THE SEA OF ETHICS

by: J. Mark Hayes, II, Circuit Court Judge

> *In a November 1962 speech, at the Louis Marshall Award Dinner of the Jewish Theological Seminary, Chief Justice Earl Warren, remarked "[I]n a civilized life, law floats in a sea of ethics".*

At the time of that address, Earl Warren was 72 years old and had been Chief Justice of the United States Supreme Court for almost a decade. Indeed, Warren's legacy as a consequential Chief Justice was already secured; he was widely credited with arranging the 1954 unanimous decision of Brown v. The Board of Education [1] which declared equal but segregated public schools in the United States unconstitutional. Notwithstanding the Brown decision, in 1962, it would be another year before poor people would be granted the right to a lawyer during a criminal proceeding [2]; it would take another four years before police were required to remind citizens arrested that they have right to a lawyer and that anything they say can be used against them in a court of law. [3]

As detailed by Warren's biographer, Jim Newton, Warren's views of law, ethics and society were shaped more by his life experiences than by any particular ideology. Even though Warren was born into a middle to lower class family in 1891, he was well provided for by his father, a union member rail mechanic in Southern California. Tragically, Warren's father would be murdered and his assailant would never be brought to prosecution. As a young man, Warren too worked for the railroad as a part-time "callboy", gathering the men when it was time to load the trains. Later in life Warren explained that working as a "callboy" had given him a chance to witness the hardships of manual labor and, at times, its indignity. He saw men exhaust their wages in the

company store or on available vices. He recalled seeing railroad workers' bodies trapped between train cars, only to be removed and placed on electric saw benches to amputate their injured limbs. [4] Against that backdrop, Warren became fascinated by the legal profession and the rule of law. Even though he was, at best, a mediocre student, Warren frequently traveled to the courthouse to watch lawyers present their cases. Warren's views of the legal profession were formed from his own experience of witnessing the legal profession being used to fight vice and corruption, as well as an instrument to improve the quality of life.

What Warren lacked as a student, though, he made up for with a mastery of politics prior to being nominated as Chief Justice by Dwight Eisenhower. He was elected three times Governor of the State of California, and, in 1946, was both the Republican and Democratic nominee for the office. He also had a reputation as a savvy prosecutor, having served as both the Alameda County District Attorney and as the California Attorney General. During his political tenure he fought vice, shut down illegal bail bondsmen, and weeded out corrupt political officials, including imprisoning a corrupt California Sherriff who was also a member of the Ku Klux Klan.

Given Warren's mastery of politics, it should come as no surprise that his legal philosophy was far less influenced by any single partisan ideology than it was by his sense of pragmatism. Historian Bernard Schwartz, explained that Warren's view of the law was pragmatic, seeing the law as an instrument for obtaining equality and fairness, especially when the political institutions had defaulted on their responsibilities to address such problems, and where constitutional rights of a defendant had been abused. [5]

Accordingly, when Warren said that "in a civilized life, law floats in a sea of ethics," he was making an aspirational statement. After spending a childhood seeing firsthand the degradation that could accompany vice and corruption and spending his adult life working against that same corruption as a prosecutor and politician, Warren recognized the symbiotic relationship between the rule of law and the conduct of lawyers and judges. As a result, Warren believed that lawyers could, by acting ethically, improve not just the judiciary, but the whole of society; in other words, that lawyers could by their own conduct create a more civilized life."

The purpose of this article is not to examine the substance of Warren's decisions, but rather, to examine and illuminate Warren's conclusion that the success of the civilized life was inextricably linked to the rule of law, and that the rule of law, in turn, depended upon lawyers and judges following their ethical duties.

> ***He has told you, O man, what is good; and what does the Lord require of you but to do justice, and to love kindness, and to walk humbly with your God?***
>
> - Micah 6:8

A study of legal ethics, not unlike the study of any broader field of ethics, begins and ends with a simple question: "What is right?" Micah 6:8 is often sited when explaining in biblical and historical context the struggles the Israelites had in understanding what God expected of his chosen people. "To do justice" or to act justly was the first expectation set forth to Israelites. In the Christian tradition, to act justly (do what is right) is rarely easy and often requires that "we put aside our own desires and think of others more highly than ourselves" (Romans 12:3).

The passage in Micah presents justice less as an abstract concept of right and wrong than as an action: justice, here, is something to be done. It does not exist in a vacuum. Nor do we achieve it by simply waiting on karmic intervention. Justice must be done and, in that absence, civilization cannot withstand the base nature of man. The concept of justice — doing what is right, and fair — is easy to articulate and a worthy aspiration. How justice is achieved is the challenge.

America was a nation born upon the idea that "all men are created equal, and are endowed with divine unalienable rights of Life, Liberty, and the Pursuit of Happiness." [6] However, the founding fathers shared the philosophy outlined in the book of Micah – they understood that those rights do not exist without protection. Accordingly they established a system of justice designed to protect those rights through a constitution. Indeed, the cornerstone of the Founders' "more perfect union" was the pursuit of justice. For over 225 years, the designs of our Founding Fathers have produced a judicial

system that bears witness to the legacy of lawyers being the foot soldiers of justice in America and the guardians for the rule of law.

When Warren issued his 1962 proclamation, lawyers and judges were generally respected by the public. Though always more feared than loved, lawyers became increasingly important in post-World War II America. On the heels of the collapse of fragile democratic institutions in post-World War I Germany and the rise and violent fall of Adolph Hitler and his Nazi regime, the citizens of the affected nations increasingly looked to lawyers to help with repairing the broken pieces of their societies.

There were sound reasons to look to lawyers for this help, as their roles in the cataclysmic events leading up to World War II had always been central. Retired US Army Colonel, Frank Cohen, was an eyewitness to the Nazi's rise to power. He recently addressed a group of judges and journalists, organized by the National Judicial College (NJC), where he expressed his thoughts on how the institutions of the judiciary and the press failed Germany in the 1930s. [7]

Cohen related his eyewitness account of the downfall of democracy in Germany, which he had viewed as a Jewish boy growing up in Breslau, Germany, now known as Wroclaw, Poland. He first learned about Nazi terrorists at age seven, when his uncle was killed on the streets by Nazi storm troopers after discovering he was Jewish. He related how his kindly second-grade teacher showed up at the start of the following schoolyear wearing a Nazi uniform - and how a friend of the family was taken to Gestapo headquarters and found dead on the sidewalk a few hours later. Cohen also explained that his father likely avoided the same fate, by having earlier traveled to America to earn a living. Cohen's father had previously owned a sporting goods store, but Jewish families like the Cohens had lost the right to own businesses, attend public schools, or even eat in German restaurants. Female Jews were required to add "Sarah" to their names and males "Israel" to facilitate a policy of legally sanctioning segregation. As each new restriction was adopted, the prevailing feeling among German Jews was "well, it can't get any worse," Cohen said. "And, of course, it did." [8]

After the Gestapo officers visited his home, he and his mother fled Germany carrying one suitcase and ten deutschmarks ($5.75). They eventually made their way to New York City, where they were reunited with his father. In the interim, Kristallnacht, the night of broken glass, had taken place in Germany, terrorizing the country's remaining Jewish population. Cohen observed that if he had remained in Breslau, he would have likely perished in 1941, at the age of 16, when the last of the Breslau Jews were taken to a field and shot. Having avoided this grim scenario, he instead had a distinguished military career with the United States Army, retiring in 1978 as Chief of Staff of the Military District of Washington, D.C. and retiring again in 1993 from his second career with the University of Maryland. And, in a case of astonishing poetic justice, Frank Cohen would later end up guarding Nazi prisoners accused of war crimes after the war. [9]

"We holocausts survivors are very sensitive about our democracy," the 93-year-old Cohen said in concluding his eyewitness account. "Here I stand in the right place to comment. The judiciary is our first line of defense in this regard, and it is my hope that you who are judges will stand tall and protect us." [10]

Where were the judges who might have acted to block the injustices? "Mostly gone," he explained. As soon as Hitler gained power, he installed his own judges. "The Germans were very obedient people", Cohen said. "If this was the law, they were going to obey it. If the old judiciary had stood intact, Hitler would have been gone." [11]

The end of World War II brought a conclusion to the deadliest military conflict in history. Even to this day historical records are inconclusive, but an estimated total of 70 – 85 million people died during World War II. [12] Direct deaths covered by the war (military and civilians) are at 50 – 56 million, while an additional extended 19 to 28 million died of war-related disease and famine. Included in these deaths are the estimated six million victims of the Holocaust and an estimated five million others (Catholics, homosexuals, gypsies, disabled and others deemed subhuman or socially undesirable by the Nazis). The conclusion of World War II brought an end to Adolf Hitler, his political party, the Nazi's and its ideology. The end of World War II also ripped off any remaining scab of the Nazi reign of terror to expose an ideology centered on one man, Hitler, and based upon emotionally charged fake conspiracies, rhetorically promoted with racially and ethnically-charged speech

that terrorized German political leaders and institutions into submission by fear. [13] A world conflict that will forever symbolize a fundamental conflict between a civilized world vs. an uncivilized world; a just world vs an unjust world; and good vs. evil.

In November of 1945, the Nuremberg War Crime trials began in an effort to bring justice to prominent members of the political, military, judicial and economic leadership of Nazi Germany. These trials were recorded and broadcast throughout the world. [14] In stark contrast to the conspiracies and fear mongering of uncivilized Nazi society, these trials would forever be a symbol of civilized life and its characteristic rule of law, justice, and ethics. Preparation for the trials began in 1942, prior to the end of World War II, and involved the work of hundreds of the best lawyers from around the world. America's leadership was unquestioned, with the participation of a member of the United States Supreme Court and the Attorney General of the United States. The Nuremberg Trials inextricably linked the role of the American lawyer to the rule of law in the minds of the public throughout the civilized world.

This, however, would not be the last global display of America's judicial process. The inevitable Cold War that developed in the international community once again highlighted the distinction between America's democratic and civilized process based upon the adherence to the rule of law and uncivilized authoritarian power.

During the 1950s and early 1960s, the Cold War lead American lawyers and public figures to reemphasize the rule of law as defining the difference between the United States and the Soviet Union. American lawyers were seen as possessing a central role in maintaining the rule of law. Domestically, the national celebration of "Law Day" on May 1 began in 1958. [15] Law Day was initially created by the ABA in order to cultivate in people the "respect for law that is so vital to the democratic way of life" and was officially recognized by an act of Congress in 1958. Law Day was a Cold War response to the Soviet Union's celebration of May 1st, when military parades in Moscow were a familiar sight on the American evening news. May 1st was also the day on which international Communism celebrated its past victories and looked forward to its future conquests. The celebration of Law Day on May 1st is meant to remind us of the bedrock moral and philosophical principles upon which a democratic society is based, and to contrast them with the cynical, immoral and atheistic philosophy which underlied the international Communist conspiracy. [16]

In 1963, President John Kennedy pronounced to the world, "Certain other societies may respect the rule of force --- we [Americans] respect the rule of law." [17]

Professor and author Michael Ariens explained that, for many in leadership positions in the American Bar Association, the early 1960's were a time for hope and optimism. The role of the American lawyer, brought to newfound prominence by the Nuremburg Trials and set up as an ideological symbol by the Cold War, had never been more central. ABA President, Walter Craig's remarks to the 1964 ABA convention may have best reflected the view of the American lawyer at the time: "The defense and survival of our nation will not rest solely on the preparedness and courage of our armed forces, nor upon the strength of our nuclear weapons, but will rest equally upon the moral and intellectual courage and understanding of our people who are better equipped. Who are better equipped among all segments of our society than the members of the legal profession to assert the leadership required to instill among our people the moral and intellectual courage necessary to the survival of the philosophy of the rule of law and freedom under the law." [18]

One year and 11 days after Warren proclaimed that "in a civilized life, law floats in a sea of ethics", America would suffer one of its most tragic events, and soon thereafter, the American legal system, one of its most tragic public failures. The 1960 Presidential Election resulted in the ascension to the presidency of the youngest man ever to hold that office, John F. Kennedy. With the increasing role of television, America watched this young man, his wife, and young children, as he governed a nation in flux. Tragically, on November 22, 1963, Americans heard unprecedented news accounts of the horrifying assassination of the young president. Other presidents had been assassinated in the country's past, but never before had there been instant news reporting of such a horrific event. Television news reporting was still in its

infancy. However, within an hour of Kennedy's shooting, 68 percent of Americans had heard the news; within two hours, 92 percent had heard the news. [19] Disturbingly, the president's killer, Lee Harvey Oswald, would evade justice.

Two days after Kennedy's assassination, the nation, in disbelief, watched on live television as Kennedy's assassin Lee Harvey Oswald was shockingly shot and killed by Dallas night club owner Jack Ruby, while being escorted by police in the basement of the Dallas police headquarters. Weeks later, infamous San Francisco lawyer, Melvin Belli gave a public statement and answered several questions from reporters regarding his decision to represent Jack Ruby in the shooting of Lee Harvey Oswald. Belli noted the existence of an "admonition" from the court not to discuss the case, and stated his intention to obey the ethical requirement of the local bar. In mid-February 1964, jury selection began in the murder trial. The trial generated an intense public interest that continued until the trial ended a month later. After the guilty verdict, Belli said that the trial was the biggest "kangaroo-court" disgrace in the history of American law. A trial criticized for the manner in which it was orchestrated. A trial less centered on the truth than on the spectacle of the trial itself. Resulting in a justice system critical for its focus on sensation of the moment. Two years later, Ruby's conviction would be overturned and a new trial ordered. [20] Jack Ruby died in prison before his retrial.

Professor Ariens observed, that by 1974, the American legal profession was reeling from the turmoil of the late 1960's. Crime was increasing and the Vietnam War was highly unpopular. In addition to President Kennedy, Martin Luther King and Robert Kennedy were both assassinated. The Watergate scandal of the 1970's involved high profile government lawyers confessing to crimes that tarnished the legal profession. The general economic downturn in the country adversely affected many in the profession. The larger legal profession was hit by a series of lawsuits alleging antitrust violations by the ABA and state bar organizations, and the Supreme Court held in 1977 that a ban on lawyer advertising for ethical reasons was unconstitutional. [21]

In late 1977, the President of the ABA called for the lawyer's code of conduct replacement. Shortly thereafter, the ABA's House of Delegates approved the nomination of the members of the Kutak Commission, which was handed the task of rewriting the code. During the first half decade-long effort to craft the model rules of professional conduct, the problematic ethical behavior of lawyers continued to make national news. Within the profession, a significant segment of the bar rejected the structure and tenets of the code, demanding a more "modern" code of ethics befitting the needs of modern lawyers. Another segment of the lawyer's population challenged a particular version within the code of the ethical duties of lawyers representing clients. When the ABA adopted its Model Rules of Professional Conduct, it replaced a code that combined rules and aspiration with an approach that merely set the bottom floor regarding lawyer conduct. The drafters of the model rules intentionally created a law for lawyering that supplanted an ethic of lawyering. Much more so than the code, the modern rules ushered in the modern understanding of lawyer ethics. [22]

To combat what was perceived as the legal profession's movement away from the principles of professionalism and to activate a crusade to re-instill professionalism, the ABA Commission on Professionalism stated, "[T]he Bar should place increasing emphasis on the role of lawyers as officers of the court, or more broadly, as officers of the system of justice. Lawyers should exercise independent judgement as to how to pursue legal matters. They have a duty to make the system of justice work properly. [23] The effort to renewed interest in professionalism also promoted various scholarly essays that examined a lawyer's ethical duty to the public vs. a lawyer's private duty to the client. [24]

As judges and lawyers, we are direct participants in the judicial process of our country. As direct participants we should not view the success, worth and merit of the judicial system through blinders that narrowly focus on our own professional achievements, accomplishments or victories. Our work as lawyers and judges in America and our obligation to our profession is not the same as us doing a mere job. We are public citizens and we have obligations to our nation's justice system. A true professional is one that serves a public purpose and, traditionally the term is applied only to the professions of law, medicine,

and divinity. An education in the law is a powerful thing, and with it comes distinct powers and special responsibilities. We are not salesmen, peddling wares to the highest bidder. We are not craftsmen, faithfully implementing the design of others. We are advocates; we are servants, sworn to the solemn oath to uphold the law. We are relied upon to participate in the debate over rights and powers; we are called upon to be stewards of public order, justice and democracy. We are the architects and catalysts for making and protecting the American dream from abuse. [25]

As lawyers we see the rule of law as the promise that we live in a nation of laws that are justly and fairly enforced. These laws protect our freedom, rights and property from both government intrusion and the unlawful acts of others. The rule of law also requires that each of us, no matter whether elected official or private person in civil society, remain accountable under the law so that justice will be done. United States Supreme Court Justice Sonia Sotomayor has called the rule of law "the foundation for all of our basic rights." [26] As lawyers, we have a role and an obligation to step up, speak out and be heard on the importance of this foundational principle critical to our democracy. [27]

Earlier this year, Supreme Court Chief Justice John Roberts saw a need to speak out when he publically took to task President Trump for his criticism of an "Obama Judge" who ruled against him. Roberts countered by stating there are no Obama Judges or Trump Judges or any Federal Judges whose decisions are based on what president may have appointed them. He said, instead, that judges are dedicated to doing their best to treat all who appear before them fairly. [28] A judge's oath is to protect and defend the Constitution. Adherence to the rule of law is not partisan.

NJC President, Benes Aldana, a former chief trial judge of the Coast Guard, stated some people were surprised by Roberts rebuke, thinking judges are supposed to keep their opinions to themselves. That is generally true, Aldana said, but the Model Code of Judicial Conduct not only grants judges the freedom to speak out in defense of judicial independence, it compels them. "It says judges shall uphold and promote the independence of the judiciary," he said. "Likewise, judges swear an oath of loyalty to the constitution, not to any person." [29]

For the past sixteen-plus years, it has been my great honor to serve as a Circuit Court Judge for the State of South Carolina. Like all judges, federal, state, county, municipal or otherwise, I took an oath to preserve, protect and defend the Constitution of this state and of the United States. I, like all judges, am required to be faithful to the law. When Warren remarked that "[I]n a civilized life, law floats in a sea of ethics," I am sure he contemplated a judge's job when he or she would decide a case. In most cases, the judge's decision is based on applicable law, prior decisions, or legal principles rather than the judge's own view of what is right or fair. There are some cases that will require a judge's own views of moral convictions to affect the decision. The sea of ethics becomes the judge's personal Micah 6:8 application "to do what is right." The judge's decision should always be consistent with his or her constitutional obligation but also the ethical requirement that the decision "will not be swayed by partisan interest, public clamor or fear of criticism." [30]

Jon Meacham, a professor, author, and American historian wrote, "[M]an's capacity for justice makes democracy possible, but man's inclination to injustice makes democracy necessary." [31]

Since 1962, the ethical landscape for the American lawyer, primarily due to external factors, has changed dramatically since the end of World War II and the Nuremburg Trials. While the ethical sea may have changed, the importance of the rule of law to a civilized life has not. Meacham also observed that "In our finest hours…the soul of the country manifests itself in an inclination to open our arms rather than to clench our fists; to look out rather than to turn inward; to accept rather than to reject. In so doing, America has grown ever stronger, confident that the choice of light over dark is the means by which we pursue progress." [32]

Thank you for your contribution to the greatest justice system ever created.

1. Brown v. The Board of Education 347 U.S. 483 (1954).
2. Gideon V. Wainwright, 372 U.S. 335 (1963).
3. Miranda v. Arizona, 354 U.S. 436 (1966).
4. Newton, Jim, Justice For All; Earl Warren and The Nation He Made, Riverhead Books, (2006).
5. Schwartz, Bernard, The Warren Court: A Retrospective, Oxford Press (1996).
6. Declaration of Independence, (US 1776).
7. Cohen, Ed, Humiliated, Undermined, Weakened: Judges and Journalists Discuss if Efforts to Discredit Them Foreshadow Dark Days Ahead for American Democracy, A.B.A., Judges Journal (Aug. 12, 2019).
8. Id.
9. Id.
10. Id.
11. Id.
12 U.S. Census Bureau World Population Historical Estimates of World Populations, retrieved 2016.
13. The NJC program was inspired by a 2018 bestseller, How Democracies Die, by Harvard Scholar, Steven Levitisky and Daniel Ziblatt. The book considers a string of fallen democracies; Germany under Hitler, Venezuela under Hugo Chavez, Turkey under Recep Tayyip Erdogan, and others. According to the analysis, the process is the following: a populist demagogue is democratically elected and then sets about undermining public trusts in vital elements of democracy, including the free press and the independent judiciary. Before long, authoritarianism has replaced democracy. The demagogue claims the mandate to take all measures necessary - - including cancelling elections and suppressing dissent - - to ensure law and order. Significant is what the Harvard authors, and most of the participants at the symposium, pointed out are the similarities - - in rhetoric especially - - between politicians-cum-dictators of the past and what is happening to the press and the judiciary today. Cohen, supra., p. 9.

14. See, https://www.history.com/topics/world-warii/nuremberg-trials.
15. 36 U.S.C. §113, May 1, 1958, Presidential Proclamation of Dwight D. Eisenhower.
16. Charles S. Rhyne, "Law Day - - U.S.A. "Emphasizing the Supremacy of Law, 44 A.B.A. J. 313 (1958).
17. J. F. Kennedy, Vanderbilt Univ. 90th Anniversary Convocation Address, May 18, 1963, Nashville, Tennessee.
18. Walter E. Craig, The President's Annual Address, 50 A.B.A. J. 824 (1964) as referenced in Ariens, The Agony of Modern Legal Ethics, 1970-1985, 5 St. Mary's J. Legal Mal. & Ethics, 134 (2019).
19. Sneed, Tierney, How John F. Kennedy's Assassination Changed Television, U.S. News, November 14, 2013.
20. Rubinstein v. State of Texas, 407 S.W.2d (1966).
21. Id, Ariens, pp 8-14.
22. Id; Ariens provides a substantial analysis of the development of the present model rules and the ethical debate and challenges that lead to adoption of the present rules. The present analysis is simply a summary from a metaphorically 30,000 feet flyover.
23. Report of the Commission on Professionalism to the Board of Governors and House of Delegates of the American Bar Association, 11 A.B.A. ANN.REP., no 2, 1986, at 264; as referenced in Ariens, The Agony of Modern Legal Ethics, Id.
24. See, Ariens, Broughman's Ghost, 35 N. Ill.V.C.Rev., 263,where the defense of his client, Queen. Carolina, Lord Henry Broughman, forsake his ethical duty to the kingdom Attorney General in favor of his private duty to the Queen. (2015); and Ariens, Lost and Found – David Hoffman and the History of American Legal Ethics; St. Mary's University School of Law Homecoming CLE (2014); where original concept of honor as an ethical value is discussed.
25. See, Hayes, Mark, Ethic: A Thin Thread to Runnymede, The Justice Bulletin (Spring 2014) pp 15 – 21; and Barack, Obama, II [Foreword], 2 Charleston L. Rev.1 (2007).
26. Id.
27. Judy Perry Martinez, President's Letter, ABA Journal, Vol 5, No. 7, quoting Justice Sotomayor, p 6 (2019).
28. Cohen, supra, p 9.
29. Cohen, supra, p 9,10; Bernard Kalb, 88-year-old television journalist who began his career in the 1950s, also spoke at the NCJ meeting. Kalb was a protégé of the legendary broadcaster/newsman Edward R. Murrow. Murrow was credited with helping to expose the lies and abuse of power of Senator Joseph McCarthy during the so-called red scare of Communist paranoia. Kalb explained that, during his more philosophical

moments, Murrow would sometimes explain his concept of freedom as a structure set upon two pillars, one representing the sanctity of the courts, the other the freedom of the press. On top of these pillars, rests democracy. "Murrow's point was that so long as the two pillars were strong and firm, unbending to contemporary political pressures, so, too, would the concept of democracy be strong and firm." But if these pillars were humiliated, undermined, weakened, then, so, too, would democracy be humiliated, undermined, and weakened," Kalb said. p 11.
30. SCACR Rule 501, Canon 3 (B)(2).
31. Jon Meacham, The Soul of America: The Battle for Our Better Angels, Random House, quoting theologian Reinhold Niebuher, p 10 (2018).
32. Id., 8.

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