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Thomas W. Porter, Jr.

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THE SPIRIT AND THE LAW

Thomas W. Porter, Jr.*

Introduction

The practice of law is experiencing a spiritual crisis.¹ This crisis is seen in the personal lives of lawyers, in the lives of law firms, in the legal systems in which we work and in the paradigms that inform them. I am a trial lawyer who helped start a firm and managed it for many years. I am fortunate that fellow lawyers, primarily trial lawyers, have shared their experiences with me. Furthermore, as chair of a journal whose interests include the vocation of the lawyers, I have had the opportunity to read some of the literature on lawyers.² All of these experiences have convinced me that our noble profession is suffering spiritually at both the personal and professional level.

This Essay does not deal with all the aspects of the spiritual crisis in the law. Rather, it seeks to determine the role that the crisis in our paradigms has played in the crisis in our personal and institutional lives. This does not mean that the crisis in our paradigms is responsible for all our problems; however, I do believe that our institutions and systems can cause us to be estranged from ourselves and that is what is happening today in the practice of law. To solve the spiritual crisis in our paradigms is not simply to return to the days of the "gentleman litigator"—although that role appeals to me—because I still view litigation in the adversarial mode, with good advocates, serving as an important secondary system. Moreover, I am convinced that the problems with the old paradigms will be addressed only when we see the old paradigms in the context of the new. As the new millennium dawns, we, as a profession, are beginning to see the limitations of our old paradigms and the promise of newly emerging paradigms. These new paradigms have the potential to bring us back to our professional roots and to a clearer understanding of the divine purpose of the law.

* Of Counsel, Melick & Porter LLP.

1. See JOSEPH G. ALLEGRETTI, *THE LAWYERS'S CALLING: CHRISTIAN FAITH AND LEGAL PRACTICE* (Paulist Press, 1996). I am indebted to Joseph Allegretti for many of the reflections in this paper. See also Joseph Allegretti, *Lawyers, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 *FORDHAM L. REV.* 1101 (1998); MARY ANN GLENDON, *A NATION UNDER LAWYERS* 14 (1994).

2. The author is the chair of the *Journal of Law and Religion*.

I. The Old and the New Paradigms

The old paradigms have, at their base, an understanding of justice as retributive, the adversary system as serving retributive justice and the role of the lawyer as zealous advocate. The new paradigm for justice moves toward a broader vision of justice — restorative justice — with retributive justice remaining a viable model for those matters where attempts at restorative justice fail. The new paradigm for conflict resolution is mediation, with the adversary system serving an important and useful secondary role when mediation fails or is inappropriate. Finally, the paradigm of the zealous advocate is retained, but in the context of the new paradigm of the lawyer as both advocate and peacemaker.

II. A Spiritual Crisis

A. The Personal

Mary Ann Glendon, a law professor at Harvard Law School, states, “American lawyers, wealthier and more powerful than their counterparts anywhere else in the world, are in the grips of a great sadness.”³ While not all lawyers would say that they are experiencing this, a significant number with whom I have spoken, or whose works I have read, believe this to be true. I hear many lawyers saying, with respect to their personal lives as lawyers, that if it were not for the golden handcuffs, they would retire and do something different. They get very little enjoyment or fulfillment out of the practice. In fact, they feel that the practice has estranged them from themselves, the person that they feel that they are and want to be. They also find themselves estranged from other lawyers, due to the anger and animosity that has seeped into the practice: a lack of civility.

B. The Communal

Stories about law firms breaking up and images of law firms as dysfunctional communities are commonplace.⁴ But, this is not unique to law firms and lawyers. All communities, be they organized religions, schools or neighborhoods, are experiencing problems. This is an age in which it is hard to create and sustain community. Firms are focused on making money. More billable hours are needed, which means longer hours at work. We have

3. GLENDON, *supra* note 1, at 15.

4. See *Collegiality vs. Current Business Environment: The Fast-Approaching Future for Law Firms*, MERRILL'S ILL. L. TIMES, Nov. 1996, at 19.

little time for our families, our friends and for ourselves, not to mention time for service to the larger community. Relationships are often shallow and people have become expendable. We have become more self-seeking and self-serving. Sadly, it is certainly not an era in which the phrase "one for all and all for one" is heard.

Perhaps there never was such an era in the practice of law, but there have been times when the practice was closer to this ideal than it is at present. Communities in all professions are experiencing a spiritual crisis, and the community of lawyers is not immune. I believe Joseph Allegritti in his book *The Lawyer's Calling*⁵ is correct when he concludes, "At its core, the legal profession faces not so much a crisis of ethics, or commercialization, or public relations, but a spiritual crisis."⁶

III. The Present System and Its Paradigms

Lawyers are beginning to see what their clients, and the public in general, have seen for sometime: aspects of our legal system and practice do not serve the ends for which they were created. The adversary system is an improvement over armed conflict in so far as the legal system provides a civilized way for society to resolve its disputes. In fact, much about the system is good and works to accomplish this goal. However, its adversarial nature has increasingly become like the armed conflict it was designed to replace. As one judge has reported: "Lawsuits now are not merely a means to resolve disputes but protracted acts of warfare. The purpose is not merely to win, but to 'chew the other guy up,' to 'nail witnesses to the cross,' to 'destroy' the opposition, to 'rearrange their anatomy.'"⁷ Lawyers essentially have become hired guns. Instead of resolving conflicts, the process increases animosity and estrangement. Everyone is wounded.

Ironically, although the goal becomes winning at all costs, most clients come away from litigation feeling that everyone has lost, and that the lawyers are the only ones who benefit from the process.

In reality, truth also loses. People justify lies and deceit. Ends justify any means. In fact, my experience with the adversarial system is that its adversarial nature and emphasis on winning, with

5. ALLEGRETTI, *THE LAWYER'S CALLING*, *supra* note 1.

6. *Id.* at 3.

7. RUDOLPH J. GERBER, *LAWYERS, COURTS, AND PROFESSIONALISM: THE AGENDA FOR REFORM* 86 (1989).

painful consequences for losing, creates an atmosphere for lying. The adversary system does not work to heal people or relationships. It does not work to restore relationships that are broken or to reconcile people. As Robert Cover, a Yale law professor has written, litigation is a form of legalized violence, involving coercion where persuasion and moral dialogue have failed.⁸ Judges and juries impose their judgment on the parties and these judgments are enforced ultimately by the police. Unfortunately, lawsuits in such a model almost always exacerbate the anger, wounds, hurts, divisions, greed and desire for revenge. The system, as we see it practiced, has the potential of hurting clients and practitioners alike.

Within the modern adversarial system, the paradigm of the lawyer as “advocate” has become supreme. Moreover, the concept of “advocacy” has been interpreted to mean “zealous advocacy,” as discussed in the *Model Code of Professional Responsibility* (the “Code”).⁹ Moreover, “zealous advocacy” often becomes “winning at all costs” — or, as Vince Lombardi once said, “Winning isn’t everything, it’s the only thing!” This leads to delay, the frivolous suit, excessive discovery, the abuse of witnesses, the other party and the other attorney, the manipulation of process, the lack of civility and cooperation and the inflation of legal costs.

The legal system that produces these results is presently based on the paradigm of retributive justice. This view of justice looks at the past, assesses guilt or liability based on the law and imposes penalties or damages. The legal system of retributive justice has become a system that exalts procedure over substance, so that due process has become more important than substantive justice. This emphasis on the former over the latter consequently has made the system more and more legalistic and technical.

The paradigm of retributive justice also necessitates and fuels an adversarial system which encourages the zealous, win-at-all-costs advocacy. At the end of too many lawsuits, all the parties have been degraded in various degrees. Nothing has been done to heal the parties or to solve the problem between them in a way that creates a new future for them together. Perhaps this is why law professors and the legal community are so reluctant to talk about justice. The question becomes whether retributive justice is the justice we really want or need. Moreover, we must determine how far removed retributive justice is from revenge.

8. See Robert Cover, *Violence and the World*, 95 YALE L.J. 1601, 1601-29 (1986).

9. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980).

IV. The Spirit of the Law: Returning to Our Roots

The “spirit of the law” is something larger than the “letter of the law.” The “spirit of the law” ultimately must inform the letter. The spiritual crisis, in my view, has been created in large part because we are no longer focused on the true purpose of what the law was created to do. The law and the legal system were created to affirm relationships by giving definition to the rights and obligations of those relationships, dealing with broken relationships and restoring the relationships where the rights and obligations of the parties were not being fulfilled.

A. Biblical Context

The “spirit of the law” recognizes that the self is a person in relation to others, and that we are defined by our relations.¹⁰ In the Judeo-Christian religious traditions, the divine vocation of the law is viewed in the context of the biblical understanding of “shalom”¹¹ and “covenant.”¹² God is about breaking down barriers between people and creating fair and just relationships. When the law turns its back on its divine vocation, its spirit becomes idolatrous and, as such, demonic.

The covenant is the agreement that God has made with creation and shalom is God’s vision for humankind.¹³ Howard Zehr defines this as “all rightness,” or things being as they should be.¹⁴ This includes living in “right relations,” in peace without enmity, yet not necessarily without conflict. The covenant of God with creation became both the basis and model for shalom. God’s covenant became the model for all relationships. Law and justice became a way of defining this covenant.

The two words in Hebrew closest to justice, *tzedeq* and *mishpat*, connote making things right. Justice is an act that tries to make things right. Fittingly, the word for paying back (*shillum*) and recompense (*shillem*) have the same root word as shalom.

In sum, Biblical law attempted to define the obligations of these relationships. Justice was seen as fulfilling the demands and obligations of the relationship and, when there was a breach, attempting

10. I re-learned this truth in South Africa as I listened to people talk about the concept of *ubuntu*, which means, “I am because we are, a person is a person through persons, or I am only a person through others.” I participate, therefore I am.

11. 5 ENCYCLOPAEDIA JUDAICA 143.

12. 14 ENCYCLOPAEDIA JUDAICA 1286.

13. *See id.*

14. HOWARD ZEHR, CHANGING LENSES 130 (1990).

to make things right, healing the harm and finding solutions that would restore the well-being, or shalom, of the relationship.

B. Modern Law

Our modern common law and statutory law also define the rights and obligations of different types of relationships, whether it be the relationship between a landlord and a tenant, a manufacturer and a consumer, strangers who do harm to each other, or between a citizen and the state. The law has created a way of relating people through the corporation. People can create their own relationships through contracts, partnerships and joint ventures, defining in large part their own understanding of their rights and obligations. The law, as we know it, at least on the surface, is about relationships.

Yet these relationships should be greater than the law *about* these relationships. The law is limited to a minimal understanding of rights and obligations. Because of the breakdown and growing anonymity in our relationships, we have attempted to define relationships in greater and greater detail, in order to sustain the relationship. What has happened as a result is that we have become more and more legalistic, thereby ignoring the spirit of the relationship.

C. The Task

Relationships do break. The Biblical faith is very realistic about the problems of creating and maintaining relationships. God knows the problem. God is constantly trying to restore a relationship with God's creation, and calls us to be co-partners in this task of creating shalom. When a relationship is broken, there needs to be an effort to repair the breach, to work out a new relationship that is just and fulfilling. The law and the legal system have their own limitations in restoring relationships, but they should play a critical role in the process nevertheless.

V. Dealing with Broken Relationships

How can the legal system serve the goal of restoring the relationship that is broken? How have our present paradigms failed to serve the created purpose of the law and, in fact, have become, at times, counter-productive? Are there other emerging paradigms that might better serve the spirit of the law and its divine purpose?

A. Restorative Justice: The Goal

As Howard Zehr points out in his book, *Changing Lenses*, there is an emerging alternative to retributive justice; it is called “restorative justice,” or “transformative justice.”¹⁵ Zehr discusses how restorative justice is based on the biblical idea of justice, whereas retributive justice is something we primarily adopted from the Greeks and the Romans.¹⁶

Restorative justice grows out of the biblical understanding of justice as described above: establishing right relations, fulfilling the rights and obligations of the relationship and, when there is a breach, attempting to make things right, healing the harm and finding solutions that would restore the well-being or *shalom* of the relationship.

Zehr states: “Biblical justice decidedly was not a forensic inquiry into wrongdoing to establish guilt and decide what punishment was merited. Rather Biblical justice was an attempt to right wrongs, to find solutions that would bring about well-being.”¹⁷ Restorative justice focuses on the harm done, not on legal guilt. The wrong is seen primarily as a violation of a human being, of the relationship and of *shalom*, not primarily as a violation of rules. The focus is on solving the problem, healing and making things right, not on the infliction of punishment. Making things right requires restitution, accountability and accepting personal responsibility for one’s own actions. The focus is, primarily, on the future not the past. Ultimately, the goal is to bring the parties together so as to collectively work out how things are to be rectified and how they are to live together in the future. The process is aimed at reconciliation.

B. Mediation: The System of First Resort

Restorative justice should become the primary paradigm and goal of our legal system with retributive justice being sought only when attempts at restorative justice fail. Joseph Allegretti quotes Abraham Lincoln as saying:

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser—in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a

15. *Id.* at 181. My discussion of restorative justice owes much to Howard Zehr. Zehr only speaks of restorative justice in regard to criminal law, while I suggest that it should apply to civil law as well.

16. There are also elements of retributive justice in the Bible.

17. ZEHHR, *supra* note 14, at 142.

good man. Never stir up litigation. A worse man can scarcely be found than one who does this.¹⁸

When justice is defined as restorative justice, the system for achieving restorative justice is one of dialogue. While this is not the case in the present adversarial system, that is not to say that the adversarial system will disappear. With a proper focus on the role of mediation, litigation will become the avenue of last resort. Moreover, by emphasizing the benefits of and, in turn, employing mediation, we will begin to see that even in their conflicts, human beings were created good and were created to be in relationships, and that when they fall, they have the possibility of redeeming their relationships by creating a new relationship.

At its heart, mediation is about people in conflict coming together to resolve their differences with the assistance of an impartial person. It involves dialogue, not coercion. Just as important, it provides the opportunity for each party to encounter the other, telling his or her story and listening to the story of the other. The impartial party, who provides a safe space, helps each party to hear the other's story. Here, perhaps for the first time, the parties begin to understand the injuries and harm that have been created for the victim first and foremost, but also for the offender and the community. These injuries are often physical, emotional, moral and spiritual. Each party has the opportunity to recognize the humanity of the other. The mediator tries to help all the parties understand and articulate their real needs. Ideally, the mediation leads to empowerment, where the parties feel they have some control over the process and the outcome. The process then leads to accountability, as the offender recognizes the harm and the wrong that has been done and must be redressed. This process will involve restitution and reparation by the offender, thereby making things right. Sometimes it can even move beyond restitution to some type of healing, which might include genuine apologies and forgiveness. Ultimately, its goal is to move toward reconciliation and a future where the parties can live and work together.¹⁹

18. See ALLEGRETTI, *THE LAWYER'S CALLING*, *supra* note 1, at 92-93.

19. This does not mean that there is no place for litigation. Litigation, as a backup to mediation, will encourage mediation. Moreover, there are some cases that need to be litigated to vindicate important public values and resolve conflicts that cannot be mediated. Based on what I have learned about human nature, there will be plenty of cases that will not be resolved through mediation. The mediation movement has been gaining momentum and new converts among the trial bar. In fact, the movement, for me, has an almost spiritual overtone to it. Many trial lawyers are finding in mediation

C. Advocate and Peacemaker: The Lawyer's Role

The dominant paradigm today of the lawyer's role in dealing with broken relationships is the lawyer as advocate. This is a noble paradigm. William Stringfellow, a lawyer who affirmed the role of the advocate from the Christian perspective, says, "[t]he freedom in Christ is to undertake the cause of another, including causes deemed 'hopeless,' to intercede for the need of another, without evaluating it, but just because the need is apparent, to become vulnerable, even unto death in the place of another."²⁰ Thomas Shaffer, a professor at Notre Dame Law School, describes such a role as being a friend, a companion who neither condemns, nor abandons the client.²¹

There is no more important role than standing up for another person and advocating his story. This involves being a good listener, demonstrating to the client that he and his story have been truly heard and telling the story truthfully and fully in a manner that is persuasive. By doing these three things, the advocate demonstrates to the client that he or she has recognized the harm the client has experienced and empowers the client to believe that something can be done to rectify the wrong, correct the harm or resolve the conflict. Being an advocate also involves standing in the midst of the conflict and taking the slings and arrows of abuse from the other side.

The *Code* has defined this advocacy as requiring zealous advocacy.²² There were some good reasons for this: to affirm complete loyalty, to focus on the client and not the self and to encourage lawyers to represent the weak, the vulnerable and unpopular causes. Yet the problem with the paradigm of the zealous advocate is created when it becomes the only model and when zealous advocacy becomes winning at all costs. Perhaps the problem is that the model has become a model for advocating for the rights of the person as an individual but not for the relationships of the person, which are an essential part of the person, and the needs of the person who lives in community and is formed by relationships.

a way of resolving their own spiritual crises. I find here a great sign of hope for the law and the legal system and for us as legal practitioners.

20. William Stringfellow, *A Lawyer's Work*, 3 CHRISTIAN LEGAL SOCIETY QUARTERLY 19 (1982).

21. See THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 78 (1981).

22. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980) (stating that the duty of a lawyer "is to represent his client zealously within the bounds of the law").

The role of the zealous advocate is balanced in the *Code* with the paradigm of the lawyer as officer of the court. Unfortunately, however, this paradigm does not have much definition. More importantly, it does not seem to be a powerful image in the lives of lawyers in relation to this dominant image of the zealous advocate. Allegretti reports that former Supreme Court Justice Warren Burger said:

The entire legal profession — lawyers, judges, law teachers — has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers — healers of conflicts. Doctors, in spite of astronomical medical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers? Healers, not warriors? Healers, not procurers? Healers, not hired guns?²³

Perhaps, if lawyers begin to do for relationships and conflicts what doctors do for the body, this paradigm might give new meaning to the paradigm of the lawyer as counselor.

How does one serve as a healer as well as an advocate? Perhaps it has to do with training ourselves, as lawyers in ways of fairly and justly resolving conflicts and then training our clients in the same skills. We might describe this as preparation for mediation. This would include helping our clients see the importance of active listening, trying to fully hear the story of the other and the importance in conflict resolution of showing the other side that his or her story has been heard. As lawyers, we would prepare our clients to be problem solvers and get the other side to join us in trying to resolve the mutual problem. Moreover, we would work to encourage our clients, as well as ourselves, to be more creative in developing options for resolution. We might even begin to consider real reconciliation by exploring the importance of apologies that are backed up by action, as well as forgiveness in the process of really resolving disputes. This means focusing our clients on the importance of the relationship and the future where both parties must live together.

Conclusion: A Confession

I must confess that I find it very hard, within the context of my training and work in the adversarial system for the last twenty-five years, to break out of the old paradigms and practice the new. I

23. See ALLEGRETTI, *THE LAWYER'S CALLING*, *supra* note 1, at 69.

am sure that I have been co-opted by the system, and have played the games and done things which I never intended to do. I also find it hard to resolve the conflicts in my own life.

I also know that we must be realistic. We must be realistic about human nature and the forces in this world that divide people. These forces are in the form of institutions and systems that have lost their divine vocations. We must be realistic about our clients and their desires. In many ways, lawyers are exactly what their clients want them to be — a hired gun who seeks to “chew up the opponent.” Reconciliation is not easy. People do not like to apologize or forgive. We must be realistic about the problems of working out of the new paradigms when the other party and his lawyer are working out of the old paradigms. We must be realistic about the vested interests of lawyers in making money as litigators. We must be realistic about the difficulty of changing paradigms, as Galileo learned. Yet, as Galileo taught us,²⁴ paradigms can change, liberating new perspectives and a more truthful and authentic vision. The paradigm of restorative justice, based on the Biblical understanding of justice, is emerging as such a paradigm and gives me great hope for the future—the future of our system of justice, the role of the lawyer and our life together.

24. See generally GALILEO GALILEI, *DIALOGUE ON THE GREAT WORLD SYSTEMS* 66 (Salusbury translation, Univ. of Chicago Press 1953) (referring to the popular conception of the center of the universe at his time, Galileo wrote, “Therefore, you would argue more Aristotetically by saying, ‘The heavens are alterable, for my sense so tells me,’ than if you should say, ‘The heavens are unalterable, because Logic so persuaded Aristotle.’”).

