Lawyers, Ballyhoo, and Hype

To the Editor:

I've been a member of the State Bar of Michigan for over 22 years now, since 1986. In that time, I've become fully accustomed to our President's Page in the monthly *Bar Journal*s. I know that this is not considered to be the place for analytical rigor, or even critical commentary. I don't expect to be shaken, stirred, or otherwise moved by the State Bar president's monthly column for the membership. As President Obama recently professed about the American people's feelings regarding bailouts for Wall Street banksters: "I promise you. I get it."

Nevertheless, Michigan State Bar President Edward H. Pappas's February 2009 column, "Lawyers, Leadership, and Hope,"[1] substitutes Panglossian denial for professional statesmanship. President Pappas's column compares the legacy of President Abraham Lincoln and the significance of President Barack Obama. I don't want to be too harsh on Mr. Pappas. The sentiments he expresses trouble me largely because they are in some measure shared by others. For example, I, too, support Mr. Obama. Moreover, the one-page format of the State Bar President's Page is far too short to meaningfully treat such weighty historical issues.

However, there are at least two overly broad, unsupported statements in his column that I feel should be challenged and corrected to avoid unfortunately misleading (and undeservedly comforting) impressions that all is right in this best of all possible worlds:

1. **Mr. Obama's electoral victory over Arizona Senator John McCain does not, by itself, demonstrate that America's highest ideals are in fact "a way of life."**

Mr. Pappas asserts that "Obama's election demonstrates that the ideals of freedom, equality, and liberty embodied in the Declaration and Constitution are not mere words, but, in fact, a way of life." Please.

One hopes that Mr. Obama himself, with his repeatedly demonstrated sense of professionalism, tact, and proportion, would demur from such a sweeping claim. For example, when asked during the Democratic primaries which candidate Dr. Martin Luther King, Jr. would support, he said none of them. Rather, Dr. King would push leaders to live up to their promises, and to the nation's ideals.

Similarly, Nobel prize-winning novelist Toni Morrison observed that we did not vote for African Americans in general in the 2008 election; we voted for this particular African-American leader. The fatuous statements in some quarters that Mr. Obama's presidency means we live in a "post-racial" America are simply false. They should be strongly refuted if we wish to hold ourselves to the highest American ideals, including opposition to institutionalized racial discrimination as "a way of life."

President Barack Obama's administration, no matter what it does accomplish, will not eradicate the historical legacies, or the contemporary consequences, of African slavery, Jim Crow apartheid, Native American genocide, widespread anti-Semitism, violence and discrimination against women, gays, and other powerless minorities that have marred our history, and the American way of life. Nor will it completely eradicate current problems like mass racial incarceration, racial profiling, residential race segregation, and deep racial inequalities in wealth, income, and political power.

At best, this historic triumph of a man and a presidential campaign signals some potential for great and good changes in American society. The implication that it demonstrates how our entire way of life is fully consistent with our most noble aspirations would be incorrect, and is not at all helpful in serving those aspirations in the real world. Quite the contrary, it strongly suggests that with Mr. Obama's historic electoral victory, we can all give up on our ideals of social justice and turn to other pursuits. (Now what lawyer would ever do anything like *that*?) This presidency, particularly at this point in American (and world) history, is far, far too important for such misleading conclusions.

2. **All American lawyers have not "always" adequately protected human rights.**

Mr. Pappas writes "lawyers have always been leaders and an integral part of protecting individual liberties and rights under the Constitution." Unfortunately, far too many powerful lawyers and other government officials, especially recently, have tried to place themselves above the law.

As a proud member of our professional fraternity, I appreciate the sentiment of this statement by Mr. Pappas, but I also am shocked that a leading official of our State Bar would make it at this time, in light of the known record of the previous administration. Alberto Gonzalez is a lawyer (and former State Supreme Court justice). David Addington is reportedly a lawyer (although I confess I have my doubts). Professor John Yoo, Circuit Court Judge Jay Bybee, and other officials of the Bush/Cheney administration are, amazingly, lawyers. They utterly shamed and disgraced themselves, our

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country, and our profession by their support for torture as national policy, in outrageous violation of clear and binding domestic and international laws.

But their outrages on the personal dignities and safety of persons detained by U.S. armed forces are not merely a matter of these few bad legal apples' culpability. These torture-lawyers have so far faced no prosecutions, or even any official U.S. Government investigations, of their crimes (which were largely committed out in the open, at least once their bogus "legal memos" seeking to provide "cover" for torture were exposed to the light of day). As lawyers, we are all implicated by this systemic failure to prosecute notorious crimes, and we should take no comfort in anyone's ringing declarations of fealty to human rights, until this is remedied by vigorous prosecutions under law.

After the Rule of Law is applied to the Bush/Cheney administration's torture-lawyers, statements about our profession's fidelity to individual liberties and rights will be welcome and appropriate. As matters currently stand, lawyers of conscience, committed to human rights under law, should instead point out this horrible blot on our record, again and again and again, until it is removed by vigorous prosecution and, in the event of convictions, criminal sentencing to the full extent of the law.

Thomas Stephens
Detroit

FOOTNOTE

1. Pappas, *Lawyers, Leadership, and Hope,* 88 Mich B J 8 (February 2009), available at <http://www.michbar.org/journal/pdf/pdf4article1478.pdf>.

"Indecency" Case, Circa 1934, Lingers, Embarrassing MSC

To the Editor:

Kudos for publishing the Verdict of History supplement from the Michigan Supreme Court Historical Society (four installments published in the December 2008 and January–March 2009 issues).

Of particular interest is the article regarding a famous Michigan Supreme Court opinion authored by the late and esteemed Justice John D. Voelker: *People v Hildabridle,* 353 Mich 562, 92 NW2d 6 (1958) (the Battle Creek-area nudist camp).

Notice, J. Voelker recognized the United States Supreme Court's landmark decision whereby *"obscenity"* is unprotected by the First Amendment, *Roth v United States,* 354 US 476, 77 S Ct 1304; 1 L Ed 2d 1498 (1957). However, J. Voelker elucidated a paramount distinction: the Sunshine Garden nudists were *not* engaged in *obscene behavior*—ergo, *Roth* was inapplicable.

For three main reasons, the travesty of justice exhibited by the lower courts in the nudist case parallels the recent wrongful conviction in Grand Rapids of public access TV producer Timothy Huffman.[1] The trumped-up charges, the police Gestapo tactics, and the

constitutionally infirm reasoning of the lower courts are hauntingly familiar:

- Both defendants were charged with criminal indecent exposure and the trial courts imposed a jail sentence.
- In the nudist case, "[t]he police obtained search warrants" by what J. Voelker described as "an obvious subterfuge" in what he ridiculed as "Operation Bootstrap." "Yet to say that the search and arrests here were illegal is an understatement," he went on. "It was indecent—indeed the one big indecency we find in this whole case: descending upon these unsuspecting souls like storm troopers." Likewise in the GRTV case, Grand Rapids Police officers raided Huffman's home—executing an invalid search warrant on the bogus basis of a cable TV subscriber lodging a complaint she was an indecent exposure "victim," allegedly because she viewed non-obscene male genitalia displayed during a late night cable TV show at her East Grand Rapids home. Other cable TV subscribers "might have seen" it and "might have been offended," the lower court opined.
- In both cases, the lower courts upheld the convictions based on illogical reasoning—nonsense—steeped in obiter dictum, which J. Voelker discounted as "less a legal opinion than an exercise in moral indignation." To convict them would be to say that "any nudity anywhere becomes both open and [obscene] regardless of the circumstances and simply because some irritated or overzealous [law enforcement] officers may think so," wrote Voelker for the Court.

Moreover, J. Voelker wrote, "the embarrassing [*People v*] *Ring* [1934] case is hereby nominated for oblivion," i.e., the proposition that nudism per se was criminal under Michigan law supposedly because "[i]nstinctive modesty, human decency and natural self-respect require that the private parts of persons be customarily kept covered in the presence of others."

Lo and behold, the "embarrassing" poverty of logic derived from the long-ago overturned *Ring* case ruling was cited in upholding Huffman's indecent exposure conviction—as though it was somehow reincarnated into controlling law.

Not to be outdone, the Michigan Supreme Court let the conviction stand (cert denied).

Hmmm. Perhaps J. Voelker's opinion is prophetic in explaining why: "As a rule, the Supreme Court during the past twenty years has consisted principally of worn-out political hacks and third-rate lawyers."

Meanwhile, the masquerade party continues: state censorship and prior restraint of free speech, cheaply disguised as an "indecent exposure" prosecution.

Stephan A. Savickas
Grand Rapids

FOOTNOTE

1. *People v Huffman*, 474 Mich 999, 708 NW2d 95 (2006). Attorney Steve Savickas was formerly appointed by the 61st District Court in Kent County to represent Timothy Huffman.

Whither *Miller*?

To the Editor:

I read with interest the article "Survived *Miller*? Think Again" by Theresamarie Mantese and Gregory M. Nowakowski in the March 2009 *Michigan Bar Journal*. In *Miller v Allstate (On Remand)*,[1] the Court of Appeals determined that since the non-learned profession of physical therapy could be incorporated under the Professional Service Corporation Act (PSCA), MCL 450.1251(1) eliminated the possibility of the incorporation of a physical therapy business under the Business Corporation Act (BCA). As noted in Klimko, "Incorporation by Professional Service Providers: The Curious Case of *Miller v Allstate*,"[2] while the Court of Appeals' ruling on proper incorporation was vacated [481 Mich 601 (2008)], it was not reversed on the merits.

It appears that the Corporation Division, on advice from the attorney general, has from the inception of the PSCA in 1962 allowed non-learned professions to incorporate under the BCA or the PSCA, and continues to do so today. The question is whether the historical application of this practice has become a substitute for what, I submit, are the clear directives of the statutes.

Joseph T. Longo III
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FOOTNOTES

1. *Miller v Allstate (On Remand)*, 275 Mich App 649 (2007).
2. Klimko, *Incorporation by professional service providers: The curious case of* Miller v Allstate, XXVIII Mich Bus L J 27 (Fall 2008).

If Memory Serves

To the Editor:

I write to correct an error that appeared in an article in the February 2009 issue of the *Michigan Bar Journal*. In the article entitled, "*In re Huff*," appearing at pages 10–12 of the Verdict of History supplement, on page 11, second full paragraph, the author states:

> The governor of Arkansas, Orval Faubus, had defied what he regarded as an unconstitutional decision and refused to allow black students admission to Central High School in Little Rock. President Eisenhower had sent in the National Guard to enforce the order, and the case was being litigated at the same time as the Huff standoff.

Those of us attorneys old enough to remember the events as they happened will recall that the Arkansas National Guard was commanded by Governor Faubus and was following his orders not to permit the black students admission.

President Eisenhower (the Executive Branch) ordered the United States Army to enforce the decision of the United States Supreme Court (the Judicial Branch), and when the U.S. Marshalls and the U.S. Army troops arrived in Little Rock, there was the spectacle of the troops facing down the Arkansas National Guard, plus Eisenhower's threat to order the Guard into federal service. Needless to say, many guardsmen had a change of mind, and under such show of force and resolve, the black students were admitted to Central High School.

John G. Mandelaris
Flint