

LAW DAY 2050: POST-PROFESSIONALISM, MORAL LEADERSHIP, AND THE LAW-AS-BUSINESS PARADIGM

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Inspired by Ted Schneyer's future history of professional discipline¹ and Bob Gordon's description of "the hazy aspirational world" of the "Law Day Sermon,"² I offer a vision of the legal profession's next fifty years in the form of a Law Day speech from the year 2050. Looking back on developments in the first half of the twenty-first century, this piece explores the implications of the analysis proposed in my earlier article, The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar.³ The speech presents a projection of the moral leadership the bar could achieve if it were to embrace the law as a business paradigm.

As we celebrate Law Day in the year 2050, we can be proud of the bar's achievements during the past fifty years. Looking back from this point, it is hard to believe that lawyers were once held in low esteem by the public⁴ and that, as a community, lawyers failed to pro-

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1. See Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 FORDHAM L. REV. 125 (1991).

2. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 13 (1988). Gordon suggests that the "Law Day Sermon" leaves "ordinary life far behind for the hazy aspirational world . . . inspirational, boozily solemn, anything but real." *Id.* at 13.

3. Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

4. See, for example, The Harris Poll, Jan. 7-12, 1999, ranking law firms last of fourteen institutions with only fourteen percent of the public expressing "a great deal of confidence" in them. The Polling Report, Inc., *Confidence/Trust in Institutions* (visited June 8, 1999), <<http://www.pollingreport.com/institut.html>>. See also Poll: *Doctor is Most Prestigious Job*, UPI, June 17, 1998, available in LEXIS, News Library, UPI File (recognizing that 23% of the public identifies lawyers as having "very great prestige" as opposed to 61% for doctors, 55% for scientists, 53% for teachers, 46% for clergy, and 41% for police officers); Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50-51 (showing that 56% of the public believes lawyers "use the system to protect the powerful and enrich themselves"); Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 22 (noting that poll shows the most-cited reason for a negative view of lawyers was that "lawyers are too interested in money").

vide moral leadership to society.⁵ I have decided to take this opportunity to review the evolution of the bar and the legal system in the twenty-first century.

Today, as in the twentieth century, the market for legal services divides roughly into two segments: one for businesses and wealthy individuals, the other for low- and middle-income persons.⁶ The major providers of legal services to businesses and wealthy individuals are the "Big 11" global, multidisciplinary, professional services firms that provide "one-stop shopping" to their clients. In addition to legal services, these firms provide other services—primarily financial, consulting, and accounting. Some began as accounting firms, others as banks or investment banks. As they expanded into the delivery of legal services, they acquired law firms or built their own practices. Among the "Big 11," only Holland & Knight began as a law firm. While firms exclusively offering legal services have not disappeared entirely, only a few, such as Cravath & Wachtel,⁷ remain.

Today's situation would not have been totally unfamiliar to lawyers at the turn of the century. By that time, the "Big 5" accounting firms had become significant legal service providers in Europe and were beginning to play a major role in the delivery of legal services in the United States.⁸ Financial services companies were looking to

5. See *supra* note 4; see also MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994).

6. This formulation is a modification of Heinz and Laumann's division of legal practice into two hemispheres: representation of large organizations and representation of individuals. See JOHN P. HEINZ AND EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 127 (rev. ed. 1994). Even Heinz and Laumann concede that representation of some wealthy individuals might fit within the organizational hemisphere. See *id.* at 128; see also John P. Heinz et al., *The Changing Character of Lawyer's Work: Chicago in 1975 and 1995*, 32 L. & SOC'Y REV. 751, 775 (1998) ("Lawyers employed by large firms do, of course, handle legal work for individuals—often for the individuals who are officers of their corporate clients.").

7. This firm resulted from the early twenty-first century merger of Cravath, Swaine & Moore with Wachtel, Lipton, Rosen & Katz.

8. See, e.g., Philip S. Anderson, *We All Must Be Accountable*, A.B.A. J., Oct. 1998, at 6 (noting that the "Big 5" accounting firms "began acquiring or developing law firms in Europe and Australia," that two of them "have announced they intend to become the world's largest law firms by the turn of the century or shortly thereafter," and that four of the top five "employers of the most lawyers" are "accounting firms"); Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, GEO. J. LEGAL ETHICS (forthcoming 2000); John Gibeaut, *Squeeze Play*, A.B.A. J., Feb. 1998, at 42, 44 (observing that "all the major accounting firms have significant legal practices throughout Europe [and] . . . that the European movement is beginning to wash up on U.S. shores"); David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 434-35 (1994) (describing how the accounting firms developed a significant position in the European legal services market).

broaden their businesses,⁹ and many lawyers were adopting an entrepreneurial approach to their work.¹⁰

These trends accelerated in the twenty-first century and helped create the political climate which led first to a *de facto* and later a *de jure* abolition of the prohibitions of legal practice by nonlawyers—the “unauthorized practice”¹¹ restrictions. While some in the organized bar fiercely resisted these developments,¹² others advocated a compromising approach¹³ and a few considered permitting nonlawyers to offer legal services, as well as to manage and invest in organizations providing legal services.¹⁴ More and more prominent lawyers joined professional legal services firms.¹⁵ The pressure from accounting firms, banks, and investment banks continued to increase. Big business clients added their voices in support of these efforts. They wanted the maximum freedom to choose their own legal services providers.¹⁶ If

9. See Daly, *supra* note 8.

10. See Pearce, *supra* note 3, at 1250-53; CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL FIRM ATTORNEYS* 17-18 (1996) (providing examples of solo and small firm lawyers).

11. See, e.g., Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 3-44 (1981) (providing an overview of unauthorized practice restrictions).

12. See, e.g., ABA Comm. on Multidisciplinary Practice, *Written Remarks of Lawrence J. Fox: You've Got the Soul of the Profession in Your Hands* (visited June 16, 1999) <<http://www.abanet.org/cpr/fox1.html>> (describing the author's “nightmare” of attending “the annual meeting of the National Association of Multi-disciplinary Professional Firms”); ABA Comm. on Multidisciplinary Practice, *Appendix C: Reporter's Notes* (visited June 8, 1999) <<http://www.abanet.org/cpr/mdappendixc.html>> (noting unauthorized practice complaints filed against “Big 5” accounting firms in Texas and Virginia).

13. See ABA Comm. on Multidisciplinary Practice, *American Bar Association Commission on Multidisciplinary Practice Report to the House of Delegates: Recommendation* (visited June 8, 1998) <<http://www.abanet.org/cpr/mdprecommendation.html>> (recommending that lawyers be able to establish multidisciplinary practices within the framework of the existing ethics rules and prohibitions on non-lawyer practice of law).

14. See, e.g., Edward S. Adams and John H. Matheson, *Law Firms on the Big Board?: A Proposal for Non-Lawyer Investment in Law Firms*, 86 CAL. L. REV. 1, 40 (1998) (arguing for repeal of “prohibitions against non-lawyer investment in law firms and association with nonlawyers”); Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L. J. 577, 604-05 (1989) (arguing in favor of multidisciplinary practice and for repeal of unauthorized practice prohibitions); Pearce, *supra* note 3, at 1265-76 (arguing in favor of permitting nonlawyers to practice law); Deborah L. Rhode, *Meet Needs With Nonlawyers: It Is Time To Accept Lay Practitioners—and Regulate Them*, A.B.A. J., Jan. 1996, at 104.

15. This trend began in the twentieth century. See, e.g., Tom Herman, *Tax Report: A Special Summary and Forecast of Federal and State Tax Developments*, WALL ST. J., Nov. 11, 1998, at A1 (observing that “[m]ore high-profile tax lawyers are leaving lucrative law-firm partnerships to join ‘Big 5’ accounting firms”); Elizabeth MacDonald, *Accounting Firms Hire Lawyers And Other Attorneys Cry Foul*, WALL ST. J., Aug. 22, 1997, at B8 (“Accounting firms are hiring lots of legal eagles, making law firms nervous about protecting their turf.”).

16. See *Attorneys—Multidisciplinary Practice: ACCA Backs Multidisciplinary Concept Allowing Lawyers to Join with Nonlawyers*, 67 U.S. L. WKLY. 2499, 2500 (1999). The American Corporate Counsel Association (ACCA), a national bar association for in-house corporate counsel, stated that it “supports a broad range of choice for clients to select from

these pressures were not enough, the fate of the unauthorized practice prohibition was finally sealed when the World Trade Organization found the restrictions to be an unjustified restraint on international competition.¹⁷

Joining the fight against the unauthorized practice rules was an unlikely ally of big business—the consumer movement. Consumer advocates were infuriated that low and moderate income consumers of legal services had continued to face high prices in a restricted market while de facto abolition of the unauthorized practice prohibitions opened the market serving wealthy individuals and businesses. The consumer movement's position was consistent with its long opposition to the legal profession's monopoly on the ground that lawyers maintained the monopoly for their own interests, not those of the public,¹⁸ and that the disciplinary system was underfinanced, ineffective, and biased toward protecting lawyers.¹⁹

As the leaders of the consumer movement correctly anticipated, the end of the prohibition of non-lawyer practice caused a revolution in the delivery of services to low- and moderate-income individuals and small businesses. Comprehensive plans offered by Legal Maintenance Organizations, or LMOs, became common parts of employee benefit packages,²⁰ as well as viable options for individual consumers who could afford them.²¹ For those who only wished to make an occasional purchase of common services, such as wills, real estate closings, and no-fault divorces, H&R Block, American Express and Merrill Lynch, among others, have developed inexpensive, standardized methods for making reasonable quality services available at a

service providers capable of formulating comprehensive solutions which address not only the legal aspect of their problems, but various other facets as well." *Id.*

17. See, e.g., Mara M. Burr, *Will the General Agreement on Trade in Services Result in International Standards for Lawyers and Access to the World Market?*, 20 *HAMLINE L. REV.* 667 (1997); Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Looking at the Differences in Perception Between U.S. and Foreign Codes of Lawyer Conduct*, 32 *VAND. J. TRANSNAT'L L.* (forthcoming 1999) (anticipating World Trade Organization's consideration of legal services).

18. See, e.g., ABA Comm. on Multidisciplinary Practice, *Written Remarks of James C. Turner Submitted to the Commission on Multidisciplinary Practice* (visited June 16, 1999) <<http://www.abanet.org/cpr/turner1.html>>. James C. Turner, The Executive Director of HALT, Inc.—An Organization of Americans for Legal Reform, quireied whether the bar's enforcement of unauthorized practice restrictions was "lawyers defending their economic turf." *Id.*

19. See, e.g., HALT, Inc.—An Organization of Americans for Legal Reform, *HALT's Legal Reform Agenda* (last modified August 8, 1998) <<http://www.halt.org/INFO/reform-agenda.html>> (critiquing lawyer discipline).

20. See Schneyer, *supra* note 1, at 126 (discussing LMOs); Stephanie Armour, *Latest Workplace Perk: A Lawyer*, *USA TODAY*, Aug. 30, 1999, at A1 (noting that "[t]ens of thousands of employees . . . are finding a new workplace benefit: access to legal services").

21. Consumers have found, though, that LMOs, like HMOs (Health Maintenance Organizations), make services more affordable, in part, by limiting the consumer's control of the delivery of services.

low cost. New publications aid the consumer by rating legal service providers. For-profit legal referral services offer more personalized advice on selecting appropriate services.²²

Some of these developments contributed to a decline in the price of litigation services. This decline was smaller than that for transactional services, because some restrictions on delivering litigation services remain.

The courts established three tiers of practitioners that remain in effect today. The top tier consists of members of the bar, who can appear before all courts. Those in the middle tier are "advocates" who have completed an undergraduate law degree (common in most countries other than the United States in the twentieth century)²³ or a special one-year training course and are generally permitted to appear in trial courts but not in appellate forums. The third tier is for "aides" who have completed only a two-month long course. Their practice is restricted to administrative proceedings, uncontested court proceedings like no-fault divorces, and courts of limited jurisdiction, like Housing Court, where nonlawyers have traditionally provided assistance to parties.²⁴

The addition of the second and third tiers has provided consumers with more choices and more affordable services than were available in the twentieth century. Other developments have also made those litigation services more affordable. Widespread use of videoconference court appearances,²⁵ streamlined discovery practice, and the greater use of alternative dispute resolution, reduced the time and expense of litigation. The extension of the contingent fee to criminal and family law cases made counsel of choice more affordable in those areas.²⁶ Unfortunately, although prices have been reduced considerably and access has increased greatly since the turn of the century,

22. Most jurisdictions barred the latter in the late twentieth century. *See, e.g.,* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 774 (1986) (describing how rules limit referral services to non-profit organizations or bar-affiliated groups).

23. *See* Daly, *supra* note 8, at 12 (observing that "law is an undergraduate area of study in almost all the countries of the world").

24. Interestingly, this system of multiple tier legal service providers, including nonlawyers offering transactional services, resembles the situation in Europe at the turn of the century more closely than it resembles that in the United States. *See, e.g.,* Daly, *supra* note 8 (describing how European legal systems tended to establish a divided profession "and permit non lawyers to offer legal advice").

25. For an early example of videoconferencing, see Mark Hamblett, *Video Bridges Two Countries in Livent Bankruptcy Hearing*, N.Y. L.J., June 7, 1999, at 1 (describing "the first videoconference hearing between a bankruptcy judge in the United States and one in a foreign country").

26. *See, e.g.,* Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498 (1991) (arguing for permitting contingent fees in criminal representation); Laura W. Morgan, *If It Walks Like a Duck, and Talks Like a Duck . . . : Contingency Fees and Results Bonuses in Divorce Practice*, DIVORCE LITIG., July 1998, at 138 (arguing for permitting contingent fees in divorce practice).

some litigation services remain unaffordable to moderate- and low-income consumers.

In light of all of these developments, the employment of lawyers has changed dramatically. While most lawyers work for the "Big 11," LMOs, or legal service providers like H&R Block, a few are part of lawyer-owned boutique practices, usually in litigation. A few small or solo practices exist for those consumers who would rather shop in their neighborhoods or obtain the personalized service of a small business, even at a higher cost.

These changes in practice helped transform legal education to make available a much wider variety of opportunities. Colleges offer an undergraduate law degree that permits graduates to practice as advocates.²⁷ While some law schools refuse to offer any curriculum other than for a Juris Doctor degree, others also offer a year-long course for advocates and a two-month course for aides.²⁸ Students can choose to attend law school classes in person, through the internet,²⁹ or by some combination of the two.

The regulation of lawyers has also undergone major changes. In the twenty-first century, a consensus developed that state regulation of law practice was inappropriate and impractical. State regulators had never been able to obtain adequate funding or develop effective enforcement programs. Perhaps more important, they could not provide the uniformity of rules and enforcement necessary to a market for legal services that was increasingly national and international in scope.³⁰ Although firms providing services to businesses and wealthy

27. Such an opportunity was available abroad far earlier. See Daly, *supra* note 8.

28. For an early critique of a "unitary bar" and unified legal education in the United States, see ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 416-20 (1921).

29. For a discussion of some early developments in use of the internet for legal education, see William B. Bulkeley, *Kaplan Plans a Law School Via the Web*, WALL ST. J., Sept. 16, 1998, at B1.

30. See Schneyer, *supra* note 1, at 127. See Debra Baker, *New Push for Going Mobile: European-style Cross-border Practices May Be the Next Big Wave Here*, A.B.A. J., July 1999, at 18 (noting that "a French advocate can represent clients in German courts, yet New York lawyers can't cross the Hudson River to give advice on the issuance of government bonds in New Jersey without risking jail time"). In the late twentieth century, some support existed for federal regulation of the legal profession. See, e.g., Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994) (describing arguments in favor of federal regulation). Others urged the introduction of federal regulation into practice in the federal courts. See, e.g., Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460 (1996); Committee on Professional Responsibility, *Uniform Ethics Rules in Federal Court: Jurisdictional Issues in Professional Regulation*, 50 REC. ASS'N B. CITY N.Y. 842 (1995). Even advocates of state regulation conceded the tremendous difficulty it posed for multijurisdictional practice and advocated major reforms. See, e.g., Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice-Is Model Rule 8.5 the Answer, An Answer, or No Answer At All?*, 36 S. TEX. L. REV. 715, 798 (1995) (acknowledging that the "movement toward consolidation and multijurisdictional practice" and the "national" nature of the economy had created a "dilemma . . . in multijurisdictional practice"); Charles

individuals had long provided assistance across state and national boundaries, the advent of the "Big 11" meant that virtually all providers in the elite market were global in scope. The development of LMOs and the delivery of services through retail chains also made the market for low- and middle-income persons a national one. Thirty years ago, Congress addressed these changes by establishing the National Disciplinary Commission for Lawyers and Allied Professions (NDCLAP)³¹ to regulate legal services providers.

NDCLAP's *Federal Code of Ethics*³² [hereinafter *Federal Code*] generally resembles the *Model Rules of Professional Responsibility* [hereinafter *Model Rules*] and *Model Code of Professional Conduct* [hereinafter *Model Code*] of the late twentieth century. The *Federal Code* diverges significantly from these codes in three areas. First, the *Federal Code* is significantly more protective of consumers. For example, it requires written retainers explaining the terms and conditions of the representation, including the determination of the cost of services and the client's option to file a complaint with NDCLAP.³³ The *Federal Code* similarly requires all legal service providers to have mandatory malpractice insurance.³⁴ Second, the *Federal Code* requires legal services providers to disclose information necessary to prevent the commission of criminal, illegal or fraudulent acts "that the lawyer reasonably believes [will] likely . . . result in death, or substantial bodily harm, or substantial injury to . . . financial interest or property."³⁵ Third, following the trend toward relaxing the con-

W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEXAS L. REV. 665, 701, 713 (1995) (arguing that "lawyers and their interstate clients should be free to approach interstate legal matters without concern for undesirable and artificial restrictions imposed by state lines," but rejecting federalization of lawyer regulation).

31. Schneyer, *supra* note 1, at 125.

32. *See id.* at 127 (predicting a "Federal Code of Lawyering").

33. Compare these provisions with ABA MODEL RULES OF PROFESSIONAL RESPONSIBILITY, Rule 1.5(b) (recommending, but not requiring, written fee agreements for clients "not regularly represented") and ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-19 (recommending, but not requiring, written fee agreements). *See* Stephen Gillers, *Caveat Client: How the Proposed Final Draft of the "Restatement of the Law Governing Lawyers" Fails to Protect Unsophisticated Consumers in Fee Agreements with Lawyers*, 10 GEO. J. LEGAL ETHICS 581 (1997) (criticizing prevailing standards for failing to protect consumers adequately and urging rule changes to provide consumers with information they need and to penalize harshly those lawyers who violate a consumer's rights).

34. *See, e.g.*, Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583, 2623-24 (1996) (arguing in favor of mandatory malpractice insurance).

35. N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1998). The language of the *Federal Code*, based on the New Jersey rule, departed from the general standard at the turn of the century which did not require disclosure of client wrongdoing and indeed only permitted it "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." MODEL RULES Rule 1.6(b)(1) (1995).

flicts rules which started in the late twentieth century, the *Federal Code* makes all conflicts personal, but requires strict screening procedures to ensure confidentiality and loyalty within a firm.³⁶

In enforcing the *Federal Code*, NDCLAP has a wide range of sanctions available. It can fine individuals or organizations or prohibit them from providing legal services and publishes notices informing the public of disciplinary proceedings, which are open to the public. Instead of waiting for consumer complaints, as was generally the practice under the prior regime of state discipline, NDCLAP proactively conducts random audits. For example, a recent audit of "redacted client billings at the Phoenix office of [one of the "Big 11" identified] . . . eight instances of 'churning' or presumptive overbilling"³⁷ and three instances of inadequate conflict screens.³⁸ The "Big 11" firm agreed to make restitution and pay a modest fine along with publication of these sanctions.³⁹ As a result of an internal investigation, the "Big 11" firm disciplined the lawyers and other employees responsible, decided to modify its minimum billing policy, and revised its screening policy.⁴⁰ This regime of federal enforcement, together with increased competition, has resulted in a dramatic increase in the quality of legal services.

While all of these changes increased the quality and affordability of legal services, they would not have necessarily led lawyers to a position of moral and political leadership. The catalyst for this development was the bar's embrace of the idea that law practice was a business and rejection of professionalism's dichotomy between a self-interested business and an altruistic profession. This transition, however, was not an easy one. The ideology of professionalism had served lawyers well since its inception in the late nineteenth century.⁴¹ At that time, lawyers and members of the public complained that the practice of law had become a business.⁴² Elite lawyers' asser-

36. See, e.g., Neil W. Hamilton & Kevin R. Coan, *Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57 (1998) (describing and opposing trend toward undermining imputed disqualification of entire firm through increasing acceptance of screens); *Wisdom of Ethics 2000 Panel's Draft on Modifications to Rule 1.10 is Examined*, 67 U.S. L. WKLY. 2766, 2767. (Chair of ABA Standing Committee on Ethics and Professionalism "advocates screening to cure disqualification, as is provided for under the *Restatement of Law Governing Lawyers*"). See *id.*

37. Schneyer, *supra* note 1, at 125.

38. *Id.*

39. See *id.*

40. See *id.*

41. See Pearce, *supra* note 3, at 1238 (describing history and identifying basic elements of professionalism as "esoteric knowledge, altruism, and autonomy").

42. See Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870-1910*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 61 (Gerard W. Gawalt ed., 1984) (describing "the extraordinary outpouring of rhetoric, from all the public pulpits of the ideal bar association and law

tion of a republican vision of lawyering grounded in the faith that lawyers, unlike business people, were above self-interest appeared contrary to fact.⁴³

Professionalism emerged to rescue the dichotomy between a business and a profession, and to expand lawyers' autonomy through the enactment of the unauthorized practice laws. Like the republican perspective, professionalism claimed that lawyers worked primarily for the common good and not for profit.⁴⁴ Unlike the republican perspective, professionalism conceded that flawed lawyers existed in significant numbers and that the invisible hand of reputation, while important, alone was insufficient to police the bar.⁴⁵ Professionalism's contribution was the proposition that self-regulation through the development of a code of ethics and control of bar membership through admission requirements and unauthorized practice prohibitions would accomplish this goal and weed out the bad apples.⁴⁶

Despite occasional crises, the Professionalism Paradigm persisted throughout the twentieth century, but eventually the bar and the public again came to question whether lawyers were inherently more altruistic than business people. In *Bates v. State Bar of Arizona*,⁴⁷ the U. S. Supreme Court observed that "the belief that lawyers are somehow 'above' trade has become an anachronism."⁴⁸ A few years later, Chief Justice Burger declared the profession in crisis as a result of creeping commercialism.⁴⁹ During the following decades, leading scholars, judges, and bar leaders joined him in declaring the profession "lost," "betrayed," or near "death."⁵⁰ The public echoed these sentiments. It viewed lawyers as basically out for their own interests and the interests of the rich and powerful.⁵¹

In response, leaders of the profession vainly tried to save the paradigm. They made speeches and wrote books and articles attacking business behavior by lawyers, exhorting them to return to an

school commencement addresses, memorial speeches on colleagues, articles and books on the theme of the profession's 'decline from a profession to a business') (citation omitted).

43. See Pearce, *supra* note 3, at 1241. The Republican perspective was that the market for legal services was based on the invisible hand of reputation and not of profit. See Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 260; see also GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS, reprinted in 32 A.B.A. REP. 1, 75 (5th. ed. 1907) ("Sooner or later, the real public, the business men of the community, who have important lawsuits, and are important clients, endorse the estimate of a man entertained by his associates of the Bar, unless indeed there be some glaring defect of popular qualities.").

44. See Pearce, *supra* note 3, at 1242.

45. See *id.* at 1238-40, 1242.

46. See *id.*

47. 433 U.S. 350 (1977).

48. *Id.* at 371.

49. See Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62.

50. See Pearce, *supra* note 3, at 1257 (quoting commentators).

51. See *id.* at 1256 (citing polls).

ethic of professionalism.⁵² They created Professionalism Commissions and required professionalism courses.⁵³ They sought to increase lawyers' pro bono contributions.⁵⁴ None of these efforts had much of an impact. Most lawyers—like most of the public—rejected the view that lawyers were above self-interest, and, consequently, they viewed appeals based on professionalism to be hypocritical, silly, or irrelevant to their increasingly business-like work lives.⁵⁵ The public reputation of lawyers continued to decline.⁵⁶

Nevertheless, the bar could have persisted. If it had, just imagine what we would have today. I suspect that if the organized bar had continued to cling to professionalism, its role today would be to serve as a narrowly self-interested labor organization. One would imagine that its primary goal would be to gain and protect work rules guaranteeing that only lawyers could hold supervisory positions in the legal services departments of professional services firms. The bar's claims of professionalism would have continued to ring hollow. The public would have continued to hold the organized bar in low esteem.

Fortunately, this was not the road we took. For us, the turning point came soon after the demise of the unauthorized practice prohibitions when we acknowledged (albeit somewhat belatedly) that we had entered into the era of post-professionalism.⁵⁷ More and more members of the bar conceded that the paradigm of professionalism was no longer persuasive.⁵⁸ Instead of clinging to the idea that they were morally superior to nonlawyers, growing numbers of lawyers embraced the notion that the practice of law was a business.⁵⁹ What had been a contradiction under professionalism—that purportedly altruistic lawyers sought to make as much money as they could—

52. See *id.* at 1230 & n.3, 1257, 1263 & n.196 (providing examples).

53. See *id.* at 1254-56, 1263 & n.196 (providing examples).

54. See, e.g., Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148 (1990) (prominent federal judge urging commitment to pro bono as part of lawyers' professional obligations); Jerome J. Shestack, *The Pro Bono Principle*, A.B.A. J., Feb. 1998, at 8 (ABA President urging the same).

55. See Pearce, *supra* note 3, at 1265.

56. See, e.g., Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 663 (1994) (noting a decline in "estimations of lawyers" during decade); Randall Samborn, *Tracking Trends*, NAT'L L. J., Aug. 9, 1993, at 20 (describing poll results indicating decline of respect for lawyers).

57. See HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 216-23 (1998) (defining post-professionalism).

58. See THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 144, 151-52, 159 (1962) (noting that a paradigm shift "begins with one of a few individuals" and then expands to include larger numbers of community members); see also Pearce, *supra* note 3, at 1235-36.

59. See Pearce, *supra* note 3, at 1265-76 (explaining the business paradigm of law practice); see also SERON, *supra* note 10, at x (noting that lawyers "face the same basic issues as do all service occupations"); Paula Dwyer, *Soon Anybody May Be Able to Own a Law Firm*, BUS. WK., Jan. 26, 1987, at 42 (quoting Stephen Gillers' observation that in time "the distribution of legal services will be no different from any other product").

became a truism.⁶⁰ Lawyers were like other people. Their self-interest was very important to them. But so was the public good.

When a significant majority of lawyers discarded the professionalism paradigm, the bar faced the challenge of finding a way to motivate lawyers to accept a commitment to the common good. The first step the bar undertook was an introspective one. It recognized that professionalism advocates were correct in observing a decline in lawyers' commitment to the public good. In 1964, Erwin Smigel's renowned study of Wall Street lawyers found that they primarily identified themselves as guardians of society.⁶¹ Just twenty years later, the situation was entirely different. Studies of lawyers at large firms revealed that most understood themselves largely as hired guns and not as guardians of society.⁶² This perspective extended throughout the bar. Contrary to professionalism's commitment to the common good, the standard conception of lawyers' role had become extreme partisanship on behalf of clients and moral non-accountability in pursuit of clients' goals.⁶³

In formulating a plan to restore a commitment to the common good, the bar sought to understand why this commitment had diminished. Professionalism advocates had ascribed this shift to lawyers' increasing business behavior and the bar's increased diversity, which undermined the ability of a largely heterogeneous, white, Protestant elite to perpetuate the ethos of *noblesse oblige* professionalism.⁶⁴ In the post-professionalism era, the bar found these arguments unpersuasive. A new self-awareness of the bar's history revealed that in previous periods the business-profession dichotomy had survived the challenges of business behavior⁶⁵ and increases in diversity.⁶⁶

60. See Pearce, *supra* note 3, at 1267.

61. See ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* (1964).

62. See, e.g., Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399 (1985) (observing that large firm lawyers generally do not serve as independent counsellors for their clients); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985) (presenting findings that large firm lawyers surveyed do not serve as Smigel's guardians of the law and instead work primarily to promote their clients' interests).

63. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 10 (1988) (identifying extreme partisanship and moral non-accountability as basic principles of lawyer ideology); see also Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 671 (1978).

64. See, e.g., ANTHONY KRONMAN, *THE LOST LAWYER* 273-300 (1993) (describing influences of changes in law firm conduct and the diversity of lawyers).

65. See Pearce, *supra* note 3, at 1241-46 (discussing how the professionalism paradigm preserved the business-profession dichotomy and explained business behavior). The professionalism paradigm, for example, developed around the same time as, and survived, the spread throughout the elite bar of the "Cravath System" of lawyers functioning as a business-like team engaged in "a civil business practice." JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976). Earlier the republi-

Instead, the twenty-first century bar found that lawyers' decline in commitment to the common good mirrored a change in societal consciousness. The second half of the twentieth century saw a shift throughout society away from a sense of obligation to the community and toward the individualistic pursuit of self-interested goals.⁶⁷ Lawyers were unable to insulate themselves from this trend. They moved from a vision of themselves as guardians of society who also represented clients to the belief that they were hired guns concerned with promoting their clients' self-interest.⁶⁸

Further fueling this development was the growth in the late twentieth century of public interest law as a freestanding field of practice and the related campaigns to increase pro bono efforts.⁶⁹ While the earlier Wall Street lawyer, who viewed himself as the guardian of society, confronted the tension between the client's interest and the common good, the growth of public interest and pro bono permitted his successors to divide their client interests from their public duties. Elite lawyers could serve as hired guns for their corporate clients, and yet maintain their good standing in the professionalism world by expressing their commitment to public service through pro bono work separate from, and marginal to, the bulk of their practice.⁷⁰

can paradigm co-existed with business behavior by leading lawyers. For example, lawyer advertising is a blatant breach of professionalism's taboo on business behavior. See Pearce, *supra* note 3, at 1242 (describing professionalism's taboos). Yet, two leading lawyers of the early nineteenth century, who are still venerated today, participated in an advertisement which would violate late twentieth century standards by including a testimonial from a sitting judge. David Hoffman, the first American legal ethicist, placed the advertisement in question in 1835. The testimonial was from Chief Justice John Marshall. See Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Service*, 58 N.Y.U. L. REV. 1084, 1085 n.2 (1983).

66. See, e.g., Gary Nash, *The Philadelphia Bench and Bar, 1800-1861*, 7 COMP. STUD. IN SOC. & HIST. 203 (observing an increase in the diversity of class backgrounds of bar members); RICHARD L. ABEL, *AMERICAN LAWYERS 85-87* (1989) (describing a decrease in the number of native-born White, Protestant lawyers, and an increase in Catholic and Jewish lawyers, as well as immigrants and children of immigrants in late nineteenth and early twentieth century urban areas).

67. See, e.g., ROBERT N. BELLAH ET AL., *HABITS OF THE HEART xi-xxviii* (rev. ed. 1996) (discussing shift away from communal obligation); MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW 292* (1989) (describing the acceleration of the trend toward individualism since the 1960s—in the context of family law).

68. Compare SMIGEL, *supra* note 61, with LUBAN, *supra* note 63, and Schwartz, *supra* note 63.

69. See, e.g., Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970) (describing development of the public interest bar).

70. See, e.g., AMERICAN BAR ASSOCIATION COMMISSION ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE:" A BLUE PRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 47-48 (1986) (emphasizing the importance of pro bono service to professionalism); John E. Robson, *Private Lawyers and Public Interest*, A.B.A. J., Apr. 1970, at 332, 334 (suggesting that "[i]nvolvement in legal problems of the poor and in environmental issues is replacing participation in a bar association's corporate law section, and aspiration to lead the local legal aid program ranks with ambition to head the local bar association"); *Today's News: Update*, N.Y. L.J., June 15, 1999, at 1 (describing a ceremony

With this new understanding of the decline in commitment to the common good, the twenty-first century bar sought to restore it. In this effort, the bar had four distinct advantages over professionalism advocates. The first advantage was removal of the burden of professionalism. This meant both that the organized bar need not try to sell an unpersuasive ideology and that it could dispense with jeremiads against business behavior. Leaving the fight against commercialism behind, the bar's message was simple: commitment to the common good.

The second advantage was the pressure of competition from nonlawyers. As a matter of self-interest, the bar needed to distinguish itself. Simply put, promoting the common good through strenuous individual and organized efforts was good public relations for members of the bar (which was far more necessary than when lawyers had no competition from nonlawyers). Similarly, self-policing was no longer the unfulfilled aspiration of a monopoly. It had become essential to creating a positive "brand name."

The third advantage was that viewing and maintaining law practice as a business demanded moral accountability. Under the ideology of professionalism, lawyers had the autonomy to create their own role morality. In the late twentieth century, lawyers filled that role with extreme partisanship and moral non-accountability.⁷¹ The end of professionalism meant the end of autonomy and therefore moral non-accountability. Lawyers had no choice but to accept that they were accountable for their actions just like everyone else.⁷² Acceptance of moral responsibility did not result in abandonment of loyalty to clients. But, much as our republican forebears and Smigel's Wall Street lawyers, the bar viewed this obligation in the context of lawyers' larger obligation to the common good. Moral accountability became an important concern for individual lawyers and the organized bar. In addition to holding each other to moral standards, lawyers were able to engage in constructive dialogue about their work with members of the public who, unlike lawyers, had for a long time considered lawyers morally accountable for their actions.

For a fourth advantage, accepting law practice as a business placed a burden on lawyers to demonstrate their commitment to the common good. Professionalism had simply assumed that the community of lawyers would promote the common good and thereby earn the public's respect. In contrast, being part of a business placed law-

honoring a large law firm for accepting many pro bono referrals in the preceding twenty years).

71. See LUBAN, *supra* note 63.

72. See, e.g., Thomas L. Shaffer, *Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393, 403-04 (1990-91) (arguing that each person has an obligation to the common good regardless of his or her occupation).

yers on the same footing as other occupations. If lawyers wanted respect for moral leadership, they would have to earn it.

With all these advantages, the bar found the common good a much easier sell. Like others in society, lawyers were searching for meaning in their work beyond making money.⁷³ Discarding the aspiration of moral non-accountability, they engaged the rich potential to make a positive difference for their clients, for those involved with their clients, and for society as a whole. After years of dialogue, lawyers reached a consensus on a moral vision of their role as business persons with responsibility for the administration of justice. This shared commitment has enabled the bar to become a model of a moral, responsible business community.

Lawyers' moral leadership, together with other changes in practice, transformed lawyers' public image. The public has appreciated lawyers' commitment to the common good, as well as the many positive changes in the market and in regulation that have made the delivery of legal services and the legal system far more consumer friendly and affordable. Now that clients have the choice of retaining lawyers or nonlawyers, they choose lawyers only when they believe lawyers will provide better quality services at a better price. One result of this change is that business executives no longer complain that lawyers add no value towards a transaction.⁷⁴ When clients choose to hire lawyers, it's precisely because of the significant value they do add.

Despite the dramatic increase in public confidence in the bar, some hostility to lawyers continues. Far too many members of the public continue to reject the fundamental moral principle that every person is entitled to representation. They believe that in every dispute only one side is right and deserving of a lawyer's assistance. Discarding professionalism has forced us to articulate our moral vision with more clarity, but, nonetheless, some remain unconvinced.

We have other challenges before us as well. We still have not fully resolved the problem of providing services to those too poor to afford even the lower prices presently available. Despite our lack of success

73. See e.g., Russell G. Pearce, *Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 *FORDHAM L. REV.* 1075, 1081 (1998) (discussing "lawyers' continuing search for meaning in their work").

74. See, e.g., Ronald L. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239, 255 (1984) (describing the value lawyers add to transactions and describing lawyers as "transaction cost engineers"); Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 *CAP. U. L. REV.* 241, 282-83 (1997) (same). Cf. RICHARD SUSSKIND, *THE FUTURE OF THE LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY*, 288 (1996) (predicting that "[i]nstead of regarding the law as restrictive, users of legal information services will gradually appreciate that the law can be a source of empowerment and a powerful weapon which can be marshalled in support of the exploitation of opportunities and the attainment of all manner of objectives").

thus far, we must not give up on trying to realize more fully the goal of equal justice under law.

This failing reminds us that we should not be smug or self-righteous about the tremendous strides we have made since the turn of the century. Although we have discarded the ideology of professionalism, we must continue to respect the tradition of our predecessors who employed professionalism to promote the common good.

On this occasion, I would particularly like to honor the memory of Justice Louis D. Brandeis. Although an exponent of professionalism, he rejected the distinction between a business and a profession and asserted that business should join the elite ranks of the learned professions.⁷⁵ We at the bar today have come to a similar conclusion based on a different rationale. We have discarded professionalism in favor of the understanding that all people, whether in the elite or not, share responsibility for the public good in whatever work they do.⁷⁶ The work of the bar involves the administration of justice and the preservation of order. This places a great responsibility upon us. On this Law Day 2050, let us rededicate ourselves to promoting justice through our work and let us keep in mind words Louis Brandeis wrote almost 150 years ago: "There is a call upon the [bar] to do a great work for this country."⁷⁷

75. See Louis D. Brandeis, *Business—A Profession*, in *BUSINESS—A PROFESSION* 1, 1 (Louis D. Brandeis ed. 1932) (asserting that "[t]he time has come for abandoning [the] classification [of business] or profession dichotomy").

76. Shaffer, *supra* note 72.

77. Louis D. Brandeis, *The Opportunity in the Law*, in Brandeis, *supra* note 75, at 243, 329.

