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## America's Preoccupation with Ethics in Government Essay.

Vincent R. Johnson

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# ESSAY

## AMERICA'S PREOCCUPATION WITH ETHICS IN GOVERNMENT

VINCENT R. JOHNSON\*

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### I. INTRODUCTION: *GUANXI* IN THE WORST SENSE

Even the casual observer would notice that Americans today have a continuing preoccupation with ethics in government.<sup>1</sup> Stories about conflicts of interest abound,<sup>2</sup> particularly as media coverage focuses routinely on the actions of special prosecutors,<sup>3</sup> influential lobbyists,<sup>4</sup> and campaign contributors.<sup>5</sup> Today, the news

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1. See, e.g., Ronald Brownstein, *Life in the Time of Scandal: Ten Ways the Relentless Ethics Wars Are Changing American Politics*, U.S. NEWS & WORLD REP., Apr. 27, 1998 (recognizing that accusations of scandal have become an inescapable facet of the political process), available in 1998 WL 8126646; Sister Eynard Gallagher, *Augustine's Ethics Award Item "Dismissive, Inaccurate,"* WASH. BUS. J., Apr. 17, 1998, at 74 (noting that, even though a university presented an ethics award, the media related countless stories of ethical violations in business and government), available in 1998 WL 7692847; Mortimer B. Zuckerman, *A Chance to Define His Role: The President Has Attained Popularity but Still Must Earn History's Respect*, U.S. NEWS & WORLD REP., Jan. 26, 1998, at 76 (asserting that "[r]ecord numbers of Americans think politicians are crooked and that the government is run for the benefit of special interests and lobbies"), available in 1998 WL 8126323.

2. See, e.g., Ronald Brownstein, *Burned out on Cooperation*, U.S. NEWS & WORLD REP., June 29, 1998, at 34 (stating that conflicts of interest have led to poor legislative output in Washington), available in 1998 WL 8126914; Lanny J. Davis, *Why Janet Reno Is Right and Everyone Else Is Wrong*, WALL ST. J., July 30, 1998, at A18 (asserting that there would be no conflict of interest for the Justice Department "to continue its investigation of Democratic campaign finance abuses"), available in 1998 WL-WSJ 3503649; Regina Hong, *Councilman to Vote Despite Dispute Development: Bernardo Perez Says He Has No Conflict of Interest and Will Take Part Next Week in the Decision on a Moorpark Housing Project*, L.A. TIMES, June 27, 1998, at B5 (discussing a councilman's plans to vote despite numerous questions raised concerning conflicts of interest), available in 1998 WL 2440980.

3. See, e.g., Adam Cohen, *Is the Prosecutor Running a Starr Chamber?*, TIME, Feb. 2, 1998, at 58 (discussing special prosecutor Kenneth Starr's investigation of President Clinton), available in 1998 WL 7694271; *Carl Levin, Starr Is Not Above the Law, Either*, WASH. POST, July 2, 1998, at A21 (stating that special prosecutors are required to comply with Justice Department policies or face removal from office), available in 1998 WL 11589621.

4. See, e.g., Jill Abramson, *The Business of Persuasion Thrives in Nation's Capital*, N.Y. TIMES, Sept. 29, 1998, at 1 (reporting that \$1.2 billion was spent on lobbying the federal government in 1997), available in 1998 WL 5428806; Charles Babington, *In Maryland, a Question of Disclosure: Critics Say Rules Protect Lawmakers, Not the Public*, WASH. POST, Feb. 15, 1998, at B1 (asserting that "[w]ith more lobbyists and more money pouring into state capitals such as Annapolis, many people inside and outside the General Assembly say an overhaul of ethics rules and enforcement procedures is needed soon"), available in 1998 WL 2467918; Margot Hornblower, *Politics, Pork and the Fast Track*, TIME, Feb. 9, 1998, at 20 (relating that a lobbyist was influential in acquiring Clinton's backing of a federal highway project), available in 1998 WL 7694325; Vincent R. Johnson, *Lobbying of Officials Undermines Confidence in City Government*, SAN ANTONIO EXPRESS-NEWS, Mar. 5, 1998, at 5B (criticizing the lobbying of public officials "behind closed doors"), available

is saturated with charges of unethical conduct,<sup>6</sup> investigations of official wrongdoing,<sup>7</sup> and calls for legal reform.<sup>8</sup> These reports evi-

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in 1998 WL 5084621; Bob Merrifield, *Lobbyist Disclosure Gets Second Look: Court Setback Brings Refining of Ordinance*, CHI. TRIB., Mar. 25, 1998, at 6 (discussing a proposed ordinance designed to regulate lobbyists), available in 1998 WL 2838258.

5. See, e.g., Manuel Perez-Rivas, *PAC Challenges Candidates to Speed Disclosures*, WASH. POST, June 11, 1998, at M1 (discussing a local civic group's efforts to require a county council to reveal a list of campaign contributors), available in 1998 WL 11585546; Liam Plevin & Ford Fessenden, *Campaign Donors Spread the Wealth*, NEWSDAY, Feb. 15, 1998, at A6 (reporting that critics of campaign finance believe that the system in New York has more to do with wealthy contributors gaining access to power than with ideology), available in 1998 WL 2672601; Richard J. Trabulsi, Jr., *Letters to the Editor: Our Supreme Court Is Not for Sale*, WALL ST. J., Aug. 20, 1998, at A15 (denying that Texas Supreme Court justices running for election are being "bought" by law firm contributions), available in 1998 WL-WSJ 3506129.

6. See, e.g., Victoria Harker, *Hard-Edged Divorce Lawyer Disbarred*, ARIZ. REPUBLIC, July 29, 1998, at B2 (noting that the State Bar of Arizona disbarred an attorney faced with twenty-four counts of unethical conduct), available in 1998 WL 7787373; Jim Kleinpeter, *NCAA Drops One Charge Against LSU*, NEW ORLEANS TIMES-PICAYUNE, July 23, 1998, at D2 (discussing an investigation of unethical conduct by members of a university's athletic department), available in 1998 WL 6284500; see also Jack W. Germond & Jules Witcover, *Do Voters Want Cleaner Politics?*, DENV. POST, July 18, 1998, at B7 (reporting that a survey of 1,600 registered voters in Ohio and Washington indicated a desire for more ethical campaigns), available in 1998 WL 6116817.

7. See, e.g., Carlos Guerra, *Latest Arena Dealings Raise Big Questions*, SAN ANTONIO EXPRESS-NEWS, Oct. 13, 1997, at 1B (questioning whether a sports foundation that funded a trip by a city councilman later received special treatment), available in 1997 WL 13209108; David Jackson, *Reno Begins Preliminary Inquiry on Democrat's Ads*, DALLAS MORNING NEWS, Sept. 9, 1998, at 5A (discussing an investigation into whether the Democratic Party exceeded its political budget with advertisements during the 1996 presidential election), available in 1998 WL 13100983; Phil Kuntz, *Campaign-Finance Probe Finds Little Evidence of Wrongdoing*, WALL ST. J., June 26, 1998, at A16 (stating that the Justice Department's 20-month investigation discovered little evidence of official wrongdoing within the Democratic National Committee), available in 1998 WL 3499380.

8. For instance, the election of a new mayor in San Antonio in the spring of 1997 initiated a reform process typical of periodic efforts in other American cities. For many months, a proposed revision of the city ethics law was regularly in the news. See, e.g., Christopher Anderson, *Peak Sees "New Era" for Ethics*, SAN ANTONIO EXPRESS-NEWS, June 6, 1997, at 1A (noting that the mayor of San Antonio placed ethics reform high on his agenda), available in 1998 WL 3176656; Christopher Anderson, *Sparks Fly Over Ethics Reform*, SAN ANTONIO EXPRESS-NEWS, Mar. 25, 1998, at 1A (discussing charges leveled by politicians relating to an ethics reform proposal), available in 1998 WL 5084857; Christopher Anderson & Chris Williams, *City Leaders Urge Stiffer Ethics Policy*, SAN ANTONIO EXPRESS-NEWS, Mar. 24, 1998, at 1A (questioning a councilman's motives in an influence-peddling controversy), available in 1998 WL 5084691; Editorial, *Proposed Ethics Changes Bring Needed Progress*, SAN ANTONIO EXPRESS-NEWS, Jan. 22, 1998, at 4B (urging approval of the proposed code), available in 1998 WL 5074793; Vincent R. Johnson, *Current City Ethics Code Lacks Enforcement*, SAN ANTONIO EXPRESS-NEWS, Mar. 6, 1998, at 5B (calling for stronger sanctions), available in LEXIS, News Library, Papers File; Gerald S.

dence how deeply concerned Americans are with the issue of whether some persons—often the wealthy or influential—are able to advance their own private interests unfairly by exploiting relationships with individuals who occupy positions of power. As a result of America's disdain for personal influence affecting public or legal decision-making, professional ethics is subject to extensive regulation. American judges, lawyers, and public officials are now held to detailed ethical standards<sup>9</sup> and are routinely sanctioned for violation of those rules.<sup>10</sup>

Not surprisingly, America's expectations regarding the conduct of public officials, lawyers, and judges are not shared uniformly throughout the world. Some cultures are less concerned than Americans with discouraging the role of personal relationships in public and legal decision-making. In China, for example, the use of special connections and privileged relationships for the purpose of gaining an advantage or accomplishing results is often referred to as the use of "*guanxi*."<sup>11</sup> The term *guanxi* has multiple connota-

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Reamey, *Ethics Code Not Hollow Words*, SAN ANTONIO EXPRESS-NEWS, Feb. 4, 1998, at 5B (defining ethics codes as "publicly proclaim[ing] not what we are, but what we insist on being"), available in 1998 WL 5076295.

9. See, e.g., ARIZ. REV. STAT. ANN. § 38-501 to -511 (West 1996) (delineating the conflict of interest rules for state officials); SAN ANTONIO, TEX., ETHICS CODE OF THE CITY OF SAN ANTONIO (1999) (outlining the ethical standards governing city officials and employees); MODEL CODE OF JUDICIAL CONDUCT (1990) (providing ethical standards for the conduct of judges); MODEL RULES OF PROFESSIONAL CONDUCT (1998) (establishing a model code of ethics governing the conduct of lawyers); JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 642-99 (1998) (relating selected federal statutes dealing with ethical issues).

10. See, e.g., *In re Anast*, 634 N.E.2d 493, 493 (Ind. 1994) (approving of the disbarment of an attorney who, in addition to other conduct, attempted to improperly influence a probation officer); *Mississippi Comm'n on Judicial Performance v. Dodds*, 680 So. 2d 180, 200 (Miss. 1996) (holding that the removal of a judge who engaged in ticket fixing, improperly handled a driving under the influence charge, accepted money without legal authority, engaged in ex parte communications, signed an execution of judgment without legal authority, and obstructed the judicial process was warranted); *Office of Disciplinary Counsel v. Atkin*, 704 N.E.2d 244, 245 (Ohio 1999) (disbarring an attorney permanently who asserted that he could bribe a federal district court judge); *In re Stevens*, 1998 WL 939713, at \*1 (N.Y. Comm'n on Judicial Conduct Dec. 28, 1998) (admonishing a state judge for misusing the prestige of his office to further his son's private interests).

11. See Ted Hagelin, *Reflections on the Economic Future of Hong Kong*, 30 VAND. J. TRANSNAT'L L. 726, 734 n.113 (1997) (citing BOYE LAFAYETTE DEMENTE, CHINESE ETIQUETTE AND ETHICS IN BUSINESS (2d ed. 1994)). In an article discussing Hong Kong, Ted Hagelin explained:

*Guanxi* (pronounced "gwahn-shee") is the network of personal connections which governs virtually every facet of Chinese society, both public and private . . . . *Guanxi* is

tions and describes practices that have been said to pervade every aspect of Chinese culture.<sup>12</sup> At its best, *guanxi* encourages collective responsibility and fosters productive personal relationships.<sup>13</sup> At its worst, *guanxi* is akin to corruption<sup>14</sup> and can amount to not following the rules.<sup>15</sup> Thus, in the worst sense, the use of *guanxi*

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the “oil of life” in China; *guanxi* is the means by which all transactions are accomplished and the measure of an individual’s power and wealth . . . . The Chinese spend a great deal of time and money nurturing personal connections (building *guanxi*) in order to increase personal prestige and to further professional or business opportunities . . . . However, *guanxi* is not synonymous with bribery; it is rooted in deep cultural conventions having more to do with interpersonal respect and friendship than with money per se.

*Id.* (citations omitted). According to another source:

One of the first words foreigners in China learn is *guanxi*, a traditional concept meaning relationship or connections. To get anything done in China, you must have *guanxi*. In a society of scarcity and strict institutional control, getting what you want—a good doctor, a scarce consumer item, the right job, acceptable housing, a chance to travel abroad—depends on having good *guanxi*. Thus, Chinese cultivate *guanxi*. The use of *guanxi* (who owes you a favor, or who thinks you might be of use in the future) is just as important as the formal lines of authority.

ANNE F. THURSTON ET AL., CHINA BOUND: A GUIDE TO ACADEMIC LIFE AND WORK IN THE PRC 58-59 (rev. 1994); see Joel Kotkin, *Asian-Americans Left Holding the Bag*, WALL ST. J., Jan 23, 1997, at A16 (explaining that “*Guanxi* is supposed to go both ways”), available in 1997 WL-WSJ 2406775. Regarding the influence of *guanxi* on Chinese business, one author explained:

In Chinese companies, the best jobs typically go to those with the best *guanxi*, or connections. A typical anecdote: A Chinese woman working for an American investment bank in Shanghai told me that when she graduated from university she had wanted to work for a Chinese commercial bank, but her parents didn’t have powerful connections. Now she is happy that her promotions will be based upon her performance.

Michael A. Santoro, *Manager’s Journal: Promoting Human Rights in China Is Good Business*, WALL ST. J., June 29, 1998, at A18, available in 1998 WL-WSJ 3499663.

12. See ANNE F. THURSTON ET AL., CHINA BOUND: A GUIDE TO ACADEMIC LIFE AND WORK IN THE PRC 58-59 (rev. 1994).

13. See Joseph W. Dellapenna, *The Lesson of the Triple Twisted Pine: Plum Blossoms on Mountain Peaks and the Future of the Rule of Law in Hong Kong*, 30 VAND. J. TRANS-NAT’L L. 637, 637 (1997).

14. See Jerome A. Cohen & John E. Lange, *The Chinese Legal System: A Primer for Investors*, 17 N.Y.L. SCH. J. INT’L & COMP. L. 345, 350 (1997).

15. Addressing the role that *guanxi* plays in Chinese legal proceedings, one author wrote:

Enforcing one’s security interest through judicial proceedings in China can prove to be an onerous and unpredictable task for many. Although the general rules for enforcement are available under Chinese law, in practice, one who tries to obtain and enforce an arbitration or court judgment faces many formal and informal obstacles. One major factor contributing to the difficulty is the prevalence of personal connec-

undermines adherence to the rule of law.<sup>16</sup> For example, “[t]he

tions or *guanxi* in judicial proceedings. Often, the party who has the strongest *guanxi* with the most powerful individuals will have an edge regardless of the strength of his case. This may frustrate many who see China as having no rule of law, with *guanxi* taking precedence over any formal contracts. Nevertheless, such is a reality that must be dealt with . . . . [T]he pervasiveness of *guanxi* affects all aspects of enforcement through formal proceedings.

One manifestation of the widespread problem of *guanxi* comes in the form of local protectionism. It is widely acknowledged that judges in China often favor local parties. The reasons for this can be attributed to the environment within which judges operate in the PRC. Chinese judges do not have tenure on bench, and often practice in their home districts, where they may have longtime friends and former classmates who are lawyers, company executives, or government officials. More importantly, Chinese judges are appointed with the approval of the local Communist Party and receive most of their funding and services from the local government, both of which have vested investment and tax interests in local business. Understandably, under the circumstances, judges tend to be more sensitive to the social, political, and economic impacts of their decisions on the local community and may defer their decisions to the liking of the local official or party members.

In addition, the problems of corruption and disregard for the rule of law pervade the entire society. In a culture that heavily emphasizes the importance of relationships, *guanxi* is the most important factor in any transaction. In this context, bribery or “gift-giving” tends to be more socially acceptable and, as a result, corruption becomes systematic. Judges in the PRC are especially vulnerable because they are generally underpaid . . . .

Finally, the corruption problem is further intensified in a culture that lacks a concept of the rule of law. In the PRC, court orders are often ignored or are only grudgingly obeyed . . . .

Brian Y. Lee, Note, *Taking Mortgage Interests in Real Property Under the Guarantee Law of The People's Republic of China*, 21 HASTINGS INT'L & COMP. L. REV. 539, 559-61 (1998); see Joseph W. Dellapenna, *The Lesson of the Triple Twisted Pine: Plum Blossoms on Mountain Peaks and the Future of the Rule of Law in Hong Kong*, 30 VAND. J. TRANS-NAT'L L. 637, 652 (1997) (stating that “anyone could obtain dispensation from both formal statutory requirements and informal Party policies by deploying sufficient *guanxi*”).

16. See Joseph W. Dellapenna, *The Lesson of the Triple Twisted Pine: Plum Blossoms on Mountain Peaks and the Future of the Rule of Law in Hong Kong*, 30 VAND. J. TRANS-NAT'L L. 637, 637 (1997). Concerning *guanxi* and the rule of law, Professor Dellapenna commented that:

Traditional Chinese culture de-emphasized the role of law, providing little or no commitment to ‘neutral’ rules or principles, no concept of individual rights, and no specialized legal institutions. Instead, traditional Chinese culture stressed collective responsibility (especially through the family), connections (*guanxi*), and gifts as accepted modes for influencing decision-makers)

*Id.*; see Elizabeth Bukowski, *A Western Virus Among China's Leaders*, WALL ST. J., June 19, 1997, at A18 (stating that “[g]uanxi [connections] work best in an environment that is partially open so that there are opportunities, but partially closed so that only a few can take advantage of them . . . . If the system becomes too legalized, *guanxi* are not as useful”), available in 1997 WL-WSJ 2424954; cf. Thomas J. Duesterberg, *Clinton's Favoritism Imperils Free Trade*, WALL ST. J., Feb. 25, 1997, at A22 (arguing that “[t]he emergence

cultural weight placed on personal relationships (*guanxi*) in China encourages insider trading between those persons having connections within government agencies or issuing joint-stock companies.”<sup>17</sup>

Undoubtedly, the practice of cultivating and capitalizing on *guanxi* exists in some form in all societies.<sup>18</sup> However, because *guanxi* is often equated with dishonesty<sup>19</sup> or nepotism,<sup>20</sup> many countries seek to limit the use of *guanxi* in governmental affairs through legislation; an obvious, although extreme, example is the legislation created to prevent the attainment of special treatment

under the Clinton administration of *guanxi* as a basis for trade policy undermines the moral leadership the U.S. has so painstakingly built over the years by consistent application of equitable rules in the international trading arena”), available in LEXIS, News Library, Papers File.

17. Ann P. Vandevelde, Note, *Realizing the Re-Emergence of the Chinese Stock Market: Fact or Fiction?*, 30 VAND. J. TRANSNAT'L L. 579, 607-08 (1997) (footnote omitted).

18. See Helena Kolenda, *One Party, Two Systems: Corruption in the People's Republic of China and Attempts to Control It*, 4 J. CHINESE L. 187, 190-92 (1990) (contending that corruption exists, in some form or another, in all societies). But see Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market, 1978-1989*, 5 J. CHINESE L. 143, 244 n.3 (1991) (distinguishing *guanxi* from similar social networks in Western cultures). In their article, Lucie Cheng and Arthur Rosett explain that:

*Guanxi* differs in several important respects from the social networks observable in many Western cultures, including contemporary America. *Guanxi* linkages are always dyadic and hierarchically ranked in relation to ego. Moreover, the relationship is maintained primarily by specific personal obligations based on norms of reciprocity. In contrast, a Western network (say the familiar “old boys network”) is likely to be polycentric, based on relative equality of the members, dependent on voluntaristic choice of its members for its perpetuation, and less dependent on specific and transactional reciprocity.

*Id.* (citation omitted).

19. See Jerome A. Cohen & John E. Lange, *The Chinese Legal System: A Primer for Investors*, 17 N.Y.L. SCH. J. INT'L & COMP. L. 345, 349-50 (1997) (discussing how *guanxi* may contribute to China's corruption). In their article, Cohen and Lange opine that:

The importance in Chinese culture of *guanxi*—relationships—is itself a mild form of corruption to the extent that it affects relations between the government and private entities, in that it inevitably compromises the principle of equal treatment under the law. The point where relationships and “favors” turn into bribery and graft is not always clear . . . . But even where corruption is not in fact present, the widespread suspicion of it is corrosive of legal relationships.

*Id.* at 350.

20. See Robb M. LaKritz, Comment, *Taming a 5,000 Year-Old Dragon: Toward a Theory of Legal Development in Post-Mao China*, 11 EMORY INT'L L. REV. 237, 264 (1997) (considering “*guanxi*, corruption, and nepotism” to be “traditional Chinese norms”).



through bribery of public officials.<sup>21</sup> Yet, what may be particular to the United States is the passion with which the American public believes that laws and law enforcement mechanisms should be employed to root out and minimize the role of *guanxi* in the public sector. Many Americans today expect that the law *can, should, and will be used* to ensure that a level playing field in public life exists by eliminating, insofar as possible, any unfair advantage that might be gained through the use of special connections to those who exercise the power of government.

In an effort to understand America's preoccupation with ethics in government, this Essay sets forth, in Part II, examples of the rules applicable to judges, lawyers, and public officials that seek to promote equal treatment for all persons by limiting the role of *guanxi* in public affairs. The Essay then goes on to trace two threads of development in America during the twentieth century that may account for the presence of such rules. The first thread, discussed in Part III, involves the search for social equality, including the struggles during the past century between rich and poor, black and white, and residents and new immigrants. The second thread of influence, discussed in Part IV, relates to a very different, but parallel, search in twentieth-century America for ethical certainty. The Essay argues that the rise of consumerism, the nature of the American media, and the "statutorification" of American law have been integral parts of that quest. In light of these developments, the Essay suggests that the present American preoccupation with ethics in government is not surprising, nor is the fact that other countries accord a different level of priority to such matters. The conclusion, Part V, raises the question of whether the unremitting pursuit of ethics in government comes at too high a cost—

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21. See *Compromise Reached to Assure Ratification of Antibribery Treaty*, WALL ST. J., Oct. 21, 1998 (discussing the ratification of a major international antibribery pact), available in 1998 WL-WSJ 18988997; Neil King, Jr., *Momentum Builds for Corporate-Bribery Ban*, WALL ST. J., Sept. 23, 1997, at A16 (discussing a proposed treaty "to extend to foreign companies a strict 1977 law that forbids U.S. multinationals from bribing foreign officials"), available in 1997 WL-WSJ 14167278. By one report, "[a]ccording to Hong Kong's Independent Commission Against Corruption, outright bribes as well as gifts or payments to establish *guanxi* ('connections') average 3 to 5 percent of operating costs, or \$3 billion to \$5 billion a year." Michael A. Almond & Scott D. Syfert, *Beyond Compliance: Corruption, Corporate Responsibility and Ethical Standards in the New Global Economy*, 22 N.C. J. INT'L L. & COM. REG. 389, 434 (1997).

whether Americans have failed to appreciate the difference between “good *guanxi*” and “bad *guanxi*.”

## II. RULES THAT LIMIT *GUANXI*

### A. *Leveling the Playing Field*

As part of the American quest for ethics in government, vast resources are spent on enacting and enforcing laws that seek to regulate the conduct of public officials and employees and to limit the influence of lobbyists, lawyers, campaign contributors, and former public servants.<sup>22</sup> A few examples of current rules designed to restrict the influence of *guanxi* in the United States can be drawn from the codes that are applicable to judges, lawyers, and public officials.

#### 1. Judges

Judges in America have a special role in ensuring “equal justice under the law.”<sup>23</sup> To promote the fulfillment of that promise, states maintain strict codes of ethics that govern the public and private conduct of judges.<sup>24</sup> Judges, for example, are ethically prohibited from participating in the decision of any case in which their impartiality “might reasonably be questioned;” this prohibition extends to concerns that might be raised based upon familial connections, prior professional relationships, or economic interests.<sup>25</sup> These strict provisions are enforced vigorously through disqualifi-

22. See, e.g., John Hanna, *Ethics Commission Off Starvation Rations with New Budget*, AP ONLINE, May 7, 1995 (addressing the approval of a \$454,600 budget for a Kansas ethics commission), available in 1995 WL 6726903; Jon Sarche, *Senate Committee Begins Work on Ethics Bill*, AP ONLINE, Jan. 23, 1997 (discussing the proposed expenditure in Wyoming of \$100,000 on a state ethics review committee), available in 1997 WL 2496931.

23. See MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) (1990) (requiring a judge to “perform judicial duties without bias or prejudice . . . including but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status”).

24. Most state codes are based on the Model Code of Judicial Conduct, last revised by the American Bar Association in 1990. See Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 950 n.3 (1996) (explaining that, as of 1996, at least thirty-one states had adopted the Model Code of Judicial Conduct or portions thereof).

25. MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990). Canon 3E of the Model Code of Judicial Conduct states, in part:

- (1) A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where:

cation motions, which have become a standard feature of the procedural skirmishing now common in American civil litigation.<sup>26</sup> In this regard, a judge who ignores the rules on recusal risks not only correction by a higher court,<sup>27</sup> but also professional discipline that may range from reprimand<sup>28</sup> to removal from office.<sup>29</sup>

- 
- (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
  - (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
  - (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's household, has an economic interest in the subject matter of the controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;
  - (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
    - (i) is a party to the proceeding, or an officer, director or trustee of a party;
    - (ii) is acting as a lawyer in the proceeding;
    - (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;
    - (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

*Id.*

26. See John Council, *Recusal Roulette*, TEX. LAW., Sept. 1, 1997, at 1 (quoting the presiding judge in Dallas, who now hears an estimated 100 recusal hearings a year, as saying that “[w]e didn’t use to have this problem 25 years ago . . . . Most are absolutely frivolous . . . . I think it kind of shows the decline in collegiality of the bar and the respect for judges”).

27. See, e.g., *United States v. Anderson*, 160 F.3d 231, 232-34 (5th Cir. 1998) (reversing and vacating a sentence after a trial judge failed to recuse himself in spite of the fact the defendant’s attorney had previously testified against the judge in a Fifth Circuit Judicial Council proceeding); *State v. Barker*, 420 N.W.2d 695, 697, 702-03 (Neb. 1988) (setting aside a sentence because a judge failed to recuse himself after engaging in ex parte communications).

28. See, e.g., *Broadman v. Commission on Judicial Performance*, 959 P.2d 715, 730-31 (Cal. 1998) (concluding that public censure was proper for a judge who attempted to affect the outcome of a legal malpractice case involving an attorney that the judge disliked); *In re Cooks*, 694 So. 2d 892, 904 (La. 1997) (holding that a judge’s failure to recuse herself from a case in which she had a close personal relationship with a litigant warranted public censure); *In re Lemoine*, 692 So. 2d 358, 361 (La. 1997) (determining that a judge should be censured for improperly failing to recuse himself).

29. See, e.g., *Mississippi Comm’n on Judicial Performance v. Dodds*, 680 So. 2d 180, 200 (Miss. 1996) (determining that removal was warranted for a judge who, among other things, engaged in ex parte communications); *In re Sims*, 462 N.E.2d 370, 374 (N.Y. 1984)

Similarly, in order to ensure that no litigant gains an unfair advantage over other litigants, judges are prohibited from receiving any information from a party about the merits of a pending case unless all parties are present or are informed fully of the contents of the communication and are given an opportunity to respond.<sup>30</sup> Corresponding provisions in the ethical rules applicable to attorneys likewise prohibit lawyers from engaging in such *ex parte* communications.<sup>31</sup> A judge or a lawyer who flouts these strictures risks serious reproach. Indeed, many judges and lawyers have been sanctioned for such behavior, including powerful justices on the highest courts of New York<sup>32</sup> and Texas.<sup>33</sup>

Judges are also prohibited from using the prestige of their office for the advancement of private interests.<sup>34</sup> Conduct as simple as a communication by a judge seeking to get a traffic ticket fixed or a criminal charge dismissed will result in serious discipline and often public humiliation.<sup>35</sup> For instance, a recent scandal involved the

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(removing a judge from office based on official misconduct involving the signing of orders concerning her husband and son).

30. See MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) (1990) (mandating that, with certain limited exceptions, a judge “shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding”).

31. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.5 (1998) (providing that “[a] lawyer shall not . . . communicate *ex parte* with . . . [a judge, juror, prospective juror or other official] except as permitted by law”).

32. See *In re Fuchsberg*, 426 N.Y.S.2d 639, 646-47 (Ct. Jud. 1978) (discussing an improper communication with experts on the law that subjected a judge on the highest state court to censure and disapproval).

33. In the mid-1980s, Texas Supreme Court Justice C.L. Ray became the center of a controversy after allegedly engaging in improper *ex parte* communications with a prominent San Antonio lawyer over the transfer of a case in which the justice had administrative authority. See Sam Kinch, Jr., *Power Struggle in Austin*, DALLAS MORNING NEWS, Apr. 11, 1986, at 19A (detailing the ethics controversy), available in 1986 WL 4313772. The Commission on Judicial Conduct reprimanded the Justice for, among other things, his improper request to transfer the case. See Terrence Stutz, *2 Justices Cited for Misconduct*, DALLAS MORNING NEWS, June 10, 1987, at 1A (explaining the grounds for discipline), available in 1987 WL 4613603; R.G. Ratcliffe, *State Ethics Panel Scolds Pair of Justices for Poor Conduct*, HOUS. CHRON., June 10, 1987, at 1 (reporting the circumstances surrounding the reprimand), available in 1987 WL 5616096.

34. See MODEL CODE OF JUDICIAL CONDUCT Canon 2B (1990) (stating that “[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others”).

35. See *In re Rice*, 489 S.E.2d 783, 786 (W. Va. 1997) (admonishing a judge for contacting a police officer and prosecutor about his son-in-law’s arrest, even though judge did not disclose his relationship to the accused).

Chief Justice of the Pennsylvania Supreme Court, who was excoriated in the press for seeking to influence the progress of a trial taking place in a lower court.<sup>36</sup>

Additionally, judges are precluded from making appointments on any basis except that of merit.<sup>37</sup> Despite this rule, legal newspapers routinely report cases in which judges have been charged with, and sometimes found guilty of, appointing guardians, special masters, and counsel for indigent persons on the basis of nepotism or favoritism.<sup>38</sup> Nevertheless, these ethical standards serve a useful function because they provide a framework in which members of the bench must operate in order to ensure that the judiciary is fair and just.

## 2. Lawyers

Lawyers in America play a key role in influencing the conduct of public affairs.<sup>39</sup> In response to that fact, lawyers in every state are subject to comprehensive ethical rules.<sup>40</sup> In many states, those

36. See Joseph A. Slobodzian, *Next Time, Don't Pick Up the Telephone*, NAT'L L.J., Mar. 4, 1996, at A6 (remarking that a federal appeals court ordered a new murder trial because the state supreme court chief justice ordered a trial judge to change an evidentiary ruling).

37. See MODEL CODE OF JUDICIAL CONDUCT Canon 3C(4) (1998) (detailing some of the administrative responsibilities of judges). The Code provides:

A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

*Id.*

38. See Purvette A. Bryant, *High Court Ousts Graziano from Job: In a Seething Opinion the Florida Supreme Court Said the Pioneering Volusia Judge Had Misused Her Power*, ORLANDO SENTINEL, May 31, 1997, at A1 (stating that a judge was removed from office for appointing her housemate as a guardian ad litem), available in 1997 WL 2780671; cf. Rex Bossert, *When Judge Helpers Run the Show: Special Masters*, NAT'L L.J., Feb. 16, 1998, at A1 (noting that critics of judicial dependence on special masters believe that "appointments are too cozy—many times drawn from the same small cadre of players").

39. Cf. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1998) (explaining that a lawyer is "an officer of the legal system and a public citizen having special responsibility for the quality of justice").

40. See, e.g., COLO. R. PROF'L CONDUCT, reprinted in 12 COLO. REV. STAT., app. to ch. 18 to 20 (1998); ILL. R. PROF'L CONDUCT, reprinted in ILL. COMP. STAT. ANN., S. CT. RULES art. VIII (West 1993 & Supp. 1998); TEX. DISCIPLINARY R. PROF'L CONDUCT, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9); see also Rachel E. Boehm, *Caught in the Revolving Door: A State Lawyer's Guide to Post-Employment Restrictions*, 15 REV. LITIG. 525, 549 n.76 (1996) (ob-

rules are enforced vigorously by full-time prosecutors whose only job is to police the legal profession.<sup>41</sup>

One rule of attorney ethics that relates to the subject of *guanxi* is the rule that prohibits an attorney from stating or even implying that the lawyer can influence a judge or other government official by any means except on the basis of the merits of a case.<sup>42</sup> A lawyer who violates this rule, even in private conversations, can be called upon to explain allegedly improper statements and will be subject to professional discipline.<sup>43</sup> In fact, in one recent Texas case, an attorney was humiliated by extensive questioning under oath about a statement relating to this rule.<sup>44</sup> The attorney had written a letter suggesting that a certain judge would defer to legal arguments made by a part-time legislator if the legislator appeared as co-counsel in the judge's court, because the legislator sat on the state committee that sets judicial salaries.<sup>45</sup>

### 3. Public Officials and Employees

As with judges and lawyers, the enactment of codes of ethics governing the conduct of public officials and public employees has

serving that "every state except California has adopted ethics rules based on the Model Rules of Professional Conduct or the Model Code of Professional Responsibility [and] California is governed by the California Rules of Professional Ethics").

41. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 101 (1986) (explaining that "[m]ost jurisdictions today rely on a full-time bar counsel to handle screening and to make decisions about prosecuting complaints").

42. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(e) (1998) (stating, that "[i]t is professional misconduct for a lawyer to . . . state or imply an ability to influence improperly a government agency or official").

43. See, e.g., *In re Anast*, 634 N.E.2d 493, 493 (Ind. 1994) (upholding the disbarment of an attorney who, among other actions, attempted to persuade a probation officer to reduce restrictions on his client); *In re Sears*, 364 A.2d 777, 784-85, 791 (N.J. Sup. Ct. 1976) (suspending an attorney for three years based, in part, on his creating an impression of improper influence with the Securities and Exchange Commission); Office of Disciplinary Counsel v. *Atkin*, 704 N.E.2d 244, 245 (Ohio 1999) (disbarring permanently an attorney who contended that he could bribe a federal district judge). Discussing the impropriety of giving an impression of improper influence, the New Jersey Supreme Court reasoned, "it is sufficient that the attorney merely state or imply that he could influence the judicial tribunal improperly. It is irrelevant whether he actually makes the attempt or accomplishes the objective." *Sears*, 364 A.2d at 785.

44. The author of this Essay attended the deposition in 1995 where such questioning occurred. See generally *Nationsbank of Tex. v. Akin, Gump, Hauer & Feld, L.L.P.*, No. 94-48-B (117th Dist. Ct., Nueces County, Tex. 1995), *rev'd*, 979 S.W.2d 385 (Tex. App.—Corpus Christi 1998, no pet. h.).

45. See *id.*

become common.<sup>46</sup> Such codes now exist in almost every major American city,<sup>47</sup> and similar provisions, often embodied in statutes, are in place at the state<sup>48</sup> and federal<sup>49</sup> levels. Public officials and employees who violate these rules face a wide range of sanctions, including criminal prosecution, civil suits for damages, discipline, or removal from office.<sup>50</sup>

Typically, ethics codes in the field of public employment prohibit government officials and employees from taking any official action that would be likely to advance substantially the economic interests of closely connected persons or entities, such as family members, outside employers, personal clients, or business associates.<sup>51</sup> In addition, government ethics codes often limit the kinds and amounts

46. See JOSEPHSON INSTITUTE FOR THE ADVANCEMENT OF ETHICS, PRESERVING THE PUBLIC TRUST: PRINCIPLES OF PUBLIC SERVICE ETHICS 2 (1990) (referring to the “proliferation of ethics laws”).

47. See, e.g., HOUSTON, TEX., ORDINANCES ch. 18 (1997) (establishing ethical rules for city officials and candidates); SEATTLE, WASH., SEATTLE MUNICIPAL CODE § 3.110.560 (1998) (outlining rules for city employees and officials); MILWAUKEE, WIS., CODE OF ORDINANCES ch. 303 (1995) (setting forth the ethical rules applicable to city officials and employees).

48. See, e.g., CAL. GOV'T CODE § 1126 (Deering 1982 & Supp. 1998) (providing a conflict of interest rule to govern public officials and employees); CONN. GEN. STAT. ANN. §§ 1-79 to 1-89a (West 1988 & Supp. 1998) (delineating the code of ethics for public officials); TEX. LOC. GOV'T CODE ANN. § 171 (Vernon 1988) (setting forth rules governing conflicts of interest for local government officials).

49. See 5 C.F.R. §§ 735.101-.203 (1998) (listing rules on employee conduct); see also JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES, & STATUTES 642-99 (1998) (setting forth selected federal statutes related to ethics issues).

50. See, e.g., SAN ANTONIO, TEX., ETHICS CODE OF THE CITY OF SAN ANTONIO § 2-91 (1999) (establishing enforcement mechanisms including that employees who violate the ethics code may be “notified, warned, reprimanded, suspended or removed from office, or may face damages or criminal prosecution”); MILWAUKEE, WIS., CODE OF ORDINANCES §§ 303-35 (1995) (providing a penalty of “not less than \$100 nor more than \$1,000 for each violation” of the city’s code of ethics).

51. See SAN ANTONIO, TEX. ETHICS CODE OF THE CITY OF SAN ANTONIO § 2-43 (1999) (requiring city officials and employees to avoid official conduct that would result in improper economic benefit to themselves, their relatives, or business associates). MILWAUKEE, WIS., CODE OF ORDINANCES ch. 303, § 5 (1998) (prohibiting city or official employees from using a public position “to obtain financial gain or anything of substantial value for the official’s or employee’s private benefit or that of his or her immediate family, or for an organization with which he or she is associated”). Model legislation regarding improper influence on public officials suggests the following language:

A [County, City, Town, or Village] officer or employee shall not use his or her official position or office, or take or fail to take any action, in a manner which he or she knows or has reason to know may result in a personal financial benefit for any of the following persons:

of gifts that public employees may receive, thereby precluding any improper influence on public decision-making.<sup>52</sup> Nepotism, through the appointment or supervision of relatives, is usually prohibited as well.<sup>53</sup> In fact, some codes explicitly prohibit city officials or employees from using their official positions to secure for

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- (a) the [County, City, Town, or Village] officer or employee;
  - (b) his or her outside employer or business;
  - (c) a member of his or her household;
  - (d) a customer or client;
  - (e) a relative; or
  - (f) a person from whom the officer or employee has received election campaign contributions of more than \$1000 in the aggregate during the past twelve months . . . .

Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 *FORDHAM URB. L.J.* 61, 69 (1993).

52. See, e.g., FORT WORTH, TEX., CODE ch. 2, art. VII, §§ 2-236 to -275 (1998) (laying out the code of ethics for city officials and employees); MILWAUKEE, WIS., CODE OF ORDINANCES ch. 303 (1997) (providing a code of ethics for city officials and employees). Concerning gifts, the Milwaukee City Code provides:

No person may offer or give to an official or other city [employee], directly or indirectly, and no official or other city [employee] may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the official's vote, the official's or other city [employee's] official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the official or other city [employee]. This subsection does not prohibit an official or other city [employee] from engaging in outside employment.

*Id.* § 303-5(3). Regarding the acceptance of gifts by government, employees or officers, some governmental entities have relatively complex rules. See SAN JOSE, CAL., CODE ch. 12.10 (1997); cf. 5 U.S.C. § 7353 (1994) (limiting gifts to federal employees).

53. See ARIZ. REV. STAT. ANN. § 38-481 (West 1996). In Arizona, for example, an officer of the government may be criminally punished for securing employment within the government for a person related by consanguinity or affinity. See *id.* The Arizona statute forbidding nepotism by public officials provides:

- A. It is unlawful, unless otherwise expressly provided by law, for an executive, legislative, ministerial or judicial officer to appoint or vote for appointment of any person related to him by affinity of consanguinity within the third degree to any clerkship, office, position, employment or duty in any department of the state, district, county, city or municipal government of which such executive, legislative, ministerial or judicial officer is a member, when the salary, wages or compensation of such appointee is to be paid from public funds or fees of such office, or to appoint, vote for or agree to appoint, or to work for, suggest, arrange or be a party to the appointment of any person in consideration of the appointment of a person related to him within the degree provided by this section.
- B. Any executive, legislative, ministerial or judicial officer who violates any provision of this section is guilty of a class 2 misdemeanor.
- C. The designation executive, legislative, ministerial or judicial officer includes all officials of the state or of any county or incorporated city within the state, holding officer either by election or appointments, and the heads of the departments of



any person any form of special consideration, treatment, exemption, or advantage beyond that which is lawfully available to other persons.<sup>54</sup>

A topic of great concern to Americans relating to public officials and public employees is the revolving door between government service and the private sector.<sup>55</sup> Americans may change jobs many times in a career. This means that someone who once worked for the government may later work for private interests. The risk that former public employees will exploit their connections with those still in government service has led to the enactment of a myriad of rules at all levels of government<sup>56</sup> and within the legal profession.<sup>57</sup> Essentially, these rules attempt to distinguish those forms of subsequent employment that are permissible from those that are forbid-

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state, county or incorporated cities, officers and boards or managers of the universities.

*Id.*

54. See DALLAS, TEX., CODE OF ETHICS art. XII, § 2-122 (1998). Specifically, the Dallas Code of Ethics provides:

(a) An officer or employee of the city shall not:

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- (2) Use his official position to secure special privileges or exemptions for himself or others.
- (3) Grant any special consideration, treatment or advantage to a person or organization beyond that which is available to every other person or organization. This shall not prohibit the granting of fringe benefits to city employees as a part of their contract of employment or as an added incentive to the securing or retaining of employees.

*Id.*

55. See generally Rachel E. Boehm, *Caught in the Revolving Door: A State Lawyer's Guide to Post-Employment Restrictions*, 15 REV. LITIG. 525 (1996) (discussing post-government employment restrictions placed on lawyers).

56. See, e.g., 18 U.S.C. § 207 (1994 & Supp. II 1996) (setting restrictions on former officers, employees, and elected officials of the executive and legislative branches); SAN ANTONIO, TEX., ETHICS CODE OF THE CITY OF SAN ANTONIO, Part C, § 3 (prohibiting former city employees from involvement in sales to the city for a one year period after termination of employment).

57. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1998) (prohibiting a lawyer from representing private clients in a matter in which the lawyer served as a public official or employee); Rachel E. Boehm, *Caught in the Revolving Door: A State Lawyer's Guide to Post-Employment Restrictions*, 15 REV. LITIG. 525, 526 (1996) (noting that "[a]t least thirty states have adopted ethics laws that place a variety of post-employment restrictions on the former government lawyer").

den.<sup>58</sup> Strict ethical standards seek to ensure that the system of governance applies to all people in an equal and fair manner.

### B. *America's Preoccupation with Ethics*

The rules relating to judges, lawyers, and public officials and employees are indicia of America's preoccupation with ethics in regard to the conduct of public affairs. Many other examples of this preoccupation exist, such as the numerous federal and state laws governing political campaign contributions<sup>59</sup> and the conduct of lobbyists.<sup>60</sup> Of course, such laws do not stand in isolation from the society they seek to influence. Rather, the passage of ethics laws naturally gives rise to the development of entire industries dedicated to the related tasks of ethics education, compliance, enforcement, defense, and the like.<sup>61</sup>

America, however, has not always been so concerned with the subject of ethics in government. A century ago, one would not have found the city ethics codes, state conflict of interest laws, and federal statutes on revolving-door employment that exist today, nor would there have been anything similar to the now-ubiquitous Justice Department special prosecutors or congressional ethics investigations. Today, ethics officers, who are charged with duties of ethics education, advising, and enforcement, are a standard part of

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58. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.11 (1998) (stating that "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation"). See generally John J. Woykovsky, Note, *Conflicts of Interest: The Former Government Attorney and the Case of Michael Abbell*, 11 GEO. J. LEGAL ETHICS 165, 171-72 (1997) (discussing Rule 1.11 and its application to former government attorneys).

59. See, e.g., 26 U.S.C. § 9035 (1994) (imposing limitations on presidential election campaign expenses); TEX. ELEC. CODE ANN. § 253.001-176 (Vernon Supp. 1998) (restricting political contributions and expenditures).

60. See, e.g., Federal Lobbyist Disclosure Act of 1995, 2 U.S.C. § 1601 (Supp. III 1997) (requiring registration of lobbyists); TEX. GOVT. CODE ANN. §§ 305.001-036 (Vernon 1998) (requiring registration of lobbyists).

61. For example, the existence of ethics codes for attorneys has given rise to such entities as the Texas Center for Legal Ethics and Professionalism and a group called Americans for the Enforcement of Attorney Ethics. See *San Antonio Selected As Site for State-wide Ethics Center*, 53 TEX. B.J. 412, 414 (1990) (discussing creation of the Texas Center For Legal Ethics and Professionalism); Nicole Foy, *Smoke Yet to Clear in State's Unprecedented Tobacco Settlement*, SAN ANTONIO EXPRESS-NEWS, Jan. 18, 1998, at 1A (referring to the group Americans For the Enforcement of Attorney Ethics), available in 1998 WL 5074355.

the military and many other facets of federal, state, and local governments,<sup>62</sup> as well as the private sector.<sup>63</sup> Whereas ethical standards are pervasive in the public sector today, such was not the case a century ago.

In this respect, one should consider what forces may have contributed to the current American preoccupation with the legal regulation of ethics in public life. The answer may be simply that corruption—*guanxi* in its worst sense—is rampant in the United States. More likely, the answer is not so easy. Little evidence suggests that improper conduct by public officials is more prevalent in the United States than in other countries in which public-sector ethics is less of an issue.<sup>64</sup> America's preoccupation with ethics in government is probably better explained by an examination of facets of society less directly related to government ethics such as forces that focus public attention, shape public discourse, and drive public energies. More specifically, the current visibility of governmental ethics issues may be an outgrowth of two of the most significant developments in American society during the twentieth

62. See 5 U.S.C. § 7301 (Supp. III 1997) (listing the duties of the Office of Government Ethics and the individual federal agencies); CAL. PUB. UTIL. CODE § 130610 (Deering Supp. 1999) (establishing an ethics officer for the Los Angeles County Metropolitan Transportation Authority); *Navy Starts an Ethics Center*, NAT'L L.J., Nov. 9, 1998, at A8 (announcing the creation of a "think tank" on military ethics); cf. Glenn R. Simpson, *Legal Troubles for President May Continue*, WALL ST. J., Apr. 17, 1998, at A16 (discussing the former Justice Department ethics officer's request to join the special prosecutor's staff), available in 1998 WL-WSJ 3490493.

63. See Joseph J. Fleischman et al., *The Organizational Sentencing Guidelines and the Employment-at-Will Rule as Applied to In-House Counsel*, 48 BUS. LAW 611, 627 (1993) (reporting that the employment of professional ethics officers in the corporate sector "is a recent trend which appears to be gaining momentum"); Neil King, Jr., *Momentum Builds for Corporate-Bribery Ban*, WALL ST. J., Sept. 23, 1997, at A16 (stating that "[w]ith the world's airline and defense industries considered among the most corrupt, Boeing has instituted a code of conduct and has about 50 'ethics coordinators' who report to top management"), available in 1997 WL-WSJ 14167278; see also Paul Dodson, *Professor's Book Focuses on Companies' Ethics Statements*, S. BEND TRIB., Feb. 22, 1998, at B1 (discussing the adoption of ethics statements by private corporations), available in 1998 WL 12747063.

64. See David A. Gantz, *Globalizing Sanctions Against Foreign Bribery: The Emergence of a New International Legal Consensus*, 18 NW. J. INT'L L. & BUS. 457, 463 (1998) (reporting that "while domestic bribery within the United States is not perceived to be a major problem, a recent survey suggests that some nations are less corrupt than the United States, although the United States still ranks among the least corrupt" (footnote omitted)); Barbara Crossette, *Europe Dominates Survey's Top 10 Least-Corrupt-Countries List*, N.Y. TIMES, Oct. 4, 1998, at 5 (discussing a survey ranking the United States 17th out of 85 countries in terms of least corruption), available in 1998 WL 5429674.

century—the search for social equality, discussed next in Part III, and the transformation of professional ethical standards into enforceable rules of law, discussed later in Part IV.

### III. THE SEARCH FOR SOCIAL EQUALITY

At the beginning of the 1900s, vast inequalities divided persons in the United States. Three of the most significant divisions were disparities between rich and poor, whites and nonwhites, and current residents and new immigrants.<sup>65</sup> Throughout the twentieth century, the desire to ameliorate these social problems catalyzed a wide array of legal and social reforms.<sup>66</sup> Over the course of many decades, these lines of social division have changed, and some have begun to disappear. The forces that inspired Americans to fight against inequality based on poverty, race, and residency may also be the very forces that have energized calls for better ethics in government.

#### A. *Reducing Poverty*

In the early 1900s, the capitalists who led the industrialization of the United States held great wealth.<sup>67</sup> They had profited enormously from the building of railroads, the making of steel, and the mining of valuable minerals.<sup>68</sup> In contrast, ordinary persons en-

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65. See PHILIP PERLMUTTER, *DIVIDED WE FALL: A HISTORY OF ETHNIC, RELIGIOUS, AND RACIAL PREJUDICE IN AMERICA* 166-208 (1992) (discussing discrimination against immigrants at the beginning of the twentieth century); cf. Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 *IND. L.J.* 119, 122-23 (1994) (noting that the individualistic nature of the American character tends to lead to vast social and political inequality and that capitalism and the accumulation of wealth was exalted during the “Gilded Age” of the last two decades of the nineteenth century). In 1896, the Supreme Court of the United States endorsed the racially divisive doctrine of “separate but equal” in *Plessy v. Ferguson*. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding a state statute that required separate but equal accommodations on trains as not violative of either the Thirteenth or Fourteenth Amendments).

66. See, e.g., Equal Employment Opportunities Act, 42 U.S.C. §§ 2000e to e-17 (1994); Fair Housing Act, 42 U.S.C. §§ 3601-31 (1994); Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1994); Social Security Act, 42 U.S.C. §§ 301-1397 (1994 & Supp. II 1996).

67. Cf. CARY REICH, *THE LIFE OF NELSON A. ROCKEFELLER: WORLDS TO CONQUER 1908-1958* 4 (1996) (declaring that John D. Rockefeller, the progenitor of the Standard Oil trust, had “a fortune that dwarfed all the mighty fortunes of the Gilded Age”).

68. See RICHARD KRICKUS, *PURSUING THE AMERICAN DREAM: WHITE ETHNICS AND THE NEW POPULISM* 103 (1976) (discussing J.P. Morgan, Andrew Carnegie, Henry Clay Frick, and others who created the nation’s first major corporations in each of their respec-

joyed little prosperity. They lived in housing that was modest, if not inadequate,<sup>69</sup> and they received limited education.<sup>70</sup> As many Americans toiled amidst dangerous, unsanitary, and exceedingly unpleasant working conditions,<sup>71</sup> accident victims routinely went uncompensated because the legal system offered little redress.<sup>72</sup> With virtually no system to provide social insurance, the sick and the elderly frequently became destitute.<sup>73</sup>

During the twentieth century, the disparity between rich and poor in the United States was, in many respects, reduced.<sup>74</sup> The enactment of a federal income tax early in the twentieth century created significant obstacles to the accumulation of great wealth,

tive fields). Describing the United States during the Gilded Age, Richard Krickus stated, “[t]he United States at the turn of the century was the most powerful industrial nation in the world . . . . At the very apex of this vast industrial and financial empire sat a small coterie of men.” *Id.*

69. See PHILIP PERLMUTTER, *DIVIDED WE FALL: A HISTORY OF ETHNIC, RELIGIOUS, AND RACIAL PREJUDICE IN AMERICA* 178 (1992) (describing the living conditions among the large numbers of immigrants as “trying” and “miserable”).

70. See, e.g., Francis H. Nichols, *Children of the Coal Shadow*, *McCLURE'S MAG.* (stating that in Pennsylvania's coal counties, an average man probably spent much of his childhood working at the coal mine rather than learning in a school room), *reprinted in* 4 *EDUCATION IN THE UNITED STATES: A DOCUMENTARY HISTORY* 2143-45 (Sol Cohen ed., 1974); David Wessel, *Reaching Back: Scanning the Future, Economic Historian Plumbs Distant Past*, *WALL ST. J.*, Feb. 13, 1996, at A1 (stating that “[i]n 1910, only 10% of eighteen-year-olds in New York had diplomas; a generation later, most did”), *available in* 1996 WL 3090843.

71. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 80, at 573 (5th ed. 1984) (indicating that at the turn of the twentieth century there existed “working conditions of an extreme inhumanity in many industries, which the employer was under no particular incentive to improve”); PHILIP PERLMUTTER, *DIVIDED WE FALL: A HISTORY OF ETHNIC, RELIGIOUS, AND RACIAL PREJUDICE IN AMERICA* 179 (1992) (describing the “difficult, dangerous and low paying” working conditions immigrants endured at the turn of the century).

72. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 80, at 572 (5th ed. 1984) (explaining that “[u]nder the common law system, [prior to the adoption of workers' compensation law in the early years of the twentieth century] by far the greater proportion of industrial accidents remained uncompensated, and the burden fell upon the worker, who was least able to support it”).

73. Cf. Phyllis E. Bernard, *Social Security and Medicare Adjudications at HHS: Two Approaches to Administration Justice in an Ever-Expanding Bureaucracy*, 3 *HEALTH MATRIX* 339, 364 (1993) (recognizing that the Social Security Act of 1935 undertook “to construct a national safety net for the destitute”).

74. See Richard Morin, *The New Great Divide: More and More, Where You Live Depends on What Your Worth*, *WASH. POST*, Jan. 18, 1998, at W14 (reporting the gap between rich and poor has decreased, but rich and poor are more physically isolated), *available in* 1998 WL 2462529.

and it provided not merely revenue for government, but also a vehicle for government to redistribute assets and finance social programs.<sup>75</sup> In addition, Congress passed legislation prohibiting child labor,<sup>76</sup> limiting work hours,<sup>77</sup> giving employees the right to organize,<sup>78</sup> and improving workplace safety.<sup>79</sup> In many industries, labor unions succeeded in winning generous wages and benefits for their members; in fact, by the middle of the century, unions were among

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75. See Akhil Reed Amar, *Textualism and the Bill of Rights*, 66 GEO. WASH. L. REV. 1143, 1146 (1998) (indicating that the "Sixteenth Amendment was also profoundly redistributive, authorizing a 'progressive' income tax that would take more proportionately from the rich than the poor"); Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 IND. L.J. 119, 132 (1994) (stating "[t]he demand for a new income tax began in the Gilded Age as various classes and sections of the country reacted to the first capitalist heyday and sought to shift the burdens of supporting government to the wealthy people who prospered from it"); Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 613 (1998) (explaining that the federal income tax focused largely on redistributing assets from the richest to the working and middle class Americans).

76. See Jeremy S. Sosin, *The Price of Killing a Child: Is the Fair Labor Standards Act Strong Enough to Protect Children in Today's Workplace?*, 31 VAL. U. L. REV. 1181, 1183-84 (1997) (stating that "[i]n 1938, the United States Congress enacted the Fair Labor Standards Act (FLSA)," which included statutory provisions prohibiting "oppressive child labor"). Of course, whether such laws should be strengthened is an important public issue. For example, Michael A. Pignatella stated:

Like a recurring nightmare, the specter of abusive child labor is once again haunting the workplaces of America. Despite anti-child labor legislation by Congress, and affirmation of that legislation by the Supreme Court, child labor abuse is flourishing on farms and in the garment districts, grocery stores, and restaurants of the United States—injuring and killing children, and locking them into a lifelong cycle of poverty.

Although the causes of this resurgence are manifold, ineffective legislation, lack of sufficient funding to enforce existing laws, and lack of societal awareness are paramount. There are numerous loopholes in the Fair Labor Standards Act (FLSA) that allow for the abuse and exploitation of children, particularly in agricultural occupations. The penalties for violating these laws are also ineffective deterrents. Moreover, the FLSA does not provide a cause of action for parents or guardians of working children who are abused. Finally, enforcement of this act has been sporadic and inefficient, and funding for enforcement has continued to decrease.

. . . The number of federal child labor law violations has risen steadily in the past decade, from 10,000 in 1983 to over 40,000 in 1990. The National Safety Workplace Institute has noted that at least 300 children are killed annually while at the workplace, and 70,000 more are injured.

Known violations may reflect only a small portion of the problem. . . .

Michael A. Pignatella, Note, *The Recurring Nightmare of Child Labor Abuse—Causes and Solutions for the 90s*, 15 B.C. THIRD WORLD L.J. 171, 171-72 (1995).

77. See 29 U.S.C. § 207 (1994 & Supp. II 1996) (setting maximum work hours).

78. See National Labor Relations Act of 1935, 29 U.S.C. § 151 (1994) (declaring a federal policy which protects workers' rights to organize).

79. See Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (1994).

the most powerful forces in the country.<sup>80</sup> Organized labor plays an important role in many fields of economic endeavor today.<sup>81</sup>

Other significant advancements occurred in the area of education. Over the past century, the goal of a twelve-year education evolved into an accepted standard in American public schools.<sup>82</sup> The passage of the GI Bill after World War II has opened higher education to a much wider segment of American society.<sup>83</sup> Changes such as these have resulted in growing numbers of Americans attending colleges and universities.<sup>84</sup> This increase in education has resulted, for many, in better jobs, higher earnings, and increased social mobility.

During the twentieth century, workers' compensation laws throughout the country made accident compensation readily available to many of those who were seriously injured. Such legislation provides redress for work-related injuries through an insurance system that eliminates the need to prove that anyone was at fault, thus reducing the need for litigation.<sup>85</sup> In addition, the principles of tort law have been so extensively reformulated that for many years any seriously injured consumer or other accident victim has had a realistic chance of obtaining significant monetary relief

80. See MELVYN DUBOFSKY, *THE STATE AND LABOR IN MODERN AMERICA* 197 (1994) (emphasizing the power of unions during the twentieth century); see also DAVID McCULLOUGH, *TRUMAN* 493-506 (1992) (describing President Harry Truman's titanic struggles with the steel, coal mining, and railway unions).

81. See Kevin Galvin, *Labor Day: Unions Win, Lose Some*, DAYTON DAILY NEWS, Sept. 7, 1998, at 3A (noting that various "displays of power have increased the visibility of America's unions, which are striving to regain clout"), available in 1998 WL 12806486.

82. See H.G. GOOD, *A HISTORY OF AMERICAN EDUCATION* 257-59 (1956) (describing the prolific increase in high school enrollment during the early 1900s).

83. See Stephen E. Ambrose, *Preserve the Citizen Service Tradition*, WALL ST. J., Oct. 23, 1998, at A14 (noting that the "GI bill sent hundreds of thousands of GIs to college—guys who never dreamed it would be possible . . . to get a higher education"), available in 1998 WL-WSJ 18989297.

84. See Mary Ann Roser, *College Enrollment Up Statewide: Preliminary Figures for Public and Private Texas Institutions Point to Beginning of National Trend*, AUSTIN AM.-STATESMAN, Oct. 9, 1998, at B1 (relating that "[n]ationally, college enrollment is expected to rise from 14.5 million . . . [in 1998] to 16.08 million by 2008," according to the U.S. Department of Education), available in 1998 WL 3627470; see also *All Things Considered* (NPR radio broadcast, Sept. 24, 1998) (explaining that "more Blacks, Latinos, Native Americans and Asian Americans are going to college and earning degrees today than in previous years"), available in 1998 WL 3646569.

85. See VINCENT R. JOHNSON & ALAN GUNN, *STUDIES IN AMERICAN TORT LAW* 180 (1994) (observing that workers' compensation legislation has been adopted in every state and discussing how such insurance systems operate).

through the legal system.<sup>86</sup> On a different front, Social Security,<sup>87</sup> Medicare,<sup>88</sup> Medicaid,<sup>89</sup> and the rise of private pension programs<sup>90</sup> have all reduced greatly the risk that the aged in America will be left poor and homeless.

Despite these reforms, a disparity still exists between the rich and the poor in the United States, and there are reports that this gulf is widening.<sup>91</sup> Undoubtedly there is still much work to be done. But it is also undeniable that the situation of the poor has improved greatly from a hundred years ago in terms of working

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86. See PETER A. BELL & JEFFREY O'CONNELL, *ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW* 47 (1997) (concluding that "a higher percentage of injured people bring tort lawsuits" than previously and that "[t]he average amount defendants in such lawsuits pay out has gone up, too"); G. EDWARD WHITE, *TORT LAW IN AMERICA* xix (1980) (noting that the "widespread attitude which associated injury with bad luck or deficiencies in character has been gradually replaced by one which presumes that most injured persons are entitled to compensation, through the legal system or some other mechanism"). Some critics argue that tort law has tipped the scales too far in favor of plaintiffs and against defendants. See PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 5-7 (1988) (criticizing the reformulation of basic tort principles, which began in the 1950s through the efforts of academicians and judges, and ultimately "changed the common law as profoundly as it had ever been changed before").

87. 42 U.S.C. §§ 301-1397 (1994 & Supp. II 1996).

88. *Id.* §§ 1395-1395ddd.

89. *Id.* §§ 1396-1396v.

90. The growth of pension plans created a need for legal protection of such assets. See George Lee Flint, Jr., *ERISA: Jury Trial Mandated for Benefit Claims Action*, 25 *LOYOLA L.A. L. REV.* 361, 361 (1992). Professor Flint stated that:

Through the Employee Retirement Income Security Act of 1974 (ERISA) [Pub. L. No. 93-406, 88 Stat. 829 (1974)], Congress intended to provide increased legal remedies for participant-beneficiaries who are denied benefits from private employee benefit programs. To achieve this goal, Congress provided new federal remedies under federal causes of action that are tried in both federal and state courts.

*Id.*

91. See Comment, *Ain't We Got Fun*, *ARIZ. DAILY STAR*, Dec. 18, 1997, at 22A (indicating that a "report on income disparity by the Center on Budget and Policy Priorities provides a stark illustration of the growing gap between rich and poor in this country and in Arizona"), available in 1997 WL 16299505; Editorial, *The Rich Get Richer and the Poor Get Poorer: North Carolina's Income Gap Between Rich and Poor Widens*, *GREENSBORO NEWS & REC.*, Dec. 27, 1997, at A6 (observing that the "income gap between rich and poor people is . . . getting wider in most states"), available in 1997 WL 14482227.



conditions,<sup>92</sup> education,<sup>93</sup> accident compensation,<sup>94</sup> health care,<sup>95</sup> and retirement.<sup>96</sup>

### B. *Improving the Status of Racial Minorities*

Racial disparities in America today are also considerably less egregious than at the start of the twentieth century. At the beginning of the 1900s, the United States was a radically segregated society, with African Americans and other racial minorities relegated to the bottom social tier with little chance to advance. However, by the middle of the century, the moral bankruptcy of a system based on racial segregation was not merely apparent, but so intolerable that it had to be abolished. In 1954, the Supreme Court of the United States addressed this task by overruling its earlier decisions and ordering the desegregation of public schools.<sup>97</sup> After *Brown v. Board of Education*<sup>98</sup> “separate but equal” was no longer the rule in public education.<sup>99</sup> Once Congress passed the Civil

92. See Marion G. Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 963 (1990) (stating that workers have been able to improve working conditions, particularly through the passage of the Wagner Act, 29 U.S.C. §§ 151-69 (1994)); Christopher T. Wonnell, *The Influential Myth of a Generalized Conflict of Interest Between Labor and Management*, 81 GEO. L.J. 39, 63 (1992) (indicating that working conditions have greatly improved since 1800); see also Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245, 248 (1995) (explaining that unions lifted workers out of poverty from the 1930s to the 1960s).

93. Cf. LAURENCE P. FELDMAN, CONSUMER PROTECTION 16 (2d ed. 1980) (proposing that the growth in education has promoted a rise in consumer protection). *But see* Timothy D. Lynch, *Education As a Fundamental Right: Challenging the Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953, 983 (1998) (suggesting that state efforts to improve the education of poor children have been inadequate).

94. See PETER A. BELL & JEFFREY O'CONNELL, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW 47 (1997) (explaining that tort law today enables plaintiffs to recover a “greater percentage of the compensation paid for injury and illness”).

95. See Margaret G. Farrell, *Health Care Consumer Claims and Litigation*, A.L.I.-A.B.A. 271, 277 (1998), available in WL ALI-ABA Database (noting that today consumers enjoy several options in health care due to the procedures set up by health care providers and the legal requirements set forth in common law, regulations, and statutes).

96. See Senator Carol Moseley-Braun, *Women's Retirement Security*, 4 ELDER L.J. 493, 495 (1996) (discussing steps that Congress has taken over the years to protect workers' retirement benefits, including the Retirement Equity Act of 1984).

97. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (rejecting any language in *Plessy v. Ferguson* contrary to its holding, which denounced the concept of “separate but equal”).

98. 347 U.S. 483 (1954).

99. See *Brown*, 347 U.S. at 495 (holding that “[s]eparate educational facilities are inherently unequal”).

Rights Act of 1964,<sup>100</sup> that idea was never again taken seriously. Now, racial discrimination is banned by federal law in employment,<sup>101</sup> housing,<sup>102</sup> voting<sup>103</sup> and public accommodations;<sup>104</sup> similar laws exist at the state<sup>105</sup> and local levels as well.<sup>106</sup>

The United States continues to have serious racial problems. This is not surprising considering the fact that it is a highly mobile, individualistic, and heterogeneous society. However, the improvement in the situation of minorities in America is also unmistakable. No longer is open discrimination tolerated, nor is racial hatred an acceptable form of public discourse.<sup>107</sup> Furthermore, persons, who at the beginning of this century would have been the victims of racial mistreatment, now sit on the Supreme Court,<sup>108</sup> in Congress,<sup>109</sup> in the President's Cabinet,<sup>110</sup> and at virtually every level of

100. Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2001h (1994)).

101. See Equal Employment Opportunities Act, 42 U.S.C. §§ 2000e-2000e-17 (1994) (prohibiting discrimination by an employer on the basis of race, sex, religion, national origin, or color).

102. See Fair Housing Act, 42 U.S.C. §§ 3601-31 (1994).

103. See Voting Rights Act of 1965, 42 U.S.C. § 1973 (1994).

104. See 42 U.S.C. § 2000a (1994) (prohibiting discrimination or segregation in places of public accommodation).

105. See, e.g., TEX. LAB. CODE ANN. § 21.051 (Vernon Supp. 1998) (prohibiting employment discrimination); TEX. PROP. CODE ANN. § 301.021 (Vernon 1995) (prohibiting housing discrimination); TEX. HEALTH & SAFETY CODE ANN. § 241.027 (Vernon 1992) (prohibiting discrimination in the transfer of hospital patients).

106. For example, discrimination based on race and other enumerated grounds is barred by the City Code of San Antonio. See SAN ANTONIO, TEX., CODE §§ 2-8, 2-9, 9-40 (1998) (outlawing discrimination in the awarding of subcontracts funded by city appointments, and the sale or rental of a dwelling and related facilities and services).

107. Cf. Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 TEX. TECH. L. REV. 811, 839 (1998) (stating that “[t]oday, overtly discriminatory statements rarely occur in American political campaigns. Rather, when bias and prejudice are present, they typically manifest themselves covertly through the use of code words or, perhaps, carefully phrased rhetorical questions”).

108. See BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 369 (1993) (stating that Justice Clarence Thomas is the second African American to sit on the Supreme Court of the United States, replacing the first, Justice Thurgood Marshall).

109. See Dawn S. Onley, *Forum Puts State of Race Under Microscope: Newark Mayor Argues for Affirmative Action*, STAR-LEDGER (Newark, N.J.) Jan. 29, 1998, at O23 (stating that the number of African-American members of Congress has grown from 4 in 1960 to 41 in 1996), available in 1998 WL 3387667; cf. Robin Leary, *Congressional Black Caucus Has Full Agenda*, PHILADELPHIA TRIB., Sept. 2, 1997, at 3A (discussing the Congressional Black Caucus, which was formed in the 1970s to “lobby for legislation that would help blacks”), available in 1997 WL 11718359.

federal, state, and local government.<sup>111</sup> Those previously excluded individuals now make the laws and enforce the policies that define American society.

There is still too much racism in America. Much work remains to be done. However, the historical record shows that the gulf between the races has been reduced significantly and that the quest for equality continues.<sup>112</sup>

### C. *Addressing the Plight of New Immigrants*

Determining what progress has been made in America during the twentieth century in according equal treatment to newly arrived immigrants is more difficult. In some respects, one might perceive that only the identities of the disfavored have changed. At the beginning of the 1900s, newly arrived immigrants from Southern, Eastern, and Central Europe were among the main victims of discrimination.<sup>113</sup> Often, they were relegated to the least rewarding jobs and the most inadequate accommodations, and their economic and social progress was impeded.<sup>114</sup> Gradually,

110. African-American members of the Clinton cabinet have included Secretary of Labor Alexis Herman, Surgeon General Joycelyn Elders, Secretary of Agriculture Mike Espy, Secretary of Commerce Ron Brown, and Secretary of Transportation Rodney Slater. See *Another Black Cabinet Member Shines*, CALL & POST (Cleveland), Nov. 6, 1997, at 4A, available in 1997 WL 11584726.

111. See Scott Shepard, *Southerners Study What's Happened, What's to Come Back in Birmingham: Conference to Look at Troubled Past, Upbeat Present and the Future*, ATLANTA J.-CONST., Nov. 14, 1998, at A4 (reporting that "[t]he Magnolia State [Mississippi] now has more black elected officials than any other state in the nation"), available in 1998 WL 3726294; see also Mark Helm & Stewart M. Powell, *Latinos Running for Office in Record Numbers National Trend Even in States with Small Hispanic Populations*, SAN FRANCISCO EXAMINER, Oct. 30, 1998, at B9 (discussing the progress of Latino candidates in pursuing state and national offices), available in 1998 WL 5193480.

112. See Walter Friedenber, *Looking Back at a Half Century: A Journalist's Report* (arguing that "America has not solved its great racial dilemma, but it has made great progress"), in *THE PLACE OF RACE, GENDER AND CLASS IN AMERICAN SOCIAL AND CULTURAL LIFE* 3, 5 (1997); see also Michael D. Goldhaber, *Minorities Surge at Big Law Firms*, NAT'L L.J., Dec. 14, 1998, at A1, A15 (discussing increasing numbers of Asian-American, Hispanic, and African-American attorneys in large law firms).

113. See PHILIP PERLMUTTER, *DIVIDED WE FALL: A HISTORY OF ETHNIC, RELIGIOUS, AND RACIAL PREJUDICE IN AMERICA* 166, 203-08 (1992) (noting that more than half of the immigrants between 1901 and 1910 came from Southern, Eastern, and Central Europe and discussing the impact of violence, "inflated patriotism," as well as "nativism" on immigrants).

114. Cf. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 127 (1976) (discussing how the rules for admission to law practice

however, Poles, Czechs, Italians, Irish, and other European minority groups became assimilated into mainstream American society. Today, except perhaps for persons of the same ethnic stock, no one cares much about the national origins of an Irish-American President,<sup>115</sup> a Polish-American National Security Advisor,<sup>116</sup> a Czech-American Secretary of State,<sup>117</sup> or an Italian-American Senator.<sup>118</sup>

Unfortunately though, new disfavored classes have emerged, such as, perhaps, Haitians and Vietnamese.<sup>119</sup> Continuing prejudice against newly arrived residents poses challenges of a substantial magnitude.<sup>120</sup> Currently, America has a burgeoning Hispanic population, much of which consists of relatively recent immigrants from Mexico and Central America.<sup>121</sup> Although many of these

were gerrymandered “to exclude, or to anathematize, members of ethnic minority groups”); Deborah L. Rhode, *Moral Character As a Professional Credential*, 94 *YALE L.J.* 491, 500 (1985) (noting that “[a]t the close of the nineteenth century, the recently-founded American Bar Association, joined by various state and local organizations as well as law schools, began spearheading a campaign for higher professional standards”). According to Deborah Rhode, “While the quest was ‘aimed in principle against incompetence, crass commercialism, and unethical behavior,’ the ostensibly ‘ill-prepared’ and ‘morally weak’ candidates were often in fact ‘of foreign parentage, and, most pointedly, Jews.’” *Id.* (quoting M. LARSON, *THE RULE OF PROFESSIONALISM* 173 (1977)).

115. See THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT* 1960, 5 (1961) (re-marking that John F. Kennedy’s family is of Irish descent).

116. See Stas Kmiec, *Kultura: Public Television Celebrates Polish Americans*, *POLISH AM. J.*, Mar. 1, 1998, at 11 (noting that Zbigniew Brezinski, a Polish American, served as National Security Advisor), available in 1998 WL 12486599.

117. See Donna Abu-Nasr, *Albright Renews Oath of Allegiance*, *AP ONLINE*, Nov. 10, 1998 (stating that Madeline Albright, who emigrated from Czechoslovakia at the age of 11, became the first female Secretary of State), available in 1998 WL 22417135.

118. See John Machacek, *Underestimated, Ambitious and Headstrong D’Amato Never Held Himself Back*, *GANNETT NEWS SERV.*, Nov. 6, 1998 (acknowledging former U.S. Senator Alfonse D’Amato as the first Italian American to hold statewide office in New York), available in 1998 WL 5637758.

119. See Marjorie Valbrun, *Caribbean Immigrants’ Political Moves Stir Tensions*, *WALL ST. J.*, June 30, 1998, at A20 (discussing the impact of several Haitian candidates running for various political offices in Florida), available in 1998 WL-WSJ 3499777; Editorial, *Welfare Triage in Massachusetts*, *BOSTON GLOBE*, Dec. 16, 1996, at A18 (suggesting that Russian Jews, Cambodians, Vietnamese, Haitians, and Portuguese are the new immigrant groups being discriminated against), available in 1996 WL 6890074.

120. See Valerie L. Barth, Comment, *Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Law Affecting Immigrants*, 29 *ST. MARY’S L.J.* 105, 106 (1997) (observing that “[a]nti-immigrant sentiment, fueled by the increase in the number of immigrants entering the United States . . . is once again on the rise in America”).

121. See *Hispanic Populace Doubles in N.C., Nationwide, the Hispanic Population Increased By Nearly a Third*, *GREENSBORO NEWS & REC.*, Sept. 5, 1998, at B2A (reporting

persons have entered the country legally, others have not.<sup>122</sup> Often without distinguishing between legal and illegal immigration, many Americans have come to resent new immigrants, who are often perceived as taking scarce resources away from current residents.<sup>123</sup>

Despite these problems and challenges, the position of newly arrived immigrants has improved considerably compared with their standing a century ago. Today, new immigrants have a much better chance of obtaining an education,<sup>124</sup> enjoying economic success,<sup>125</sup>

that in the last seven years, “[n]ationwide, the Hispanic population increased by nearly a third, to 29.3 million”), available in 1998 WL 21188479; see also *Growing Hispanic Population Not Realizing Its Political Clout: Why Don't Juan and Maria Vote?*, TUCSON CITIZEN, Oct. 9, 1998, at 1C (recognizing that “[b]y 2040, Hispanics will outnumber all other U.S. minority groups combined”), available in 1998 WL 13141144.

122. See Dan Mihalopoulos, *Homecoming*, ST. LOUIS POST-DISPATCH, Jan. 17, 1999, at B1 (reporting that approximately “5 million undocumented residents live in the United States, more than half of them from Mexico”), available in 1999 WL 3007326.

123. See Ned Glascock & Ruth Sheehan, *Backlash Greets Newcomers*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 23, 1998, at A1 (noting the resentment felt against immigrant Latino workers), available in 1998 WL 6127801. A 1997 study conducted for the U.S. Commission on Immigration indicated that:

[N]ew immigrant families initially tend to receive more in public services than they pay for in taxes. [Although] [i]mmigrants need about the same amount of government services as “native households,” immigrant families tend to earn lower wages and own less property and therefore pay less in taxes.

However, immigrant families—and Latin American families in particular—tend to have more children, translating into a need for more school resources. As a result, . . . native households pay more in annual state and local taxes to offset use by new immigrants . . . .

However, as the new arrivals and their descendants become more a part of mainstream America, they tend to contribute more in taxes than they get back in services over the course of their lifetimes . . . .

*Id.*; see Valerie L. Barth, Comment, *Anti-Immigrant Backlash and the Role of the Judiciary: A Proposal for Heightened Review of Federal Law Affecting Immigrants*, 29 ST. MARY'S L.J. 105, 113 (1997) (stating that California Proposition 187, which limited public benefits to illegal immigrants, was “initially proposed as a measure designed to preserve scarce state resources for its citizens”).

124. See Richard Rothstein, *Bilingual Education: The Controversy*, 79 PHI DELTA KAPPAN 672, 672 (1998) (discussing the low numbers of immigrants who had access to public education during the early twentieth century and providing statistics indicative of greater access to education among Hispanics today).

125. See *Poverty Level of Hispanic Population Drops, Income Improves, Census Bureau Reports*, M2 PRESSWIRE, Sept. 25, 1998, (remarking that “[t]he number of the nation's Hispanic population who were poor declined significantly between 1996 and 1997, while their real median household income increased significantly, according to . . . the Commerce Department's Census Bureau”), available in 1998 WL 16524418.

and redressing unfair treatment through the courts<sup>126</sup> than they would have had at the beginning of the twentieth century. There is widespread public support for the idea that *legal* immigrants should enjoy full equal rights. The serious differences in public opinion relate not to that basic proposition, but rather to the more knotty issues of who should be allowed to immigrate, what equality actually means, and what should be done about *illegal* immigration. Those differences, however, should not obscure the fact that the continuing quest for better treatment of immigrants has achieved important results during the twentieth century.

#### D. *A Broader Perspective: The American Struggle*

The search for social equality has been a dominant theme in twentieth century America. The reform movements on behalf of immigrants, minorities, and the poor are important and obvious parts of that fabric. But so, too, is the quest for ethics in government. In each case, the goal has been to assure equal opportunity and competition on fair terms. It is not surprising that a society passionately committed to eliminating obstacles to equal opportunity based on race, wealth, or residency should also be passionately committed to eradicating obstacles to competition based on merit that are presented by the existence of private connections or special relationships to those in power. Like poverty, racism, and discrimination against immigrants, corruption within the government and the legal system prevents all persons from having equal access to the benefits and resources that government can provide. The quest for ethics in government can be understood, at least in part, as a product of the continuing American search for social equality.

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126. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding that undocumented children in Texas could not be statutorily denied an education); Marc Mathieu, *Workshop Will Put Focus on Protecting Workers Against Employment Bias*, MIAMI TIMES, June 25, 1998, at 1C (discussing Justice Department program on immigrant workers' rights), available in 1998 WL 11368456; Patrick J. McDonnell, *California and the West: Judge's Final Order Kills Key Points of Proposition 187*, L.A. TIMES, Mar. 19, 1998, at A3 (forbidding implementation of proposition 187 provisions targeting illegal immigrants), available in 1998 WL 2409430. See generally RICHARD A. BOSWELL & GILBERT PAUL CARRASCO, IMMIGRATION AND NATIONALITY LAW: CASES AND MATERIALS 675-722 (1992) (discussing immigrants' legal rights relating to employment, education, and public entitlements).

## IV. THE SEARCH FOR ETHICAL CERTAINTY

A. *The Standardization of American Ethics*

The transformation of professional ethical standards into enforceable rules of law has paralleled the search for social equality in twentieth-century America.<sup>127</sup> At the beginning of this century, the professional ethics of lawyers, judges, politicians, and civil servants were largely personal matters.<sup>128</sup> In making difficult decisions, and in distinguishing right from wrong, these individuals relied primarily upon religious beliefs and social mores.<sup>129</sup> The

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127. See GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION* 88 (1985) (discussing the suggestion that “the American bar’s history of codification reflects diminishing interest in ethical aspirations and greater reliance on minimum prohibitions,” and commenting that “[d]efenders of the regulatory approach see its primary virtue as clarifying credible, enforceable requirements, unconfused by cant and exhortation; accordingly, the . . . Model Rules are defended as a code of legal standards, not of ethics”); Thomas L. Shaffer, *The Legal Profession’s Rule Against Vouching for Clients: Advocacy and “The Manner That Is The Man Himself,”* 7 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 145, 161 (1993) (discussing the development of codified rules of ethics in American law). According to Professor Shaffer:

Rules came to American legal ethics as part of the baggage of what Durkheim called the “market morality” of the 1870s. Market morality produced codes of legal ethics, which at first mixed principles with rules and have since become rules rather than principles; it produced the modern bar association; and, in the codes and through the influence of the bar associations, it developed the adversary ethic . . . .

*Id.*

128. See Thomas L. Shaffer, *The Profession As a Moral Teacher*, 18 *ST. MARY’S L.J.* 195, 223-24 (1986) (commenting that “[t]he profession in its modern manifestation separates code and character. The profession in its old, organic sense, which did not separate code from character, showed its moral self more in associations like neighborhoods than in corporate associations that commissioned rules of professional conduct”). Contrasting character-based ethics with rule-based ethics, Philip Rhinelander, moral philosopher, stated:

The great classical writers considered that character was fundamental. Consequently they stressed the importance of developing virtues, or dispositions of character, such as courage, wisdom, temperance and the like. For them rules about particular kinds of conduct were secondary and derivative. By contrast, a legalistic approach to ethics begins with rules about particular kinds of conduct and makes virtues secondary. The first approach . . . puts more weight upon the judgment of the individual. It emphasizes the need for practice and training, because acquiring virtue is like acquiring any other skill . . . . [T]he ultimate standard is the model of the virtuous person: what he or she would do is the test of what is right.

Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professional As a Moral Argument*, 26 *GONZ. L. REV.* 393, 396 n.11 (1991) (citation omitted).

129. See GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION* 87 (1985) (commenting that “[p]rior to the twentieth century, the American bar’s

process required moral reasoning about the common good.<sup>130</sup> Formal enforcement of ethical standards was neither a goal nor an issue;<sup>131</sup> rather, the character of the actor was the public's principal guarantee of good performance of professional duties.<sup>132</sup> More importantly, the principles embodied in the nascent ethical codes for

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ethical governance remained largely a matter of professional traditions and community norms”).

130. Cf. Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 707 (1988) (articulating that “[t]he recent professional history of lawyers—and the codification of that recent history in professional regulation—is the history of a movement toward rights and rules, and a movement away from moral discourse about the common good”).

131. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 54 (1986) (explaining that “[t]he [1908] Canons were not originally adopted in order to serve as a regulatory blueprint for enforcement through disbarment and suspension actions. Instead, they seem to have been a statement of professional solidarity”).

132. See Thomas L. Shaffer, *On Being a Professional Elder*, 62 NOTRE DAME L. REV. 624, 630 (1987) (reviewing the underlying theory behind Anglo-American professional ethics). Regarding character as the foundation for legal ethics, Professor Shaffer explained that:

Sir Thomas Percival, codifier of medical ethics in the eighteenth century, said he was writing his code for gentlemen, as did Baltimore's David Hoffman, codifier of legal ethics in the next generation. What they meant is that the legal and medical educator depends on established dispositions in the professional novice—that the novice in a profession has or seeks to have what Aristotle called practical wisdom; she or he is a *good* person, a person of integrity. Professional education begins with and rests on this integrity. In the generation after Hoffman's, the principal source of modern legal ethics, Judge George Sharswood of Pennsylvania, said: ‘Let it be remembered and treasured in the heart of every student, that no 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 blackness of darkness . . . .’

Sharswood's phrase, ‘the most sterling integrity,’ referred to culture-bound morals, to the morals we learn in our families, our towns, and in the conventional church. There is nothing abstract about these morals: They are not principles; they are habits. We speak of them when we say a person has character. And it was character in this sense that Percival and Hoffman depended on when they set out to teach professional ethics. The law student had to have character first, Hoffman said, and then “it may still be well that he would be fortified with a few rules for his future government” as a lawyer. Hoffman's *Fifty Resolutions for Professional Deportment*, our first code of legal ethics, began with that observation. This was also Percival's procedure in medical ethics.

When character is in place, fortified by “a few rules” that have to do with professional craft, the professional person becomes dependable. Professional *character* is the connection between virtue and craft . . . .

*Id.* (footnotes omitted).



lawyers and doctors were typically not imposed upon unwilling practitioners with the force of law.<sup>133</sup>

Today, however, the situation is considerably different. At the threshold of the new millennium, professional ethics in American public life is regulated heavily. The rules governing the conduct of lawyers, judges, and public servants are routinely codified in uniform terms and strictly enforced.<sup>134</sup> Several developments in American society have animated this shift from ethical standards based on individual character to standards based instead on legally binding, uniform rules.<sup>135</sup> Although undoubtedly this change reflects the premium that Americans place on the rule of law and

133. The early ethical codes for lawyers contained principles, not rules. See Thomas L. Shaffer, *The Legal Profession's Rule Against Vouching for Clients: Advocacy and "The Manner That Is The Man Himself,"* 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 145, 160 (1993) (explaining that "[t]he difference [between a rule and a principle] is that a rule can only be followed or broken; principles are more flexible"); see also Vincent Robert Johnson, *Ethical Limitations on Creative Financing of Mass Tort Class Actions*, 54 BROOK. L. REV. 539, 539 n.1 (1988) (discussing the sources of ethical guidance that influenced the drafting of the 1908 American Bar Association Canons of Professional Ethics).

134. The American Bar Association's promulgation of the Model Code of Professional Responsibility in 1969 marked an important step in the transformation of legal ethics into enforceable rules of law. After promulgation of the Code, numerous states enacted rules of ethics patterned after the Code. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 56 (1986) (relating that "[i]n contrast to the 1908 Canons which were only slowly adopted in some states, the 1969 Code was an impressive and quick success" and that "[t]he Code acquired the force of law when it was adopted in a jurisdiction by state authority, typically the state's highest court"). Today, the codification of ethics rules is commonplace in virtually every profession in the United States. See generally *CODES OF PROFESSIONAL RESPONSIBILITY* (Rena A. Gorlin ed., 3d ed. 1994) (setting forth professional ethics codes for accounting, advertising, architecture, banking, business management, engineering, financial planning, human resource management, insurance, journalism, real estate, allied health, chiropractic, dentistry, medicine, mental health, nursing, pharmacy, social work, dispute resolution, law practice, litigation, and legal support staff).

135. The change in the nature of professional ethics has been the subject of criticism. See Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605, 606-07 (1996) (analyzing the decreased role of moral discourse in American society and legal ethics). Professor Shaffer, for example, stated:

Americans in the late twentieth century evade moral discussion of what they are about. My impression is that this is true of law students in "professional responsibility" courses, as it is of law faculties and lawyers in practice. The methods of evasion are diverse but consistently banal. They include resolutions that dig no deeper than rules of practice imposed by courts—rules which virtually everyone identifies as ethically inadequate, or labels as a superficial moral minimum, or both . . . .

*Id.* at 606-07; see Thomas L. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181, 223 (1981) (opining that lawyers' reliance on their conscience "fades a little more every time the profession recodifies its rules of professional behavior").

individual rights,<sup>136</sup> three other forces have contributed greatly to this transformation: the rise of consumerism, the power of the press, and the American preference for statutory solutions.

### 1. Consumerism

In the United States, consumerism has evolved into a dominant societal mentality.<sup>137</sup> Today, Americans see themselves as consumers, and as such, they expect a dependable level of quality in both goods and services,<sup>138</sup> regardless of whether they are delivered by businesses, professionals, or the government.<sup>139</sup> Legal clients, for example, expect lawyers to handle their affairs confidentially and to disclose to them all relevant information.<sup>140</sup> In fact, a client relies upon the notion that his or her lawyer will do everything that a competent and honest lawyer *should do*, even if the client does not know exactly what such conduct entails.<sup>141</sup> If the lawyer falls short,

136. Cf. Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 706 (1988) (explaining that because an individualistic society is necessarily self-interested, rules are essential to preserve rights).

137. One indication of the rise of consumerism is the groundswell of deceptive trade practices laws. See Vincent R. Johnson, *Liberating Progress and the Free Market from the Specter of Tort Liability*, 83 NW. U. L. REV. 1026, 1045 (1989) (remarking that “[s]ince the late 1960s, every state in the union has passed some form of legislation aimed at protecting consumers from sales abuses” (citing D. PRIDGEN, CONSUMER PROTECTION AND THE LAW 3-2 (1988))).

138. See LAURENCE D. FELDMAN, CONSUMER PROTECTION: PROBLEMS AND PROSPECTS 1-2 (2d ed. 1980) (suggesting that consumers expect to know the truth about the quality of the products that they use).

139. In light of consumers’ expectations, the federal government has passed legislation protecting consumers. See, e.g., 16 C.F.R. § 455.2 (1998) (providing guidelines for used motor vehicle sellers to avoid deceiving consumers); 49 C.F.R. § 1103.15 (1998) (requiring practitioners admitted to practice before the Surface Transportation Board to be respectful and refrain from deceiving the public); 5 C.F.R. § 5501.106 (1998) (allowing government employees to obtain written approval to work outside of governmental responsibilities).

140. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1998) (providing that “[a] lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information”); *Lawyer and Client: Personal Responsibility in a Professional System*, (discussing the view of some clients that lawyers should act in the best interests of the clients and inform clients of all possible options available to resolve their problem), in ETHICS AND ADVOCACY, 45, 49-50 (Roscoe Pound ed., 1978).

141. See Stuart A. Forsyth, *Good Client Relations = The Key to Success*, ARIZ. ATT’Y, May 1998, at 20, 22 (noting that “clients want quality legal services, and they do expect their lawyers to be competent”), available in WESTLAW, AZATT Database; see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1998) (providing that “[a] lawyer

the client expects to have the right to complain.<sup>142</sup> More specifically, clients today expect there to be both professional standards defining competent, ethical practices and effective mechanisms for enforcing those standards.<sup>143</sup> Of course, similar expectations on the part of the American clients pervade callings other than law, and as is often the case, if there is an expectation of standards and enforcement, rules and procedures arise to address those expectations. In ethics, as in physics, nature abhors a vacuum.

The ethical standards applied today to those who act on behalf of government or participate in the legal system are merely part of a larger trend in America toward consumer protection.<sup>144</sup> Those rules ensure a dependable level of services for citizens, offer the advantages of standardization, and protect consumers who are often not well positioned to safeguard their own interests.

## 2. The Media

The robust practices of the American media, which are a product of the institutional status of the press in America and the legal rights that it enjoys,<sup>145</sup> have also contributed to the shift in America from individual, character-based professional ethics toward standardized, rule-based professional ethics. In the United States, the media is not controlled by the government. As a result, it is not obliged to do the government's bidding, and rather than merely

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shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (prohibiting a lawyer from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation").

142. *Cf. In re Braner*, 504 N.E.2d 102, 106 (Ill. 1987) (disbarring a lawyer for defrauding a client).

143. *In re Tatum*, 587 F.2d 682, 683 (5th Cir. 1979) (disciplining an attorney for professional misconduct because he failed to timely file a motion on his client's behalf); *In re Sousa*, 915 P.2d 408, 413 (Or. 1996) (stating that "a continuous pattern of misrepresentations, neglect, failure to act in behalf of his clients, and failure to acknowledge his ethical obligations" injured his clients and, thus, mandated his disbarment from the practice of law).

144. See generally LAURENCE P. FELDMAN, CONSUMER PROTECTION: PROBLEMS AND PROSPECTS (1980) (discussing the trend of consumer protection in the law).

145. Arguably, aggressive media reporting of ethics violations ensures the proper functioning of a constitutional system based on checks and balances. See LEONARD W. LEVY, THE EMERGENCE OF A FREE PRESS xii (1985) (explaining that "[f]reedom of the press also meant that the press had achieved a special status as an unofficial fourth branch of government, 'the Fourth Estate' whose function was to check the three official branches by exposing misdeeds and policies contrary to the public interest").

disseminate the “party line,” the media is free to act as an outside critic.<sup>146</sup> Of equal importance to this independent status of the media are the constitutional privileges that the media enjoys. Protected by the First Amendment to the United States Constitution, which guarantees freedom of speech and freedom of the press, news outlets in the United States have great discretion to report what they wish.<sup>147</sup> In reporting matters involving the conduct of public officials, members of the press are free from the risk of legal liability, except for harm caused by knowingly or recklessly made false statements.<sup>148</sup> In this respect, even negligently wrong statements about the official conduct of public figures and public officials are wholly exempt from legal liability.<sup>149</sup> Not surprisingly, this insulation from liability has the effect of making reporting often aggressive and sometimes careless.

In focusing attention, as it frequently does, on the failings of public figures, the media feeds an appetite that runs deep in the American citizenry.<sup>150</sup> Although the process is often brutal, it is, in a sense, also healthy. In a democracy, people need ready access to information about public affairs to cast ballots intelligently.<sup>151</sup> News reports about the shortcomings of public officials inevitably fuel calls for higher ethical standards and stronger enforcement of those norms. To maintain credibility, public officials are under

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146. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 n.24 (1974) (relating that freedom of the press “is in peril as soon as the government tries to compel what goes into a newspaper” (quoting 2 Z. CHAFE, *GOVERNMENT AND MASS COMMUNICATION* 633 (1947))).

147. See U.S. CONST. amend. I (stating “Congress shall make no law . . . abridging the freedom of speech or of the press”).

148. See *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) (concluding that a public official cannot recover for defamation without proving that the defendant acted with “actual malice,” meaning knowledge of falsity or reckless disregard for the truth).

149. See *id.* In contrast, a state may constitutionally permit recovery in libel or slander for a negligently false statement about a private person. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (stating that “so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual”).

150. Cf. William P. Marshall, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 183 (1994) (discussing the Supreme Court’s extensive protection of the media, and asserting that this protection encourages the media to feed “the public appetite for scandal”).

151. See *Minneapolis Star & Tribune Co. v. Minnesota*, 460 U.S. 575, 585 (1983) (recounting that “[an] untrammelled press [is] a vital source of public information . . . and an informed public is the essence of working democracy”) (citation omitted).

pressure to respond, or at least to appear to respond, to such demands. Hence there is substantial political motivation for those in power to promulgate new standards and increase enforcement activities. Unfortunately, this is true even if the new standards or enforcement methods are ill advised. The public attention span typically is too short to measure whether reforms have been sound. Often the “reformer” gets credit in the short-term contest for public opinion, even if in the long run the reform efforts fail.<sup>152</sup>

If the news media were more inhibited in its coverage of ethical lapses of public officials, less resources would likely be devoted to the drafting and enforcement of ethics laws.<sup>153</sup> Instead, the independent status of the press and the broad legal protections it enjoys invite relatively unrestricted reporting of ethical problems. Such reporting in turn generates demands for higher ethical standards, better compliance, and more vigorous enforcement. Those demands, in turn, produce heightened regulation and enforcement of professional ethics standards.

### 3. Statutory Solutions

At the beginning of the 1900s, statutes were unusual features in American law. Courts made most of the law through *ad hoc* adjudication of disputes.<sup>154</sup> With the rise of the social welfare state during the twentieth century, legislation became increasingly

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152. A similar point has been made with respect to the signing of international environmental agreements. See generally Robert W. Hahn & Kenneth R. Richards, *The Internationalization of Environmental Regulation*, 30 HARV. INTL. L.J. 421 (1989). The authors write:

One of the primary motives for countries' acceptance of these agreements lies in the benefits that signature confers on political leaders. The appearance of action may outweigh the importance of actual progress; the mere act of signing often garners more political credit for leaders than efforts to eradicate the problem . . . .

*Id.* at 436.

153. Cf. Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 703 (1988) (observing that the first codes of legal ethics were enacted in response to a public and journalistic perception that America's leading lawyers were acting immorally).

154. See Ellen Ash Peters, *Common Law Judging in a Statutory World*, 43 U. PITT. L. REV. 995, 995 (1982) (noting the dearth of statutes at the start of the twentieth century and commenting that “common law cases were for all practical purposes the principal if not exclusive source of law”).

important.<sup>155</sup> Today, statutes are a bulwark in American law and address virtually every conceivable subject, ranging from the sale of securities,<sup>156</sup> to the operation of aircraft,<sup>157</sup> to liability for consumer fraud.<sup>158</sup> In fact, it is difficult to think of any dispute or problem that remains untouched by legislation,<sup>159</sup> particularly as Americans today expect legislation to answer virtually all social problems.<sup>160</sup>

The preference for statutory solutions to community concerns reflects many things: a belief in the rule of law, a trust in legislative processes, a preference for comprehensive solutions, and an eagerness for defined standards, to mention just a few. Viewed in the broader context of the increasing statutorification of American law,<sup>161</sup> nothing is more natural than statutes that address ethical issues arising in the conduct of public affairs. By choosing to deal with ethical issues through legal codes, governmental and professional authorities are merely using the tools that are used routinely today to address other concerns of the public.

#### B. *A Broader Perspective: The Chinese Path*

If the Chinese have been less preoccupied than the United States with limiting the use of *guanxi* in public life during the twentieth century, that may be because the forces that have contributed to

155. See *id.* at 996 (remarking that New Deal legislation “set the stage for [irreversible] statutory patterns in the law”).

156. See Securities Exchange Act of 1934, 15 U.S.C. § 78 (1994).

157. See Federal Aviation Act of 1958, 49 U.S.C. §§ 40101-49105 (1994 & Supp. II 1996).

158. See TEX. BUS. & COMM. CODE ANN. §§ 17.41-.854 (Vernon 1987 & Supp. 1998).

159. See Ellen Ash Peters, *Common Law Judging in a Statutory World*, 43 U. PITT. L. REV. 995, 998 (1982) (articulating that “statutes have become ubiquitous”).

160. According to former Connecticut Chief Justice Peters:

The democratization of our political processes, the pressure for the immediate institutional responses, the spotlight cast by the media, all have the capacity for producing legislation that is, from its inception, ill-conceived. Chief Justice Rose Bird of the California Supreme Court, . . . noted the extent to which we have as a nation come to place a higher value on image and on speed than on sober reflection. “Life in the fast lane,” as she put it, is reflected in a headlong rush by legislators to achieve a quick fix for every social problem. Legislators feel that they need to stand up and be counted . . . .

Ellen Ash Peters, *Common Law Judging in a Statutory World*, 43 U. PITT. L. REV. 995, 1008 (1982).

161. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (discussing the preeminence of statutory law in modern America).

the American pursuit of ethics in government—consumerism, the power of the press, and statutory problem solving—have played a diminished role in Chinese affairs. To begin with, China does not have an independent press.<sup>162</sup> Media outlets are controlled by the government. As a result, the Chinese government is in a position to determine whether reports of unethical conduct by public officials and others are disseminated to the citizenry. The temptation to avoid airing one's "dirty laundry in public" is only natural, and it would be remarkable if the Chinese government, or indeed any government with control over the media, could fully resist that temptation. Recall that America's press—with its independent status and constitutional rights—enable it to act as a critic of the government and public officials.

In addition, the legal traditions of China have been very different from those in the United States. Representative government, rights enshrined in legal documents, an open court system, and a vigorous legal profession have long been taken for granted by Americans. The same is not true in China. Only at the beginning of the twentieth century did China emerge from thousands of years of imperial rule.<sup>163</sup> Any steps thereafter to establish a system based on the rule of law were impeded by civil strife, foreign invasions, and political upheavals.<sup>164</sup> During the Cultural Revolution between 1966 and 1976, the law schools were closed, the legal profession was disbanded, and there was no possibility of redress

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162. See Helena Kolenda, *One Party, Two Systems: Corruption in the People's Republic of China and Attempts to Control It*, 4 J. CHINESE L. 187, 227 (observing that "[t]he media have always been controlled by the government," and as a result public supervision of corruption has been thwarted).

163. The last feudal dynasty, the Qing, ended in 1911. CHINA RECONSTRUCTS PRESS, CHINESE HISTORY 169 (1988).

164. The founding of the People's Republic of China in 1949 by the Chinese Communist party is likely the most important element of Chinese history in the twentieth century. Regarding legal affairs, China had virtually no legal system in place until the early 1900s. See Jenkin Chan Shiu-Fan, *The Role of Lawyers in the Chinese Legal System* (explaining that "[t]he first modern Chinese legislation attempting to create a legal profession was . . . in 1910"), reprinted in *LAW IN THE PEOPLE'S REPUBLIC OF CHINA: COMMENTARY, READING, AND MATERIALS*, 216, 216 (Ralph H. Folsom & John H. Minan eds., 1989). After the Chinese Communist Party assumed power under Mao Zedung, in 1949, it "abrogated all laws of the Nationalist government," and stamped out private lawyers in China. See *id.* However, "[a]fter the death of chairman Mao Zedung and the arrest of the 'Gang of Four,' the Chinese Communist Party advocated the principle of 'socialist legality' and favoured the restoration of the legal profession." See *id.* at 217.

through legislation or litigation.<sup>165</sup> In short, the legal system was obliterated. Today, China is rebuilding its legal profession and legal system.<sup>166</sup> A new emphasis has been placed on the rule of law.<sup>167</sup> The law schools are again open, and the professional requirements for lawyers were recently codified.<sup>168</sup> Problems such as those that are the focus of securities law,<sup>169</sup> contract law,<sup>170</sup> and intellectual property law<sup>171</sup> are now the subject of legislation. But the tradition of seeking statutory solutions to social problems is still quite young in China.

Although there is a robust market economy in China today,<sup>172</sup> that fact reflects developments that have occurred almost entirely within the past twenty years. The consumerism mentality, if it exists at all, is still in its early stages. The idea that persons might turn to lawmakers or to the courts for redress of problems in the market is still very new to the Chinese. Thus, when one considers the different path the Chinese have taken, it is not surprising that America and China have different levels of concern about the topic of ethics in the public sector.

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165. Marcus W. Brauchli, *Beijing Eases Up: China's New Economy Spurs Legal Reforms, Hopes for Democracy*, WALL ST. J., June 20, 1995, at A1 (during the Cultural Revolution, lawyers weren't allowed to practice and the army ran the courts), available in 1995 WL-WSJ 8730324.

166. See James V. Feinerman, *The Rule of Law . . . with Chinese Socialist Characteristics*, 96 CURRENT HIST. 278 (Sept. 1997) (discussing the emergence of a "rudimentary legal order" in China since the Cultural Revolution).

167. Owen M. Fiss, *Two Constitutions*, 11 YALE J. INT'L L. 492 (1986), reprinted in LAW IN THE PEOPLE'S REPUBLIC OF CHINA 61 (Ralph H. Folsom & John H. Minan eds., 1989).

168. See Cynthia Losure Baraban, *Inspiring Global Professionalism: Challenges and Opportunities for American Lawyers in China*, 73 IND. L.J. 1247, 1248 (1998) (explaining that "[t]he Lawyers' Law, which took effect in January 1997, outlines new professional requirements for Chinese attorneys"). Notably, the Lawyers' Law is the only law "recognizing that lawyers represent clients and not the state." *Id.*

169. *Chinese Lawmakers Adopt the Country's First Securities Law*, WALL ST. J., Dec. 28, 1998, at C14, available in 1998 WL-WSJ 18997149.

170. Prof. Wang Liming, Address at St. Mary's University (Feb. 15, 1999) (discussing China's proposed uniform contract code).

171. Prof. Long Weiqui, Address at St. Mary's University (Feb. 8, 1999) (discussing protection of intellectual property rights under Chinese law).

172. Cf. *China's Constitutional Tweaks*, WALL ST. J., Feb. 5, 1999, at A14 (discussing proposed constitutional recognition of market socialism), available in 1999 WL-WSJ 5439667.



V. CONCLUSION: *GUANXI* IN THE BEST SENSE

America's preoccupation with public ethics says a great deal about the country and about its aspirations and expectations at the beginning of the new millennium. If, as this Essay contends, that preoccupation has been shaped by some of the same forces that have animated the twentieth-century search for social justice and the transformation of professional ethical standards into enforceable rules of law, the concern with ethics in American government will not fade quickly. Just as there is little reason to think that those committed to striving for social justice in America will diminish their efforts in pursuit of equal rights for all persons, that Americans will stop thinking of themselves as consumers, or that the American media will stop reporting on the failings of public servants, so too is it unlikely that America's focus on public ethics will cease.

If America moves beyond its current preoccupation with ethics in government, it may be because it has become increasingly clear that ethical conduct is not a free commodity; it comes at a cost. Every call for higher ethical standards diverts attention from other social problems. Every investigation of a government official entails expenses, not the least of which is distraction of the accused and others from the performance of official duties. Every dollar spent on ethics enforcement is money diverted from other worthy programs.

Unlike in the United States, the term "*guanxi*" in China is not invariably negative.<sup>173</sup> The word has positive connotations as well.<sup>174</sup> "*Guanxi*" can suggest practices that are humane and car-

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173. See Anna M. Han, *Hong Kong's Economy Under Chinese Rule: Prosperity and Stability?*, 22 S. ILL. U. L.J. 325, 334 n.41 (1998) (commenting that *guanxi* can be used to describe a "legitimate existing relationship which would facilitate business or it can mean an illicit contact which would allow the parties to circumvent the rules").

174. See Mary Lynne Calkins, *Make Friends First, Certify Later: China and ISO 14000*, 9 GEO. INT'L ENVTL. L. REV. 609, 633 n.159 (1997). Describing the dual nature of *guanxi*, Mary Calkins stated:

The notion that people should become friends before conducting business grows out of the Chinese notion of *guanxi*, or "particularistic ties." *Guanxi* refers to connections made through unofficial ties, such as classmates, coworkers, former coworkers, persons from the same hometown, or indirectly through people who know those sources. *Guanxi* is cultivated by organizations as well as individuals. The term can be interpreted favorably as "networking," or negatively as "nepotism" or "corruption." Various political campaigns have discouraged reliance upon *guanxi*, but it remains the

ing, not just self-serving.<sup>175</sup> It can also imply that a respect for individual persons is desirable, even if that may entail deviation from strict observance of neutral rules.

Juxtaposing the concept of “rule of law” with the concept of “rule by *guanxi*,”<sup>176</sup> is indeed tempting. If that is the choice, then at least for a “Westerner,” favoring the former and decrying the latter is easy.<sup>177</sup> Yet, the pursuit of good government may pose a more difficult challenge. The task may be to distinguish “good *guanxi*” from “bad *guanxi*”—in other words, to separate the types

predominant means of doing business, or for that matter, accomplishing virtually anything.

*Id.*

175. See ANNE F. THURSTON ET AL., *CHINA BOUND: A GUIDE TO ACADEMIC LIFE AND WORK IN THE PRC* 58-59 (rev. 1994) (quoting TANI E. BARLOW & DONALD M. LOWE, *TEACHING CHINA'S LOST GENERATION: FOREIGN EXPERTS IN THE PEOPLE'S REPUBLIC OF CHINA* 104-105 (1987)). Describing good *guanxi*, the authors explained that:

In a sense, *guanxi* is the way people organize relationships outside the *jia* (family), transforming strangers into kin by extending them favors and incurring obligations. All pseudo-family ties are cemented by this process. And ideally all relations between people should have a familist[ic] overtone . . . . This kind of relationship cannot develop unless both sides accept the obligation to give and receive concrete favors as tokens of the *guanxi* . . . .

*Id.*

176. See Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 *BERKELEY J. INT'L L.* 329, 336 (1997) (stressing that the Western view of the “‘rule of law’ stands in stark contrast to what is often termed the ‘rule of relationships’ operative in Asian societies. The Chinese ‘rule of relationships’ model, often termed *guanxi*, is a sort of gift economy that involves the ‘cultivation of personal networks of mutual dependence and trust’”); see also Jacques DeLisle, *Political Alchemy, The Long Transition, and Law's Promised Empire: How July 1, 1997 Matters—And Doesn't Matter—in Hong Kong's Return to China*, 18 *U. PA. J. INT'L ECON. L.* 69, 96 (1997) (describing a system based on *guanxi* as “an informal and extralegal order”).

177. See Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 *BERKELEY J. INT'L L.* 329, 336-37 (1997). The authors explained that:

In contrast to the exalted status of the “rule of law” in Western societies, law does not occupy the same position of importance in many Asian countries. In fact, Chinese culture is distinctly averse to the use of law or lawsuits to resolve disputes. “Confucianism argues that legal principles and the legal system are ethically and socially inferior ways to resolve problems. The law is the last and most embarrassing resort, to be used only after rational dialog and moral reasoning have failed.” Or, as one commentator put it, “[t]he Chinese, perhaps demonstrating a higher level of civilization than exists here, abhor litigation. Their traditional approach to resolving disputes has been through good faith negotiation.”

*Id.*

of favors and relationships that corrupt government and abuse power from those that do nothing more than smooth the rough edges of an imperfect legal system.<sup>178</sup> It is not easy to draw the line separating practices which give government a human face and make its actions efficient<sup>179</sup> from other forms of conduct which unfairly handicap innocent persons. The challenge is to decide how much ethics in government is enough, but not too much.<sup>180</sup> That, of course, is a very difficult question.

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178. Cf. Matthew D. Latimer, *Gilding the Iron Rice Bowl: The Illusion of Shareholder Rights in China*, 69 WASH. L. REV. 1097, 1110 n.74 (1994) (explaining that “[a]n individual with good *guanxi* can often avoid much of the procedural red tape associated with government administration”).

179. See Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market, 1978-1989*, 5 J. CHINESE L. 143, 244 n.72 (1991) (noting that “[a]n official with good *guanxi* is able to get things done when other officials with lesser *guanxi* fail”).

180. Cf. James A. R. Nafziger & Ruan Jiafang, *Chinese Methods of Resolving International Trade, Investment, and Maritime Disputes*, 23 WILLAMETTE L. REV. 619, 622 (1987) (discussing the positive and negative aspects of *guanxi*). According to the authors:

The Chinese emphasis on informal relationships and *guanxi* (“connections”) can be admirable in the best of times, . . . but disastrous in the worst of times, such as during the Cultural Revolution. Memories of the latter experience, coupled with China’s current appetite for international involvement, have led to an appreciation or at least tolerance by the Chinese for more formal approaches toward resolving disputes.

*Id.*