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A Millennial Renewal of the "Spirit of the Bar"

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A Millennial Renewal of the "Spirit of the Bar"[1]

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The millennial horizon conjures up a momentous opportunity for reflection about the legal profession and legal education in their continuum[2] and partnership in the service of society. The challenges and unknowns facing the legal community and its public institutions, principally the courts, the bar, and the law schools, appear mistily in the crystal ball, but with ever-sharpening focus. A special goal for lawyers at this time should be the quest for a renewal and a reconnection among the academic, clinical, practical, and problem-solving segments of the profession of the law.

One way to approach this quest is to ask not what the millennium holds *for* the legal profession, but rather what society expects *from* the legal profession. If the pursuit of an answer turns outward instead of inward, the rough waves from cynical poll takers may abate.

As the end of the twentieth century approaches, an awkward Atticus Finch-like nostalgia,[3] reverberating through and about this illustrious profession, may distract us from the positivistic reform march forward. As commentators take historical stock of the last ninety-five years, they may lose sight of the fact that things were not quite as rosy as they are often selectively remembered. Reaching back needs to be thorough, and coupled with realistic stretching ahead.

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1. BENJAMIN N. CARDOZO, *Our Lady of the Common Law*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 97 (Margaret E. Hall ed., 1947); see *infra* text accompanying note 23 for the full text of the quotation.

* Judge, New York State Court of Appeals. This essay draws on Judge Bellacosa's remarks at the Conclave of the Pennsylvania Bar Association's Task Force on the Changing Face of Legal Education, Harrisburg, PA, (Nov. 10-11, 1995).

2. *See* AMERICAN BAR ASS'N TASK FORCE ON LAW SCH. AND THE PROFESSION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) (hereinafter MACCRATE REPORT).

3. *See* HARPER LEE, TO KILL A MOCKINGBIRD (1960).

A spate of books,[4] articles,[5] and symposia[6] have emerged at this turning point, and will continue to spark constructive debate and discussion. The public disputations, some even exposés, are robust, useful, important, and thought-provoking. Not to be underestimated in this age of sound bites, however, is the difficulty of offsetting some of the dispiriting jeremiads and despairing rhetorical flair of titles, themes, and semantics.

We can all agree that problems abound in the legal profession, and their interplay in the professions, government, sociology, ethics, economics, finances, and in the desire for gainful and meaningful employment seem to confound or defy solutions. The context and battleground somehow seem different today from previous decades. Yet this is *our* moment, *our* time, *our* culture, *our* set of problems, and *our* program for reform, for better or for worse. In this respect, we all suffer from a bit of personal and professional parochialism and from an increasing paralysis. The field of vision is riveted on the mirror dead ahead and misses the peripheral frames and range.

Learning from history is important in and of itself. Pining away wistfully for the way things might have been, however, will not reform attitudes, nor will it reform the way lawyers learn law, practice it, or serve people. The challenges are daunting in a bustling, rambunctious, open society; solutions must be creatively fashioned, tested, and recalibrated from time to time based on history, well-sorted empirical data, cultural adaptations, and sound judgment.

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4. *E.g.*, WILLIAM GADDIS, A FROLIC OF HIS OWN (1994); MARY ANN GLENDON, A NATION UNDER LAWYERS (1994); JONATHAN HARR, A CIVIL ACTION (1995); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE (1994); ANTHONY T. KRONMAN, THE LOST LAWYER (1993); SOL M. LINOWITZ & MARTIN MAYER, THE BETRAYED PROFESSION (1994).

5. *E.g.*, Roger Parloff, *For the Record: Dean Anthony Kronman*, AM. LAW., Jan.-Feb. 1996, at 84; Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85 (1994); Rob Atkinson, *How the Butler Was Made To Do It: The Perverted Professionalism of* The Remains of the Day, 105 YALE L.J. 177 (1995).

6. *E.g.*, *Centennial Symposium: Legal Practice at the End of the Twentieth Century*, 100 DICK. L. REV. 477 (1996); *Fifteenth Annual Phillip A. Hart Symposium: Legal Ethics for the Twenty-First Century*, 9 GEO. J. LEGAL ETHICS 1 (1995); David R. Gienapp, *Issues Facing the Legal Profession as the Profession Prepares To Enter the Twenty-First Century*, 40 S.D. L. REV. 207 (1995) (introduction to symposium on ethics and the legal profession); *Symposium: Then, Now and into the Future: A Century of Legal Conflict and Development*, 28 IND. L. REV. 135 (1995).

I have selected a set of queries found in Professor Mary Ann Glendon's *A Nation Under Lawyers*, because I sense that they offer a particularly trenchant triple launch pad. She asks:

> To what extent will future Americans be able to count on *practitioners* to subordinate self-interest to client representation and public service? On *judges* to resist the temptation to be wiser and fairer than the laws enacted by their fellow citizens? On *legal educators* to promote those upright habits and attitudes along with an array of useful problem-solving skills?
>
> What influence do the new ways of lawyers have on the ideas, habits, and manners of their fellow citizens? Is the adversarial culture of real and fictional litigators even now "working in secret" to transform the "body social"?[7]

How can we understand better, perform more wisely and efficiently, and allocate more fairly lawyers' roles in society? Despite caricatured images, I remain confident that lawyers can make a substantial difference, through the fulfillment of professional responsibilities to individuals and old-fashioned community involvement. The benefits of the synergistic dynamic of the sometimes tangled dual masters' tension (client representative and officer of the court) will be diminished, however, when lawyers play word games with the public about the profession's sometimes self-absorbed vision of how it proclaims its service of society's interests. Plain, common-language explanations — not coded jargon — about the service ethic will advance needed reforms and improve the profession's public image.

If lawyers reexamine their original motivations for becoming lawyers, most would probably rediscover the simple desire to render service to others in need. To be sure, a good life, prestige,[8] reputation, and power are complexly woven in as well. Lawyers are, after all, human beings first. Only later in their careers do they also become sophisticated professionals by training, disposition, and vocation.

Reflection upon the original motivation to join the profession might nonetheless lead lawyers to more readily acknowledge a baseline gratitude for the unique licensure privilege and opportunity that has been granted to them. They would worry less — with

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7. GLENDON, *supra* note 4, at 13 (emphasis added).

8. *See* BENJAMIN CARDOZO, *Mr. Justice Holmes*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, *supra* note 1, at 86.

an inspirational nudge from Robert Frost's great poem — about roads not taken.[9] They may even find some balm for their souls by blending their idealistic early yearnings with practicality and maturity — and reap the bonus of a better public reputation for doing so.

Lawyers have another special concern in the delivery of their services: to avoid routinization of process and a corresponding detachment from clients, the people at the heart of everything lawyers do. Technology, with all of its benefits and wonders, has a tendency towards depersonalization. The profession would do well to be wary of the modern miracles of instant communication and technological efficiency, lest those medicines carry with them some hidden side effects for the near or the long term; appropriate warning labels and antidotes ought to accompany technological advances. It is a disturbing development that at the bank, ATM, Motor Vehicle Bureau, or even in cyberspace, "the computer is down" is starting to acquire the all-too-familiar ring of "the check is in the mail."

Clients expect, and are entitled to, human engagement and respect — one-on-one, person-to-person, and case-by-case. Physicians call it bedside manner, and are successfully undergoing a restoration of education and sensitivity reflecting its critical importance in patient care.[10] On the other hand, lawyers may take a cautionary note from the ways in which HMOs and changes in financing, insurance, and national practices and delivery of medical services are exerting massive dehumanizing counterforces in this arena.[11]

In the end, lawyers' self-esteem and work satisfaction will also be enhanced in due proportion to what they give to their clients *in personam*, to turn a phrase from the Dead Language. The simple,

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9. Robert Frost, *The Road Not Taken*, *in* THE POETRY OF ROBERT FROST 105 (Edward Connery Lathem ed., 1979).

10. *See Treating the Dying Patient: The Challenge for Medical Education*, ARCHIVES INTERNAL MED., June 26, 1995, at 1265; Gordon K. MacLeod, *Empathy*, 13 JAMA 1041 (1994) (reviewing EMPATHY AND THE PRACTICE OF MEDICINE: BEYOND PILLS AND THE SCALPEL (Howard M. Spiro et al. eds., 1993)); Victor Cohn, *The Patient's Advocate: Why Patients Are Unhappy*, WASH. POST, Sept. 6, 1988, at Z20.

11. *See* Julie Miller, *Marketing's Focus Turns to Lawyers*, N.Y. TIMES, Apr. 16, 1995, § 13, at 5; Mike Snider, *HMOs Often Leave Patients Unsatisfied*, USA TODAY, Aug. 18, 1993, at D1; Robin Frank, *No Bedside Manners in an HMO*, NEWSDAY, Nov. 7, 1994, at A29; Dan Morgan, *HMO Trend Squeezes Big-Fee Medical Specialists*, WASH. POST, July 17, 1994, at A1.

polite call-back, or detailed, early explanation of fees, expectations and outcomes, given in plain English, will ameliorate some of the effects of negative polls and bad jokes. It will surely help if lawyers seek to avoid glib guarantees and unrealistic, unwise predictions or huckstering representations about results. Advocating causes adversarially is but one lawyering function; counseling people amicably is the great companion. The full title, last I looked, is still, "Attorney *and* Counselor at Law."

We cannot avoid the harsh glare and modern reality; lawyers, like everyone else, operate in a fishbowl age of instantaneous exposure.[12] Lawyers' quiet, often unnoticed good work is too often overshadowed by the media's over-reporting and scandal-scarred headlines. Because good work is considered boring and un-news-worthy, it is virtually impossible to offset or neutralize the ways in which the transgressions of a few are magnified into stereotypical generalizations in this modern phenomenon of grand hype and instant sound bite.

Lawyers instead wring their hands ruefully, and wonder why they receive so little respect. Sadly, the answer may be that lawyers have failed to preserve a healthy self-respect. I believe that lawyers must not surrender to the view that others should be allowed to control their self-respect, be it sought from neighbors, funsters, the press, or the public generally. Private or public plaudits for good intentions and hard work would be welcome and nice, but they are not essential, are definitely not entitlements, and are mostly unlikely to eventuate. Lawyers as a group are already a highly privileged class in our world, with power and a kind of instant societal prestige and rank that goes with membership in an exclusive public profession.

Nevertheless, days and moods come when, like anyone else, the professional caste does not count for much in the public reputation. Most of society, however, will always think differently, because, like it or not and believe it or not, lawyers' roles in our society give them unique access to halls of power, persons of power, and powerful institutions. The public feels, and is justified in believing, that it does not need to like lawyers, or proclaim hosannahs to them in a public display, for the sensitive and often thankless responsibilities lawyers undertake. The public has shown

12. One is reminded of Andy Warhol's quip that "everyone will be famous for fifteen minutes." JOHN BARTLETT, FAMILIAR QUOTATIONS 908 (15th ed. 1980).

that it is smarter than it is given credit for, and it does not feel any need to inflate the profession with compliments by telling pollsters that they love lawyers. Their true feelings of respect are individually manifested when they turn to their own lawyers in times of need and danger, and entrust them with their public responsibilities and their lives, families, property, and liberty interests. That epiphany can certainly be a good start in the self-esteem audit. Lawyers must find satisfaction and fulfillment within themselves.

When anyone goes about judging the success of lawyers, judges, professors, public officers, or the like, they should consider this handy template: Chief Judge (later Justice) Cardozo adopted Charles Francis Adams's lesson that he was doing fine when he looked at his work at the end of each year and found that he had not made a "conspicuous ass"[13] of himself. A classier, more understandable, and more easily applied test and source, with neat self-deprecation to boot, would be virtually impossible to find.

I would like to return to the opportunity to look forward to what the legal profession faces in the approaching Millennium, through the prism and focus of some of the recent books and articles.[14] A journey of discovery lies ahead, as we reconsider how the profession can serve people better and with the utmost integrity, and how legal educators can teach law students and the public in more useful, understandable ways about what the profession should be and what it actually does. The journey should include a personal re-examination and a search for the professional soul, emphasizing some fixed, guiding stars, skills, and values: for example, the service ethic, the *Code of Professional Responsibility*,[15] the *Rules of Professional Conduct*,[16] the *Code of Judicial Conduct*,[17] the *Standards on Legal Education*,[18] and professional[19] and moral[20] guideposts. The journey should be uplifting, forward-looking, and affirming; it must steer clear of depressing or

13. BENJAMIN N. CARDOZO, *The Comradeship of the Bar*, *in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO, *supra* note 1, at 422, 428.

14. *See supra* notes 4-6.

15. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1986).

16. MODEL RULES OF PROFESSIONAL CONDUCT (1995).

17. MODEL CODE OF JUDICIAL CONDUCT (1990).

18. AMERICAN BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS (1995).

19. *E.g.*, MACCRATE REPORT, *supra* note 2; *see also* Re, *supra* note 5.

20. "Those who *lead the many to justice*, shall be like the stars forever." *Daniel* 12:3 (emphasis added); *see also Matthew* 5:3-11 (The Beatitudes of the Sermon on the Mount).

negativistic detours. Let the cycles of history and culture take their course, improve some of the static predetermination, and infuse the profession with a renewed spirit of optimism.

In a recent attorney disciplinary case involving non-refundable retainer fees,[21] I wrote an opinion for a unanimous ruling of the New York Court of Appeals — the "Court of Cardozo" — on which I am privileged to serve. A key observation merits repetition here:

> [The disciplined attorney] urges us to conclude that he "complied with the limited legal precedents at the time." The conduct of attorneys is not measured by how close to the edge of thin ice they skate. The measure of an attorney's conduct is not how much clarity can be squeezed out of the strict letter of the law, but how much honor can be poured into the generous spirit of lawyer-client relationships. The "punctilio of an honor the most sensitive" must be the prevailing standard.[22]

The great Chief Judge of the New York Court of Appeals, Benjamin Nathan Cardozo, echoed another overarching theme in a commencement address in 1928 to the first graduating class of St. John's School of Law, my Alma Mater. Law, lawyering, legal education, and the legal profession cannot be synthesized better than he did that day almost seventy years ago:

> [The law] is what you and I are making it. That is the heavy burden of our calling, but that is also its unfading glory. That is the strain and the woe of it, leaving creases and scars in the faces of the veterans, but that is also the heartening appeal of it, reflecting light and joy and hope in the faces of the new recruits, eager to join the fray. . . . Here is the age-long battle, worthy of the best that we or they can offer.
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> As I look into your faces, I figure to myself what it will mean, in days to come, to the profession of the law if you and those to follow you out of this school will think worthily and highly of this great vocation of your choice. What a *spiritual* power you will then be in the age-old fellowship in which you are to enter! What a leavening force you will become in this great conglomerate bar of ours, moved as it is, at times, by the

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21. *In re* Cooperman, 83 N.Y.2d 465 (1994).

22. *Id.* at 475 (footnote omitted) (quoting Meinhard v. Salmon, 249 N.Y. 458, 464 (1928) (Cardozo, C.J.)); *see also* Lester Brickman & Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. CIN. L. REV. 11 (1995).

> ferment of high thoughts and fine ideals, and yet at times in danger of becoming sodden and inert by reason of that very mass which might make it so irresistible a power for good! How it lies with you to uplift what is low, to erase what is false, to redeem what has been lost, till all the world shall see, and seeing shall understand, that union of the scholar's thought, the mystic's yearning, the knight's ardor, and the hero's passion, which is still, in truest moments of self-expression, *the spirit of the bar!*[23]

It is this spirit, along with a set of transcendent standards, values, and principles, which needs to be renewed and reignited now and for the Millennium.

Another note of caution is needed against some Babbitt-talk from government officials who spin negativistic theories about unfair competitive practices based on speculative economic and marketplace theories. The Department of Justice's recent attack on the longstanding American Bar Association National Standards of Legal Education,[24] and the succeeding consent decree,[25] raise serious questions about the relationship between the profession and society. Competition and consumerism are important concerns, but something very essential is damaged when they are disembodied and deployed like buzz words.

It would be prudent to ask some threshold questions: How does the consent decree square with maintaining norms of quality education and professionalism? Who are the true consumers: law students or the public? Who needs protection, and from whom? Do government bureaucrats really know what is necessary and good for legal education and the profession, compared to the academy, the states' highest courts, and the profession, working in a checks-and-balances, pro bono alliance of volunteer service (branded unfairly as "guilds" and "cartels"[26])? Will ten years of federal bureaucratic supervision under a consent decree that crosses the millennial divide really serve the public interest? Is this Teddy Roosevelt's vision from the beginning of this century of the Big

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23. CARDOZO, *supra* note 1, at 95-97 (emphasis added).

24. Ken Myers, *Complaint About Accreditation Draws Federal Antitrust Inquiry*, NAT'L L.J., Mar. 28, 1994, at A6.

25. Debbie Goldberg, *ABA Settles Antitrust Case over Certifying Law Schools*, WASH. POST, June 28, 1995, at A2; Ken Myers, *Settlement Will Mean Changes in ABA's Accreditation Process*, NAT'L L.J., July 10, 1995, at A15; Henry J. Reske, *ABA Settles Antitrust Suit on Accreditation*, A.B.A. J., Aug. 1995, at 24.

26. *See* Myers, *supra* note 24; Reske, *supra* note 25.

Stick of the Sherman Act, taming anticompetitive economic barons and goliaths, or is it a millennial nightmare?

My answer to these rhetorically dramatized questions (the virus of sound bite-itis has now invaded me, too) is reflected in my resignation from the American Bar Association in August 1995.[27] In my opinion, the ABA shortsightedly consented to judgment, instead of standing up to the government and defending the integrity of its own on-the-line volunteers and its own long-time, well-tested public peer process within the Section on Legal Education and Admissions to the Bar, against what I still view as zealously disproportionate and questionable federal overreaching.

The bottom line for adventurists, spoilers, self-aggrandizers, and true reformers alike ought to be ethical, efficient and competent legal services, provided to those in need and to those who can afford to pay alike, based on well-tested, doctrinally, and clinically sound values. These should be the governing engines of the profession. The truth will eventually (and painfully) emerge that the federal government should not substitute itself for the profession's time-honored methods of inculcating, delivering, and commanding these values. It will never be good at this, and surely is inferior to peer validators.

Many harsh realities, therefore, lie ahead. With Pollyannish optimism[28] and dispositional confidence, however, I believe that a change of heart, direction, and focus, towards purer altruistic service to individuals makes for a better overall community. This is the summons of the Millennium. This goal is spurred on by the books, articles, and thinking of many excellent and diverse collaborators in robust debate and exposition.[29] How lawyers and legal educators answer this summons will be tested by trial and error, and by a final verdict of the public, not subject to appeal. That millennial horizon, and that public verdict, will bring the magnificent traditional spirit of the profession reflected in Judge

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27. Joseph W. Bellacosa, *From the Chair: Chairperson Expresses Disappointment in Consent Decree*, 26 SYLLABUS 14 (1995); Ken Myers, *Official Quits over ABA Pact: N.Y. Judge Objects to Terms of Antitrust Settlement*, NAT'L L.J., July 17, 1995, at A6; *see also* Ken Myers, *Dean Comes Out Swinging and Defends Accreditation ABA-Style*, NAT'L L.J., Jan. 22, 1996, at A15.

28. Pollyanna: "an excessively or persistently optimistic person." WEBSTER'S NEW WORLD DICTIONARY 1104 (2d college ed. 1984); *see also* ELEANOR H. PORTER, POLLYANNA (1913).

29. *See supra* notes 4-6.

Cardozo's eloquent message in the early decades of this century[30] closer to realization and fruition. May his "Spirit of the Bar" also be ours, as we close this century, and may the torch of responsibility entrusted to us for our time be renewed and passed along to succeeding generations, as it was most generously preserved for and delivered to us.

30. *See supra* note 1 and accompanying text.