

## LAWYER-BASHING AND THE CHALLENGE OF A SENSIBLE RESPONSE

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### INTRODUCTION

Last year, much of the conversation in legal circles centered on our profession's declining public image. Lawyer jokes seemed to be part of every conversation, broadsides to the legal profession a part of every newscast. Public opinion polls revealed that the image of lawyers had reached its lowest level in a decade. Of course, lawyers have always been the object of some public suspicion, but these historic attitudes fail to explain the recent precipitous decline in public trust.

The organized bar took the problem seriously. It approached the problem from the position that a loss of faith in lawyers could eventually threaten the standing of the legal system itself. The bar first concluded that the problem lay in the public's misperception of our work, and it launched a public relations campaign to restore our image. The bar initiated projects to improve lawyer/client relations, restrict advertising, and publicize lawyers' charitable activities. These efforts fit well the conclusion that it was the public's perception of the legal system and not the system itself that was the central problem.

I conclude instead, as I think many now acknowledge, that significant segments of our population are already frustrated with the legal system and that their low regard for the profession is actually a symptom of that disenchantment. To address this problem successfully, we must discern the causes of the public's grievances and attend to those causes, not simply seek to change the way we are perceived. Americans tell us they believe that the judicial process is too slow, too expensive, and too complicated, and we must be more ready to accept their judgment. Only by seeing ourselves through the public's eyes and taking their criticisms seriously can we alleviate their frustration, improve the legal system, and repair our professional image.

We must also recognize that the public's opinion of our profession is not prompted solely by the way we do our work. The public also reacts to the substantive results of our work. Those of us in the legal system know that effecting justice is our job, but we easily forget that the public has its own view about whether we make the world more just. The role we have played in public education, for example, is seen as unjust by many Americans. We have thwarted community efforts to promote a safe and well-disciplined educational environment, and we have banished all religious references from classrooms and largely

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from school events. A legal system that regularly produces outcomes regarded as unjust or ill-considered by most of its customers cannot expect to be respected by its customers.

### I. GROWING PUBLIC FRUSTRATION WITH OUR PROFESSION

One reason why we lawyers are slow to react to criticism is that public distrust of our profession has such an ancient pedigree. It has been almost 400 years since Shakespeare penned his famous allusion to this sentiment.<sup>1</sup> At the founding of this nation, the American colonists attempted to realize "[t]he dream of doing without lawyers" by prohibiting the profession altogether.<sup>2</sup> This long history of complaints about lawyers, however, does not adequately explain the decline in our public image over the past two decades.

A survey done for the American Bar Association revealed that public confidence in law firms has declined substantially since the early 1970s.<sup>3</sup> The percentage of Americans expressing "great confidence" in the profession has dropped from 24% to 18% to 14% and finally to a low of 8% since 1973.<sup>4</sup> The Gallup Organization has recorded a similar trend in public opinion regarding the honesty and integrity of lawyers. In the mid-1970s, Gallup found that more than 25% of Americans believed that lawyers had high or very high ethical standards. By 1993, that figure had dropped to barely 16%.<sup>5</sup>

We often find it tempting to brush off these results with the observation that "the public does not really know what we do." This explanation is unavailing, however, in light of the apparent depth of knowledge people have about lawyers. More than 60% of Americans have hired an attorney in the past ten years, and 50% interact with lawyers on a fairly regular basis.<sup>6</sup> More damning yet, it seems that the more exposure people have to our profession, the lower regard

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1. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2. For a discussion of the misunderstandings surrounding Dick's sarcastic suggestion, "The first thing we do, let's kill all the lawyers," see Steven H. Kruis, *Let's Not Kill All the Lawyers*, RES GESTAE, Oct. 1993, at 151.

2. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 45-46 (2d ed. 1985) ("The dream of doing without lawyers has been a persistent one; and the cognate dream of a simple, clear, natural form of justice, a book of law that everyone might read for himself, also never died."); KERMIT L. HALL ET AL., *AMERICAN LEGAL HISTORY* 305 (1991) (quoting early Pennsylvania citizen, who explained that "[t]hey have no lawyers. Everyone is to tell his own case, or some friend for him. . . . 'Tis a happy country.'").

3. See Gary A. Hengstler, *Vox Populi, The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60 [hereinafter *ABA Poll*]; see also Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 1 [hereinafter *NLJ Poll*]; Erik Hromadka, *Lawyers Battle Tarnished Professional Image*, RES GESTAE, Oct. 1993, at 152.

4. *ABA Poll*, *supra* note 3, at 63-64.

5. Randall Samborn, *Tracking Trends*, NAT'L L.J., Aug. 9, 1993, at 20.

6. *ABA Poll*, *supra* note 3, at 61.

they have for our work. A survey for the *National Law Journal* revealed that as the number of people having contact with lawyers increased from 52% to 68% from 1986 to 1993, the percentage that believed lawyers were less honest than most people increased from 17% to 31%.<sup>7</sup>

Furthermore, the people most likely to have contact with lawyers have worse impressions of the profession than those who rarely deal with us. The ABA poll revealed that 41% of the individuals with experience with the legal system have generally unfavorable attitudes, while only 25% of those with little exposure to the justice system registered negative opinions.<sup>8</sup> Most disappointing of all, a substantial percentage of people who have been part of a jury trial, which we lawyers tout as a peak legal experience, hold negative views.<sup>9</sup>

## II. RESPONDING TO OUR CRITICS

Initially, the American Bar Association responded to the tide of public criticism by focusing its resources on the perception of lawyers rather than the substantive problems with the justice system.<sup>10</sup> The board of governors approved a \$700,000 public relations campaign, hiring one of the nation's most expensive Washington image-makers, Michael Scanlon, for a reported \$170,000 and retaining Robert Squier's public relations firm to support Scanlon's efforts.<sup>11</sup> The bar focused on improving lawyers' "deskside manner," ensuring that lawyers appear "dignified" in advertisements, and publicizing pro bono activities.<sup>12</sup>

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7. *NLJ Poll*, *supra* note 3, at 20; *see also* Report of the Chief Justice's Commission on the Future of the Courts, *Reinventing Justice 2022* (Supreme Judicial Court, Commonwealth of Massachusetts 1992) [hereinafter *Reinventing Justice*].

8. *ABA Poll*, *supra* note 3, at 62, 63; *see also Reinventing Justice*, *supra* note 7, at 12 ("Although slightly less than a quarter of those surveyed felt informed about the courts, the more informed they were, the more likely they were to rate the courts' performance as 'poor.'").

9. *Id.* at 62 ("Two of the strongest predictors of an individual's negative feelings about lawyers are having served on a jury and having been sued."); *see also* Daniel Wise, *Survey: Jurors Take Dim View of Lawyers*, N.Y. L.J., Nov. 12, 1991, at 1.

10. Not surprisingly, the surveys conducted by the profession seem also to presuppose that the problem lies with a misperception of lawyers personally rather than with the role of attorneys in the legal system. Typical of recent surveys, the *NLJ* asked "What do you think lawyers can do to improve their image?" Not surprisingly, people responded in personal terms, saying that lawyers should be more honest and less greedy, charge less, provide better services, and stop advertising. *NLJ Poll*, *supra* note 3, at 20.

11. *NLJ Poll*, *supra* note 3, at 22; *see also* Edward A. Adams, *Abortion, Recession, Image on ABA's Mind*, N.Y. L.J., Feb. 9, 1993, at 1; Ann Pelham, *ABA Sparing No Expense to Polish Lawyer Image*, *The Recorder*, Nov. 23, 1992, at 3. For a discussion of the debate over such an expenditure during tight fiscal times, *see* Monica Bay, *Conventioneers Get Dose of ABA-Speak*, N.J. L.J., Aug. 16, 1993, at 12.

12. R. William Ide, III, *What the ABA Plans to Do*, A.B.A. J., Sept. 1993, at 65; *see also ABA Poll*, *supra* note 3, at 62-63 (emphasizing public perception that lawyers are unfeeling, unethical, and greedy and suggesting that lawyers curtail advertising); Eileen Ambrose, *Jokes: Disorder in the Court*, *INDIANAPOLIS NEWS*, Mar. 1, 1994, at F1 (discussing ABA training courses to improve

Efforts of the foregoing sort likely have value, but we must not allow the attention surrounding such image-making to distract us from the need for more substantive efforts. Sometimes the appearance of activity allows us to pass over even the most obvious deficiencies. I will name here but two.

First, despite mounting public complaints and our own private admissions, many lawyers still deny the inefficiency of modern civil litigation. We run a tort system in the name of compensating victims and promoting safety, but we exact a pretty high tariff. A 1986 Rand Corporation study found that the total costs of tort litigation, including attorneys fees and court costs, were actually greater than the compensation to plaintiffs, with between \$16-19 billion going to expenses as compared to \$14-16 billion in compensation.<sup>13</sup> Of these costs, 21% were attributable to the plaintiffs' attorneys fees and expenses, and 16% went to defense counsel. Accounting for court costs and the value of the time spent by the litigants, the injured parties received only 46% of the total cost in net compensation.<sup>14</sup>

The settlement agreement in a recent class action suit stands as a striking example of this problem. Suit was brought against an investment firm for defrauding its clients out of tens of thousands of dollars. After successful negotiations, counsel settled the case. Unfortunately, "success" is a relative term. Beatrice Gindea, a named plaintiff was shocked to learn that her \$10,000 claim had been settled for a mere \$400.<sup>15</sup> Her attorneys grossed \$6 million.<sup>16</sup>

We have found it difficult to debate the reality of these transaction costs candidly in legal circles. When, for example, former Vice-President Dan Quayle addressed an ABA gathering in 1991 and suggested various tort reforms, including limits on punitive damage awards, then ABA President John Curtin defended the status quo without so much as considering the merit of the proposals. Curtin's carefully calculated effort to embarrass the vice-president<sup>17</sup>

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lawyer/client communications and suggesting stricter guidelines for legal advertising).

13. Institute for Civil Justice, *Annual Report 52* (1991) (citing James S. Kakalik & Nicholas M. Pace, Institute for Civil Justice, *Costs and Compensation Paid in Tort Litigation* (1986) for propositions that plaintiffs received between \$21-25 billion in gross compensation, with \$6-8 billion going to plaintiffs' attorneys and \$5-6 billion to defense counsel).

14. *Id.*; see also Laurie Asseo, *Slugging It Out in Court, the American Way*, L.A. TIMES, Apr. 5, 1992, at A20 (citing ICJ statistics).

15. Kurt Eichenwald, *Millions for Us, Pennies for You*, N.Y. TIMES, Dec. 19, 1993, at F1. Adding insult to injury, Mrs. Gindea also found that she and the other class plaintiffs were excluded from a \$371 million fund established to repay nonclass members for the same injuries. *Id.*

16. While firms specializing in class actions admit that plaintiffs with relatively large damages should pursue their claims individually, this did not prevent Mrs. Gindea's lawyers from taking the money and running. *Id.* at F12.

17. David C. Beckwith, *Quayle Hunting*, A.B.A. J., Dec. 1991, at 10 (explaining that Curtin's request that Quayle stay long enough to hear Curtin's rebuttal, contrary to the agreed schedule, was declined, and that Curtin leapt to his feet and began speaking anyway, forcing Quayle to play his straight man).

did little more than infuriate an already frustrated public.<sup>18</sup> Such stonewalling by the profession surely promotes reactions through legislative processes.<sup>19</sup>

Second, the legal academy has also been reluctant to acknowledge criticism. An ABA task force, chaired by Sullivan & Cromwell partner Robert MacCrate, recently recommended a stronger focus on training law students and attorneys in the skills and values that make for good lawyering.<sup>20</sup> The task force concluded that such training would increase the quality and speed with which legal services are rendered while at the same time lowering the cost of those services to the average consumer. The response of law school faculties to the portions of the *MacCrate Report* aimed at the academy can at best be called mixed.<sup>21</sup>

A year after the MacCrate commission issued its report, the Illinois Bar Association embraced one of the least substantive recommendations. Illinois

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18. See David Broder, *Quayle Charges Some Lawyers Are 'Ripping Off the System,'* WASH. POST., Sept. 7, 1991, at A2 (reporting that Quayle's mail was running fifty to one in favor of reform proposals); Sandra Torry, *Quayle and Curtin Generate More Heat than Light in ABA Debate,* WASH. POST, Aug. 19, 1991, at F5 ("[Quayle and Curtin's] spat didn't do much to get at the real issues."); see also William Buckley, *Halve the Lawyers, Double the Justice,* ST. LOUIS POST-DISPATCH, Aug. 21, 1991, at B3 (The exchange between Quayle and Curtin "reminds us that the ABA is in many respects just one more trade association, as anxious to maintain its tariffs, minimum-wage laws, tax loopholes and immunity to antitrust legislation as any other vested interest."); James Kilpatrick, *A Compelling Case for Legal Reform,* ST. LOUIS POST-DISPATCH, Aug. 30, 1991, at E3 ("If the organized bar does not understand the need for these reforms, something is sadly wrong with the organized bar.").

19. In the health care area, for example, when Hoosiers learned that the number of medical malpractice claims filed had increased forty-two percent, the average award had increased more than 250%, and malpractice insurance premiums had shot up 410% from 1970 to 1975, they demanded and received reform. The General Assembly enacted the Medical Malpractice Act of 1975 (codified as amended at IND. CODE ANN. art. 27-12 (West Supp. 1993)) which capped damages and instituted a medical review panel. See Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three Year Study*, 24 IND. L. REV. 1275, 1276 (1991); see also Joanna Stark Abramson, *Contingent Fees Under Attack,* MICH. LAWYERS WKLY., Oct. 14, 1991, at 1 (discussing Michigan initiative to limit contingency fees).

20. *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, A.B.A. Sec. Legal Educ. & Admissions to Bar (1992) [hereinafter *MacCrate Report*]. The report delineates ten skills categories and four values categories, all of which are considered important for a complete legal education. According to the *Statement of Fundamental Lawyering Skills and Professional Values*, law schools should endeavor to instruct students in problem-solving, legal analysis, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution, organization and management of legal work, and recognizing and resolving ethical dilemmas. *Id.* at 135-36. Further, the schools should emphasize the following values: the provision of competent representation; the promotion of justice, fairness, and morality; improving the profession; and professional self-development. *Id.*

21. The Association of American Law Schools, for instance, asked the deans of its more than 150 member schools whether they would support using the MacCrate Report as a measure of school performance in the ABA accrediting process. Thirty-six percent supported use of the Report in accreditation, while sixty-four percent rejected the idea. Memorandum from the Association of American Law Schools to the Deans of Member Schools (May 18, 1993) (from Council Agenda Book #1, June 1993 ABA Meeting [hereinafter *Agenda Book*]).

asked the House of Delegates to amend the ABA's accreditation standards to declare that law schools should not only prepare students for admission to the bar but also "prepare them to participate effectively in the legal profession."<sup>22</sup> This seemingly small modification was resisted by most law schools. Deans from Stanford, Michigan, Cornell, Northwestern, Pennsylvania, Duke and elsewhere opposed adding this language to the definition of a law school's mission. Some objected to the very notion that law schools should or even could prepare students to practice law upon graduation.<sup>23</sup> Most, however, agreed with the goal of the amendment but feared that its vague wording would permit ever increasing ABA control over their curricula and an eventual homogenization of law schools generally.<sup>24</sup> Still others seemed to deny the problem all together.<sup>25</sup> In the end, the ABA Section of Legal Education and Admissions to the Bar assented only after it became apparent that the section's credibility was at stake.

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22. Memorandum from James P. White, Consultant on Legal Education to the ABA, to the Council of the Section of Legal Education and Admissions to the Bar (May 19, 1993) (from Agenda Book); see also Richard C. Reuben, *Changing Legal Education: House Endorses More Practical Training by Law Schools*, A.B.A. J., Apr. 1994, at 113.

23. See Letter from Lee C. Bollinger, Dean of the University of Michigan Law School, to James P. White, Consultant on Legal Education to the ABA (Apr. 21, 1993) (from Agenda Book) ("Law schools are not well equipped to turn out graduates finely honed in immediate practice skills . . ."); Letter from Paul Brest, Dean of the Stanford Law School, to James P. White, Consultant on Legal Education to the ABA (May 3, 1993) (from Agenda Book) ("[The proposed amendment] errs both in attempting to micromanage the law school curriculum and in its implication that law schools should ensure that students are prepared for practice upon graduation."); see also Paul Brest, *When Should a Lawyer Learn the Way to the Courthouse?*, STANFORD LAWYER, Fall 1993, at 2 (criticizing *MacCrate Report* recommendations as an "intrusive and counterproductive approach"); John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. OF LEGAL EDUC. 157 (1993) (criticizing *MacCrate Report* for failing to address issue of scarce school resources).

24. See Letter from John J. Costonis, Dean of the Vanderbilt University School of Law, to James P. White, Consultant on Legal Education to the ABA (Apr. 22, 1993) (from Agenda Book) ("Accrediting bodies should avoid adopting language of indeterminate meaning, and, therefore, should reject the amendment . . ."); Letter from Colin S. Diver, Dean of the University of Pennsylvania Law School, to James P. White, Consultant on Legal Education to the ABA (Apr. 23, 1993) (from Agenda Book) ("While the language added by the proposed amendment is innocuous in appearance, . . . [it] is intended as the opening wedge in a campaign to incorporate recommendations derived from the MacCrate Commission Report into the Accreditation Standards."); Letter from Pamela B. Gann, Dean of the Duke University School of Law, to James P. White, Consultant on Legal Education to the ABA (Apr. 13, 1993) (from Agenda Book) ("The detailed standards and interpretations increasingly destroy creativity and curricular initiatives and homogenize everyone.").

25. See Letter from Arthur R. Guadio, Dean of the University of Wyoming College of Law, to James P. White, Consultant on Legal Education to the ABA (Apr. 14, 1993) (from Agenda Book) ("[I]n my opinion . . . law schools today do a very good job in preparing members for the legal profession. . . . This proposed change must, therefore, raise a question about the potentially false expectations which might be created in the minds of the proposers.").

## III. BEYOND IMAGE

The Supreme Judicial Court of Massachusetts understood the importance of moving beyond issues of perception to address more systemic problems when it recently appointed a major commission to plan the future of the Bay State courts. Like the ABA, the Massachusetts commission began its work with a survey of public opinion, but rather than asking how people felt about lawyers themselves, it sought to measure attitudes towards the court system generally and to identify areas the public would like to see improved.<sup>26</sup> The people of Massachusetts responded with three principal criticisms: 88% complained that court proceedings were too slow, 81% believed that judicial processes were too expensive, and 79% found the courts hard to understand.<sup>27</sup>

These are legitimate grievances and they deserve our attention, notwithstanding the fact that initiatives addressing these problems frequently meet with resistance from factions within the profession. If we are to address the substance of the public's frustrations, we must accept the accuracy of their criticisms. We must overcome resistance to change and embrace proposals that promise to make the legal system faster, cheaper, and simpler. I suggest here a few avenues for reform.

Surely, the modern process of discovery should command our attention.<sup>28</sup> Though it is probably the single most important procedural innovation of this century, it has become so cumbersome as to give trial by ambush a good name. Reform has come only slowly, beginning with the discovery rule revisions by the Arizona Supreme Court.<sup>29</sup> More recently, the United States Judicial Conference and the Supreme Court modified the Federal Rules of Civil Procedure in an effort to relieve the backlog of cases in the federal courts. The conference proposed and the Court adopted changes to the federal discovery rules designed

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26. *Reinventing Justice*, *supra* note 7, at 12; *see also* The Chief Justice's Commission on the Future of the Courts, *Opinion Dynamics: Public Attitudes Toward the Future of the Courts* (1991) [hereinafter *Opinion Dynamics*] (available through Massachusetts Supreme Judicial Court's Public Information Office).

27. *Reinventing Justice*, *supra* note 7, at 26; *see also* *Opinion Dynamics*, *supra* note 26, at 20.

28. For insightful discussions of the factors involved in reforming discovery and procedures generally, compare Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 1 (1986) (questioning reliance on lawyer-based adjudicatory procedures and managerial judging and advocating context-specific rules) with E. Donald Elliot, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986) (advocating use of rules as incentive system for lawyer-based adjudicatory procedures and managerial judging). For a discussion of the history of the drafting of the Federal Rules of Civil Procedure, see Resnik, *supra*, at 5-22.

29. Two years ago, the Arizona Supreme Court adopted new discovery rules designed to speed civil litigation. Prior to their adoption, a lower court experimented with the new rules for six months. Of the 8000 cases tried under the scheme, nearly 3300 were arbitrated eight months earlier than under the old rules. Even more promising, almost 3000 cases were settled or abandoned by the parties. The rules are now in force in all 15 County Superior Courts. Richard E. Lerner, *Legislative Activity in the States*, N.Y. L.J., Aug. 6, 1992, at 3, 6.

to encourage particularized pleadings and promote settlements. Though the profession lobbied Congress to block the new rules,<sup>30</sup> these efforts failed, and Fed. R. Civ. P. 26 now requires attorneys to disclose information "relevant to disputed facts alleged with particularity in the pleadings." Whether these particular rule changes turn out to be beneficial or not remains to be seen, but we must turn our attention to these sorts of reforms.

Attorney discipline is another area ripe for change.<sup>31</sup> The report of the ABA's Commission on Evaluation of Disciplinary Enforcement opined that "[t]he incompetence and neglect of relatively few lawyers must not continue to sully the image of the rest." Wishing will not make it so, however, and the organs of the profession have traditionally placed a low priority on complaints involving neglect of clients or client matters.<sup>32</sup> The commission's emphasis on broadening the writ of state disciplinary oversight is worth examining. Happily, ABA President R. William Ide III has committed the association to improving "the attorney grievance, ethics and disciplinary process . . . to ensure that client concerns can be heard in a timely, effective manner."<sup>33</sup>

Finally, while the formal law continues to grow in complexity,<sup>34</sup> there is even room for optimism on this front. Lawyers and clients alike are praising alternative dispute resolution as an informal option to court proceedings. Many states, including Indiana,<sup>35</sup> have been experimenting with binding arbitration,

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30. See *Congress Fails to Block Change in Rules of Civil Procedure*, 8 LIABILITY WEEK No. 46, Nov. 29, 1993; Colleen McMahon, *Critics Turn Up Heat on Proposed Discovery Rules*, N.Y. L.J., July 19, 1993, at S1.

31. ABA Commission on Evaluation of Disciplinary Enforcement, *Report to the House of Delegates*, Feb. 3-4, 1992, at 9.

32. The commission on discipline repeatedly laments that the profession lacks disciplinary mechanisms for conduct eliciting legitimate complaints from clients yet not serious enough to warrant suspension or disbarment. *Id.* at vi-vii ("The system does not address complaints that the lawyer's service was overpriced or unreasonably slow."). *Id.* at vi (The disciplinary system does not address these tens of thousands of [legitimate] complaints annually. The public is left with no practical remedy.). *Id.* at vii ("It is clear that tens of thousands of clients alleging legitimate grounds for dissatisfaction with their lawyer's conduct are being turned away because the conduct alleged would not be a violation of disciplinary rules."). *Id.* at 9 ("Complaints alleging minor neglect or minor incompetence are almost always dismissed. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with the system."). *Id.* at 36.

33. Ide, *What the ABA Plans to Do*, *supra* note 12, at 65.

34. The quest for a simple and easily understandable body of law, accessible to the common man, is as old as the republic. See Friedman, *supra* note 2, at 403-11 (describing relationship between eighteenth century efforts to make the law "more knowable, harmonious, [and] certain" and later initiatives by the ABA and American Law Institute to unify and simplify law); Hall, *supra* note 2, at 317-25 (discussing nineteenth century codification movement to "reduce all law to a legislatively enacted body of general principles."); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 300 (1969) (describing common belief at founding that all "[s]ociety needed [was] '[b]ut a few laws, and these simple, clear, sensible, and easy in their application to the actions of men.'").

35. Erik Hromadka, *ADR in Indiana*, RES GESTAE, Aug. 1993, at 56.



mini-hearings, summary jury trials, private judges, and mediation for some years, and the reactions have been very positive. In areas ranging from standard civil disputes<sup>36</sup> to divorces<sup>37</sup> to criminal cases,<sup>38</sup> parties find greater satisfaction in these simplified proceedings than they do in traditional trials.<sup>39</sup>

Together with the incentives provided by the market,<sup>40</sup> these represent useful steps on a long road to restoring the public confidence in lawyering and our legal system. If we stray from this course, both the legal system and the profession are at risk. It should not escape our attention, for example, that in England, the failure of the bar to create cheaper alternatives has resulted in legislation authorizing non-lawyers to represent clients in court.<sup>41</sup> Indeed, in many states the pressure to permit independent legal consultants, paralegals, to provide legal services is increasing just as it has in California.<sup>42</sup> Lawyers must not forget that the monopoly on lawyering is a twentieth century notion.<sup>43</sup>

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36. See, e.g., Greg Kueterman, *Allen County Judges and Attorneys Rally Around Alternative Dispute Resolution*, INDIANA LAWYER, Dec. 28, 1993, at S6; Alissa J. Stern, *Quake Victims Compensated—Quickly*, NAT'L INST. DISP. RESOL. FORUM, Summer/Fall 1993, at 33.

37. See, e.g., Barbara Vobejda, *Making Divorce as Painless as Possible*, WASH. POST NAT'L WEEKLY ED., July 19-25, 1993, at 33.

38. See, e.g., *Cooling Hot Heads*, INDIANAPOLIS STAR, Nov. 2, 1993, at A6.

39. Despite the seeming success of these programs, there is still some opposition among lawyers to ADR. See, e.g., Barry Nace, *The ADR Debate: Efficiency Before Justice?*, TRIAL, Dec. 1993, at 7.

40. Under pressure from cost-conscious clients, many firms have been forced to augment their traditional hourly rates with alternative billing arrangements, like flat fees, blended rates, and contingency fees. See *Even Lawyers Feel Pinch of Hard Times*, EVANSVILLE COURIER J., Sept. 5, 1993, at C4 (citing *NLJ* survey which found that nearly half of nation's 250 largest law firms reduced legal staffs); Laura Schwarzkopf, *Management Tips: How to Communicate with Clients*, N.J. LAWYER, May 31, 1993, at 15 ("The economy has not allowed rate increases, which leaves the option of creating different billing methods."); Thom Weidlich, *Billing Picture Reveals A Mix of Alternatives*, NAT'L L.J., Dec. 20, 1993, at S1; see also Laura Duncan, *Law Firms Can Expect Revenue Gain This Year*, CHI. DAILY L. BULL., Jan. 19, 1993, at 3 (observing that firms had to make "painful cuts" to remain profitable in the 1990s).

41. The Courts and Legal Services Act of 1990, among other things, breaks the monopoly previously held by barristers on litigating in the higher courts of England. The Act authorizes certain qualified solicitors and even qualified nonlawyers to appear in these courts for first time. The Act further loosens the grip of lawyers on the profession by permitting qualified nonlawyers to probate wills and to provide conveyancing services. Along these same lines, the Act also allows nonlawyer groups, like accounting firms, to provide certain legal services to their clients. For a discussion of these developments and their relation to the American legal system, see Ruth Fleet Thurman, *English Legal System Shake-Up: Genuine Reform or Teapot Tempest?*, 16 B.C. INT'L & COMP. L. REV. 1 (1993).

42. See Bill Ainsworth, *Paralegals Revive Legal Technician Proposal*, RECORDER, Aug. 3, 1992, at 7; Jill Chanen, *Legal Profession Questions Scope of the Expanding Role of Paralegals*, CHI. LAWYER, July 1993, at 4.

43. See, e.g., Randall T. Shepard, *Classrooms, Clinics and Client Counseling*, 18 OHIO N.U. L. REV. 751, 752-53 (1992) (discussing *inter alia* article 7, section 21 of Indiana's 1816 Constitution which read: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice."). For a long time in America having a license to practice law

Mindful of the potential consequences of failing to relieve public frustration, ABA President Ide led the bar in supplementing the public relations campaign with efforts focusing on substantive change.<sup>44</sup> To this end, Ide organized the Just Solutions Conference series to ensure that the legal system "effectively serves the American citizen in every situation."<sup>45</sup> The first meeting dealt largely with matters of client relations, but in December, the Summit on Civil Justice System Improvements considered some of the problems targeted in this Article. Lawyers, judges, lawmakers, business people, and community representatives discussed methods for lowering the cost and increasing the pace of justice through the courts. Six weeks later, state and local leaders looked at ways to improve the criminal justice system, and in March, leaders from the media, government, education, business, and the bar addressed the problems of ethnic and racial bias in the justice system. Finally, these meetings culminated in the Just Solutions Conference in early May, at which ABA leaders met with dozens of community and organization representatives to build a consensus on the most effective means of addressing these problems.

While these steps are encouraging, we have no guarantee that they will continue. Even after President Ide worked for months establishing state justice commissions to address civil justice issues, such as early settlement procedures, case management techniques, and discovery rule modifications,<sup>46</sup> the board of governors nearly balked at funding the project, upon the advice of President-elect George E. Bushnell, Jr. Only Ide's last minute push for approval yielded the \$30,000 in "seed money."<sup>47</sup> We will have to remain vigilant if we are to sustain the ABA's commitment to improving the delivery of justice to the American public.

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did not confer such a monopoly.

44. The change in the bar's approach to the public's discontent is manifest in the statements of ABA President Ide. In September 1993, Ide told lawyers that the "challenge for us [is] to reach out to the public and increase the public's understanding about the role of lawyers." He implicitly denied the legitimacy of the public's concerns, saying that "perceptions don't always reflect reality," admitting only that they "must be acknowledged." Ide, *What the ABA Plans to Do*, *supra* note 12, at 65. By January of this year, Ide was focusing on the legal system itself, emphasizing that "[j]ustice in the United States takes too long, costs too much and is virtually inaccessible and unaffordable for too many Americans." He went further, exhorting attorneys to take the lead in solving the problems of the justice system "or rightly stand accused of being part of the problem." Walter R. Mears, *ABA's Ide Tackles Image Problems*, LEGAL INTELLIGENCER, Jan. 7, 1994, at 1.

45. R. William Ide, III, *Gaining Momentum: Efforts to Improve Legal System Are Yielding Positive Results*, A.B.A. J., Apr. 1994, at 6.

46. R. William Ide, III, *Curing an Ailing Justice System*, NAT'L L.J., Aug. 6, 1993, at S1, S9 (describing process forming state justice commissions).

47. James Podgers, *Justice Commission Funding Approved*, A.B.A. J., Apr. 1994, at 114.

## IV. UNJUST OUTCOMES AND PUBLIC DISCONTENT

In addition to evaluating procedural aspects of the justice system, the public may rightly measure our performance by the calibre of the outcomes we generate. It would be surprising—and disappointing—to learn that public attitudes towards our legal system are not, in some part, driven by the perceived quality of the product it delivers. Thus, we would do well to entertain the notion that some of the public's frustration emanates from the public's belief that we impose injustices upon society.

Our legal system is the machinery by which our society compels allegiance to its norms. Its dual charge in our constitutional democracy is to effectuate the will of the people while protecting the rights of individuals against the overreaching of transient majorities. Under this arrangement, the majority will occasionally not prevail. In such cases, it becomes the task of the judiciary to remind the majority of our Constitutional commitment to the rights of dissenters. More commonly, however, the community will have its way—laws are enacted, conduct proscribed, schools built, bonds issued—and dissenters are required to acquiesce to the majority's authority to define and effect salubrious conditions according to its vision of a healthy, prosperous, and decent community.

Lawyers and judges should approach with caution their authority to stymie the community's notion of progress. In modern legal culture, however, caution is too often replaced by hubris. We sometimes forget our role as custodians of the community voice and bestow upon the complaints of dissenters a presumption of legitimacy.<sup>48</sup> What can we say of a legal culture that rhetorically devalues what statistically is and normatively ought to be its primary function: vindication of the efforts of citizens to define the communities in which they live? And, more to the point, does the emergence of this devaluing impulse help explain the declining regard which the public has for our legal institutions?

By way of illustrating the consequences of this attitude, I will mention here our profession's forays into our nation's schools as a good example of the way substantive outcomes influence public attitudes about the legal profession. Schools are the places where society begins to inculcate and empower its newest members, and their success is a matter of considerable interest not only to parents but to the broader public as well. Our legal system has left the public confused about whether the courts mean to be part of the solution to our schools' problems or but another one of their problems.

Take first our use of the Establishment Clause, which the Supreme Court recently held prohibits invocations and benedictions at high school graduations.<sup>49</sup> The Court's estrangement from those who wish to declare thanks to God for their successes bolsters the perception that lawyers and judges govern

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48. At an international conference of judges in 1991, I heard the Chief Justice of Israel declare that vindicating minority views was "the real reason we have courts."

49. *Lee v. Weisman*, 112 S. Ct. 2649 (1992).

for themselves and not for the public at large. Add to this the public's skepticism over the judiciary's twenty-five year long campaign to interject itself into the grading, disciplining, and educating of public school children, and the product is predictable. As in so many other spheres, public dissatisfaction grows with each step judges and lawyers take towards making themselves the middlemen through which various aspects of the educational enterprise must pass.

### A. *Religion in the Public Schools*

As the public's concern with drugs and violence in the schools continues to grow, local communities across the country struggle to restore their children's sense of morality.<sup>50</sup> By and large, the Supreme Court has been swimming in the opposite direction, recently extending its Establishment Clause doctrine in *Lee v. Weisman*<sup>51</sup> to prohibit references at public school graduations to the religious faith underlying the morality that local communities are fighting to recapture. While the courts are sworn to protect the rights of religious dissenters against overbearing majorities, we, as lawyers, must also appreciate the frustration of community leaders and parents when they find that the traditional invocations and benedictions at their children's graduations, practices older than the Fourteenth Amendment, are now unconstitutional abuses.

The *Lee* decision stands at the furthestmost boundary of a constitutional jurisprudence that began in the late 1940s when the Court first applied the Establishment Clause of the First Amendment against the states in *Everson v. Board of Education*.<sup>52</sup> In *Everson*, the Court upheld a New Jersey law that reimbursed parents for the cost of bus transportation to religious schools, but the opinion included strong dicta that neither the federal nor state governments could "aid one religion, aid all religions, or prefer one religion over another."<sup>53</sup> Further, we were told, "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."<sup>54</sup>

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50. See generally Elsa Brenner, *The Rising Role of Youths in Crime*, N.Y. TIMES, Jan. 30, 1994, § 13WC, at 1 (discussing "growing uneasiness among city officials about the number of youths carrying weapons to school and 'walking the corridors with guns and knives.'"); Linda Eardley, *City Schools 'Gun-Shy' on Tracking Number of Firearms Found*, ST. LOUIS POST-DISPATCH, Feb. 7, 1994, at A1 (discussing increasing problem of student assaults with guns and knives in public schools); *Fixing Broken Schools Policies Needed on Weapons, Charter, Volunteers*, SAN DIEGO UNION-TRIB., Feb. 15, 1994, B6 (discussing San Francisco education summit on violence in public schools).

51. 112 S. Ct. 2649 (1992).

52. 330 U.S. 1 (1947). While *Everson* was the first case to review state action under the Establishment Clause, the Court had previously incorporated both the Free Exercise and the Establishment Clauses in dicta. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

53. *Everson*, 330 U.S. at 15.

54. *Id.* at 18.

In the years since *Everson*, this dicta has taken on a life of its own and now largely insulates students from exposure to community religious sentiments.<sup>55</sup> As Chief Justice Burger feared, the Court has wrongly employed "sweeping utterances on aspects of [the religion clauses of the First Amendment] that seemed clear in relation to the particular cases but have limited meaning as general principles."<sup>56</sup> Employing the "general principles" of *Everson*, the courts have prohibited public schools from sponsoring non-denominational, voluntary prayers or Bible readings in classrooms,<sup>57</sup> at assemblies,<sup>58</sup> at school sporting events,<sup>59</sup> and at graduations.<sup>60</sup>

Under this onslaught from the bench, is it any wonder that Mississippi erupted late last year when Bishop Knox, a high school principal, was dismissed because he permitted students to read a non-sectarian prayer over the intercom?<sup>61</sup> While the overwhelming majority of students favored the prayer, 490 to 96, the school superintendent, citing *School District v. Schempp*,<sup>62</sup> felt compelled to fire Knox. The local community rushed to Knox's aid, demanding and finally winning his reinstatement. Frustrated with what they perceived as illegitimate minority control of their religious lives,<sup>63</sup> thousands of students across Mississippi staged walkouts and prayer vigils in Knox's support. Parents

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55. See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (prohibiting 23-word prayer that read "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (prohibiting Bible reading of ten verses); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (prohibiting moment of silence "for meditation or voluntary prayer"); *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985) (prohibiting one-minute period of silence for quiet and private contemplation or introspection).

56. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970) (upholding property tax exemptions for religious organizations).

57. See cases cited *supra* note 55; see also *Stone v. Graham*, 449 U.S. 39 (1980) (prohibiting posting of Ten Commandments in classrooms); *Ring v. Grand Forks Pub. Sch. Dist. No. 1*, 483 F. Supp. 272 (D.N.D. 1980) (same).

58. See *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981) (prohibiting prayers sponsored by student council at school assemblies even where attendance voluntary).

59. See *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993) (upholding preliminary injunction issued against basketball coach for conducting prayers at practice and after games); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090 (1989) (prohibiting invocations at high school football games).

60. *Lee*, 112 S. Ct. 2649; see also *Lundberg v. West Monona Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989); *Graham v. Cent. Community Sch. Dist.*, 608 F. Supp. 531 (S.D. Iowa 1985); *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. 1991), *cert. denied*, 112 S. Ct. 3026 (1992).

61. The prayer read simply: "Almighty God, we ask Your blessings on our parents, our teachers, and our country throughout the day. In Your name we pray. Amen."

62. 374 U.S. 203 (1963).

63. As one exasperated local leader wondered aloud: "Most of the people here, the majority, are Christians. Why do we have to surrender our rights? We're tired of yielding to a tiny minority. What about our rights?" *School-Prayer Ban Proof of Respect*, ATLANTA CONST., Dec. 25, 1993, at A12.

and students rallied at the state capitol, prompting the state House of Representatives to pass a bill that would permit students, not the school, to initiate prayers in school.<sup>64</sup>

A recent Fifth Circuit decision paved the way for the Mississippi bill and for other state initiatives to return prayer to the schools.<sup>65</sup> In *Jones v. Clear Creek Independent School District*,<sup>66</sup> the court permitted a class of high school seniors to determine for themselves whether or not their graduation exercises would include a non-sectarian prayer.<sup>67</sup> The court reasoned in part that religious dissenters attending graduations should not be surprised to find a community's public celebration infused with community values.<sup>68</sup> The court's appreciation of the importance of public celebrations to the lives of communities has been sorely missed in past Establishment Clause cases.

### B. *The Courts and School Discipline*

More than twenty years after the Court announced its ruling in *Everson*, the federal courts also began a project of importing the requirements of procedural and substantive due process into school playgrounds and principals' offices. In one of the first cases to advance this cause, *Tinker v. Des Moines Independent Community School District*,<sup>69</sup> a divided Supreme Court held that the First Amendment precluded school officials from interfering with certain symbolic protests conducted in the school house. *Tinker* signaled the crumbling of traditional judicial deference to educators on questions of educational policy<sup>70</sup> and, observed Justice Black in dissent, "usher[ed] in . . . an entirely new era" in which, he worried, "the courts will allocate to themselves the function of deciding how the pupils' school day will be spent."<sup>71</sup>

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64. William Booth, *Bring Back School Prayer? That's Rallying Cry in Mississippi*, WASH. POST, Dec. 20, 1993, at A1; *Principal in a School Prayer Dispute Is Reinstated*, N.Y. TIMES, Dec. 17, 1993, at A33.

65. See generally Katia Hetter, *States Move to Allow Prayer in Schools*, WALL ST. J., Aug. 18, 1993, at B6 (discussing new Tennessee law permitting student-initiated prayer at public school events and similar proposed legislation in Alabama and Oklahoma).

66. 977 F.2d 963 (5th Cir. 1992), cert. denied, 113 S. Ct. 2950 (1993).

67. See also *Harris v. Joint Sch. Dist. No. 241*, 821 F. Supp. 638 (D. Idaho 1993) (upholding right of students to determine whether to include prayer in graduation ceremonies); *Albright v. Board of Educ.*, 765 F. Supp. 682 (D. Utah 1991) (upholding student-initiated, nonproselytizing, and nondenominational prayers for secular purpose of solemnizing graduation ceremonies).

68. *Jones*, 977 F.2d at 972 ("By attending graduation to experience and participate in the community's display of support for the graduates, people should not be surprised to find the event affected by community standards. The Constitution requires nothing different.").

69. 393 U.S. 503 (1969).

70. See J. Patrick Mahon, *Ingraham v. Wright: The Continuing Debate Over Corporal Punishment*, 6 J.L. & EDUC. 473, 473 (1977).

71. *Tinker*, 393 U.S. at 515, 517 (Black, J., dissenting).

Six years later in *Goss v. Lopez*,<sup>72</sup> the Court decided by a five to four margin that the Due Process Clause required that certain procedural safeguards attend even short suspensions from the public schools. The *New York Times* editorialized that *Goss* was a victory for the rights of children over the "image of the school administrator as a benign but infallible autocrat whose edicts can be challenged only at peril of chaos in the schoolhouse."<sup>73</sup> Those dissenting in *Goss*, however, warned that the Court was entering a "thicket" in which the judgment of courts would be substituted for that of the "14,000 school boards, and the 2,000,000 teachers who heretofore have been responsible for the administration of the American public school system."<sup>74</sup> Within a decade, the legal system had succeeded in wresting away from local educators final authority over the propriety of dress codes,<sup>75</sup> paddlings,<sup>76</sup> and a host of other school-related issues including grading, promotions, school transfers and exclusions from extracurricular activities.

When these first cases were handed down twenty five years ago, the specter of "chaos in the school house" was viewed as little more than a fatalistic prediction. Today it is widely regarded as a reality.<sup>77</sup> Along with worrying about whether their students can become proficient enough to compete in a complex world, educators now have more basic concerns, like whether they can keep cocaine and handguns out of the classroom. Frightened parents, teachers, and community leaders have reacted to the increased incidence of school-based violence and vandalism by seeking new methods for maintaining order. Inevitably, however, many of these innovators must reckon with an American legal system that is comprised of judges who admonish principals for being too earnest in efforts to rid their schools of dangerous weapons,<sup>78</sup> strike down anti-

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72. 419 U.S. 565 (1975).

73. *The Rights of Children*, N.Y. TIMES, Jan. 27, 1975, at A24.

74. *Goss*, 419 U.S. at 597, 599 (Powell, J., dissenting).

75. See, e.g., *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969) (long hair), *cert. denied*, 398 U.S. 937 (1970); *Bannister v. Paradis*, 316 F. Supp. 185 (D.N.H. 1970) (blue jeans). *But see* *Wright v. City of Brighton*, 441 F.2d 447 (5th Cir. 1971) (declining to follow *Breen*).

76. *Ingraham v. Wright*, 430 U.S. 651, 659 n.12, 679 n.47 (1977) (holding that paddling implicates liberty interest of Fourteenth Amendment and reserving question of whether corporal punishment gives rise to independent federal cause of action to vindicate substantive rights under Due Process Clause); see also *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980) (holding that certain instances of corporal punishment could violate substantive due process right of bodily security). *But see* *Hale v. Pringle*, 562 F. Supp. 598 (M.D. Ala. 1983) (denying student recovery for corporal punishment and declining to adopt *Hall* approach to substantive due process).

77. See generally Cindy Loose & Pierre Thomas, 'Crisis of Violence' Becoming Menace to Childhood, WASH. POST, Jan. 2, 1994, at A1 (reporting that "[s]chool suspensions and expulsions are soaring, as are the number of weapons confiscated in schools"); Lawrence F. Rossow, *Administrative Discretion and Student Suspension: A Lion in Waiting*, 13 J.L. & EDUC. 417, 440 (1984) (documenting rapid increase in suspensions in response to discipline crisis).

78. *Washington v. Smith*, 618 N.E.2d 561 (Ill. App. Ct. 1993) (finding an abuse of discretion when school board expelled student for bringing ice pick on school property).

gang initiatives,<sup>79</sup> and block efforts to deter those who illegally consume drugs and alcohol.<sup>80</sup> No wonder, then, that many view lawyers as unwelcome spoilers in the effort to improve our nation's youth and schools.<sup>81</sup>

Indeed, the bench has been known to block reforms aimed at helping the most endangered youths of all—young black males. The people of Detroit “looked at the statistics on the life chances of African-American males and their lack of performance at every level of the school system and decided that what [they] were doing wasn’t working.”<sup>82</sup> In 1991, the school board adopted a plan to establish three all-male academies for the inner-city youth.<sup>83</sup> Some twelve days before the schools were to open, however, a federal district judge held that excluding girls from the schools would violate the Equal Protection Clause.<sup>84</sup>

Following the successful precedents set by the Harlem Boys Choir, military academies, and parochial schools, the academies were specifically designed to address the problems facing young black males. Of the 170,000 students in the district, 70% are raised by single mothers, leaving most of the boys without positive male role models. Two-thirds of the males enrolled in Detroit schools fail to graduate as compared with a one-third dropout rate among the girls. It

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79. *Jeglin v. San Jacinto Unified Sch. Dist.*, 827 F. Supp. 1459 (C.D. Cal. 1993) (holding that ban on clothing identifying professional or college sports teams violated free speech rights of middle schoolers).

80. *Smith v. School of Hobart*, 811 F. Supp. 391 (N.D. Ind. 1993) (holding that reduction in grades for alcohol use during school hours violated substantive due process).

81. See A.E.P. Wall, *Too Many Laws, Not Enough Justice?*, ORLANDO SENTINEL, June 13, 1993, at G3 (linking “collapse of discipline in the public schools . . . with court orders that looked out for [dissenting students]”); Ted Williams, *How to Fix Our Schools*, HOUSTON CHRON., Nov. 14, 1993, (Viewpoints), at 3 (“courts have handcuffed the schools by making it difficult (sometimes impossible) and costly to deal with incorrigible students”); Wendell L. Wilkie, *A School Must Have Moral Authority*, WASH. POST, Sept. 13, 1986, at A21 (“courts [must] be wary of second-guessing routine disciplinary decisions so that schools are not precluded from serving as teachers of character”).

82. Isabel Wilkerson, *Detroit's Boys-Only Schools Facing Bias Lawsuit*, N.Y. TIMES, Aug. 14, 1991, at A1 (quoting superintendent of schools, Dr. Deborah McGriff).

83. See, e.g., Amy Harmon, *Three Hundred Rally in Support of All-Male Schools*, L.A. TIMES, Aug. 22, 1991, at A4; Wilkerson, *supra* note 82, at A1. While Detroit would have been the first city to successfully implement an all-male program, the idea of Afrocentric schools targeting males began in Milwaukee, but a ruling by the Department of Education thwarted that effort. Michael John Weber, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099, 1100 n.8 (1993); see also Dennis Kelly, *Judge Rejects All-Male Schools*, USA TODAY, Aug. 16, 1991, at 3A. The Department of Education also put a stop to all-male classes in Miami. Weber, *supra*, at 1100 n.7; see also Kenneth J. Cooper, *Bush, Citing Boy Scouts, Backs All-Boy Black Public Schools*, WASH. POST, Sept. 10, 1991, at A2. New York City still plans two such schools, the Ujamaa Institute for Hispanics and African-Americans and the Leadership School for Hispanics. The New York Civil Rights Coalition, however, has filed discrimination complaints against the schools, and the Department of Education is investigating. Susan Chira, *Rethinking Deliberately Segregated Schools*, N.Y. TIMES, July 11, 1993, § 4, at 20.

84. *Garrett v. Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich 1991).



is not surprising, however, that these boys are less concerned with graduation than survival when homicide is the leading cause of death for male youths between the ages of fifteen and twenty-four.<sup>85</sup> The boys are the gang members. The boys are the discipline problems.<sup>86</sup> The boys are the ones most at risk today in our cities.

In an effort to break this cycle of violence, drugs, and unemployment, the schools would have employed specially trained male teachers, providing much needed positive role models for the kids. To raise the self-esteem of the children, the curriculum would have emphasized black achievement.<sup>87</sup> Classes would have been held on Saturdays and additional tutoring would have been available.<sup>88</sup> For the first time in years, the Detroit community felt it might give its boys a chance to rise above their circumstances.<sup>89</sup>

In granting the injunction against the schools, Judge Woods did not deny that saving the black males of Detroit was an important objective nor did he question the seriousness of the difficulties facing these kids. Instead, he declared that excluding girls was not substantially related to the achievement of that objective.<sup>90</sup> He reasoned that "[a]lthough co-educational programs have failed, there is no showing that it is the co-educational factor that results in failure."<sup>91</sup> Of course this reasoning placed Detroit in a catch-22. The courts will not permit

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85. Weber, *supra* note 83, at 1099 n.2.

86. Wilkerson, *supra* note 82, at A1.

87. "Our kids are given the impression that all they can do is dance and play sports. White kids are taught they can do anything. When a little kindergartner [sic] looks at a traffic light, we need to go beyond red, yellow and green. The teacher needs to say a black man, Garrett Morgan, designed that," explains Dr. Clifford Watson, principal of one of the schools. Wilkerson, *supra* note 82, at A1. For a discussion of Afrocentric curriculums, see Weber, *supra* note 83, at 1102-21.

88. Garrett, 775 F. Supp. at 1006; *see also* Harmon, *supra* note 83, at A4; Wilkerson, *supra* note 82, at A1.

89. Chira, *supra* note 83, at 20 (discussing support for voluntary segregation given public schools' "abysmal" record at educating minorities); Harmon, *supra* note 83, at A4 (describing support from those "desperate to stop the steady stream of [Detroit's] young men flowing into prisons and onto the streets"); Wilkerson, *supra* note 82, at A1 ("We've just got to do something to turn this madness around," explained Frank Jayden, vice president of Detroit Board of Education).

90. Garrett, 775 F. Supp. at 1006-08. In *Mississippi Univ. for Women v. Hogan*, the Court announced that students may not be excluded from publicly funded schools on the basis of gender unless the state can show that the exclusion "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" 458 U.S. 718, 724 (1982) (holding that men could not be excluded from school of nursing). The Court did not decide, however, separate but equal all-male and all-female schools would violate the holding of *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (holding that separate but equal schools for African-Americans are "inherently unequal"). *Hogan*, 458 U.S. at 720 n.1; Garrett, 775 F. Supp. at 1006 n. 4; *see also* United States v. Virginia, 976 F.2d 890, 900 (4th Cir. 1992) (holding that single-sex policy at Virginia Military Institute violated equal protection but expressly suggesting establishment of comparable programs for women).

91. Garrett, 775 F. Supp. at 1007.

all-male academies absent evidence that they will work, but communities cannot produce such evidence without first establishing an academy.<sup>92</sup>

There is some indication, however, that the Court is attempting to extricate itself from the "thicket" of which Justice Powell warned.<sup>93</sup> These moves are animated by judicial concern for the plight of the nation's schools<sup>94</sup> and a belief that the explosion of suits by students and their parents against schools must be checked.<sup>95</sup> Even so, the volatility of due process jurisprudence<sup>96</sup> coupled with the eagerness of many lower courts to entertain these suits (and of lawyers to bring them) ensures that actual or threatened legal actions will continue to chill efforts of local authorities.<sup>97</sup> And, as long as the legal system is viewed as an obstacle which those concerned about education must overcome,<sup>98</sup> we should

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92. Weber, *supra* note 83, at 1124 (arguing that "[u]nless the courts allow experimentation, heterogeneous school districts will be unable to determine whether all-male African-American schools can work").

93. See, e.g., *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (holding that students not permitted same latitude as adults to use offensive expression to make "political" point); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (exempting searches and seizures by school officials from warrant requirement but holding them to reasonableness standard). See generally Andrew Fegelman, *Kids' Rights Fade Behind School Doors*, CHI. TRIB., Dec. 26, 1991, at NW1; Michael A. Mass, *Due Process Rights of Students: Limitations on Goss v. Lopez—A Retreat Out of the 'Thicket'*, 9 J.L. & EDUC. 449 (1980).

94. See, e.g., *T.L.O.*, 469 U.S. at 339 ("Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems."). See generally J.M. Sanchez, *Expelling the Fourth Amendment from American Schools: Students' Rights Six Years After T.L.O.*, 21 J.L. & EDUC. 381, 409 (1992); Frederick J. Griffith, III, *New Jersey v. T.L.O. and its Progeny: The Bill of Rights at School*, 5 COOLEY L. REV. 617 (1988).

95. Griffith, *supra* note 94.

96. See *Wood v. Strickland*, 420 U.S. 308, 329 (1975) (Powell, J., concurring in part and dissenting in part) ("One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are unquestioned constitutional rights.").

97. See Andree Aelion Brooks, *Parents v. Schools: Battling in Courts*, N.Y. TIMES, Aug. 1, 1993, §4 (Education), at 22 (tracing "sharp increase" in lawsuits against schools in part to the U.S. Supreme Court's opinion in *Goss v. Lopez*); Donald H. Henderson, *Constitutional Implications Involving the Use of Corporal Punishment in the Public Schools: A Comprehensive Review*, 15 J.L. & EDUC. 255 (1986) (reporting that increasing number of corporal punishment litigants choose to pursue federal civil rights remedies over state common law ones); Bernard Weinraub, *Reagan Orders Meese to Examine Ways to Curb Violence in Schools*, N.Y. TIMES, Mar. 1, 1985, at B9 (reporting administration's concern about "'the likely chilling effect' on teachers of actual or threatened legal moves brought by students facing disciplinary action").

98. See, e.g., Doris Sue Wong, *Bill OK'd Giving Schools More Power To Bar Pupils*, BOSTON GLOBE, Jan. 5, 1994, at 23 (parent petition drive secures passage of bill nullifying court ruling that school administrators lacked authority to discipline students for activities beyond school grounds); Rossow, *supra* note 77, at 440 (warning that "[r]egardless of how carefully an administrator follows procedural due process guidelines," suspensions can be successfully challenged if the decision to suspend a student for a particular misbehavior is deemed unreasonable by the court).

not be surprised at the disdain with which those who administer the legal system are held by the public.

#### V. CONCLUSION

I find myself at once pessimistic and optimistic about the future role of our profession in this country. The pessimism flows from realizing that lawyers have been the object of criticism for centuries, a glum reality which will not be radically altered by any public relations effort. Moreover, substantive legal reform is a hard chore indeed; changing the legal system is at least as difficult as moving a cemetery. Still, I see signs warranting hope. In the last year, the leadership of the American Bar Association has taken us a long way towards confronting the root causes of public dissatisfaction with our profession and the role it plays in American society. Whether this fine turn of events can be converted into a sustained effort, at the ABA and elsewhere in the profession, will depend on how many of us step up to do our part.

