve popular democracy but prevent complete control by the government or by the largest, most organized or powerful groups. It became the "fundamental law"¹⁰ to secure "a government of laws, and not of men."¹¹

Consistent with that purpose, our state and federal governments have been animated and constrained by the law, and virtually every social development in our country's history has been tied to the law. Law has supported economic and geographic expansion and forged international connections.¹² Our nation's history has been punctuated by events either of legal significance or which have legal components. For example, the Louisiana Purchase was a commercial transaction. Treaties with Native Americans and foreign countries are contracts. The justification for the civil war, according to President Lincoln, was the breach of the Constitution by the southern states' decision to secede. As a student of the classics and an accomplished lawyer, Lincoln initiated a process that eventually converted the natural law concept that "all men are created Equal" (found in the Declaration of Independence) into the law of the land (the 13th, 14th, and 15th Amendments to the U.S. Constitution).¹³ During the nineteenth century, industrialization and expansion were both facilitated and limited by state and congressional legislation. And in the twentieth century, a multitude of social changes, including expansion of workers rights, recovery from the depression and implementation of civil rights, have been embodied in statutory enactment or judicial decree, or both.

10. THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Penguin Books 1961).

11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

12. For example, bankruptcy and commercial laws were enacted, repealed and modified to facilitate the growth of business and to address economic fluctuations. The first bankruptcy law was enacted in 1800 in response to the economic panics of 1792 and 1797. It was repealed in 1803. This was followed by another national bankruptcy act in 1841, repealed a year later. The panic of 1857 and the financial cataclysm of the Civil War spurred consideration of another bankruptcy act in 1867. This act was repealed in 1878. In 1898, Congress enacted the Bankruptcy Act, which was amended several times, but not replaced until adoption of the Bankruptcy Code in 1978. This was most recently modified in 2005.

13. Susan Schulten, Professor of History, *Lincoln and the Constitution* (Jan. 2009) (presentation at the Univ. of Denver) (manuscript on file with author).

In this country, we expect the law to reflect and reinforce our social values and protect the rights of every citizen, and we expect our legal institutions to do the same. Indeed, this expectation is chiseled into the cornice of the building that houses the United States Supreme Court—"Equal Justice Under Law." We proudly proclaim to the rest of the world that we are a society based upon the Rule of Law.¹⁴

B. Law remains an ever-present component of American culture even in the Twenty-First Century

For better or worse, modern American society is even more infused with the law and legal processes than it was in prior generations.¹⁵ One need only turn on the television, open the newspaper, surf the Internet, go the bookstore, examine most any institution or listen to popular conversation to see legal threads woven into our culture.

A quick internet search for television programming reveals ten faux courtroom programs (e.g. Judge Judy) and thirty-six legal dramas (e.g. Boston Legal).¹⁶ Many stations and producers have hired legal experts to opine on the legal news item *du jour*. Every newspaper contains multiple articles with a legal theme—criminal investigations, court proceedings, the effect of judicial rulings, the anticipated or actual impact of statutes or regulations, commentary on what the law should be, or stories about miscreant lawyers and judges. The Internet is filled with websites and blogs that assess legal thought, court opinions, legal/social issues, judges and attorneys. Books of all genres include legal themes; there is even an independent genre of legal thrillers.¹⁷

Virtually no social, business or governmental institution operates in the absence of rules and procedures for enforcing them, or without an attempt to comply with laws and regulations.¹⁸ Schools have codes of

14. See, for example, the ABA Rule of Law Initiative website, which states that "rule of law promotion is the most effective long-term antidote to the pressing problems facing the world community today, including poverty, economic stagnation, and conflict." ABA RULE OF LAW INITIATIVE, <http://www.abanet.org/rol/> (last visited Apr. 4, 2009). For a more recent example of the emphasis on the "rule of law" in the international community, see News Release, Human Rights Watch, Southern Sudan: Protect Civilians, Improve Rule of Law (Feb. 12, 2009), available at <http://www.hrw.org/en/news/2009/02/12/southern-sudan-protect-civilians-improve-rule-law>.

15. Some commentators argue that the root of this is a surplus of both lawyers and laws. See generally, e.g., PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW (1998) (explaining lawyers contribute to the overuse of laws in the United States); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994) (explaining that inefficient decrees suffocate Americans); PHILIP K. HOWARD, LIFE WITHOUT LAWYERS: LIBERATING AMERICANS FROM TOO MUCH LAW (2009) (explaining that Americans are flooded with legal rules).

16. See Yahoo, Legal Drama TV Shows, http://dir.yahoo.com/Entertainment/Television_Shows/Drama/Legal/ (last visited Apr. 10, 2009).

17. For examples of recent legal thrillers, see MICHAEL CONNELLY, THE BRASS VERDICT (2008); LINDA FAIRSTEIN, KILLER HEAT (2008); LINDA FAIRSTEIN, LETHAL LEGACY (2009); JOHN GRISHAM, THE APPEAL (2008); JOHN GRISHAM, THE ASSOCIATE (2009); JOHN LESCROART, BETRAYAL (2008); RICHARD NORTH PATTERSON, ECLIPSE (2009).

18. In this context, I am reminded of a question that my daughter raised when her fighter pilot squadron wanted to acquire a bus in order to ensure that pilots who had partied too much could be

conduct and procedures for imposing discipline. Employers maintain employee manuals, dress codes and privacy codes and create whole departments to ensure that employees comply with applicable laws and regulations. Home owner associations and other informal groups adopt policies to regulate behavior of members and to avoid running afoul of the law.

Even casual conversation reveals legal threads. Everyone who has watched *Law and Order* knows what it means to “read somebody their rights.” Indeed, it would not be surprising to learn that most children over the age of 12 can recite the Miranda advisements. Arguments and disagreements often include challenges and dismissals such as, “So sue me . . .” or “See ya in court.” Even the most non-adversarial among us recognize the idioms, “Don’t make a federal case out of it,” or “I’ll take this case all the way to the Supreme Court.”

To resolve our disputes, we file thirty times more lawsuits per capita in the United States than do citizens of any other country.¹⁹ For example, in Colorado, which currently has a population of approximately four million, over 750,000 new cases/appeals were initiated in the state courts²⁰ and another 17,000 were initiated in the federal courts²¹ during 2007. A recent study conducted by the Institute for the Advancement of the American Legal System and the League of Women Voters reports that almost half of the respondents said they or a family member had been in a courtroom within the past five years—39% of that number as jurors, 22% in family court matters, and 18% as a party in a civil lawsuit.²²

C. The pervasive role of law in American society is evidence of a core value—reverence for the Rule of Law

Although we may feel overburdened by the law, and indeed we may have too many laws, our unbroken history and tradition of relying on the law and legal institutions reflects the energy of the paradox upon which our society rests—that law exists to maximize our liberty and opportuni-

assured of a safe drive home by a designated driver. Such a laudable objective was to comply with laws regulating drinking and driving and the regulatory fallout of failing to do so in both a civil and military context. This very simple and sensible solution necessarily required exploration of who or what should own the bus, how ownership could be transferred as membership in the squadron changed, how it could be insured, and how the cost of its operation, maintenance, and insurance could be shared (enforced) among its beneficiaries.

19. See Power of Attorneys, *Are there too many Lawyers?*, http://www.power-of-attorneys.com/are_there_too_many_lawyers.htm (last visited Apr. 4, 2009).

20. Colorado State Judicial Branch, Court Facts, http://www.courts.state.co.us/Courts/Education/Court_Facts.cfm (last visited Apr. 9, 2009).

21. JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 151 tbl.3-C, 297 tbl.F (2008), available at <http://www.uscourts.gov/judbus2007/contents.html>.

22. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM & LEAGUE OF WOMEN VOTERS, 2007 COLORADO VOTER OPINIONS ON THE JUDICIARY 3 (2007), available at <http://www.lwvcolorado.org/executivesummary1.pdf>.

ty. This esoteric concept has long since been absent from popular parlance; our modern reference to the paradox is found in the phrase the Rule of Law.

Although many cannot define what the Rule of Law is, they readily advocate it as a core value. Indeed, in recent years, reference to the Rule of Law has become increasingly common. The phrase often appears in political speeches, is used to justify political policy, has been the subject of books and articles, and was even the annual theme for the American Bar Association in 2008.

Widespread reference to the Rule of Law may have caused it to become trite to some, but the concept continues to inspire both interest²³ and devotion.²⁴ Scholars have written a multitude of books²⁵ and articles²⁶ seeking to define it and explain its effect. Just recently in an interview published as part of the "7 Questions—The Law" series, Judge

23. Websites on the Internet dedicated to the rule of law include: ABA Rule of Law Initiative (www.abanet.org/rol/); Center for the Rule of Law (www.centerfortheruleoflaw.org/); and the Rule of Law Resource Center (law.lexisnexis.com/webcenters/RuleofLawResourceCenter).

24. Of note outside of the U.S., lawyers in Pakistan have protested for reinstatement of the Rule of Law and an independent judiciary. See James Traub, *Can Pakistan Be Governed?*, N.Y. TIMES MAGAZINE, Apr. 5, 2009, available at <http://www.nytimes.com/2009/04/05/magazine/05zardari-t.html?partner=rss>.

25. There are too many books and articles addressing the Rule of Law to provide a comprehensive list. The following are only a few examples of recent, scholarly discussions: RONALD A. CASS, *THE RULE OF LAW IN AMERICA* (2001); DEMOCRACY AND THE RULE OF LAW (Jose Maria Maravall & Adam Przeworski eds., 2003); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003); BRIAN Z. TAMANAHA, *ON THE RULE OF LAW* (2004); G. EDWARD WHITE, *THE AMERICAN LEGAL TRADITION* (3d ed. 2007).

Some much older writings include: T. R. S. ALLAN, *LAW, LIBERTY AND JUSTICE: THE LEGAL FOUNDATIONS OF BRITISH CONSTITUTIONALISM* (1993); ARISTOTLE, *NICOMACHEAN ETHICS* (Terence Irwin ed., 1985); ARISTOTLE, *POLITICS* (Stephen Everson ed., 1988); RANDY BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998); CICERO, *THE REPUBLIC AND THE LAWS* (Niall Rudd trans., Oxford Univ. Press 1998); RONALD DWORIN, *LAW'S EMPIRE* (1986); LON FULLER, *THE MORALITY OF LAW* (1964); H. L. A. HART, *THE CONCEPT OF LAW* (1961); F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY, THE MIRAGE OF SOCIAL JUSTICE* (1976); F. A. HAYEK, *LAW, LEGISLATION, AND LIBERTY: THE POLITICAL ORDER OF A FREE SOCIETY* (1979); F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY: RULES AND ORDER*, (1973); F. A. HAYEK, *THE POLITICAL IDEA OF THE RULE OF LAW* (1955); F. A. HAYEK, *THE ROAD TO SERFDOM* (1944); OLIVER WENDELL HOLMES, *THE COMMON LAW* (1881); LOCKE, *supra* note 5; ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* (1922); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* (Erwin Chemerinsky et al. eds., 6th ed. 2003); REDRAFTING THE RULE OF LAW: *THE LIMITS OF LEGAL ORDER* (David Dyzenhaus ed., 1999); *THE RULE OF LAW* (Ian Shapiro ed., 1994); *THE RULE OF LAW: IDEAL OR IDEOLOGY* (Allan C. Hutcheson & Patrick Monahan eds., 1987); *THE RULE OF LAW UNDER SIEGE: SELECTED ESSAYS OF FRANZ L. NEUMAN AND OTTO KIRCHHEIMER* (William E. Scheuerman ed., 1996); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); SAMUEL RUTHERFORD, *LEX, REX, OR THE LAW AND THE PRINCE: A DISPUTE FOR THE JUST PREROGATIVE OF KING AND PEOPLE* (1644).

26. See, e.g., Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998); Paul Craig, *Formal and Substantive Conceptions of the Rule of Law*, 1997 PUB. L. 467 (1997); Ofer Raban, *Real and Imagined Threats to the Rule of Law: On Brian Tamanaha's Law As a Means to an End*, 15 VA. J. SOC. POL'Y & L. 478 (2008); Antonin Scalia, *The Rule of Law as Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Kim Lane Scheppele, *When the Law Doesn't Count: The 2000 Election and the Failure of the Rule of Law*, 149 U. PA. L. REV. 1361 (2001); Robert S. Summers, *A Formal Theory of the Rule of Law*, 6 RATIO JURIS 127 (1993); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 L. & PHIL. 137 (2002); Azar Nafisi, *Hiding Behind the Rule of Law*, N.Y. TIMES, Dec. 19, 1997, at A39.

Deanell Tacha, former Chief Judge of the Tenth Circuit Court of Appeals, was asked how the Rule of Law relates to professionalism among lawyers.²⁷ And not surprisingly, recent comments about U.S. involvement in Iraq and Afghanistan have focused upon implementation of a rule of law.²⁸

Defining the Rule of Law is a matter of much debate among both scholars and pragmatists. What are its essential components? How do they stabilize societies? Often these questions have different answers depending upon the context or the society being considered. Recognizing this, scholars have characterized the varying definitions of the Rule of Law in degrees from “thin” to “thick.” Generally, a “thin” definition pertains to universal qualities—for example, the Rule of Law is a system of laws that protects liberty and property rights, and the laws are universally applied. A “thicker” definition might incorporate ideas unique to a particular culture—for example, the Rule of Law incorporates a democratic process to create and revise laws, the existence of written laws, predictable procedures and methods for enforcement of laws and the existence of a fair and impartial judiciary, and the right to due process.

For the purposes of this article, one need not precisely define the Rule of Law nor, in scholarly fashion, characterize it by its “thinness” or “thickness.” Instead, recognizing that the Rule of Law is a shorthand way of characterizing the fundamental paradox of the role of law in the United States, one can focus on the meaning the Rule of Law has in the minds of the American public.

Americans understand the Rule of Law to mean that *no man is above the law*.²⁹ We often attribute this idea to the Magna Carta, but actually it implemented the Rule of Law by imposing unprecedented constraints on the king. In our own national history, the concept is mirrored in our foundational documents, democratic values, and the structure of our government.

27. See Matthew Crouch, *7 Questions—The Law Series: An Interview with Honorable Deanell Tacha of U.S. Court of Appeals for the Tenth Circuit*, MILE HIVE, Jan. 22, 2009, <http://tinyurl.com/db92np>.

28. See *Training and Equipping Afghan Security Forces: Unaccounted Weapons and Strategic Challenges: Hearing Before the Subcomm. on National Security and Foreign Affairs of the H. Comm. on Oversight and Government Reform*, 111th Cong. (Feb. 12, 2009), available at 2009 WLNR 2870483 (testimony of Mark L. Schneider, Senior Vice President, International Crisis Group) (“I would hope that the end of the current review of U.S. strategy for Afghanistan will raise the priority attached to establishing an effective Afghan National Police force within a functioning rule of law.”); *New Court House Opens in Bagdad*, U.S. FED. NEWS, Sept. 10, 2008, available at 2008 WLNR 17342770 (“Iraqi Chief Justice Medhat referred to the importance of the Justice Palace in establishing the rule of law in Iraq. Medhat gave thanks to the Coalition forces and a special recognition to the U.S. Army Corps of Engineers for the workmanship and diligence.”).

29. Interestingly, this is the definition given for the “Rule of Law” in the Colorado Model Content Standards for Civics. See COLO. MODEL CONTENT STANDARDS FOR CIVICS 25 (1998), <http://www.cde.state.co.us/cdeassess/documents/OSA/standards/civics.pdf>.

From this basic tenet grow several expectations. First, no person or group may ignore or violate the law without consequence. In other words, the law should be equally, consistently and predictably applied to everyone. Second, the government, too, is bound by the law. Our government has limited power, and as a consequence, no person working for the government, no agency, and no branch of government may violate the law. We expect those in government to follow it. Third, the law should be public rather than secret. This is why we require public legislative and judicial sessions, have written statutes and published judicial opinions,³⁰ and why we are deeply suspicious of secret communications by those in power. Finally, the law should be created, modified and replaced only by the process that society has prescribed in the law.

In practical terms, we believe the law is something that we create, but once created, it binds us all. The law stands separate from us, as individuals and groups. Even though each of us, from time to time, resents the fact that we have to comply with the law, we nevertheless count on it to protect us and the society in which we live. It is this universality that integrates the diverse, heterogeneous American society in which we live.

D. In American society, the beliefs and behavior of lawyers matter

Although lawyers are often the target of criticism and humor, in American society lawyers exert profound individual and collective influence. The influence of the legal profession grows from a number of sources—our specialized knowledge about the law, our number and diversity, and the wide variety of roles we play.

In his classic study *Democracy in America*, Alexis de Tocqueville presaged the important role that lawyers would play. He wrote:

In visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession, and the influence that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy.³¹

More recently, scholars have directly tied the role of lawyers to the very foundations of American society. Judith Shklar observes:

The tendency to think of law as “there” as a discrete entity, discernibly different from morals and politics, has its deepest roots in the legal profession’s view of its own functions, and forms the very basis of most of our judicial institutions and procedures.³²

30. And public court records.

31. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Phillips Bradley ed., Henry Reeve trans., Everyman’s Library ed., Alfred A. Knopf 1994) (1835).

32. JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 9 (1964).

Put in a more popular and humorous context, Jerry Seinfeld explained,

A lawyer is basically the person who knows the rules of the country. We're all throwing the dice, playing the game, moving our pieces round the board, but if there is a problem, the lawyer is the only person who read the inside of the top of the box.³³

Another reason lawyers are influential is that there are a lot of us. Currently, there are more than 1.1 million lawyers in the United States, more in toto and per capita than in any other country in the world.³⁴ In 1951, one out of every 695 persons was a lawyer; but by 2001, the ratio of lawyers to non-lawyers had almost tripled to one out of every 264 persons.³⁵ And, more are coming. As of June 2008, there are 200 accredited law schools in the country.³⁶ Enrollment in these schools is just shy of 150,000 students each year.³⁷

Finally, lawyers play a wide variety of vital roles in American society. According to national ABA statistics, more than 750,000 lawyers are in private practice, more than 88,000 work for the government, approximately 95,000 are employed in private industry or for private associations, 33,000 serve as judges and 11,000 teach.³⁸

Twenty-six of our forty-three presidents have been lawyers,³⁹ and two have had spouses who are also lawyers.⁴⁰ Routinely, upwards of 40% of the members of the U.S. House of Representatives, and more in the U.S. Senate, are lawyers.⁴¹ Their office staffs and the staffs of congressional committees are dominated by lawyers, as are members of the executive branch and regulatory agencies. In my home state, eighteen

33. *Seinfeld: The Visa* (NBC television broadcast Jan. 27, 1993), available at <http://www.seinfeldscripts.com/TheVisa.html>.

34. AM. BAR ASS'N, *LAWYER DEMOGRAPHICS* (2008), http://www.abanet.org/marketresearch/Lawyer_Demographics_2008.pdf [hereinafter *LAWYER DEMOGRAPHICS*].

35. CLARA N. CARSON, AM. BAR FOUND., *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000* 27 (2004); BARBARA CURRAN & CLARA N. CARSON, AM. BAR FOUND., *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990'S* (1994).

36. ABA Approved Law Schools, <http://www.abanet.org/legaled/approvedlawschools/approved.html> (last visited Apr. 10, 2009).

37. See Memorandum from David Rosenlieb, Data Specialist, Section of Legal Educ. & Admission to the Bar, to Deans of ABA-approved Law Schools (Feb. 15, 2008), <http://www.abanet.org/legaled/resources/2007-08%20Enrollment%20Memo.pdf> (providing detailed information on enrollment statistics for law schools in 2006 and 2007).

38. *Id.*

39. See *America's Lawyer Presidents*, <http://www.abanet.org/museum/exhibit.html> (last visited Apr. 10, 2009). At time of publication, the article has not been updated to reflect the election of President Barack Obama.

40. Hillary Clinton and Michelle Obama are lawyers.

41. See MARK C. MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS* 59 (1995); C-Span: 109th Congress Statistics, <http://www.c-span.org/congress/109congress.asp> (last visited Apr. 10, 2009).

governors have been lawyers,⁴² and the ratio of lawyers to non-lawyers in the state legislature is only slightly less than in Congress.⁴³

In recent years, we have become more diverse as a profession. No longer are American lawyers invariably members of a wealthy, white, male elite. ABA statistics in 2000 reported that 27% of lawyers were women and 12% identified themselves as people of color.⁴⁴

Put simply, lawyers are trained in the law and, we sincerely hope, in its value to American society. We populate all walks of life. We are mothers and fathers, sisters and brothers, daughters and sons. We are employers and employees, writers, teachers, litigators, advisors, business owners, legislators, government officials and judges. We work for government, for private clients and in business. We live in a variety of neighborhoods, belong to churches, synagogues, mosques and clubs, help in charitable and political causes, teach our children and converse with our neighbors and families. We make the news, enforce, create and change the law, and we are, whether we like it or not, role models for other citizens. What we believe about the Rule of Law, and how we implement it, matters.

II. A CYCLE OF CYNICISM THREATENS CONFIDENCE IN OUR LEGAL SYSTEM AND THE RULE OF LAW

A. *Public Distrust*

Few would disagree that since the middle of the twentieth century American society has become increasingly distrustful of its governmental and legal institutions. Some historians mark the advent of popular skepticism as beginning with the Vietnam War or Watergate. Some trace its roots to moral and political relativism that developed in the early decades of the twentieth century. Yet others would claim that such skepticism has long existed. For example, we all remember the Shakespearian reference to killing all the lawyers.⁴⁵

Part of the public distrust is attributable to our nature and habits. At the very fiber of American populism is a distrust of government power and fear of its excesses. To the extent that governmental structure and

42. See *About the Governor*, <http://www.colorado.gov/cs/Satellite/GovRitter/GOVR/1177024890365> (last visited April 10, 2009) (describing Governor Bill Ritter's educational background); *Colorado Governors*, <http://www.colorado.gov/dpa/doit/archives/govs/index.htm> (last visited Apr. 10, 2009) (providing biographical information on all Colorado Governors from 1876 to 1975); *DU Portfolio Community | Dick Lamm*, <https://portfolio.du.edu/pc/port?portfolio=rlamm> (last visited April 10, 2009); *Colorado's Governor Roy Romer: biography*, <http://www.colorado.gov/dpa/doit/archives/romer/govbio.htm> (last visited April 10, 2009).

43. See NAT'L CONFERENCE OF STATE LEGISLATURES, OCCUPATIONAL DATA WESTERN REGIONAL STATES TABLE 1, <http://www.ncsl.org/programs/legismgt/about/OccupationWest1.htm> (last visited Apr. 10, 2009).

44. See *LAWYER DEMOGRAPHICS*, *supra* note 34.

45. "The first thing we do [when we take over the government], let's kill all the lawyers." WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2.

legal institutions are intertwined, skepticism with regard to one can bleed into skepticism about the other. Indeed, our country has gone through several cycles during which the public became distrustful of legal institutions. The Jeffersonians repealed judgeships. President Jackson defied Supreme Court rulings. During the Civil War, Congress reduced the size of the Supreme Court and stripped it of its jurisdiction to determine whether Congress had the power to impose military rule in the southern states. In the nineteenth century, many states abolished the appointment of judges and replaced the selection systems with popular elections.

In recent decades, however, public distrust of lawyers and legal institutions has surged again. A number of new factors may contribute to the current situation.

First, there has been a decline in knowledge about civic organization and citizen responsibilities. For several decades, there has been a decline in focus on substantive civics education in the public schools.⁴⁶ According to Bert Brandenburg, the Executive Director of *Justice at Stake*, many Americans cannot correctly name all three branches of government; one-third cannot name *any* of them; and more than one in five Americans do not believe that the Supreme Court can declare an act of Congress unconstitutional.⁴⁷

To the extent that citizens have not formally learned about the purpose of the law or how legal institutions work, it is human nature to fill in the gap with popular information. We rely on urban myths, what our friends or the media tell us, what we hear over the back fence, from Nancy Grace, or what we see on *Law and Order*. Many of the jurors who serve in matters before me comment after the trial that they were surprised to learn how a trial actually works; that it is not like anything they have seen on TV, and that, based on their experience, they would look forward to serving again sometime.

Second, we have become a nation of consumers who believe we can purchase anything we want. In this expectation, we do not differentiate between goods and services. We shop for cars, colleges and legal representation. We believe that we get what we pay for, or that “money talks.” Clients, corporate and private, are often savvy customers who do not hesitate to specify the results they expect. In the litigation context, I call this the attempt to buy “Burger King Justice,” i.e., justice, my way.

46. Research has shown a marked trend away from civics and social studies in the elementary grades, and that civic education in high school is usually limited to a single course. See, e.g., Joyce Baldwin, *Civic Education in Schools*, 2 CARNEGIE REPORTER 12, 15 (2003), available at <http://www.carnegie.org/pdf/camreporterfall03.pdf>. In Colorado, there is no requirement for a civics or government class. Instead, civics themes are to be included in the content of classes devoted to other topics.

47. Bert Brandenburg, Exec. Dir., Justice At Stake Campaign, Address at the Colorado Judicial Institute’s Judicial Excellence Dinner (Nov. 18, 2008).

Third, we are increasingly savvy about science and technology, and as a result, we naively believe that scientific and technological methodologies apply to every walk of life. We take pills for ills, and so we expect them or their technological cousins to solve all our problems.⁴⁸ In trials, it is not uncommon for jurors to be disappointed if no “CSI” type forensic evidence is presented. In addition, we are used to communicating quickly and efficiently using a host of media—face to face, email, cell phone, instant message, Twitter or Facebook. We expect prompt, if not instant, responses. It is quite a disappointment, therefore, to discover that, unlike other aspects of life, legal affairs are rarely characterized by certainty or speed.

Fourth, lawyers are frequently caricatured in jokes and by the media in ways that promote distrust. They have been characterized in the movies as “miserable human beings, either unethical or incompetent at their jobs.”⁴⁹ In her book, *In the Interests of Justice*, Deborah Rhode analyzed survey data showing that a substantial portion of the public perceives lawyers as greedy, unethical and arrogant.⁵⁰

Marc Galanter, a law professor who has long studied public impressions of lawyers, reported in 1998 that the public’s estimation of lawyers, which has not been high in the past, continues to drop.⁵¹ Those who thought lawyers less honest than most people rose from 17% in 1986 to 31% in 1993. In 1991, a national survey inquired as to “what profession or type of worker do you trust the least.” “Lawyers” was far and away the most frequent response. Almost as many people (23%) identified lawyers as untrustworthy as the next two categories (car salesman 13%, politicians 11%), combined. But Galanter goes on to argue that the public does not condemn lawyers without qualification. Rather, the public approves of lawyers’ commitment to their clients, but it distrusts lawyers’ commitment to anything else—such as to honesty, truth, or the law.

Because lawyers play so many roles in society, distrust of lawyers bleeds into distrust of the law and legal systems. And it is fed by general skepticism about government. This is not at all surprising given the steady drumbeat of scandals involving business people, government fig-

48. This brings to mind a recent advertisement in *The Economist* for a course in history. The advertisement reads, in part, “Now More than Ever, We Must Learn the Lessons of History. . . . The challenge Professor Fears poses . . . is especially pertinent during the ‘ahistorical age’ . . . an era when too many people are willing to invest in a ‘dangerous delusion’ that ‘science, technology, the global economy, and the information superhighway all make us immune to the lessons of history,’ and that ‘in an age of global economy, war and tyranny will become things of the past.’” *Advertisement*, *ECONOMIST*, Jan. 3, 2009, at 43.

49. Sandra Day O’Connor, Professionalism, Address at Dedication of the William W. Knight Law Center, in 78 *OR. L. REV.* 385, 386 (1999) (quotations omitted).

50. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 3-5 (2000).

51. Marc Galanter, *Robert S. Marx Lecture: The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse*, 66 *U. CIN. L. REV.* 805, 809 (1998).

ures, lawyers and judges. One only need reflect on recent scandals that embroiled prominent leaders (many of whom were lawyers): President Bill Clinton, U.S. Congressmen Randy Cunningham and Robert Ney, Illinois Governor Rod Blagojevich, Attorney General Alberto Gonzalez, Alaska Senator Ted Stevens and the justice department attorneys that prosecuted him, as well as a variety of federal and state judges.

In addition, for decades the news has been telling the public about policy-infused court decisions. Sometimes the portrayal of the court as a policy maker is accurate, but sometimes it is not. News reports that identify judges by political party or the president who appointed them, and then go on to short-circuit legal and factual complexity by reducing court rulings to sound bites, imply that judicial decisions are merely the result of judges' political beliefs. To the extent that people do not have a clear understanding of how various courts work, the profusion of stories about the Supreme Court's policy *cum* legal decisions understandably leads many to assume that all judges engage in social or political policy making. Unfortunately, such notion is also fueled by lawyers who argue to lower court judges that they should base their decisions on political or social policy and by lower court judges who do so.

Thus, it is not entirely surprising that a 1999 Hearst Report commissioned by the National Center for State Courts concluded that a growing portion of the public believes that courts are out of touch with the reality in their communities and that judicial decisions result from personal or political biases. Many members of the public believe that using the judicial process costs too much, takes too much time and favors the rich. The Annenberg Public Policy Center's September 2006 study reported that 75% of those surveyed believed that a judge's ruling is influenced by his or her personal political views to a great or moderate degree, 62% believe that courts favor the wealthy and another 62% believe that the courts in their state are legislating from the bench rather than applying the law.

The upshot of all this is that references to "judicial activism" and to judges as "tyrants in black robes"⁵² have become a staple of talk radio, cable and the blogosphere. Readers Digest regularly publishes a list of "America's Worst Judges." Criticism of courts and judicial decisions is routinely incorporated into the speaking points of politicians. For example, at the national "Justice Sunday" event organized a couple of years ago, the organizer referred to judges as supremacists, adding that the Supreme Court poses a greater threat to representative government than budget deficits and terrorist groups.⁵³

52. These comments, interestingly, iterate the public's fundamental view of the law—no person, not even a judge, should be above it.

53. Brandenburg, *supra* note 47.

As in prior historical cycles, it is not surprising that citizens who are dissatisfied and distrust legal institutions have initiated a number of measures to restrain judges and restructure court systems. The 2006 election cycle brought Amendment 40 in Colorado, JAIL4JUDGES in South Dakota, and Measure 40 in Oregon.⁵⁴ In 1997, the majority leader of the United States House of Representatives (also a lawyer) declared that “judges need to be intimidated.”⁵⁵ More recently, Congress considered the appointment of an Inspector General for the federal judiciary, which inspired the creation of a special committee chaired by U.S. Supreme Court Justice Stephen Breyer to investigate and report on the manner in which complaints of judicial misconduct are handled.⁵⁶

The foregoing factors have blurred the boundaries separating the three branches of government. When courts are perceived as encroaching upon the prerogatives of the legislative branch by fashioning and imposing social policy, the legislative branch retaliates. There are inquiries by the Senate into the political views and anticipated judicial rulings during confirmation hearings for federal judicial nominees, legislative efforts are made to reduce federal court jurisdiction and attempts are made to direct the outcomes in pending litigation, such as in the Terry Schiavo case. This amalgam makes it harder and harder for citizens to have confidence in the Rule of Law.

B. Lawyer Dissatisfaction

According to many observers, the decline in public esteem for lawyers and legal institutions also correlates to dissatisfaction within the profession—a decline in professional civility, increase in adversarialism, decline in the role of the lawyer as counselor, decline in attorney competence, and greater competition among attorneys for clients and fees. Although there is some disagreement among researchers as to the degree of

54. Colorado’s proposed Amendment 40 sought to strictly limit the term of all state appellate judges. See STATE OF COLORADO, ANALYSIS OF THE 2006 BALLOT PROPOSALS 7-8 (2006), available at http://www.state.co.us/gov_dir/leg_dir/lcsstaff/bluebook/Bluebook2006.pdf. The Amendment would have applied retroactively, and would have “immediately removed nineteen of the state’s twenty-six appellate judges from the bench.” Rebecca Love Kourlis & Jordan M. Singer, *A Performance Evaluation Program for the Federal Judiciary*, 86 DENV. U. L. REV. 7, 28 (2008). The “Jail4Judges” initiative in South Dakota would have allowed a “Special Grand Jury” to assess fines and penalties against judges and prosecutors who violated rules established by the grand juries. See CHRIS NELSON & KEA WARNE, SOUTH DAKOTA 2006 BALLOT QUESTIONS, available at <http://www.sdsos.gov/elections/voterregistration/electvoterpdfs/2006SouthDakotaBallotQuestionPamphlet.pdf>; see also Kourlis & Singer, *supra* at n.123.

Oregon’s Measure 40, proposed in 2006, would have required state appellate judges to be elected by district, and would have established strict residency requirements for judges running for election in a particular district. See OR. SEC’Y OF STATE, MEASURE 40 EXPLANATORY STATEMENT (2006), available at http://www.sos.state.or.us/elections/nov72006/military_vp/m40_es.pdf.

55. Joan Biskupic, *Hill Republicans Target ‘Judicial Activism’*, WASH. POST, Sept. 14, 1997, at A01 (quoting then-majority whip Tom DeLay).

56. The report of this Committee resulted in the Judicial Conference of the United States adopting national procedures for resolution of such complaints and for public disclosure of their outcome.

dissatisfaction among lawyers,⁵⁷ the evidence is unavoidable.⁵⁸ In addressing problems within the profession, then U.S. Supreme Court Justice Sandra Day O'Connor in 1999 observed that attorneys are more than three times as likely as non-lawyers to suffer from depression, to develop drug dependence, to get divorced or to contemplate suicide. They suffer from higher than average rates of stress-related diseases such as ulcers, coronary artery disease and hypertension.⁵⁹ A RAND Institute study of lawyers in California found them to be “‘profoundly pessimistic about the state of the legal profession and its future,’ and that only half would choose to become lawyers if they had it to do over.”⁶⁰

Many describe the conditions of contemporary legal practice as brutal. Lawyers' income is tied to how much they work. Either voluntarily, or by compulsion, lawyers work long hours. And in a society of instant electronic connections, business goes on around the clock.

A recent conversation I had with a young bar leader was illustrative. His six-year-old son started making loud noises every time the lawyer reached for his Blackberry or cell phone. When he asked his son to stop and inquired as to why the boy was making so much noise, the boy replied that he did not want his Dad to work when he was at home. The father confessed to me that he felt conflicted; he too wanted to spend time with his son, but he had been bluntly instructed by his superior that his working hours were not limited to the office. “If a client wants to talk with you in the middle of the night, you better be available.”

In a culture where the cost of legal education has increased markedly along with the number of lawyers, there has been a change in the internal culture of law firms and in their relationships with clients. To make adequate profits, fewer resources can be devoted to training new associates. They, instead, become a profit center. As more lawyers compete for a limited client base, they must perpetually hustle to bring clients in and to make sure that clients are satisfied with the results ob-

57. See JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 271-74 (2005); NALP FOUND. FOR LAW CAREER RES. & EDUC. & AM. BAR FOUND., *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 7 (2004), available at http://www.nalpfoundation.org/webmodules/articles/articlefiles/87-After_JD_2004_web.pdf.

58. See Martin E.P. Seligman et al., *Why Lawyers are Unhappy*, 23 *CARDOZO L. REV.* 33 (2001); John P. Heinz et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 *IND. L.J.* 735 (1999); Patrick J. Schiltz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52 *VAN. L. REV.* 871, 871-906 (1999).

59. O'Connor, *supra* note 49, at 386; see also RHODE, *supra* note 50, at 8; Michael J. Sweeney, *The Devastation of Depression*, B. LEADER, Mar.-Apr. 1998, at 11; William W. Eaton et al., *Occupations and Prevalence of Major Depressive Disorder*, 32 *J. OCC. MED.* 1079, 1081 (1990).

60. O'Connor, *supra* note 49, at 386. Several highly publicized books in the 1990's advanced the theme that lawyers had lost their former ideals as statesmen, public leaders, as preservers of the public good. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); SOL M. LINOWITZ WITH MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

tained. Thus, the attorney's need for compensation becomes consonant with satisfying the client's objectives.

In addition, many lawyers describe behavior within the profession as brutish. All of us know lawyers who have left the profession, and most of us have heard statements like the following: "I am tired of the deceit. I am tired of chicanery. But most of all, I am tired of the misery my job causes other people." Many attorneys believe that "zealously representing their clients" means pushing all the rules of ethics and decency to the limit. Some have reached the point that they simply "don't want to mud wrestle anymore." In a speech to law students at the University of Oklahoma, Justice O'Connor noted that a National Law Journal study reported that over 50% of the attorneys surveyed used the word "obnoxious" to describe their colleagues.⁶¹

Such negativity is apparent even in law schools, where students complain of a contentious, competitive and combative environment, and that the single most common reason for becoming a lawyer is the economic reward.

The whole adversarial system is set up to produce winners and losers, just as the grading curve creates winners and losers—and the losers don't get the jobs they want. It is a winner-take-all system, and for some that means winning at any cost.⁶²

Sometimes I have the pleasure of taking a new law graduate out to lunch to congratulate him or her on his or her accomplishment and to offer encouragement in the ensuing job search. Recently, responding to my question about what propelled her to go to law school, a new law school graduate confided in a whisper that she had done so because she wanted to help people. When I asked why she whispered, she replied that she was embarrassed and did not want anyone to hear that her primary objective was not like that of her classmates—to make lots of money.

C. The combination of public distrust and professional dissatisfaction creates a Cycle of Cynicism

The problem with public distrust and professional dissatisfaction is that they create a self-perpetuating Cycle of Cynicism about legal institutions and the Rule of Law. Such negative attitudes foster an expectation

61. Sandra Day O'Connor, *Professionalism*, Address at the Dedication of the University of Oklahoma's Law School Building and Library (Apr. 30, 2002), in 55 OKLA. L. REV. 197, 199 (2002). Justice O'Connor identified common, combative language that lawyers customarily use to describe their experiences:

"I attacked every weak point in their argument"

"Her criticisms were right on target"

"I demolished his position"

"If we use that strategy, she will wipe us out"

"I shot down each of their contentions."

62. EDUCATING LAWYERS, *supra* note 1, at 149.

that the legal system will fail in its duty to serve society, and behavior consonant with that expectation leads to the expected failure—first in small ways, then in ever-larger ones.

Clients who do not trust the law and the legal system to protect them search for aggressive lawyers to do so. Those clients may believe that they know more about the law than do their attorneys, refuse advice that is offered, or disparage the lawyers' advice if it points toward an outcome that is not the client's desire. They may not pay their bills, and they may threaten to or actually sue for malpractice if outcomes do not meet their specifications.

Lawyers, in competition for business, fear rejecting any client, even if the client has unreasonable expectations. In service to their clients (and to be paid), attorneys believe that they must promise and deliver according to the clients' expectations. Sometimes attorneys let clients over-control; sometimes attorneys act in pre-emptive self-defense to protect against later attack if results do not satisfy the clients.⁶³

Many attorneys at side bar or in chambers candidly admit that they cannot control their clients or convince them to be reasonable. Some admit that the only reason they are proceeding to trial is because their clients want to tell their story or have their "day in court," regardless of the merit of their claims or defenses, or that they have taken the cases on contingent fee bases, are upside down in expenses and cannot be paid unless they get favorable verdicts. Other lawyers feel they must impress their clients with courtroom performances of exaggerated intensity, theatrics or contentious and unprofessional behavior.

Lawyers who are vulnerable to their clients may have difficulty maintaining objectivity or resisting clients' demands. To reduce clients' expectations, lawyers may project excessive unpredictability on the legal process, lack of trustworthiness on the opposing counsel, personal animosity on the judge or lack of attention or understanding on the jury. (Indeed, when I was a trial lawyer, I recall telling clients that going to court was a lot like gambling in Las Vegas.) And if there is an unfavorable outcome, it is only human nature to blame the adversary, the process, the jury or the judge. Such actions feed distrust of lawyers and the legal system and fuel the fear that it is the whims of individuals rather than the Rule of Law that governs society.

In his recent book, *Law as a Means to an End: Threat to the Rule of Law*,⁶⁴ Brian Z. Tamanaha⁶⁵ argues that both the public and the legal

63. This manifests in a variety of ways, such as so-called "CYA" letters, memos to the file, and asking other attorneys or staff to sit in on conversations to document what occurs. Attorneys in my district candidly admit that they file at least one motion to dismiss and one motion for summary judgment in every case, regardless of whether such is warranted, simply because they fear the prospect of a malpractice claim if they don't.

64. TAMANAHA, *supra* note 4.

profession now believe that the law no longer has any societal benefit; it is simply a tool that clients and interest groups use to accomplish selfish purposes. This, he contends, undermines both the effect of and confidence in the Rule of Law.⁶⁶

Tamanaha's evidence is compelling. He provides a comprehensive tracing of legal theory⁶⁷ and application over the last century. He examines legal education, the role of academia, the practicing profession and the judiciary. With regard to each, he documents trends and provides a multitude of examples that demonstrate disdain for the Rule of Law and efforts to escape it.

Tamanaha's study also points out two ways in which lawyers have so narrowed their perspective that they cannot see society's need for and dependence upon the Rule of Law. The first is in the belief that an attorney's only duty is to the client. When this occurs, lawyers are more likely to bend, twist or manipulate the law and legal process to achieve the client's objective. With such a narrow focus, the attorney can be blinded to the impact that his or her conduct has on public confidence. Several examples come to mind.

My court reporter tells of an attorney who complained to him after a hearing by asking why the judge was so intent on following the rules. The attorney was shocked by the reporter's response, "because they are the rules." This exchange reflects an all too common view that judges are free to, and should, ignore the rules (or the law).

Another illustration arises in the criminal context. A prosecutor and defense attorney jointly asked for a sentence reduction for an offender

65. Cardozo Professor of Law at St. John's University School of Law. Professor Tamanaha is also the author of *ON THE RULE OF LAW* (2004), *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (2001), and *REALISTIC SOCIO-LEGAL THEORY* (1997). He is a frequent contributor to and associate editor of *Law and Society Review*.

66. Tamanaha's definition of the Rule of Law is slightly different than that used here. He contends, based upon historical legal theory, that law necessarily should direct itself to the public good. I agree with his critic, Ofer Raban, that in our pluralistic society we rarely agree on what the "public good" is. See Raban, *supra* note 26, at 482-83. Dr. Raban is an Assistant Professor of Law at the University of Oregon.

67. Building on his earlier book *On the Rule of Law*, Tamanaha observes that through the close of the 19th Century the law had generally been regarded as having an immanent, or objective quality:

"A few centuries ago . . . law was widely understood to possess a necessary content and integrity that was, in some sense, given or predetermined. Law was the right ordering of society binding on all. Law was not entirely subject to our individual or group whims or will. There were several versions of this. Law was thought to consist of rules or principles immanent within the customs or culture of the society, or of God-given principles disclosed by revelation or discoverable through the application of reason, or of principles dictated by human nature, or of the logically necessary requirement of objective legal concepts."

TAMANAHA, *supra* note 4, at 1; see also G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* (3d ed. 2007) (tracing the development of the American legal tradition through biographical commentary on jurists such as Marshall, Holmes, and Burger).

who had been convicted of defrauding a number of victims. The law accorded the victims the opportunity to speak at sentencing and required the court to consider their comments in imposing sentence. Modification of the sentence could be made only within a short, specified period following its issuance, and the period could not be extended. The period had passed before the request for reduction, and no notice had been given to the victims of the parties' request. At the hearing, the attorneys acknowledged that the allowed time had expired and no further extension could be granted, but nevertheless they argued for the reduction. Their argument was that neither the deadline nor the absence of victim input mattered because they had agreed on the sentence . . . and by the way, because they had agreed, no one would appeal the reduction. This argument is what I call a "winky-wink" argument. It essentially is that the law does not matter if we agree that it does not.

Similar arguments are made in civil cases as well, but in ordinary civil litigation parties have much more freedom to craft solutions to their problems. This is limited in some arenas, however, where settlements must meet statutory requirements. For example, in a bankruptcy case, a debtor-in-possession and major creditors proposed a plan of reorganization that suited them, but it did not conform to the statutory requirements that required notice to and the consent of other creditors. They were angry that the judge would not approve it.

Another example of the effect of this narrowing of focus occurs when attorneys invite judges and juries to ignore the law. I call these "invitations to activism." In civil jury trials, attorneys purposely attempt to stir up emotional responses in jurors even though the jurors are instructed not to base their decision on "sympathy or prejudice." Or counsel argue about the "equities" in the case and try to paint one party as the "good guy" and another as the "bad guy," thereby asking for a moral rather than a legal assessment. Sometimes attorneys ask judges and juries to "send messages" or to correct bad laws. They make speeches in the courtroom and on the steps to the courthouse that they hope will make the evening news. They argue the merits of the result their client wants rather than about how the law should apply. This happens so often that I now routinely remind parties to administrative appeals that I will not be evaluating the wisdom of the underlying determination, only the process by which it was obtained. In other opinions, to avoid misunderstanding, I often begin with a paragraph describing what issues the Court is *not* deciding.

The effect of a narrow focus is not limited to practicing attorneys, however. It can become the source of uncivil comments among jurists and arrogance among legislators. Some years ago, I was introduced to a U.S. Senator from another state. He was an attorney and a member of the Senate Judiciary Committee. During the conversation we discussed how legislators determined which statutes needed revision or correction.

I explained that the Senators of my state had asked me to send copies of opinions in which I found a statutory ambiguity, where the statute was inconsistent with other law or where legislative intent was unclear. The Senator with whom I was talking was obviously puzzled. As he stated, “Why would anyone bother with what a judge says—lobbyists will tell me whenever a law needs revision.”

A second narrowing in focus that Tamanaha points out grows out of the size and diversity within the legal profession. We have become balkanized. During the 18th, 19th and early 20th Centuries, in the course of their professional lives, leaders in the legal profession often performed multiple roles, such as practicing attorney, legislator, administrator, judge, and law professor.⁶⁸ Such lawyers brought not only diverse experiences to each new role; they maintained contact and conversation with colleagues in disciplines left behind. This allowed members of the profession to communicate values and ideas outside of a particular job or endeavor.

In comparison, modern membership in the legal profession is more diverse and widespread, but we are also more divided. We distinguish ourselves by function—academics, practicing lawyers, government lawyers and the judiciary. Then within these functions, we have specialties—for academics it may be by school or area of interest, for practitioners it may be by firm and practice specialty, and among judges it may be by type of court where one serves.⁶⁹ In addition, there are a multitude of national, state, local and specialty bar associations and groups,⁷⁰ each of which has its own purpose and objectives.⁷¹ Although lawyers may

68. Indeed, one only has to reflect upon legal legends to recall their various roles—Jefferson, Madison, Hamilton, Marshall, Kent, Storey, Shaw, Lincoln, Taney, Harlan, Holmes, Hand, Cardozo, Frankfurter, Taft and Pound, to name just a few. These lawyers had the benefit of legal experience gained from different vantage points and maintained contacts (and communication) with those active in the differing facets of the profession.

69. Indeed, I recall one judge who would not associate with or refer to judges on other courts as “colleagues.”

70. National legal associations include the American Bar Association (www.abanet.org) and the Federal Bar Association (www.fedbar.org). Prominent state groups include the Colorado Bar Association (www.cobar.org) and the Colorado Criminal Defense Bar (www.ccdb.org). At the local level, groups include the Arapahoe County Bar Association (www.cobar.org/index.cfm/ID/20089/ARAP/Arapahoe-County), the Denver Bar Association (www.denbar.org), and the Boulder County Bar Association (www.boulder-bar.org). Finally, influential specialty groups include the American Constitution Society (www.americanconstitutionalsociety.org), the Federalist Society (www.fed-soc.org), the American Association for Justice (www.justice.org), and The Faculty of Federal Advocates (www.facultyfederaladvocates.org).

71. For example, Judge Richard A. Posner comments on the change of the relationship of law schools and professors to the practicing bar in his tribute to Bernard D. Meltzer. Richard A. Posner, *In Memoriam, Bernard D. Meltzer (1914-2007)*, 74 U. CHI. L. REV. 435, 435 (2007). He contends that due to the absorption of law schools into universities, they have adopted a more academic focus, seeking to perpetuate their reputation in academic circles rather than to prepare graduates to practice law. See *id.* at 436. The contemporary refrain is, “We teach you law, not how to be a lawyer”. This is one of the primary criticisms of law schools articulated by the Carnegie Foundation in *EDUCATING LAWYERS*, *supra* note 1, at 24.

belong to a number of organizations or engage in more than one activity, there are few who share a holistic view of the profession with all of its component parts. The narrowing of our viewpoint as lawyers either to a client's objectives or to a particular practical, political or personal viewpoint has the potential of blinding us to a larger perspective. We focus on what we do, not how it contributes or detracts from the public's overall confidence in legal institutions and legal processes. Our single minded focus thus fuels the Cycle of Cynicism.

Since the fundamental tenet of the Rule of Law is that no man is above it and that the law applies equally to all, no one, even the government can ignore it, manipulate it or violate it without consequence. It follows that if the law can be bought, sold, manipulated, violated or ignored by anyone, then that person is above the law. The fear that people regularly violate the Rule of Law is at the core of the Cycle of Cynicism. This is why the public rails at incidents of public or private corruption, despises judges who apply their personal viewpoints rather than the law, fears that money buys judicial outcomes, and resents outcomes based upon manipulation of the law it calls "legal technicalities." This is why the public disapproves of policies (and presidents) that authorize actions, such as torture, based on what is characterized as a highly technical legal analysis, or locate detention centers outside the United States in order to avoid application of United States law. This is also why people laugh at jokes in which lawyers attempt to take advantage of the law for personal benefit, but are ultimately held accountable under it.⁷²

If the public sees the law as simply a collection of meaningless expressions that can be violated with impunity, be manipulated or controlled by a few, or be changed outside authorized processes, they may well conclude that the law will not protect them from anyone or anything. As a result, they may understandably reason that there is no need to follow the law, and to the contrary, that they are entitled to violate it in order to protect themselves and their interests. This is the mentality that is common in groups estranged from society (e.g., gangs and criminal populations) and in societies without legal structure. One response to

72. This joke, or versions of it, is an old stand-by. It apparently originated sometime during the 1960's and even became a Brad Paisley song.

A lawyer purchased a box of very rare and expensive cigars, then insured them against loss by fire. Within a month, he had smoked the entire stockpile of the great cigars, and without having made even the first insurance premium payment, he submitted a claim for their loss. The insurance company denied the claim, and the lawyer sued, alleging that the cigars were lost in a series of small fires. The court found the claim frivolous, but nevertheless enforced the insurance contract against its drafter, the insurance company. To avoid costs on appeal, the insurance company paid \$15,000 for the cigars.

After the lawyer cashed the check, the insurance company complained to the district attorney. The district attorney charged 24 counts of arson. With his insurance claim and his own testimony from the civil case as admissions, the attorney was convicted of intentionally burning the insured property and was sentenced to 24 months in jail and a \$24,000 fine.

widespread lawbreaking is authoritarian control. Locke long ago identified the ultimate risk, "Without law, there is tyranny."

I do not mean to suggest that American society is about to fall off the precipice into anarchy nor that we are about to surrender our liberties to dictatorial control, but because American society is unique in its belief in and dependence upon the Rule of Law, the stability of American society is particularly vulnerable to loss of public confidence in the law and legal institutions. If we do not find ways to reverse the Cycle of Cynicism and restore confidence in legal institutions and the Rule of Law, the cohesiveness of our society and the protection of our individual rights are in jeopardy.

Although lawyers do not control the future, individually and collectively they can wield significant power in influencing it. Reversal of the Cycle of Cynicism may well depend on us. The antidote to cynicism is belief. If lawyers do not believe in and demonstrate a commitment to the Rule of Law and the legal institutions that implement it, there is little reason for the public to do so.

This prompts fundamental questions about the ethos of the legal profession: What do lawyers believe in? What are they committed to?

III. LEGAL ETHOS FOR THE 21ST CENTURY

A. *What is a professional ethos?*

In thinking about ethos, it is first helpful to define it. *Ethos* is a belief or collection of beliefs, or ideas or attitudes that guide a person, group or institution.⁷³ Ethos is not a childlike belief in something magical. Ethos, instead, is a dedication or commitment to a belief or value. Ethos is not the same as *ethics*. Ethics are rules for conduct; they regulate behavior.⁷⁴ Ethics implement ethos. *Put differently, ethos is the "why" we do what we do; ethics is the "what" or "how" we do it.*

Ethos is relatively easy to define for a cohesive group that has formed around a set of beliefs or values. The ethos of this type of group often is articulated in a "statement of belief" or a mission statement.⁷⁵

73. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 429 (11th ed. 2003), available at <http://www.merriam-webster.com>.

74. Ethics is defined as "the principles of conduct governing an individual or a group." *Id.*

75. Churches, schools and associations often have statements of belief. See, e.g., The Church of the Nazarene: Agreed Statement of Belief (2008), <http://www.nazarene.org/ministries/administration/visitorcenter/beliefs/display.aspx>; The College Board, Connecting Students to College Success, <http://www.collegeboard.com/about/index.html> (last visited Apr. 10, 2009); Ottawa-Glandorf Rotary Club, Mission Statement of the Ottawa Glandorf Rotary Club, <http://www.ogrotary.org> (last visited Apr. 10, 2009) ("Gather and unite a group of men and women who have a core belief in the motto "SERVICE ABOVE SELF" who are willing to contribute their time, talent and treasure to that belief under the banner of Rotary International to serve mankind with projects that are International, National and Local in scope and to become the premier service club in our county.").

The legal profession has neither because we are associated primarily by our education and by what we do. For example, we do not meet periodically as a whole or share a common uniform, song, handshake, motto or creed. As a consequence, identifying common beliefs or values among lawyers is difficult.

In discerning whether we have an ethos and what it might be, it is helpful to look at other learned professions—medicine, the clergy, and education. In each of these, there are arguably two types of commitments or devotions. The first is to a particular beneficiary—patient, penitent, or student. The second is to a value or ideal that transcends and benefits both the professional and the beneficiary. The transcendent value is like an umbrella—it covers, animates and gives meaning to all of the professional's actions. In medicine, the commitment is to Health, with the clergy it is to God, and in teaching it is to Knowledge.

By logical extension, one might expect the legal profession also to have dual devotions—one to the client and one to a transcendent value. The obligation to the client is generally accepted, and indeed, we seem to perform that obligation admirably. But unfortunately, for the legal profession there is no clearly recognized and commonly accepted devotion to a transcendent value or belief.⁷⁶

In searching for some articulation of a transcendent value, one might look to the lawyers' oath or to ethical standards. But neither clearly identifies nor requires dedication to a transcendent value. The wording of the lawyer's oath varies from jurisdiction to jurisdiction. In most oaths, lawyers promise to *do* certain things, like uphold the Constitution and to adhere to professional standards, but the oath does not state *why* the lawyer should do this.⁷⁷ In other words, the oath does not profess

76. This is what, arguably, gives rise to the criticism that the legal profession is just a business. See discussion *supra* Part II.C.

77. See for example the Lawyers Oath in Colorado and in South Carolina. The oath for attorneys in Colorado reads:

I will support the Constitution of the United States and the Constitution of the State of Colorado; I will maintain the respect due to Courts and judicial officers; I will employ only such means as are consistent with truth and honor; I will treat all persons whom I encounter through my practice of law with fairness, courtesy, respect and honesty; I will use my knowledge of the law for the betterment of society and the improvement of the legal system; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed; I will at all times faithfully and diligently adhere to the Colorado Rules of Professional Conduct.

COLO. BAR ASS'N, COLO. ATT'Y OATH OF ADMISSION, <http://www.cobar.org/index.cfm/ID/1653/CETH/Colorado-Attorney-Oath-of-Admission/> (last visited Apr. 10, 2009). The Oath for attorneys in South Carolina reads:

I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been appointed, and that I will, to the best of my ability, discharge those duties and will preserve, protect and defend the Constitution of this State and of the United States; I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them; To my clients, I pledge faithfulness, competence, diligence, good judge-

commitment to a transcendent value; it simply acts as a laundry list of "should'a, ought'a and haft'as". The words state what we promise to do, but they do not profess a commitment to any particular value. As a consequence, they are empty. They fail to give our work meaning or to inspire us to reach beyond the specifics listed.

The same is true for Codes of Professional Responsibility or Ethical Canons. They set out standards for behavior. Arguably, they articulate the professional commitment to the client, but they do not contain any statement or profession of a transcendent value. They do not set forth a rationale for *why* we should act in a particular way.

Law students readily recognize this. In law school, ethics is most often taught as a required doctrinal class. In studying the ethical rules, students use the same analytical skills that they would use for courses such as torts and contracts.⁷⁸ Ethics is simply the law that governs lawyering.⁷⁹

This view continues among lawyers in practice. We comply with ethical rules as minimal standards and satisfy continuing legal education requirements for periodic ethical instruction. But if we were asked what we as lawyers believe in or are committed to, most of us would not know what to say.

Identification of a professional ethos might be found in traditions or admonitions of professional associations. But unfortunately, neither reflects a clear statement of any transcendent value nor a commonly held commitment to it. Prior to the twentieth century, there was no written

ment and prompt communication; To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications; I will not pursue or maintain any suit or proceeding which appears to me to be unjust nor maintain any defenses except those I believe to be honestly debatable under the law of the land, but this obligation shall not prevent me from defending a person charged with a crime; I will employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party, the judge or jury by a false statement of fact or law; I will respect and preserve inviolate the confidences of my clients, and will accept no compensation in connection with a client's business except from the client or with the client's knowledge and approval; I will maintain the dignity of the legal system and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will assist the defenseless or oppressed by ensuring that justice is available to all citizens and will not delay any person's cause for profit or malice.

RULE 402(K), SCACR.

78. As Karl Llewellyn, a noted legal educator, long ago observed, students are taught to "knock your ethics into temporary anesthesia . . . You are to acquire the ability to think precisely, to analyze coldly . . . to see, and see only, and manipulate the machinery of the law." KARL LEWELLYN, *BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 116 (1985).

79. EDUCATING LAWYERS, *supra* note 1, at 24, 28 (contending that this form of instruction misses an important dimension that is necessary for professional development—the social and moral context for the lawyer's work).

code of conduct for lawyers. Lawyers learned the law and their role in society largely from mentors as they “read the law” or worked as apprentices. Despite public criticism, generally, the lawyer was expected to act much like a statesman, relying upon his own judgments as to morality, justice and public good.⁸⁰ Like the concept of *noblesse oblige*,⁸¹ however, his obligation may have been as much the product of his socioeconomic status as of any professional objective.

When law schools were created, a more formal statement of lawyers’ obligations was required. The first professional code, the 1908 Professional Canons, contained some aspirational language. It stated that the lawyer “advances the honor of the profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law.”

As of 1969, attorneys were encouraged to “point out those factors which may lead to a decision that is morally just as well as legally permissible.”⁸² But in the early 1980s, this standard was significantly relaxed following a period of debate about the relative importance of the attorney’s obligation to clients versus his/her obligation as an officer of the court. In 1982, the ABA rejected the Kutak Commission’s proposal that an attorney’s duty of confidentiality abate in order to 1) rectify a client’s criminal or fraudulent act or 2) comply with the law. Though not necessarily significant in substance, the rejection of these suggestions signaled a philosophical shift more firmly toward the interests of the client and away from any devotion to any larger interest.⁸³

Now the Model Rules state that, “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and public citizen having special responsibility for the quality of justice.”⁸⁴ This statement hints at a transcendent value, but it does not expressly identify it. It appears to build off of the 1986 ABA Commission on Lawyer Professionalism’s statement that the profession has a “devo-

80. See Robert Gordon, *The Independence of Lawyers*, in *LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE* 66 (Susan Carle ed., 2005); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, in *LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE* 53 (Susan Carle ed., 2005); Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, in *LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE* 61-62 (Susan Carle ed., 2005); see also *ABA CANONS OF PROF’L ETHICS*, CANON 32 (1908), available at http://www.abanet.org/cpr/mrpc/Canons_Ethics.pdf.

81. See David Luban, *The Noblesse Oblige Tradition in Practice of Law*, 41 *VAND. L. REV.* 717, 723-24 (1988).

82. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-8 (1969) (amended 1980).

83. Since 1983, lawyers have been authorized to refer to moral, economic, social and political factors that are relevant to client’s situation, but are under no obligation to do so. MODEL RULES OF PROF’L CONDUCT, R. 2.1 (1983).

84. MODEL RULES OF PROF’L CONDUCT, Preamble (1983).

tion to serving both the client's interest and the public good"⁸⁵ and the 1996 report of the ABA Section of Legal Education and Admissions to the Bar that suggested that lawyers share "a common calling to promote justice and public good."⁸⁶ The problem with the terms "public good" and "promoting justice" is that neither have a precise meaning. Both terms are amorphous, abstract and subject to a variety of subjective definitions. As Tamanaha points out, serving the "public good" and "promoting justice" too often is a rationalization for otherwise satisfying the client's objectives.

Over the years, bar leaders have repeatedly called for greater professionalism,⁸⁷ but the word "professionalism" is equally vague and undefined. Specific admonishments that attorneys be more "civil" in their dealings with each other, engage in public service such as pro bono representation, and to remember that they are "officers of the court" and "handmaidens of the law" also fail to identify a professional ethos. They do not articulate any belief or value to which we, as lawyers, are committed; they don't inspire us because they don't tell us *why* we should behave or not behave in a particular manner. They are, at best, prescriptions for good conduct—to be civil, honest and reliable, and do good deeds without compensation. But they do not unite us in a common belief or commitment to something greater than ourselves. Therefore, we continue in diverse directions without a common purpose. For example, transactional lawyers reject the admonition that they act as "officers of the court" because they do not go to court, and government lawyers contend that, as public employees by definition, whatever they do is for public good.

There is no doubt that there are many lawyers who have personal guiding beliefs, who aspire to higher standards than those required for licensing and who may even view the law as a calling. But such values are not shared across the profession. Indeed, to the contrary, as a profession we seem to have only one consistently understood loyalty—to the client. This means that we are obligated to do what our clients desire, restricted only in that we cannot violate the law or our rules of ethics. And by logical extension, lawyers who have no clients—law professors and judges—arguably share no commitment with the remainder of the

85. COMM'N ON PROFESSIONALISM, AM. BAR ASS'N, "...IN THE SPIRIT OF PUBLIC SERVICE:" A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10 (1986), available at http://www.abanet.org/cpr/professionalism/Stanley_Commission_Report.pdf.

86. PROFESSIONALISM COMM., *Teaching and Learning Professionalism*, 1996 A.B.A. SEC. LEGAL EDUC. & ADMISSION TO THE BAR 6.

87. See, e.g., ABA CANONS OF PROF'L ETHICS, CANON 15 (1908), available at http://www.abanet.org/cpr/mrpc/Canons_Ethics.pdf ("nothing . . . fosters popular prejudice against lawyers as a class . . . [as much as the view that it is] the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause."); see also Peter W. Meldrim, *Address of the President*, 38th Conf. Ann. Rep. A.B.A. 313, 323 (1915) ("Law is a profession, not a trade, and success in it consists in more than money getting."); COMM'N ON PROFESSIONALISM, *supra* note 85, at 3.

profession. This helps explain the vastly different views of the role and value of law among the different sects of the profession.

It also helps explain lawyer dissatisfaction. Absent a philosophy that gives broad meaning and importance to the law, it is difficult for attorneys to have a sense of professional identity, any aspirational standard to guide judgment and behavior, or to find meaning in work that does not fully achieve a client's objectives. There is no common belief to facilitate cooperation or collaboration, and there is no counterweight to clients' subjective demands—other than pleasing a client or receiving a fee, there seems to be no value in what we do.

Recognizing that we lack a transcendent professional ethos helps explain both professional dissatisfaction and its role in the Cycle of Cynicism. A singular devotion to the interest of clients both deprives lawyers of professional purpose and eats away at public confidence in legal institutions and the Rule of Law. Lincoln recognized more than 175 years ago that “reverence for the laws” is indispensable to preservation of our civic liberties.⁸⁸ If lawyers—who are the most familiar with the law—do not revere it, why should the rest of society?

B. The need for a transcendent ethos—dedication to the Rule of Law

What can act as an antidote to the Cycle of Cynicism? Like Tamana, I do not believe that we can return to values of yesteryear as a remedy. We no longer operate under notions of “natural law,” for we have participated in making our own law for almost 250 years. We are a pluralistic society with wide diversity in individual beliefs and values, and in fostering social equality we have become more relativistic in our judgments of differing views. Given such pluralism, it is not workable to suggest that lawyers counsel clients as to the morality of their objectives. Admonitions to lawyers to be more civil, honest and to perform public service have not meaningfully affected the Cycle of Cynicism, and there is no indication that more rules of professional conduct will do so. The problems of the twenty-first century are new ones, or new versions of old ones. They demand a contemporary allegiance that is infused with the energy of our nation's core beliefs.

It is not workable to suggest that lawyers pledge allegiance to “the Law” or “to legal institutions” even though we hope that the public will have confidence in them. Reference to “the Law” in the abstract has no meaning. And with regard to specific laws, few would agree with every one. Indeed, many would debate not only the content of a particular law, but also whether any law is necessary in the first place.

88. See Harrison Sheppard, *American Principles & the Evolving Ethos of American Legal Practice*, 28 *LOY. U. CHI. L.J.* 237, 238 (1996) (citing Abraham Lincoln, *The Perpetuation of Our Political Institutions: Address before the Young Men's Lyceum at Springfield, Illinois January 27, 1838*, in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 76, 80-81 (Roy P. Basler ed. 1946)).

What is needed, I suggest, is something more profound: a profession of our dedication to a transcendent value that grounds us all as lawyers, and that both benefits society and counterbalances the subjectivity of any client's wishes. Our ethos should reflect our core national values and the intrinsic paradox on which our country was founded—namely, that people enjoy maximum freedom only when they create the law and are equally constrained by it. Our profession should articulate the value of, and commit our efforts to, supporting and preserving the Rule of Law.

C. Critical Conversations

One might ask what dedication to the Rule of Law would look like. How would it play out? What effect would it have? These are all good questions for which there are no certain answers. To address these questions, we need to have a series of thoughtful and critical conversations that involve all members and segments of the legal profession. If we are willing to engage in professional introspection through such conversations, we may be able to reverse the Cycle of Cynicism.

1. Profession-wide Conversations

The first and most important conversations should involve all segments of the profession—law professors, practicing attorneys, judges, law students and legislators—because each brings a unique perspective to the questions of what the Rule of Law is and how a commitment to it changes our behavior.

Some lawyers may have had little exposure to the history of jurisprudence or legal tradition in law school, and most probably have had little time or energy to devote to it since graduation. It is now time to study, reflect, and discuss. Bar associations, Inns of Court, law schools, judicial conferences, attorney continuing legal education classes, firm retreats and discussion groups can focus our attention, provide resources, inspire us to reflect privately and provide opportunities for conversation. We can invite speakers, spark debate, and challenge old ways of thinking and acting.

There is abundant information available on the subject. As is apparent from the references in this article, legal academics have thought and written extensively about the legal, political, historical and sociological implications of the Rule of Law. They are best equipped to offer perspectives as to where our notions of law come from, different understandings of the nature of law, and the effects of the limitation or extension of law on society.

Practitioners add the perspective of lawyers and clients in the “real world.” How does a lawyer translate abstract notions of the Rule of Law into concrete application? How does a belief in the Rule of Law intersect with the duty to the client? What obligation should an attorney have

to counsel a client as to the law's limitations? How does a lawyer explain to a client that it is in the client's best interest to adhere to the law?

Judges bring a third perspective to the conversation. As many observe, they are the personification of the law and are therefore critical in supporting the Rule of Law. They bring knowledge of the interplay between law and conflicting objectives in the courtroom, and what behaviors undermine or support confidence in the legal process. They can address the benefits that come from focusing upon the applicable law in a litigation context—easier narrowing of disputes, speedier and less costly resolution of conflicts and greater predictability in outcome.

Law students offer observations both as to how they can best learn about legal tradition and what relevance it has to the world as they see it. Involving them in the conversation helps them form a professional identity and equips them to apply lessons from legal history to challenges of the future. They will be the standard-bearers of the profession in the future. It is critical that they understand the vital role that they will play in American society.

Finally, legislators bring knowledge to both the process of making law and the forces that motivate change in the law. Their commitment to creating laws in a transparent fashion and to writing laws that can be applied uniformly and are perceived to benefit society as a whole go a long way toward inspiring confidence in the Rule of Law.

Each sector can learn from the others. If all share a commitment to the Rule of Law, then there can be common ground upon which further communication and trust can build. Judges might more carefully articulate the law and how it applies and might be more trusting of lawyers' motivations. Lawyers might advise clients differently or vary their approaches in litigation and outside it. Academics, legislators and practicing attorneys might see judicial decisions in a less contentious and less political light. From these conversations, others may grow.

2. Conversations within law schools

Educating Lawyers contends that law students form their views of the legal profession and their professional identity during law school. It advocates teaching doctrine and professional values in an integrated fashion.

Imagine a conversation among law faculty who have varying interests and expertise, but who are all committed to creating a curriculum that remedies the insufficiency of civics education at primary, secondary and undergraduate levels and produces a graduate who is conversant with the history of legal thought and tradition as well as substantive law. Imagine a coordinated curriculum that weaves professional values into every substantive course and demonstrates that codified ethical standards are the natural outgrowth of professional values.

Imagine graduates who believe that, in addition to earning an income, being a lawyer adds value to society. Imagine that their idealism lasts longer than their first job. Imagine that they find satisfaction in their work, and that they can educate their clients, neighbors, friends and children. They have the best chance of unwinding the Cycle of Cynicism.

3. Conversations among jurists

One of the greatest fears about the judiciary is that it will exercise unbridled power. Imagine a conversation among judges who are committed to the belief that no person, even a judge, is above the law. They might talk about how to better explain the law, demonstrate its application, or make processes more transparent, accessible and efficient. They might try to simplify procedures and make the application of rules and law more consistent. They might work harder to screen out their own biases and be more "fair and impartial." They might be more hesitant to play Solomon and "do justice" or tailor a legal outcome to match a personal predisposition. Instead, they might more rigorously follow the law, and should it yield an outcome that they believe is unjust, they might be both humble and courageous in saying so, but leave changes of the law to the people who created it in the first place.

4. Conversations among lawyers and judges in litigation

All too often lawyers and judges see each other only as opponents. Lawyers consider judges and the law to be impediments to desired outcomes and opposing counsel as enemies. Judges see lawyers as combatants who simply want to win at any cost or who act only to maximize their revenues.

Imagine a conversation among counsel early in the case during which they discuss what law applies to the controversy at hand. Imagine them agreeing as to what law applies, and if so, whether the dispute is one of interpretation of law or of a factual nature. If the lawyers do not agree on the applicable law or upon its interpretation, imagine that they then ask the judge to resolve this dispute, each offering his/her interpretation and research. Imagine that the judge also engages in legal research and provides it to counsel for comment. As to the framing of legal issues, litigation would then more closely resemble an intellectual explora-

tion,⁸⁹ with both counsel and the judge seeking to apply the correct law, rather than the lawyers focusing solely on a desired outcome.⁹⁰

5. Conversations with clients⁹¹

As noted earlier, lawyers are often faced with clients whose objectives are not consistent with the law or whose expectations of how the law will apply are unrealistic. That is due, in part, to human nature. On an abstract level, as part of society at large, most of us endorse the law because it provides order and stability. But we do not want to follow it if it is inconsistent with our present personal interest. Thus, lawyers who have a dual devotion to the client and the Rule of Law would be presented with a conflict, but also an opportunity. Imagine lawyers who are able to explain this conflict as well as the way the clients' interests and society's interest converge.

An example of this type of conversation is as follows. A client wants to obtain investors for a business endeavor through a public or private offering. The law requires that in doing so, he must disclose a prior criminal conviction. The client does not want to do so for the practical reason that he fears that this might chill investor interest, and he rationalizes this by correctly noting that the conviction was long ago, was the result of bad legal advice and has nothing to do with either this business or his honesty and reliability. (This is a version of "the law shouldn't apply to me.")

The lawyer who has no devotion to the Rule of Law might simply advise the client as to the applicable law and consequences of not complying and leave it to the client to decide whether to disclose or not. But the lawyer who also seeks to serve the Rule of Law might take a different

89. In my experience, this happens more frequently in controversies in specialty areas of the law, for example criminal, tax, patent or bankruptcy litigation. The civility in these specialty areas has often been attributed to the small size of the Bar and the fact that practitioners deal with each other repeatedly. That may be so, in addition, I think it is due to uniform familiarity with the law of the specialty and the common ground that it creates.

90. This would be something wholly different from the process described by Roscoe Pound in 1906: "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 the law. Hence comes in large sense the modern America race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witnesses 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 the law, are made agents and abettors of lawlessness." Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29th Conf. Pt. 1 Annu. Rep. A.B.A. 395, 406 (1906), reprinted in *LANDMARKS OF LAW* 180, 187 (Roy D. Henson ed., 1960).

91. These conversations also can become conversations within law firms. When new or inexperienced attorneys have questions or seek advice from more experienced lawyers, the conversations often impart values as well as information. Imagine the difference between a conversation that conveys the message that the new lawyer should do everything possible to satisfy the client and one in which the new lawyer is encouraged to research the law and explain it as accurately as possible to the client. The latter case includes an opportunity for the less experienced lawyer to develop a dedication to the Rule of Law as well as to serve the client, as the more skilled and experienced lawyer has already learned to do.

approach by explaining to the client that if no disclosure is made, and the deal works out as anticipated, then the non-disclosure will never be a problem. But that if the business is not successful and the investors become unhappy they may sue and learn of the non-disclosure. In that event, the law will not protect the client because the client did not adhere to the law. Thus the law, as inconvenient as it is, ultimately protects the client.

The difference here is not necessarily in the outcome—the client may still decide not to disclose—but in the explanation. No moral lesson is offered in the latter case, simply a statement and demonstration of the effect and purpose of the Rule of Law.

Another example arises in a litigation context. The lawyer seeks to prepare the client for the courtroom process and the potential of an adverse outcome. If the lawyer is not concerned with the Rule of Law or the need for public confidence in legal process, she might talk only about the people who will be making the decision. “Judge Smith likes little old ladies and doesn’t like smart alecks,” or “The jury favors whoever it thinks is the underdog.” Or to get the best jury, “let’s employ a jury consultant who will be able to tell us which jurors are likely to like you.” While there might be merit to these observations, the implicit message is that outcome will turn on personal predilections of the fact-finder, rather than application of the law.

Imagine a different conversation with the same purpose—to help the client have reasonable expectations. Instead of the focusing on the personal predilections or preferences of the judge or jury, the lawyer emphasizes the law and how it must be applied. For example, “The law requires the judge/jury to carefully consider a number of factors or circumstances, including how old the parties are and how much experience or knowledge they have. This is because the judge/jury has to craft an outcome that is particular to the facts of the case. Although we can expect that the judge/jury will follow the law, we can’t guess exactly how the judge/jury might evaluate each factor, so I can’t guarantee an outcome.” The difference here is that the client is told that the legal process will be followed even though the outcome is uncertain. In addition, both winner and loser can walk away from the process believing that it was the law that was applied to the facts at hand; it was not a personal judgment as to the party’s worth. This reaffirms the predictability and steadfastness of the law, rather than the capriciousness and unfairness of the legal system.

IV. CONCLUSION

Law is the mortar that holds American society together and the paradox of the Rule of Law is at the heart of our nation’s promise of liberty and opportunity. Due to the intrinsic role law plays in American society, the beliefs of lawyers about the law and legal institutions *matter*. To

reverse the Cycle of Cynicism and to preserve the Rule of Law in the twenty-first century, members of the legal profession must engage in a careful reflection upon our role in society. At the core of this introspection we must decide—are we, individually and as a profession, committed to the Rule of Law? If so, how do we profess and demonstrate that commitment? I invite you to ponder these questions and to continue this conversation—the future of our profession and American society may well depend on it.

