




1995

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Original Citation

Gordon J. Beggs, Proverbial Practice: Legal Ethics from Old Testament Wisdom, 30 Wake Forest Law Review 831 (1995)

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Citation: 30 Wake Forest L. Rev. 831 1995

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ESSAY

PROVERBIAL PRACTICE: LEGAL ETHICS FROM OLD TESTAMENT WISDOM*

*Gordon J. Beggs***

The Old Testament book of Proverbs supplied foundational moral values for our nation's legal ethics. With the adoption and revision of formal codes, moral teaching has virtually disappeared from legal ethics. This essay suggests that the wisdom of Proverbs offers a timely challenge to the character of the legal profession by advocating values which include justice, purity, mercy, humility, honesty, candor, truthful testimony, and civility.

The proverbs of Solomon son of David, King of Israel:
for attaining wisdom and discipline;
for understanding words of insight;
for acquiring a disciplined and prudent life,
doing what is right and just and fair;
for giving prudence to the simple,
knowledge and discretion to the young—
let the wise listen and add to their learning,
and let the discerning get guidance—
for understanding proverbs and parables,
the sayings and riddles of the wise.
The fear of the LORD is the beginning of knowledge,
but fools despise wisdom and discipline.

Prologue, *Proverbs* 1:1-7 (NIV).¹

INTRODUCTION

When legal educator David Hoffman of the University of Maryland published the United States' first course on legal ethics almost 160 years ago, he included a reading list that began with *Proverbs of Solomon*, a book from the Old Testament of the Bible.² His selection of *Proverbs* re-

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1. The Scriptures in this essay are, except as otherwise noted, taken from the HOLY BIBLE, NEW INTERNATIONAL VERSION, Copyright © 1973, 1978, 1984 International Bible Society and are used by permission of Zondervan Bible Publishers.

2. DAVID HOFFMAN, A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PRO-

flected the primary role of the Judeo-Christian ethic as the source of morals for the nation at that time.³ His choice was also faithful to the historic use of the book, indicated in its prologue, of preparing the young to administer the Hebrew government in a wise and Godly manner.⁴

George Sharswood succeeded Hoffman as the nation's leading authority on legal ethics.⁵ Sharswood served as Dean of the University of Pennsylvania Law School and later as Chief Justice of the Pennsylvania Supreme Court.⁶ His lectures on legal ethics beginning in 1854 laid the foundation for our modern codes.⁷ Sharswood expressed the Judeo-Christian view that law is derived from principles laid down by a Supreme Being and recommended "the most careful study" of the "system of law delivered by Moses to the Jews."⁸ Sharswood shared Hoffman's view that *Proverbs* was a source of ethical principles for lawyers. He cited the book to support what today seems the counterintuitive principle of moderation in the accumulation of wealth⁹ and to condemn deception in practice.¹⁰

Both Hoffman and Sharswood emphasized that the attorney's conduct should be governed by conscience. In his writings, Hoffman refused to separate private from public morality, and indicated that lawyers should not be exempt from the ethical norms that guide all citizens.¹¹ Sharswood held the same beliefs, noting that "[n]o man can ever be a truly great lawyer, who is not in every sense of the word, a good man A lawyer without the most sterling integrity may shine for a while with meteoric splendor; but his light will soon go out in the blackness of darkness."¹²

With the adoption and revision of formal codes of ethics, the empha-

FESSION GENERALLY 724 (Arno Press 1972). Hoffman's list also featured the Old Testament book *Ecclesiastes* and, from the *Apocrypha*, the books of *Ecclesiasticus*, and *Wisdom. Id.*

3. See, e.g., *Zorach v. Clauston*, 343 U.S. 306, 313 (1952) (noting that "[w]e are a religious people whose institutions presuppose a Supreme Being."); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 318 (1827) (stating that "[m]oral obligations are those arising from the admonitions of conscience and accountability to the Supreme Being"). See also Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1616 (1989) (stating that "[t]he Founders undoubtedly would have concurred with Justice Douglas' observation in *Zorach*").

4. ANDREW E. HILL & JOHN H. WALTON, *A SURVEY OF THE OLD TESTAMENT* 287 (1991).

5. THOMAS L. SHAFFER, *AMERICAN LEGAL ETHICS* 76 (1985) [hereinafter *SHAFFER, ETHICS*].

6. *Memorial to GEORGE SHARSWOOD, PROFESSIONAL ETHICS* iii, viii (5th ed., Fred B. Rothman & Co. 1993) (1896).

7. SHARSWOOD, *supra* note 6, at 5; THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* 7 (1981) [hereinafter *SHAFFER, CHRISTIAN LAWYER*].

8. SHARSWOOD, *supra* note 6, at 10-12.

9. *Id.* at 18 (citing *Proverbs* 13:11).

10. *Id.* at 74 (citing *Proverbs* 26:27).

11. Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 MD. L. REV. 673, 684 (1979). Hoffman's approach is exemplified in his Resolution XII: "I will never plead the Statute of Limitations, when based on the mere efflux of time: for if my client is conscious he owes the debt and has no other defence than the legal bar, he shall never make me a partner in his knavery." HOFFMAN, *supra* note 2, at 754.

12. SHARSWOOD, *supra* note 6, at 168.

sis that Hoffman and Sharswood placed on moral principles has, over time, given way to an effort to regulate professional conduct by increasingly detailed prescriptive norms. The American Bar Association (ABA) *Canons of Professional Ethics*, adopted in 1908, contained thirty-two principles.¹³ Seven of these made explicit reference to broad ethical concepts such as "conscience," "honor," and "moral law."¹⁴ By contrast, the 1983 ABA *Model Rules of Professional Conduct* makes two brief references to "personal conscience," which appear in the Preamble.¹⁵ The forty-nine model rules, which include numerous subdivisions, contain only one express reference to morals, which is permissive: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation."¹⁶

Professor Thomas Shaffer has commented on this trend in legal ethics:

Each generation of American lawyers . . . has revised its code of ethics; each revision says less about morals and says what it does say about morals less clearly. The American Bar Association's new Model Rules of Professional Conduct for American lawyers bring this development to new fullness by avoiding the traditional words of ethical argument, words such as conscience, morality, right, good, and propriety, in favor of the words of mandate and permission that are the stuff of statutes and court orders. The claim implicit in these proposals is that the nationally organized bar is not interested in providing, or is not able to provide, moral admonition to American lawyers; moral admonition has become either entirely private, or non-professional, or it has become a concern appropriate in more local or more specialized organizations of lawyers.¹⁷

Instead, the bar now looks primarily to the adversary system, rather than broad moral principles, as the source of what is right.¹⁸ This change has occurred notwithstanding the fact that contemporary practice centers on the office and board room rather than the courts.¹⁹ Today, few lawyers or

13. CANONS OF PROFESSIONAL ETHICS (1908).

14. *Id.* CANONS 15, 16, 22, 25, 30, 31, and 32.

15. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1990) [hereinafter MODEL RULES].

16. *Id.* Rule 2.1.

17. SHAFFER, ETHICS, *supra* note 5, at 167; see also Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 963 (1987) ("Most of what is called legal ethics is similar to rules made by administrative agencies. It is regulatory. Its appeal is not to conscience, but to sanction. It seeks mandate rather than insight.").

18. SHAFFER, CHRISTIAN LAWYER, *supra* note 7, at 77 (suggesting that "American legal ethics narrowed itself to the English-barrister model").

19. See ROBERT H. ARONSON & DONALD T. WECKSTEIN, PROFESSIONAL RESPONSIBILITY 395, 399-400 (1991) (few ethical standards address pervasive attorney roles as advisors and negotiators); see also F.B. MacKinnon, *Summary of a Statement of the Effect of Religious Principles on Lawyers' Ethical Problems*, 10 VAND. L. REV. 931, 935-36 (1957) (noting the prevalence of proceedings such as arbitration, collective bargaining, contract negotiation, and informal agency proceedings which differ significantly from a formal adversary proceed-

courts refer to religious principles to discern applicable standards of conduct.²⁰ As a general rule, law professors do not consider it their responsibility to teach morality to their students.²¹

In some measure, the history of legal ethics since Hoffman and Sharwood simply reflects the movement of jurisprudence away from natural law theory, which recognized universal moral principles and afforded the nineteenth century lawyer a foundation for ethics.²² By the beginning of the twentieth century, natural law had been largely supplanted by the positivism advanced by the analytic school, which argued that no moral foundation was required for laws, as it consisted merely of a "system of precepts imposed or enforced by the sovereign."²³ Roscoe Pound put it metaphorically: "The state t[ook] the place of Jehovah handing the tables of the law to Moses."²⁴ More recently, scholars belonging to the critical legal studies movement would deny laws, including ethical codes, "any special character separating them from politics and political decisions."²⁵ Similarly, the adherents of the law and economics school would attempt to evaluate the codes according to their potential to maximize wealth.²⁶

Nonetheless, some commentators have expressed disdain for the recent trend in legal ethics away from a focus on morality. According to Professor Michael Swygert, these newer approaches have eroded "the nexus between law and morality"²⁷ by their emphasis on "wealth maximization and political manipulations."²⁸ Professor Owen Fiss believes that this separation of law from morality is a product of a time in which people focused on their differences, rather than on any shared values or ideals.²⁹ Against this background, states Fiss:

ing and indicating that "[b]ecause of these differences, the demands on the lawyer's self restraint in the interest of justice may be great.").

20. MacKinnon, *supra* note 19, at 933 ("For most lawyers religious principles apparently do not offer directly applicable standards of conduct, either in terms of solutions for particular problems such as that of divorce or in terms of absolutely constant rules of behavior such as honesty."); J. Michael Medina, *The Bible Annotated: Use of the Bible in Reported American Decisions*, 12 N. LL. U. L. REV. 187, 252 (1991) (stating that courts cite the Bible for pithy quotes, history, and wisdom); Scott C. Idleman, Note, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433, 442 (1993) (indicating that "religion and religious values (at least as traditionally defined) are generally viewed as illegitimate sources from which to draw in the judicial decision-making process.").

21. See, e.g. Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 31 (1992) ("The conventional view on most faculties has been that education in professional responsibility is someone else's responsibility.").

22. ROSCOE POUND, *LAW AND MORALS* 1-2 (1969) (noting that natural law theory views positive law as the declaration of universal moral principles).

23. *Id.* at 13.

24. *Id.* at 14.

25. J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 432 (1992).

26. See *id.* at 436-38.

27. Michael I. Swygert, *Striving to Make Great Lawyers - Citizenship and Moral Responsibility: A Jurisprudence for Law Teaching*, 30 B.C. L. REV. 803, 817 (1989).

28. *Id.*

29. Owen M. Fiss, *The Death of the Law*, 72 CORNELL L. REV. 1, 14 (1986).

The prospect of understanding and nourishing a common morality seemed hopeless. . . . We will never be able to respond fully to the negativism of critical legal studies or the crude instrumentalism of law and economics until a regenerative process takes hold, until the broad social processes that fed and nourished those movements are reversed.³⁰

This essay is offered as a step toward the regeneration of shared public values which Professor Fiss invites.³¹ The author attempts to explore some of the underlying principles of legal ethics as Hoffman and Sharswood might have understood that term. While this effort might be undertaken from other Judeo-Christian sources, the present essay is based on *Proverbs*, as Hoffman and Sharswood both relied on the book as a source for their teaching. The reader is invited to consider whether the Judeo-Christian principles expressed in *Proverbs* provide guidance for the modern practice of law.

I. PROVERBS AND ITS THEOLOGY

Proverbs was composed by several authors, including King Solomon, between the tenth and sixth centuries B.C.³² The word "proverb" in Hebrew has a variety of meanings and may refer to a "comparison, a code of behavior, and the discovery of hidden truth."³³ The book consists of a series of poetic forms, including contrasts, similes, and metaphors.³⁴ As stated by the Prologue, these writings are intended to teach wisdom, discipline, and discretion.³⁵

Proverbs cannot be completely understood apart from its theology.³⁶ The Prologue instructs that "[t]he fear of the LORD is the beginning of knowledge."³⁷ As commentators have noted, this concept is one of relationship:

Essentially, then, the fear of the Lord is a worshipping, reverent submission to the God of the covenant. The fear of the Lord is a right relationship to God, one of obedience to his covenant stipulations that prompts right method in thought and right behavior in action.³⁸

Thus, *Proverbs*, while practical in its application, is grounded in faith. The text encourages the reader: "Trust in the LORD with all your heart

30. *Id.*

31. *Id.*

32. HILL & WALTON, *supra* note 4, at 286-87.

33. *Id.* at 286.

34. THE NIV STUDY BIBLE 943 (Kenneth Barker et al. eds., 1985). *Proverbs* personifies wisdom and folly as women, each of whom attempts to persuade the young to follow her way. *See id.* at 944.

35. *Id.* at 943; *Proverbs* 1:4.

36. *See* Suzanne Last Stone, *In Pursuit of the Counter-text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 821 (1993) (stating that "[o]ne cannot fully understand Jewish law without considering the religious framework that makes Jewish law possible and renders it intelligible to its practitioners").

37. *Proverbs* 1:7.

38. HILL & WALTON, *supra* note 4, at 288.

and lean not on your own understanding; in all your ways acknowledge him, and he will make your paths straight."³⁹ Underscoring this idea, the book makes numerous references to the omniscience⁴⁰ and justice⁴¹ of God.

According to *Proverbs*, righteous adherence to the book's teachings will result in numerous blessings. For example, one will be rewarded with a sense of joy: "The prospect of the righteous is joy, but the hopes of the wicked come to nothing."⁴² There is also a peace that attends an unburdened conscience: "The man of integrity walks securely, but he who takes crooked paths will be found out."⁴³ The righteous earn a good name, an asset of inestimable value for an individual: "A good name is more desirable than great riches . . ."⁴⁴ Because there is an interconnectedness to the enterprises of mankind, this honor extends even to the community in which the righteous reside: "Through the blessing of the upright a city is exalted, but by the mouth of the wicked it is destroyed."⁴⁵

It should be noted that these blessings do not purport to be prophecy in the sense of the certain promise of God.⁴⁶ Instead, *Proverbs* may be read as wisdom literature to catalog benefits that may reasonably be expected to flow from Proverbial practice, consisting of right attitudes and behavior consistent with Old Testament wisdom.⁴⁷

39. *Proverbs* 3:5-6.

40. See, e.g., *Proverbs* 5:21 ("For a man's ways are in full view of the LORD, and he examines all his paths."); *Proverbs* 16:2 ("All a man's ways seem innocent to him, but motives are weighed by the LORD."); *Proverbs* 21:2 ("All a man's ways seem right to him, but the LORD weighs the heart.")

41. See, e.g., *Proverbs* 3:11-12 ("My son, do not despise the LORD's discipline and do not resent his rebuke, because the LORD disciplines those he loves, as a father the son he delights in."); *Proverbs* 11:4 ("Wealth is worthless in the day of wrath, but righteousness delivers from death."); *Proverbs* 12:2 ("A good man obtains favor from the LORD, but the LORD condemns a crafty man."); *Proverbs* 16:4 ("The LORD works out everything for his own ends—even the wicked for a day of disaster."); *Proverbs* 28:9 ("If anyone turns a deaf ear to the law, even his prayers are detestable."); *Proverbs* 29:26 ("Many seek an audience with a ruler, but it is from the LORD that man gets justice.")

42. *Proverbs* 10:28.

43. *Proverbs* 10:9.

44. *Proverbs* 22:1. The Supreme Court of Pennsylvania commented that this verse was given "vivid meaning" when it relied on the testimony of 52 character witnesses and 21 letters to acquit a trial judge charged with violations of the canons of judicial ethics as a result of accepting an envelope containing cash from a union official. *In re Sylvester*, 555 A.2d 1202, 1208 (Pa. 1989).

45. *Proverbs* 11:11.

46. For the Biblical standard for prophecy, see *Deuteronomy* 18:22 ("If what a prophet proclaims in the name of the LORD does not take place or come true, that is a message the LORD has not spoken. That prophet has spoken presumptuously. Do not be afraid of him.")

47. THE NIV STUDY BIBLE, *supra* note 34, at 943. The editors of *The NIV Study Bible* caution that "we must not interpret [*Proverbs*] as prophecy or its statements about certain effects and results as promises . . . [T]here are enough exceptions to indicate that sometimes the righteous suffer and the wicked prosper." *Id.*

II. PROVERBIAL PRACTICE

A. *Justice*

Proverbs suggests a very different motivation for the practice of law than the desire for wealth, power, and glamour—qualities glorified in the television series *L.A. Law*—which is believed to have attracted many recent law school applicants.⁴⁸ As noted by George Sharswood, *Proverbs* advises restraint in the quest for wealth.⁴⁹ The appropriate goal is modest indeed: “[G]ive me neither poverty nor riches, but give me only my daily bread.”⁵⁰ According to the Scripture, seeking anything more may lead to unfortunate consequences: “A faithful man will be richly blessed, but one eager to get rich will not go unpunished.”⁵¹

Likewise, power and glamour should not be paramount concerns. *Proverbs* counsels that it is “[b]etter to be lowly in spirit and among the oppressed than to share plunder with the proud.”⁵² Instead, the lawyer’s purpose should be serving the cause of justice, or as stated by the Prologue, “acquiring a disciplined and prudent life, doing what is right and just and fair.”⁵³ Understanding this is one of the blessings that accompanies the wisdom of *Proverbs*.⁵⁴

B. *Purity*

The attorney who is concerned with “doing what is right and just and fair” will be selective in accepting cases. The ethical lawyer chooses not to pursue the frivolous claims of an overly-litigious client. Modern practice, by contrast, attempts to divorce the morality of the lawyer from that of the client.⁵⁵ David Hoffman did not accept this distinction. He resolved: “If, after duly examining a case, I am persuaded that my client’s claim or

48. Jean Webb, director of admissions at Yale University School of Law, which was seeing more than a twelve percent drop in applications in 1995 thinks “‘L.A. Law’ may be a factor. Before its cancellation, the show made law look ‘like a glamorous profession.’” Jeff Barge, *Fewer Consider Law*, A.B.A. J., June 1995, at 24, 24. In 1994, Professor Carrie Menkel-Meadow stated, “I really do think ‘L.A. Law’ has had an effect. There is no question students are still driven by the almighty dollar.” James Podgers, *Chasing the Ideal*, A.B.A. J., Aug. 1994, at 56, 58. Professor Stephen Gillers commented that “[p]eople come to law school subliminally influenced by ‘L.A. Law.’” David S. Machlowitz, *Lawyers on TV*, A.B.A. J., Nov. 1988, at 52, 55. The article elaborated that “[t]he effect may be more than subliminal. Some attribute the 10 percent rise in law school applications [in 1988] to ‘L.A. Law’ as well as to the Oct. 19 market crash, which made MBAs less desirable.” *Id.*

49. SHARSWOOD, *supra* note 6, at 18 (quoting *Proverbs* 13:11, which states that “[d]ishonest money dwindles away, but he who gathers money little by little makes it grow”).

50. *Proverbs* 30:8.

51. *Proverbs* 28:20.

52. *Proverbs* 16:19.

53. *Proverbs* 1:3.

54. *Proverbs* 2:9-10 (“Then you will understand what is right and just and fair—every good path. For wisdom will enter your heart, and knowledge will be pleasant to your soul.”).

55. The current ABA code states: “A lawyer’s representation of a client, including rep-

defence (as the case may be), cannot, or rather ought not, to be sustained, I will promptly advise him to abandon it."⁵⁶ Similarly, George Sharswood taught:

Counsel have an undoubted right, and are in duty bound, to refuse to be concerned for a plaintiff in the legal pursuit of a demand which offends his sense of what is just and right. The courts are open to the party in person to prosecute his own claim, and plead his own cause; and although he ought to examine and be well satisfied before he refuses to a suitor the benefit of his professional skill and learning, yet it would be on his part an immoral act to afford that assistance, when his conscience told him that the client was aiming to perpetrate a wrong through the means of some advantage the law may have afforded him.⁵⁷

Hoffman and Sharswood's views find support in *Proverbs*' admonition not to "accuse a man for no reason—when he has done you no harm."⁵⁸ The Scripture recommends: "What you have seen with your eyes do not bring hastily to court, for what will you do in the end if your neighbor puts you to shame?"⁵⁹ The text also warns: "If a wise man goes to court with a fool, the fool rages and scoffs, and there is no peace."⁶⁰ Proverbial practice will therefore avoid unjust litigation which is "detestable" to the Lord and serves only to create dissension.⁶¹

According to George Sharswood, selective practice also includes dissuading an eager client with a meritorious claim whose prosecution is not in the client's overall best interest.⁶² Sharswood notes that "[a] very important part of the advocate's duty is to moderate the passions of the party, and where the case is of a character to justify it, to encourage an amicable compromise of the controversy."⁶³ This approach comports with *Proverbs*' wisdom that many matters are better left unpursued: "Starting a quarrel is like breaching a dam; so drop the matter before a dispute breaks out."⁶⁴ Indeed, for some disputes even a resolution by chance may be preferable to a contest which serves the interest of counsel more than the client: "Casting the lot settles disputes and keeps strong opponents apart."⁶⁵

resentation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES, *supra* note 15, Rule 1.2(b).

56. HOFFMAN, *supra* note 2, at 754.

57. SHARSWOOD, *supra* note 6, at 96.

58. *Proverbs* 3:30.

59. *Proverbs* 25:7-8.

60. *Proverbs* 29:9.

61. *Proverbs* 6:16 & 19 (stating that "a man who stirs up dissension among brothers is detestable to the Lord").

62. SHARSWOOD, *supra* note 6, at 109.

63. *Id.*

64. *Proverbs* 17:14.

65. *Proverbs* 18:18.

C. Mercy

Proverbs expresses special concern regarding justice for the poor. As such, Proverbial practice involves both a prescriptive and a proscriptive duty with respect to the poor. The first, a responsibility to assist those unable to afford legal services, has been recognized throughout our history. David Hoffman asserted that an attorney should diligently represent the poor, notwithstanding the fact that their claims might be small.⁶⁶ Modern practice involves a duty to "render public interest legal service" which may be discharged "by providing professional services at no fee or a reduced fee to persons of limited means."⁶⁷ The Supreme Court recently stated: "[I]n a time when the need for legal services among the poor is growing and public funding for such services has not kept pace, lawyers' ethical obligation to volunteer their time and skills pro bono publico is manifest."⁶⁸

The duty to assist the poor is central to *Proverbs*: "The righteous care about justice for the poor, but the wicked have no such concern."⁶⁹ The book contains an explicit instruction to represent the poor:

Speak up for those who cannot speak for themselves, for the rights of all who are destitute.

Speak up and judge fairly; defend the rights of the poor and needy.⁷⁰

Otherwise, there may be consequences: "If a man shuts his ears to the cry of the poor, he too will cry out and not be answered."⁷¹

As this last verse suggests, *Proverbs* also establishes a proscription with no precise counterpart in modern practice.⁷² This is a duty, based on the relationship of God to man, not to oppress the poor using the law: "He who oppresses the poor shows contempt for their Maker, but who-

66. HOFFMAN, *supra* note 2, at 760.

67. MODEL RULES, *supra* note 15, Rule 6.1.

68. *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 310 (1989). Nevertheless, the Court, in a 5-4 decision, held that Mallard, who was challenging his appointment to a prisoners' rights case, was correct in his assertion that a district court had no authority to require an attorney to render services over the attorney's objection. *Id.* at 301-02. The Court held that 28 U.S.C. § 1915(d) (1988) only authorizes a court to "request" such services. *Mallard*, 490 U.S. at 301-02.

69. *Proverbs* 29:7.

70. *Proverbs* 31:8-9.

71. *Proverbs* 21:13.

72. Modern practice prohibits oppression, but only where the actions serve no legitimate purpose. The current ABA code provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." MODEL RULES, *supra* note 15, Rule 3.1. This reflects a slight modification of the prior standard contained in the *Model Code of Professional Responsibility*, which stated that an attorney could not "[f]ile a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (1969).

ever is kind to the needy honors God.”⁷³ The text counsels the practitioner: “Do not exploit the poor because they are poor and do not crush the needy in court, for the LORD will take up their case and will plunder those who plunder them.”⁷⁴ The courts, like the practitioner, must also ensure that this duty of fairness to the poor is upheld: “If a king judges the poor with fairness, his throne will always be secure.”⁷⁵

D. Humility

Though humility is not a characteristic that the public generally associates with lawyers, David Hoffman identified it as essential. He offered his reasoning in a colorful metaphor:

Law is a deep science: its boundaries, like space, seem to recede, as we advance: and though there be as much of certainty in it, as in any other science, it is fit we should be modest in our opinions, and ever willing to be further instructed. Its acquisition is more than the labour of a life; and, after all, can be with none the subject of unshaken confidence. In the language then, of a late beautiful writer, I am resolved to “consider my own acquired knowledge but as a torch flung into an abyss, making the darkness visible, and showing me the extent of my own ignorance.”⁷⁶

As Hoffman suggests, humility is essential to keeping the lawyer sharp and effective in a complex and rapidly-changing profession. In Proverbial practice, humility is necessary for success, and its absence portends disaster: “Do you see a man wise in his own eyes? There is more hope for a fool than for him.”⁷⁷ Advising the discerning lawyer to recognize the limitations which all attorneys share and devote his or her career to the pursuit of learning, *Proverbs* states, “[a]pply your heart to instruction and your ears to words of knowledge.”⁷⁸ A humble lawyer who is open to correction through experience and teaching acquires wisdom⁷⁹ and, with fear of the LORD, wealth, honor, and life.⁸⁰

E. Honesty

Maintaining basic honesty has always been one of the major challenges for attorneys. David Hoffman warned that the attorney role necessarily “brings its ministers into a too intimate and dangerous

73. *Proverbs* 14:31.

74. *Proverbs* 22:22-23

75. *Proverbs* 29:14.

76. HOFFMAN, *supra* note 2, at 766.

77. *Proverbs* 26:12; *see also Proverbs* 19:2 (“It is not good to have zeal without knowledge, nor to be hasty and miss the way.”).

78. *Proverbs* 23:12; *see also Proverbs* 15:14 (“The discerning heart seeks knowledge, but the mouth of a fool feeds on folly.”).

79. *Proverbs* 15:32 (“He who ignores discipline despises himself, but whoever heeds correction gains understanding.”).

80. *Proverbs* 22:4 (“Humility and the fear of the LORD bring wealth and honor and life.”).

acquaintance with man's depravity."⁸¹ George Sharswood cautioned his students: "There are pitfalls and mantraps at every step, and the mere youth, at the very outset of his career, needs often the prudence and self-denial, as well as the moral courage, which belong commonly to riper years."⁸²

Today, dishonest behavior, principally misappropriation of client funds, is among the most frequent reasons for attorney discipline.⁸³ While modern law teaching tends to foster moral relativism,⁸⁴ *Proverbs* condemns any form of dishonesty:

Stolen water is sweet; food eaten in secret is delicious! But little do they know that the dead are there, that her guests are in the depths of the grave.⁸⁵

Food gained by fraud tastes sweet to a man, but he ends up with a mouth full of gravel.⁸⁶

No matter what the financial stakes, *Proverbs* counsels honest behavior that will preserve the blessing of a good reputation: "[T]o be esteemed is better than silver or gold."⁸⁷

F. Candor

Modern practice attempts a distinction between candor and honesty that places undue reliance on the adversary system and is not supported by *Proverbs*. ABA Model Rule 3.3 creates a duty of "candor" toward a tribunal.⁸⁸ While the rule prohibits an attorney from knowingly making a

81. HOFFMAN, *supra* note 2, at 745.

82. SHARSWOOD, *supra* note 6, at 55.

83. See Jack A. Guttenberg, *The Ohio Attorney Disciplinary Process—1982 to 1991: An Empirical Study, Critique, and Recommendations for Change*, 62 U. CIN. L. REV. 947, 971 (1994) (indicating that from 1982 to 1991, 17.9% of the attorney discipline cases decided by the Ohio Supreme Court involved theft of client or third-party funds).

84. Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?*, 41 J. LEGAL EDUC. 3, 7 (1991). Menkel-Meadow notes that

[T]he traditional classroom fosters adversariness, argumentativeness, and zealotry, along with the view that lawyers are only the means through which clients accomplish their ends—what is "right" is whatever works for this particular client or this particular case. We extol loyalty to the client above all and neglect the responsibility of the lawyer to counsel the client about moral and other concerns. Our case-by-case method, which focuses on identifying principles of doctrine rather than principles of behavior also encourages moral relativism.

Id. (citations omitted).

85. *Proverbs* 9:17-18.

86. *Proverbs* 20:17.

87. *Proverbs* 22:1.

88. ABA Model Rules 3.3(a) & (b) state:

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the posi-

false statement of material fact, it allows an attorney to withhold material facts from the tribunal unless disclosure is necessary to avoid assisting the client in a crime or fraud.⁸⁹ Model Rule 4.1 applies a similar requirement of "truthfulness" to statements made by an attorney to opponents.⁹⁰ "Candor" or "truthfulness" requires an honest answer to a specific inquiry, but permits the withholding of unfavorable information not specifically requested by an opponent. The underlying assumption is that the adversary system affords the parties an impartial tribunal, whose responsibility is to determine the truth of the matter.⁹¹ Under these rules, the practice of discovery, negotiation, alternative dispute resolution, and trial has evolved into an exercise in gamesmanship where reputable attorneys divulge adverse information only where it is impossible to interpret an adversary's inquiry in a way which does not require disclosure.⁹² Of course, in some of these settings a tribunal will effectively have no role in ascertaining the truth, and any deception, therefore, is likely to remain unchecked.

This view was not always the standard for practice. David Hoffman in his resolution on negotiation stated:

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- tion of the client and not disclosed by opposing counsel; or
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by rule 1.6 [confidentiality of information].

MODEL RULES, *supra* note 15, Rules 3.3(a), (b).

89. *Id.* Rule 3.3(a)(2).

90. ABA Model Rule 4.1 provides:

- In the course of representing a client a lawyer shall not knowingly:
- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6 [Confidentiality of Information].

MODEL RULES, *supra* note 15, Rule 4.1.

91. The comments state that "an attorney does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value." MODEL RULES, *supra* note 15, Rule 3.3 cmt.

92. As a general rule the courts are unable to effectively police this behavior. On rare occasions, however, a court will impose significant sanctions for extreme misconduct. One such case is *Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp.*, 858 P.2d 1054 (Wash. 1993). The case began as a malpractice and products liability suit on behalf of a two-year-old girl who suffered permanent brain damage from a medication. *Id.* at 1058. The physician defendant cross-claimed against the pharmaceutical company. *Id.* The company avoided the production of smoking gun documents and the identification of their custodian by giving what the court characterized as "evasive or misleading responses" to the physician's discovery requests regarding the drug's main ingredient and a related product. *Id.* at 1080. The trial court refused to issue sanctions. On appeal, the Supreme Court reversed and directed the trial court to determine who should be sanctioned and the amount. *Id.* at 1084. The trial judge sanctioned the company and its counsel in the amount of \$325,000. *Fines Say It's Not OK to Withhold Evidence*, SEATTLE TIMES, Jan. 30, 1994, at B2.

I will never permit myself to enter upon a system of tactics, to ascertain who shall overreach the other, by the most nicely balanced artifices of disingenuousness, by mystery, silence, obscurity, suspicion, vigilance to the letter, and all of the other machinery used by this class of tacticians, to the vulgar surprise of clients, and the admiration of a few ill judging lawyers.⁹³

George Sharswood offered similar advice: “[H]e who sits down deliberately to plot a surprise upon his opponent, and which he knows can succeed only by its being a surprise, deserves to fall, and in all probability will fall, into the trap which his own hands have laid.⁹⁴ He finds support from the saying of the “wise man” in *Proverbs* 26:27: “Whosoever diggeth a pit shall fall therein, and he that rolleth a stone, it will return upon him.”⁹⁵

Because it is God who provides justice, *Proverbs* leaves no room for deception: “Honest scales and balances are from the LORD; all the weights in the bag are of his making.”⁹⁶ In this scheme, the balances are metaphors both for judgment and the honesty of the participants.⁹⁷ The text affirms that “[t]he LORD detests lying lips, but he delights in men who are truthful.”⁹⁸ In this context, truthfulness is not just the absence of affirmative misstatement, as in the Model Rules, but any speech which misleads. *Proverbs*’ command is straightforward: “Do not . . . use your lips to deceive.”⁹⁹ The standard is not to be diluted by artifice as: “[T]he LORD condemns a crafty man.”¹⁰⁰ Thus, recent standards of legal ethics that describe the lawyer’s duty in terms of “candor,” rather than “honesty,” are not supported by *Proverbs*.

G. Truthful Testimony

An attorney’s use of false testimony presents similar issues. While the Model Rules prohibit an attorney from knowingly using false evidence,¹⁰¹ lawyers have debated whether a criminal defense attorney who learns that a client intends to testify on matters that the attorney knows are untrue may (assuming the client cannot be dissuaded) nonetheless

93. HOFFMAN, *supra* note 2, at 764.

94. SHARSWOOD, *supra* note 6, at 73-74.

95. *Id.* at 74 (citing *Proverbs* 26:27 (King James)).

96. *Proverbs* 16:11.

97. See Steve Sheppard, *The State Interest in the Good Citizen: Constitutional Balance Between the Citizen and the Perfectionist State*, 45 HASTINGS L.J. 969, 1027 (1994) (describing uses of the balance metaphor in law and literature).

98. *Proverbs* 12:22.

99. *Proverbs* 24:28.

100. *Proverbs* 12:2.

101. MODEL RULES, *supra* note 15, Rule 3.3(a)(4). For the text of Rule 3.3(a)(4), see *supra* note 88. See also *Nix v. Whiteside*, 475 U.S. 157, 168-171 (1986) (citing Rule 3.3, in dicta, for proposition that criminal defense attorney’s threats to withdraw and to reveal perjury by client were permissible and holds there was no deprivation of Sixth Amendment right to counsel in these circumstances).

offer the client's testimony and argue it to the jury.¹⁰² *Proverbs* offers a clear response to this issue in its repeated condemnation of false testimony. Among the things the Lord "hates" and finds "detestable" is "a false witness who pours out lies."¹⁰³ To emphasize this point, *Proverbs* asserts that: "[a] corrupt witness mocks at justice."¹⁰⁴ Indeed, the book compares testimony that falsely accuses another to a deadly weapon: "Like a club or a sword or a sharp arrow is the man who gives false testimony against his neighbor."¹⁰⁵ The attorney who is committed to Proverbial practice will not present and argue such a client's testimony, as the Scripture commands that: "[t]he righteous hate what is false."¹⁰⁶ Indeed, *Proverbs* effectively requires the attorney either to withdraw from the representation or to reveal the perjury to the tribunal. "A false witness will perish, and whoever listens to him will be destroyed forever."¹⁰⁷

H. Civility

Incivility among lawyers in modern practice has reached crisis proportions. Justice Sandra Day O'Connor has noted: "The justice system cannot function effectively when those charged with its function cannot be polite to one another If there is one thing on which we should agree, it is the need to put civility back in our profession."¹⁰⁸ As one commentator has suggested, however, even the Supreme Court fails to exemplify this quality in its opinions.¹⁰⁹ David Hoffman and George Sharswood recognized the importance of civility to the ethical lawyer. Hoffman resolved that "[i]n all intercourse with my professional brethren, I will be always courteous."¹¹⁰ Similarly, George Sharswood taught:

Indeed it is highly important that the temper of an advocate should always be equal. He should most carefully aim to repress everything like excitability and irritability. When passion is allowed to prevail, the judgment is dethroned. Words are spoken, or things done, which the parties afterward wish could be left unsaid or undone. Equanimity and self-possession are qualities of unspeakable value.¹¹¹

In recent years, lawyers have drifted far from the standards of civility recognized by Hoffman and Sharswood. *Proverbs* recognizes the significance of this problem with over sixty verses relating to concepts such as the tongue, lips, word, quarrel, dissension, and answer.¹¹² Among the most

102. MODEL RULES, *supra* note 15, Rule 3.3 cmts. 7-10.

103. *Proverbs* 6:16-19.

104. *Proverbs* 19:28.

105. *Proverbs* 25:18.

106. *Proverbs* 13:5.

107. *Proverbs* 21:28.

108. James Podgers, *Changes Sought in Civil Justice System*, A.B.A. J., Feb. 1994, at 111, 112.

109. Philip Allen Lacovara, *Un-Courtly Manners*, A.B.A. J., Dec. 1994, at 50, 50.

110. HOFFMAN, *supra* note 2, at 752.

111. SHARSWOOD, *supra* note 6, at 64.

112. *E.g.*, *Proverbs* 4:24, 5:2, 6:14, 6:19, 8:6-8, 10:12-13, 10:18-21, 10:31-32, 11:12, 12:14,

pithy and poetic are:

When words are many, sin is not absent, but he who holds his tongue is wise.¹¹³

Reckless words pierce like a sword, but the tongue of the wise brings healing.¹¹⁴

A gentle answer turns away wrath, but a harsh word stirs up anger.¹¹⁵

The tongue has the power of life and death, and those who love it will eat its fruit.¹¹⁶

A word aptly spoken is like apples of gold in settings of silver.¹¹⁷

Through patience a ruler can be persuaded, and a gentle tongue can break a bone.¹¹⁸

As Professor Shaffer has suggested, if the profession is to rise above the level of Rambo-like combat often seen today, lawyers must take seriously *Proverbs*' teachings on the concept of servanthood, which includes reconciliation with one's enemies.¹¹⁹ Shaffer cites two verses which exemplify this teaching: "If your enemy is hungry, give him food to eat; if he is thirsty, give him water to drink; so you will heap coals on his head, and the LORD will reward you."¹²⁰ The point, of course, is not that the Proverbial practitioner will punish opponents by returning good for evil; instead, the contrasting behavior will convict them in the sense of causing them to recognize a wrong and to seek change.

CONCLUSION

Proverbs offers lawyers a challenge of character:

Wisdom is supreme; therefore get wisdom. Though it cost all you have, get understanding.

Esteem her, and she will exalt you; embrace her, and she will honor you.

She will set a garland of grace on your head and present you with a crown of splendor.¹²¹

12:18, 12:25, 13:2-3, 14:3, 14:7, 15:1-2, 15:4, 15:7, 15:18, 15:23, 16:1, 16:13, 16:23, 16:28, 16:30, 17:4, 17:7, 17:14, 17:19-20, 17:28, 18:6-7, 18:20-21, 19:1, 20:3, 20:15, 21:23, 22:17-18, 23:16, 24:1-2, 24:26, 24:28, 25:11, 25:15, 25:23, 26:4-5, 26:17, 26:20, 26:24, 26:28, 28:23, 28:25, 29:22, and 31:26.

113. *Proverbs* 10:19.

114. *Proverbs* 12:18.

115. *Proverbs* 15:1.

116. *Proverbs* 18:21.

117. *Proverbs* 25:11.

118. *Proverbs* 25:15.

119. Thomas L. Shaffer, *Moral Theology in Legal Ethics*, 12 *CAP. U. L. REV.* 179, 180-81 (1982).

120. *Id.* at 181 (quoting *Proverbs* 25:21-22); see also Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 *STAN. L. REV.* 1859, 1878-79 (1993) (proposing a sectarian law school "theology" faithful to Judeo-Christian values).

121. *Proverbs* 4:7-9.

There is evidence that the legal profession senses a need to address the question of its character. Modern practitioners are beginning to rediscover the importance of values. A recent Perspective published in the *ABA Journal* urges that “[l]awyers should be trained more like doctors. They, too, are caregivers, entrusted with society’s moral health. In fact, lawyers should not be “trained” but educated. Students should learn to consider not what behavior the law should enforce, but what values it embodies.”¹²² Applied to ethics, this position entails a recognition that the mere inculcation of the detailed prescriptive norms of the modern codes is insufficient to ensure the integrity of the profession.

Ethical practice is not possible absent foundational moral values. *Proverbs* supplied these values for the establishment of our nation’s legal ethics, as taught by David Hoffman and George Sharswood. The wisdom of *Proverbs*, reflecting the Judeo-Christian ethic, provides guidance for the modern practice of law. *Proverbs* advocates “a belief in public values and the willingness to act on them.”¹²³ These values include justice, purity, mercy, humility, honesty, candor, truthful testimony, and civility. If practitioners accept *Proverbs’* challenge to seek wisdom, the profession may yet experience the regenerative process envisioned by Professor Fiss.

122. Robert C. Cumbow, *A Learned Profession*, A.B.A. J., July 1995, at 104, 104.

123. Fiss, *supra* note 29, at 14.