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The Practice of Law as a Useful Art: Toward an Alternative Theory of Professionalism

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THE PRACTICE OF LAW AS A USEFUL ART: TOWARD AN ALTERNATIVE THEORY OF PROFESSIONALISM

*Norman W. Spaulding**

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I. THE RHETORIC OF CRISIS

Over the course of the twentieth century the organized bar spent most of its regulatory energy chasing after lawyers who dared to advertise and lawyers and laypersons who were engaged in various forms of what the bar defined as unauthorized practice of law.¹ Combined with minimum fee schedules, “treaties” with other professional service providers delimiting areas of non-competition, mandatory examination and licensing by state bars, and moral character review for admission to practice, the bar’s restrictions on advertising and unauthorized practice implemented a very specific idea of professionalism. Although actual professional misconduct in the service of clients was an indirect object of concern, by any measure it received relatively little attention from the bench and bar.²

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1. See RICHARD ABEL, *AMERICAN LAWYERS* (1991); JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

2. See ABA COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *REPORT TO THE HOUSE OF DELEGATES LAWYER REGULATION FOR A NEW CENTURY*, x–xii, 1–34 (1992); ABA COMM’N ON PROFESSIONS, *IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM* 63–64 (1986); ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT—FINAL DRAFT* (1970); RICHARD ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008); RICHARD ABEL, *LAWYERS ON TRIAL: UNDERSTANDING*

Pro bono service and other means of ensuring that middle- and low-income Americans had access to the legal system were even lower priorities.³

Toward the end of the century, courts, commentators and legislators sniffed out the protectionism latent in the bar's concept of professionalism and began to dismantle its associated regulatory structure. Post-functionalist sociologists documented the yawning gap between the profession's lofty, service-oriented ideals and its lucrative regulatory practices.⁴ The Supreme Court struck down restrictions on certain kinds of advertising and solicitation by lawyers as inconsistent with the First Amendment;⁵ it struck down minimum fee schedules on the theory that the practice of law is indeed "commerce" under the Sherman Act;⁶ it struck down certain state residency restrictions on law practice;⁷ it recognized basic constitutional limits on the use of moral character review to arbitrarily exclude qualified candidates for admission to practice;⁸ it imposed constraints on the use of member dues for political action by state bar associations;⁹ and it recognized the right of lawyers to work in concert with public interest organizations and labor unions to

ETHICAL MISCONDUCT (2011); Timothy K. McPike & Mark I. Harrison, *Lawyer Discipline Since 1970*, in ABA/ALI COMM. ON CONTINUING PROFESSIONAL EDUCATION, LAW PRACTICE QUALITY EVALUATION 197-98 (1987); Deborah L. Rhode, *Institutionalizing Legal Ethics*, 44 CASE W. L. REV. 665 (1994).

3. See DEBORAH L. RHODE, ACCESS TO JUSTICE (2005); DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS (2005); David Luban, *Taking Out the Adversary*, 91 CAL. L. REV. 209 (2003).

4. See ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR (1988); ELIOT FREIDSON, PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE (1986); ROBERT NELSON & DAVID TRUBEK, LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATION IN THE AMERICAN LEGAL PROFESSION (1992); Richard L. Abel, *United States: The Contradictions of Professionalism*, in LAWYERS AND SOCIETY: THE COMMON LAW WORLD VOL. 1, 186-243 (Abel & Lewis eds., 1989); Ivan Illich, *Disabling Professions*, in IVAN ILLICH ET AL., DISABLING PROFESSIONS 11-40 (1977); Talcott Parsons, *The Professions and Social Structure*, in ESSAYS IN SOCIOLOGICAL THEORY (Parsons ed., 1958).

5. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *cf. Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978); see also Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. (forthcoming 2013).

6. *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

7. *Sup. Ct. of Va. v. Friedman*, 487 U.S. 59 (1988); *Sup. Ct. of N.H. v. Piper*, 470 U.S. 637 (1985).

8. *Schwartz v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232 (1957).

9. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990).

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expand access to legal services.¹⁰ At the state level, patently overbroad unauthorized practice laws were occasionally revisited by state legislatures and challenged on First Amendment grounds in the courts.¹¹ While there has been little, if any, movement in recent decades to improve access to legal services,¹² courts began to address professional misconduct in the service of clients by recognizing (albeit without much palpable enthusiasm) malpractice claims against lawyers in civil practice¹³ and ineffective assistance of counsel claims under the Sixth Amendment against criminal lawyers.¹⁴

It is perhaps no accident that the anti-protectionist developments of the last four decades coincide with pitched expressions of anxiety by elite members of the bar about a “crisis” of professionalism.¹⁵ As the bar has been forced to release some of its control over competition for legal services, frustration with the new demands of competition has been expressed as anxiety over declining standards of professionalism, increasing commercialization, and the legal

10. *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers v. Ill. State Bar Ass’n*, 389 U.S. 217 (1967); *Bhd. of R.R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

11. *See Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ. A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999) (per curiam); *Cultum v. Heritage House Realtors, Inc.*, 694 P.2d 630 (Wash. 1985) (en banc); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

12. Significant federal subsidies created in the 1970s have all but disappeared and the movement to make pro bono service mandatory failed. *See Luban, supra* note 3, at 211–12.

13. *See ABA PROFILE OF LEGAL MALPRACTICE CLAIMS* (2008); RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* (2009); Gary N. Schumann & Scott B. Herlihy, *The Impending Wave of Legal Malpractice Litigation—Predictions, Analysis, and Proposals for Change*, 30 ST. MARY’S L.J. 143 (1998).

14. *See Strickland v. Washington*, 466 U.S. 668 (1984); *cf. Siverson v. O’Leary*, 764 F.2d 1208 (7th Cir. 1985); *Javor v. United States*, 724 F.2d 831 (9th Cir. 1984); Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77 (2007).

15. *See ABA COMM. ON PROFESSIONALISM*, “...IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 1 (1986), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/professionalism/Stanley_Commission_Report.authcheckdam.pdf (“Has our profession abandoned principle for profit, professionalism for commercialism?”); *A National Action Plan on Lawyer Conduct and Professionalism*, CONFERENCE OF CHIEF JUSTICES (Aug. 2, 2001), http://ccj.ncsc.dni.us/impl_plan.pdf (citing a resolution for a National Study and Action Plan by the Conference of Chief Justices in 1996 as noting a decline in professionalism); *see also* ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

profession's corresponding loss of prestige in the public eye.¹⁶ Examples of actual misconduct in the service of clients, which had never really been a priority in twentieth century professional regulation, were suddenly invoked as proof of this crisis.¹⁷

In fact, the rhetoric of crisis may be inherent in the concept of professionalism to which elite American lawyers have been attached. There is, to begin with, Rayman Solomon's argument that elites in the legal profession experienced "crises" in professionalism almost continuously over the course of the twentieth century—even through decades in which the protectionist regulatory project appeared unimpeachable.¹⁸ Expert "[k]nowledge and autonomy are the cornerstones of this elite construction of the profession and their development and preservation are the defining characteristics of the rhetoric of being a professional. Bar leaders," he summarizes, regularly "invoke the concept of professionalism to lament the decline of some aspect of this normative universe and to exhort their audience to reestablish the norms."¹⁹ He goes on to examine five separate periods in which elite twentieth century lawyers adopted the rhetoric of decline, lamentation, and exhortation in response to perceived crises in professionalism.

There is also, as Burton Bledstein has carefully documented, a remarkably persistent, distinctively middle-Victorian set of values, dispositions, and class consciousness that seems to preclude any deep feeling of security among lawyers (and perhaps all professionals) even as the size and profitability of the profession expands. According to Bledstein, the professional not only "mastered an esoteric but useful body of systematic knowledge," "completed theoretical training," "received a degree or license from a recognized institution,"²⁰ and "embraced an ethic of service" in which "dedication to a client's interest took precedence over personal profit,"²¹ the professional also relied upon a constant dissemination of symbols to "emphasize[]

16. See sources cited *supra* note 15.

17. DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 956 (4th ed. 2004) (citing data on the tiny number of public sanctions imposed relative to grievances filed); PROFILE OF LEGAL MALPRACTICE 2004-2007, ABA STANDING COMMITTEE ON LAWYER'S PROFESSIONAL LIABILITY.

18. Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in NELSON & TRUBEK, *supra* note 4, at 144.

19. *Id.* at 148.

20. BURTON J. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA 86-87 (1976).

21. *Id.* at 87.

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professional authority.”²² These symbols included “[d]egrees, diplomas, and honorary awards . . . on the office walls of a certified practitioner;”²³ the lawyer’s “‘casebooks’ and legal library;”²⁴ “the number of technical aids in an office, the number of articles and books on a vita, [and] the income and lifestyle of a successful practitioner.”²⁵ The effect was to draw into relief “the complexity of a subject, its forbidding nature to the layman, the uninitiated, and even the inexperienced practitioner.”²⁶ Appreciation of complexity correspondingly “reinforced the public’s consciousness of its dependence” upon the professional.²⁷

But if the “culture of professionalism tended to cultivate an atmosphere of constant crisis—emergency—in which practitioners both created work for themselves and reinforced their authority by intimidating clients,”²⁸ it also filled professionals with anxiety about the fragility and hypocrisy of that symbolic project. Work ostensibly grounded in esoteric knowledge was at peril of being exposed as pedestrian and routine rather than complex, or, worse still, mere charlatanism.²⁹ And the exercise of ostensibly independent judgment on behalf of clients in the name of service could be exposed as tendentious or debased by the compensation received, by excessive fidelity to the client’s cause, and by injury to the public interest and the rule of law.³⁰ Even professional authority grounded in genuinely

22. *Id.* at 95.

23. *Id.* at 95.

24. *Id.* at 96.

25. *Id.* at 99. For legal professionals, the courthouse itself also operated as a crucial symbol of authority. See Norman W. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial*, 24 YALE J.L. & HUMAN. 311 (2012).

26. BLEDSSTEIN, *supra* note 20, at 98.

27. *Id.* at 99. A welter of post-functionalist sociological research on the professions in the latter half of the twentieth century confirms that Bledstein’s thesis is relevant to the modern professions. As Ivan Illich acidly concludes, “Professionals tell you what you need and claim the power to prescribe Neither income, long training, delicate tasks, nor social standing is the mark of the professional. Rather, it is his authority to define a person as a client, to determine that person’s need and to hand the person a prescription.” Illich, *supra* note 4, at 16–17; see also ABBOTT, *supra* note 4; FREIDSON, *supra* note 4; NELSON & TRUBEK, *supra* note 4; Richard L. Abel, *United States: The Contradictions of Professionalism*, in LAWYERS IN SOCIETY: THE COMMON LAW WORLD 186 (Richard L. Abel and Philip S.C. Lewis eds, 1988).

28. BLEDSSTEIN, *supra* note 20, at 100.

29. See, e.g., *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

30. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Robert W. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of*

expert and independent judgment was open to attack for creating a form of dependence on elites inconsistent with democratic access to law.³¹ This critique was central to populist Jacksonian calls to abolish restrictions on admission to the practice of law and to codify law by legislation.³² Common law adjudication was not only expensive and impenetrably complex, it placed stewardship of the rule of law in the hands of lawyers and the least democratic branch.³³

Finally, even as the culture of professionalism “bred public attitudes of submission and passivity” among professionals, it cultivated “a vertical vision that compelled persons to look upward.”³⁴ In that upward gaze, a successful career is chronically unstable—the highest and defining accomplishment always a future feat. As Bledstein vividly describes:

Career meant scheduled mobility, from the distinct and ascending levels of schooling, to the distinct and ascending levels of occupational responsibility and prestige. . . . Horizontally the careerist “boomed,” fought, energetically competed, wasted the obstacles in the way, and overcame all impediments, especially his own inertia. Vertically he escalated, mounting the successive platforms of achievement.³⁵

For the professionals who shared this “vertically oriented” disposition the terror of failure, of being unmasked, and above all, of falling, was ever present. “The fear of falling gnawed away at every climber, and this fear—ubiquitous in the middle class—was often the source of a general anxiety within individuals which no amount of monetary security, public honors, or personal confidence seemed to eliminate.”³⁶

Against this history it is difficult to read Julius Henry Cohen’s exhortations about professionalism, the imperative of professional organization, and the objectives of professional discipline in his 1916 book, *The Law: Business or Profession?*, as more than a prologue to

New York City Lawyers, 1870-1910, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* (Gerald W. Gawalt ed., 1983).

31. CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM REFORM* (1981); Norman W. Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 *FORDHAM L. REV.* 983 (2004).

32. See COOK, *supra* note 31, at 158–63; Spaulding, *supra* note 31, at 988–90.

33. See COOK, *supra* note 31, at 158–63; Spaulding, *supra* note 31, at 985–86.

34. BLEDESTEIN, *supra* note 20, at 104–05.

35. *Id.* at 111–12.

36. *Id.* at 106. Bledstein notes that “[a]dvise literature on the fragile nature of success proliferated in America after 1840, and the fear of failure was evident throughout.” *Id.* at 106 n.38.

the bar's discredited regulatory venture in the twentieth century.³⁷ A prologue delivered in the rhetoric and defined by the mid-Victorian values of elite lawyers who had reacted so vehemently to the leveling spirit and policies of Jacksonian populism in the nineteenth century. But even if Cohen's call for more formal professional organization and regulation fits well within a trajectory rooted in the ideology of elite antebellum Whig-Federalists who set the foundation for the adoption of mid-Victorian values among American lawyers, and extending forward to the bar's twentieth century protectionism and management of various "crises" of professionalism, it is in other important respects utterly anachronistic. Indeed, the bar and its critics remain, to this day, caught in a paralyzing anachronism that reflects fundamental misunderstandings of what the practice of law is.

In this Article, I begin by briefly describing how Cohen's work fits within the trajectory of professional ideology and organization for American lawyers.³⁸ I then demonstrate the anachronism of the twentieth century bar's professionalism project. I conclude by offering some observations about alternative ideas of professionalism to guide regulation of the legal profession in the twenty-first century.³⁹

II. THE RHETORIC OF COMMERCIAL DEGENERATION

The basic themes of *The Law: Business or Profession?* are familiar to any student of the history of the legal profession. Nostalgia for the supposedly more tame, dignified, gentlemanly mores of the past is mixed with handwringing about public anti-lawyer sentiment, increased commercialization, and lax standards of admission and discipline reducing the character, ethics, manners, and quality of the bar.⁴⁰ Sidney George Fisher, a Whig lawyer, author, and farmer from Pennsylvania, expressed remarkably similar sentiments in an 1869 diary entry. "The practice of law," he lamented,

37. JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* (1916).

38. Samuel Levine has quite ably demonstrated how influential Cohen's ideas were among elites in the twentieth century bar. See Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 *AM. J. LEGAL HIST.* 1 (2005).

39. My reading is not grounded in Cohen's biography, which, by all the evidence, suggests that he admirably embodied the ethic of service that was espoused by many elite lawyers searching for ways to mediate the contradictions of the profession's ideals at the time. See Gordon, *supra* note 30, at 51, 61.

40. See *infra* Part II.

has become little better than a mere trade under the degrading influence of democracy. It by no means follows that a successful lawyer is a gentleman, that he is a man of honor, or that he has received a liberal education; and indeed those who are now most successful at making money, the great object of all, are notoriously deficient in these qualities, which were once regarded as prerequisites.

The bar and the bench, too, have fallen very far below the dignified and respectable position it held when I knew it thirty years ago. I saw and knew the last of the old set who gave so much influence and reputation—Rawle, Binney, Sergeant, Chauncey, the two Ingersolls, Scott, etc.—all of them gentlemen by culture, birth and manners, all of them distinguished for their learning and ability, Binney and Sergeant pre-eminent for eloquence and power, all of them too, with scarcely an exception, worthy of all confidence and respect for integrity, professional honor, and moral worth. The courtroom, in those days, every morning when the bar was assembled, was like a drawing room, filled with elegantly dressed gentlemen of courtly and refined manners.

Many a times have I gone to hear Binney or Sergeant speak and to enjoy the conversation of these men, for they were very gracious and kind to young members of the profession; and I always remember their courtesy to me with pleasure, whether, when I met them in Court, or enjoyed, as I constantly did, the hospitality of their homes. *All of this is now changed—culture, elegance, refinement, courtesy, eloquence, wit, scholarship have vanished.*⁴¹

To be fair, Fisher hated the practice of law almost from the very beginning of his career—he longed to succeed as a gentleman of letters—but similar sentiments can be found among early American lawyers who were not malcontents.⁴² Crucially, the supposed commercial degeneration of the bar was also central to populist critiques in the antebellum period. “Gain,” P.W. Grayson

41. SIDNEY GEORGE FISHER, A PHILADELPHIA PERSPECTIVE: THE DIARY OF SIDNEY GEORGE FISHER COVERING THE YEARS 1834-1871, at 553 (1967) (emphasis added) (diary entry of Sept. 18, 1869); see also COHEN, *supra* note 37, at 105–06 (quoting Sharswood on the decline of the Roman legal profession).

42. A PHILADELPHIA PERSPECTIVE: THE CIVIL WAR DIARY OF SIDNEY GEORGE FISHER (Jonathan W. White ed., 2007). For similar expressions by antebellum lawyers see *Diary and Autobiography of John Adams*, in 1 THE ADAMS PAPERS (L.H. Butterfield ed., 1962); Amalia Kessler, Civic Republicanism and the Cultural Foundations of American Adversarialism: Henry Vanderlyn and the Decline of Equity’s Quasi-Inquisitorial Tradition, Faculty Workshop Presentation, Stanford Law School (Apr. 20, 2011) (on file with author).

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complained in 1830, is the “animating principle” of the bar.⁴³ “Eager for employment, they pry into the business of men, with snakish smoothness slip into the secrets of their affairs, discern the ingredients of litigation, and blow them up into strife. *This is, indeed, but laboring in their vocation.*”⁴⁴

Cohen, for his part, devotes several chapters to comparative evidence running back to the classical period to establish that law was everywhere regarded as more than a mere trade concerned with profit.⁴⁵ But his core argument picks up in the spirit of Fisher’s lamentation, emphasizing “[t]he degree to which our profession has been commercialized since the Civil War”⁴⁶ and blaming the antebellum populist movement for this decline—what Fisher called “the degrading influence of democracy.”⁴⁷ “An untrained, an uneducated, an unlicensed and an unregulated bar,” Cohen insists, “thrives upon pettifogging, bribery, and corruption. It pollutes the stream of justice and brings down contempt upon the profession.”⁴⁸ It privileges “the current standard of the market place,—‘*Profits first.*’”⁴⁹ It “touts” and solicits and advertises and chases after the misfortune of others and gambles on the outcomes of cases.⁵⁰ It enters corrupt combinations to bring litigation rather than suffering

43. P.W. Grayson, *Vice Unmasked, an Essay: Being a Consideration of the Influence of Law Upon the Moral Essence of Man, With Other Reflections*, in *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR* 194–95 (Perry Miller ed., 1962).

44. *Id.* at 194–95; see *IN DEBT TO SHAYS: THE BICENTENNIAL OF AN AGRARIAN REBELLION* (Robert A. Gross ed., 1993); see also MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY* (1976); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973) (on populist anti-lawyer sentiment); DAVID SZATMARY, *SHAYS’ REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION* (1980).

45. COHEN, *supra* note 37, at 44–98.

46. *Id.* at 106.

47. FISHER, *supra* note 41, at 553; see, e.g., COHEN, *supra* note 37, at 105 (noting that the post Civil War generation “has never had to make sacrifices for the State”); *id.* at 115–17 (discussing the Jacksonian populist movement to abolish restrictions on entry to practice); *id.* at 247 (same); *id.* at 146 (describing nineteenth century American lawyers as having “failed to train ourselves properly for our true place in society”); *id.* at 157 (describing the bar of 1830–1850 as “barren of inspiring ideals”); *id.* at 102 (“An untrained, an uneducated, an unlicensed and an unregulated bar thrives upon pettifogging, bribery, and corruption.”).

48. *Id.* at 102, 215. Cohen is not totally indifferent to evidence that even elite lawyers had been “led astray, like our clients, by ‘the chase for the dollar.’” *Id.* at 105.

49. *Id.* at 243.

50. *Id.* at 209 (contingent fee); *id.* at 246 (lay combinations); *id.* at 234 (champerty); *id.* at 173–200 (advertising, solicit, touting).

“all hazards to avoid stirring up strife.”⁵¹ It seeks, “in short, to *commercialize* instead of *professionalize* the practice of the law.”⁵²

The solution for Cohen was formal regulation by the organized bar to restore the profession’s commitment to what he variously calls “our social conscience,”⁵³ “social service,”⁵⁴ the traditional duties of “an officer of the court,”⁵⁵ the “guild ideal,”⁵⁶ and “its sense of fealty to court, to client and to community.”⁵⁷ Formal regulation, Cohen insists, must be designed and implemented by the bar,⁵⁸ and it should concentrate on practices that appear irretrievably “commercial” in nature (such as advertising and contingency fees) as well as erecting entry barriers (including heightened educational prerequisites and regulating unauthorized practice) to discourage and exclude those who would approach the practice of law with baser motives.⁵⁹ The elite twentieth century bar attempted to hold precisely this regulatory line.⁶⁰

Cohen was not naïve about the intersection between law and business. Lawyers might use what they learned in law practice to become business executives, and any sensible lawyer would take advantage of business principles to efficiently manage his law office.⁶¹ But business principles could not be allowed to define the attorney-client relationship or the standards of practice that shaped it. “[C]ommercial standards” were simply anathema to “the standards of

51. *Id.* at 238.

52. *Id.* at 243.

53. *Id.* at 144.

54. *Id.* at 146, 213, 243.

55. *Id.* at 42.

56. *Id.* at 127.

57. *Id.* at 243.

58. *Id.* at 22–23 (“[The capacity to] purg[e] the profession of those who fall below the standards of the profession itself . . . is made possible by reason of the Court’s inherent jurisdiction over lawyers. It is because of the lawyer’s position as an *officer of the Court* that the disciplinary process is made practicable. Destroy the conception of the Bar as a profession—as a branch of the judicial system, and you at once remove the basis upon which the lawyer may be brought to prompt and summary accountability. Take away the conception of the practice of law as a profession—make it a business—and at once you destroy the very basis of professional discipline.”).

59. Also employ training in ethics, establish ethics committees, control exit via disbarment, and impose discipline. *See id.* at Book II; *see also id.* at 141 (“Education for the Bar must include *moral training* . . .”).

60. *See supra* Part I.

61. COHEN, *supra* note 37, at 210–11.

our profession.”⁶² The elite twentieth century bar was equally committed to this view of professionalism, in rhetoric and sentiment, if not in actual practice.⁶³

III. THE ABSENT OBJECT OF NOSTALGIA AND OTHER ANACHRONISMS

What are we to make of the fact that, at least as early as the 1830s, Jacksonian populists thought the profession had already sacrificed professionalism on the altar of profit and that the practice of law needed radical, democratic reform? Indeed, the charge of commercialization belonged, successively, to antebellum populists who sought to make the legal profession more accessible and democratically accountable by eliminating entry barriers;⁶⁴ Whig-Federalist and mid-Victorian elites who turned to an ideology of professionalism to counter the populists;⁶⁵ twentieth century bar leaders who drew upon that ideology to justify formal professional organization and disciplinary power; and of course to nearly all current critics of the profession—post-functionalist, populist, neo-Marxist, Kantian, and otherwise—who see an all too convenient contradiction in the relationship between professional ideology and professional organization.⁶⁶ If there was no period in which the bar was immune from the charge of commercialization and anxiety about it, how do we explain the remarkably consistent conjunction of nostalgia and crisis rhetoric among elite lawyers?

The nostalgia of Fisher and Cohen has a strategic valence and effect, even if it is, in each case, thoroughly sincere. It strips disfavored behavior in the present of authority and aligns professional ideals with a privileged past to lend credibility to reform measures that conflate lawyers’ self-interest and the public interest. But the nostalgic moment, or more precisely, its object, is almost always misplaced—a kind of anachronism—for there was never an antecedent moment of pure professional integrity to recover.⁶⁷ The

62. *Id.* at 215. Indeed, respectable businesses should adopt the standards of the professions. *Id.* at 42–43.

63. *See supra* Part I.

64. *See* Grayson, *supra* note 43; Spaulding, *supra* note 31.

65. BLEDSSTEIN, *supra* note 20; Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001 (2005).

66. *See supra* note 4.

67. Just as there was never an antecedent period in which morally activist or civic republican norms dominated American law practice. *See generally* Norman W.

object of nostalgic recollection is instead the collective conditions of practice in which lawyers in the present imagine that they would have thrived without having to compromise principle for profit.⁶⁸ As Cohen's references to the lawyer in "Republican Rome" (who "rendered service for his client gratuitously")⁶⁹ and the treatment of a fee as a mere "honorarium" in seventeenth century England suggest,⁷⁰ the ultimate object of nostalgic recollection is a patrician ideal. It is the status of noblemen and wealthy, landed gentry for whom the practice of law was, if not a mere pastime or diversion, a calling almost entirely independent of the need to make a living. But the material conditions for this patrician ideal never existed for most American lawyers.⁷¹ And as Cohen acknowledges, even when those conditions did exist, compensation for services rendered still became the norm and lawyers were accused of demanding "excessive fees."⁷²

The anti-democratic element of the elite bar's concept of professionalism is equally anachronistic. Whatever the prejudices of the elite bar, American lawyers were never a recognizably discrete social class. Running well into the colonial period, the practice of law was occupied, if not dominated, by "climbers."⁷³ We have always

Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 FORDHAM L. REV. 1397 (2003).

68. I think it is surpassingly difficult to argue that the rhetoric of crisis is instead to be explained by a gradually and yet inexorably increasing degree of commercial rapacity. The material conditions of commercialism and greed have shifted, but not the temptation. There are, for instance, striking parallels in the practices of lawyers involved in debt collection after the American Revolution, railroad lawyers in the mid- and late nineteenth century, and M&A lawyers in the 1980s. See SZATMARY, *supra* note 44; WILLIAM G. THOMAS, *LAWYERING FOR THE RAILROAD: BUSINESS, LAW, AND POWER IN THE NEW SOUTH* (1999); Grayson, *supra* note 43; see also BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* (2002); James A. Henretta, *The "Market" in the Early Republic*, 18 J. EARLY AM. REPUB. 289 (1998); Thomas D. Russell, *The Antebellum Courthouse as Creditors' Domain: Trial-Court Activity in South Carolina and the Concomitance of Lending and Litigation*, 40 AM. J. LEG. HIST. 331 (1996).

69. COHEN, *supra* note 37, at 202.

70. *Id.* at 201.

71. There are examples of early American lawyers who came from landed gentry, see ANTON HERMAN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* (1965); GERARD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760-1840* (1979), but for the most part law was a middle class calling and a vehicle for upward social mobility. See FRIEDMAN, *supra* note 44.

72. COHEN, *supra* note 37, at 202-03.

73. See FRIEDMAN, *supra* note 44, at 305 ("In fact, the doors to the profession were at all times relatively open. Control over admission to the bar was loose, to say the least. Legal education was not very stringent. The bar became a great avenue of

been, as Lawrence Friedman once trenchantly observed, a “nimble” profession.⁷⁴ And while Cohen concentrates the blame for commercialization on lawyers without formal training and lawyers representing consumers and employees, until quite recently, the greatest lucre in the profession was reserved for the highly trained, elite lawyers who cleared and maintained the legal paths for the expansion of corporate and industrial capitalism.⁷⁵

Nor is it the case, as I have argued elsewhere at some length, that lawyers in the antebellum period were bereft of professional standards of conduct or free from professional regulation.⁷⁶ There was a law of lawyering, professional ethics were hotly debated in law magazines and public speeches, judges regulated admission to the bar (albeit with varying degrees of rigor), and even in states that eliminated judicial control over admission, judges retained control over disbarment.⁷⁷ It is a measure of the changes wrought by the project of formal professional organization envisioned by Cohen and his mid-Victorian predecessors (as well as the pedagogic innovations of Christopher Columbus Langdell) that we have largely forgotten this history of alternatives to regulation by mandatory bar associations and training in law schools.

Reading Cohen from a twenty-first century vantage, perhaps the most striking anachronism in *The Law: Business or Profession?* is its remove from the modernist movement of the early 1900s. In 1915,

social advancement.”); *id.* at 635 (“[As late as the Gilded Age,] the private lawyer kept his independent status as a middle-class craftsman and entrepreneur The upper echelons of the profession never quite succeeded in closing the doors against newcomers and outsiders.”); Maxwell Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL. HIST. 306, 313–14 (1968); *cf. id.* at 305–06 (“The bar was open to almost everybody . . . but this did not mean that there were no barriers of class or background Studies have shown that lawyers from wealthy backgrounds are far more likely to reach the heights than lawyers from working-class homes. . . . Some of the best, most famous lawyers came up the hard way; but all in all, good social background was important then too.”).

74. FRIEDMAN, *supra* note 44, at 634 (“The truth was that the profession was exceedingly nimble at finding new kinds of work and new ways to do it. Its nimbleness was no doubt due to the character of the bar: open-ended, unrestricted, uninhibited, attractive to sharp, ambitious men.”).

75. Gordon, *The Ideal and the Actual in the Law*, *supra* note 30; Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA (Geison ed., 1983); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977).

76. See Norman W. Spaulding, *The Privilege of Probity: Forgotten Foundations of the Attorney Client Privilege*, 25 GEO. J. LEGAL ETHICS (forthcoming 2013); Spaulding, *supra* note 67.

77. See Spaulding, *supra* note 67, at 1425.

Paul Strand shot his famous photograph of the shadowy, astylar exterior the “House of Morgan” at 23 Wall Street dwarfing the pedestrians on the adjacent sidewalk.⁷⁸ By 1914, Picasso had developed the “new figurative language” of cubism, “which replaced traditional perspective” by deconstructing three-dimensional space “into facets that merged and penetrated each other.”⁷⁹ Cubists, as Peter Gay describes, “were intent on making works of art that would not let the viewer forget their distinct essence as human products. They shattered surfaces that in nature belong together and reassembled fragmented reality . . . giving the viewer the chore of putting the fragments together into a recognizable semblance of actuality.”⁸⁰ In “The Man in a Bowler Hat” (1915), Picasso applies this technique of “analytical deconstruction” to reveal the “grotesque characteristics of a middle-class man . . . corseted in a tightly buttoned jacket, with a self-satisfied smile.”⁸¹ In the same year a Chicago literary journal published T.S. Eliot’s poem “The Love Song of J. Alfred Prufrock;”⁸² James Joyce’s *A Portrait of the Artist as a Young Man* was published a year later.⁸³ Sigmund Freud had already published, inter alia, *Totem and Taboo* (1913), *Three Essays on the Theory of Sexuality* (1905), *Jokes and Their Relation to the Unconscious* (1905), and *The Interpretation of Dreams* (1899). Stravinsky’s “thumping, static . . . nerve-wracking,” and thoroughly “anti-romantic[]” score for *The Rites of Spring* premiered in Paris in 1913.⁸⁴ Schoenberg premiered his “breathhtakingly unconventional” exploration of atonality in the *Second String Quartet* in Vienna 1909.⁸⁵ And Frank Lloyd Wright’s “radical innovation” in domestic architecture began at the turn of the century.⁸⁶ Gay observes that “[t]he disputes common among Victorian builders and their clients about which historical style, Greek or Venetian or Renaissance, was superior to its rivals . . . struck Wright, along with other modernists, as

78. ROBERT M. CRUNDEN, *BODY AND SOUL: THE MAKING OF AMERICAN MODERNISM: ART, MUSIC AND LETTERS IN THE JAZZ AGE 1919-1926*, at 59 (2000).

79. PICASSO: *THE MONOGRAPH, 1881-1973*, at 12, 140 (Léal ed., 2009).

80. PETER GAY, *MODERNISM: THE LURE OF HERESY* 155 (2008).

81. See PICASSO: *THE MONOGRAPH*, *supra* note 79, at 140, 181.

82. T.S. Eliot, *The Love Song of J. Alfred Prufrock*, in *POETRY: A MAGAZINE OF VERSE* 130 (1915).

83. JAMES JOYCE, *A PORTRAIT OF THE ARTIST AS A YOUNG MAN* (1916).

84. GAY, *supra* note 80, at 259.

85. *Id.* at 247-50.

86. *Id.* at 288.

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a reactionary escape from living in the present, a betrayal of their craft.”⁸⁷

For all the concern of proponents of the culture of professionalism with the specter of commercialization, with what Cohen called the need for “[r]adical reorganization of the American Bar,”⁸⁸ and with forcing out the “little devils” of inconsistency “in every corner of our professional life,”⁸⁹ the end product in ideals and regulatory practices was not merely restrained by nostalgia bordering on escapism and anti-democratic sentiment; it was remarkably complacent. All the more so in contrast to modernists of the same period in the visual arts, architecture, music, and psychology, who sought to break decisively from bourgeois values, to openly challenge “conventional sensibilities,” and to cultivate a “principled self-scrutiny.”⁹⁰ If, in retrospect, the fields in which modernists worked seem free of the kinds of responsibilities lawyers shoulder, it is worth recalling that artists have had no less complex and delicate a balance to strike between professional autonomy and the demands of client patronage, no less a struggle with the lure of commercialization in an era of mass markets and “inexpensive reproductive techniques.”⁹¹ From this perspective, the bar’s handwringing about sacrificing principle to profit in the twentieth century seems just like what post-functionalists called it: proof of surrender to bourgeois commercialism dressed up as steadfast resistance.

IV. THE MODERNIST TURN: LAW AS A USEFUL ART

If Cohen and his cohort can be forgiven for missing or ignoring the spirit of modernism, we twenty-first century lawyers cannot. More than ever, we need a modernist commitment to witheringly “principled self-scrutiny.” And that commitment would have to be shared by the bar’s internal critics, especially those in the legal academy, who are largely removed from the demands of practice and appear to be as attached to the “conventional sensibilities” of criticism as the bar has been to its protectionist project.

Modernism drew the Enlightenment theory of subjectivity into doubt. Yet no theory or critique of professionalism takes the

87. *Id.*

88. COHEN, *supra* note 37, at 155.

89. *Id.* at 212.

90. GAY, *supra* note 80, at 3–4.

91. *Id.* at 17–27; *see also* WALTER BENJAMIN, *THE WORK OF ART IN AN AGE OF MECHANICAL REPRODUCTION* (Prism Key Press 2010) (1936).

decentered subject depicted in Picasso's cubism and Freud's psychology seriously as a problem for the attorney-client relationship.⁹² And while some legal theorists have made the realist turn and taken doctrinal indeterminacy as well as the biases of class, race, and gender seriously, the urge to rescue the fractured foundations of traditional legal principles all too often proves irresistible.⁹³ Indeed, reform projects can entrench the very biases and resistance they seek to overcome. As Wendy Brown poignantly observes:

While the effort to replace liberalism's abstract formulation of equality with legal recognition of injurious social stratifications is understandable, what such arguments do not query is whether legal "protection" for a certain injury-forming identity discursively entrenches the injury-identity connection it denounces. Might such protection codify within the law the very powerlessness it aims to redress?⁹⁴

Legal ethicists, for their part, have generally clung to neo-Kantian and consequentialist moral arguments notwithstanding devastating critiques elaborated by modern philosophers,⁹⁵ and notwithstanding the overwhelming evidence of moral pluralism in our society, and thus in the clients American lawyers represent.⁹⁶ In the practice of law, finally, dispute resolution procedures increasingly demand "enclosed" spaces in which efficiency, order, secrecy, rationality, and elite control are privileged over participation, transparency, and the

92. Problems of collective identity and collective action have received some attention. See DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 209, 237 (2007). On the problem of the decentered subject for law, see Norman W. Spaulding, *The Historical Consciousness of the Resistant Subject*, 1 *IRVINE L. REV.* 677 (2011).

93. In this respect, I agree with David Luban that Critical Legal Studies scholars and other critical legal theorists are "alone *aware* of the modernist predicament in the contemporary legal context." DAVID LUBAN, *LEGAL MODERNISM* 40 (1994) (emphasis added). I would not, however, classify these theorists as modernist so much as neo-Realist and neo-Marxist.

94. WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 21 (1995); see also *id.* at 27.

95. See BERNARD WILLIAMS, *MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980* (1981); BERNARD WILLIAMS, *UTILITARIANISM, FOR AND AGAINST* (1973); BERNARD WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 9 (1972) ("Most moral philosophy at most times has been empty and boring . . ."); FREDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* (Douglas Smith trans., Oxford Univ. Pub. 2007) (1887).

96. See Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 *U. COLO. L. REV.* 1 (2003); Norman W. Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 *CORNELL L. REV.* 1377, 1389 (2008).

passionate, dynamic features of adversarial exchange.⁹⁷ Procedural enclosure thus now complements the bar's protectionist enclosure of access to law.

Instead of seeking to ground professional authority in the conjunction of knowledge, autonomy, prestige, and "crisis" central to the mid-Victorian and twentieth century project of professionalization, a modernist concept of professionalism might begin from the more humble premise that law is simply one of the useful arts. Like other practitioners of the useful arts, lawyers would have to release their sentimental attachment to anachronistic concepts of craftsmanship—the guild ideal and its patrician integument—along with priggishness about the material aspects of producing useful art. Modernists expressed their acute sensitivity to the material aspects of production in the figure of "the Machine." As Frank Lloyd Wright described in his 1901 speech to the Chicago Architectural Club,

the Machine has dealt Art, in the grand old sense a death blow
Art in the grand old sense—meaning Art in the sense of structural tradition, whose craft is fashioned upon the handicraft ideal, ancient or modern, an art wherein this form and that form as structural parts were laboriously joined in such a way as to beautifully emphasize the manner of the joining⁹⁸

Wright was objecting most immediately to the persistence of the overwrought English Arts and Crafts style and the fundamental dishonesty of neoclassicism, which relied upon but concealed the use of steel and other machined materials.⁹⁹ But more broadly, he rejected the anxiety of architects of his time about whether the mechanized production capacities of the industrial revolution posed a mortal threat to architecture—*anxiety that mechanization was "a terrible engine of enslavement, deluging the civilized world with a murderous ubiquity, which plainly enough was the damnation of their art and craft."*¹⁰⁰ While his peers were caught up in the nostalgic rhetoric of decline, lamentation, and exhortation, he admonished, "invincible, triumphant, the machine goes on, gathering force and knitting the material necessities of mankind ever closer into a

97. Spaulding, *supra* note 25.

98. Frank Lloyd Wright, Speech to Chicago Architectural Club (1901), *reprinted in* FRANK LLOYD WRIGHT COLLECTED WRITINGS 1894-1930, at 58-60 (Bruce Brooks Pfeiffer ed., 1992).

99. *Id.*

100. *Id.* at 59.

universal automatic fabric, the engine, the motor, and the battleship, the works of art of the century!”¹⁰¹

Indeed, in the machine, Wright saw nothing less than “the great forerunner of Democracy” and “the only future” for architecture.¹⁰²

[W]e insist now upon a basis of Democracy. Is it not more likely that the medium of artistic expression itself has broadened and changed until a new definition and new direction must be given the art-activity of the future, and that the Machine has finally made for the artist, whether he will yet own it or not, a splendid distinction between the Art of old and the Art to come? A distinction made by the tool which frees human labor, lengthens and broadens the life of the simplest man, thereby the basis of the Democracy upon which we insist.¹⁰³

Wright was not denying the abuses of Gilded Age industrial capitalism, but rather straining to see ahead of them and locate an emancipatory potential within the material conditions created by them. As importantly, he insisted upon “the utter helplessness of old forms to satisfy new conditions” and he rebuked his colleagues who were “clinging sadly to the old order” and “feeling only—when they feel at all—that what is most truly like the past is the safest and therefore the best.”¹⁰⁴ The architect who could overcome the anachronisms of his craft was, in Wright’s view, uniquely positioned to exploit the “pliant,” “plastic,” and highly efficient capacities of machine production to meet “man’s spiritual and material needs without waste, within reach of all.”¹⁰⁵

That Wright’s own architecture is so thoroughly modern and yet deeply connected both to nature and the functional, accessible use of

101. *Id.* at 61.

102. *Id.* at 59. Wright was not the only modernist who celebrated the capacity of the machine. See GAY, *supra* note 80, at 305 (quoting Le Corbusier’s famous statement that “A house is a machine for living in.”); see also BENJAMIN, *supra* note 91. Compare LEWIS MUMFORD, *TECHNICS AND CIVILIZATION* (1934), with LEWIS MUMFORD, *THE MYTH OF THE MACHINE: THE PENTAGON OF POWER* (1970).

103. Wright, *supra* note 98, at 61–62.

104. *Id.* at 62–63.

105. *Id.* at 62, 65; GAY, *supra* note 80, at 293; Frank Lloyd Wright, *Modern Architecture, Being the Kahn Lectures*, in *THE ESSENTIAL FRANK LLOYD WRIGHT: CRITICAL WRITINGS ON ARCHITECTURE* 169 (Bruce Brooks Pfeiffer ed. 2008) (“Rightly used the very curse machinery puts upon handicraft should emancipate the artist from temptation to petty structural deceit and end this wearisome struggle to make things seem what they are not and can never be. Then the machine itself, eventually, will satisfy the simple terms of its modern art equation as the ball of clay in the sculptor’s hand yields to his desire—ending forever this nostalgic masquerade led by a stultified culture in the name of art.”).

space draws into relief the extent to which he was not caught up in any naïve or radical futurism. “Simplicity in art,” which Wright thought the machine could “teach” the modern architect, “is a synthetic, positive quality, in which we may see evidence of mind, breadth of scheme, wealth of detail, and withal a sense of completeness found in a tree or a flower A thing to be simple needs only to be true to itself in organic sense.”¹⁰⁶ And lest we take too parochial a view of what Wright meant by mechanization, it is worth emphasizing that he saw office buildings and even cities as machines.¹⁰⁷ Indeed, in the interconnected structural attributes of cities he predicted that machines would “weav[e] a web of intercommunication so far-reaching that distance becomes as nothing, the thought of one man in one corner of the earth one day visible to the naked eye of all men the next.”¹⁰⁸ Finally, Wright’s concept of architecture as a useful art abjures not only sentimentalism, nostalgia, and all “affectation,”¹⁰⁹ but also the base modernist impulse merely to *épater la bourgeoisie* as well as the anti-democratic elitism of modernists who believed their only legitimate audience was insiders.¹¹⁰ To practice a useful art, on his account, is to put expertise in the service of human needs for democratic ends—“without waste, within reach of all.”¹¹¹

What is the law if not a *machinery* of government? Machinery is, after all, precisely what the framers of the constitution believed they were creating. As Michael Kammen has reminded us:

The most common way of referring to the Constitution—the oldest as well as the most enduring—is simply as an “instrument” In 1774 Jefferson’s *Summary View* [of the Rights of British America]

106. Wright, *supra* note 98, at 64.

107. *Id.* at 68–69.

108. *Id.* at 69.

109. *Id.* at 64.

110. GAY, *supra* note 80, at 23–24.

111. There is of course much to criticize in Frank Lloyd Wright, the person, and in the profession of architecture. I intend no endorsement of either. If it has less frequently framed its challenges in the language of “crisis,” architecture, as a profession, nevertheless faces daunting twenty-first century challenges. See Kelly Minner, *What Will the Architecture Profession Look Like in 2025?*, ARCH DAILY (Nov. 4, 2012, 11:51 AM), <http://www.archdaily.com/118441/what-will-the-architecture-profession-look-like-in-2025/>. On Frank Lloyd Wright’s personal failings, particularly his well-documented lack of humility, see ADA LOUISE HUXTABLE, *FRANK LLOYD WRIGHT: A LIFE* (2008). My point is simply that the legal profession has too long delayed engagement with forms of modernism that profoundly affected other useful arts, and likely would improve its self-understanding, its public image, as well as the pleasures of practice.

mentioned “the great machine of government”; and in 1775 John Adams described the British imperial constitution as a vast but broken mechanism: “the great machine will not go any longer without a new wheel.” . . . During the Convention held at Philadelphia in 1787, however, delegates referred to the “admirable mechanism of the English Constitution.” It is scarcely surprising, therefore, that during the debates over ratification in 1787-88, Federalists and Anti-Federalists occasionally discussed the newly drafted Constitution in these terms.¹¹²

Eric Slauter has extended Kammen’s analysis, revealing the extent to which the framers understood their work “by analogy to architecture,” and thus the rule of law itself as “a work of art.”¹¹³ “The transition from the Articles of Confederation to the Constitution,” he writes, “was regularly figured in contemporary rhetoric and imagery as the abandonment of an ‘impotent’ Congress and the ‘erection’ of a new piece of architecture, an edifice designed to shelter the law and liberties of the United States.”¹¹⁴

What follows for professional regulation from the idea that the practice of law is a useful art? Most importantly, principled self-scrutiny should expose the embarrassingly pervasive gaps between right and remedy for actual professional misconduct in the service of clients. There is currently no meaningful remedy for many common types of breach of professional duty. In civil matters, the cost of malpractice litigation, including contingency fees, can preclude malpractice liability as a remedy;¹¹⁵ woefully inadequate resources for investigation and under-enforcement of misconduct complaints to bar disciplinary authorities diminish the risk of professional discipline for

112. MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 16–18 (1986).

113. ERIC SLAUTER, *THE STATE AS A WORK OF ART: THE CULTURAL ORIGINS OF THE CONSTITUTION* 63–64 (2009).

114. *Id.* at 63; *see also* Letter from Abraham Lincoln, President of the United States, to Thurlow Weed (Dec. 17, 1860) (“[N]o state can, in any lawful way, get out of the Union, without the consent of the others; and . . . it is the duty of the President, and other functionaries to run the machine as it is.”).

115. *See* Jack Smart, *An Attorney’s Fee Provision May Not Be A Good Idea*, 42 ORANGE COUNTY LAW. 34 (2000) (“It’s not uncommon for California attorneys to advise the clients who have claims between \$5,000 and \$50,000 that it is not economically wise to pursue litigation.”); Jeffery Badgley, *Legal Malpractice and Florida Foreclosure Attorneys*, FLA. LEGAL MALPRACTICE (May 22, 2011), <http://www.floridalegalmalpractice.blogspot.com/2011/05/legal-malpractice-and-florida.html> (saying that for many homeowners who feel their lawyer committed malpractice, the costs of a lawsuit outweigh the possible recovery); *cf.* ABA PROFILE OF LEGAL MALPRACTICE CLAIMS 2004-2007 (2008) (figures on size and number of claims).

bad lawyers;¹¹⁶ what little professional discipline is imposed is marred by disproportionate enforcement against solo practitioners and inadequate enforcement against large firms;¹¹⁷ the increasingly pervasive use of limited liability partnerships in law firm organization not only restricts recovery in malpractice cases, it also likely reduces intra-firm monitoring for misconduct;¹¹⁸ and in many states, courts

116. Of 118,054 complaints received in 2010, 44,814 were never investigated and only 3,791 resulted in public sanctions. *2010 Survey on Lawyer Discipline Systems*, ABA CENTER FOR PROF. RESP. STANDING COMMITTEE ON PROF. DISCIPLINE (Mar. 2012), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2010_sold_finalreport.authcheckdam.pdf; see also Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002); Matthew J. Nasuti, Letter to the Editor, CAL. LAW., Feb. 1992, at 10 (expressing outrage at California State Bar's failure to disbar lawyers for egregious professional misconduct); David E. Johnson, *Permanent Disbarment: The Case For...*, PROF. LAW., Feb. 1994, at 22 (noting that in only six states is disbarment even potentially permanent).

117. With respect to malpractice liability, there is only slight disproportionality in the number of suits brought against solo practitioners versus lawyers in large firms. As the ABA has observed, "although 70% of lawyers are either solo practitioners or in firms of less than ten attorneys, 80% of the claims are filed against them. 14% of lawyers in the U.S. practice in firms that are greater than 100 lawyers, but only 8% of the claims are filed against them." ABA STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE CLAIMS: 2004-2007, at 6-7 (2008). Note, however, that these figures do not include claims against lawyers who fail to carry malpractice insurance, many of whom are likely to be small firm or solo practitioners. With respect to disproportionality in bar disciplinary proceedings, concern over the issue became so high in California in the late 1990s that California passed BUS. & PROF. CODE § 6035.1, which required the State Bar to gather statistics to ensure that the prosecution of complaints against differently sized firms aligned with the proportion of complaints. The report did find statistically significant discrepancies in prosecution rates, though the State Bar argued that this was due to structural factors rather than institutional bias on their part. STATE BAR OF CAL., INVESTIGATION AND PROSECUTION OF DISCIPLINARY COMPLAINTS AGAINST ATTORNEYS IN SOLO PRACTICE, SMALL LAW FIRMS AND LARGE SIZE LAW FIRMS (2001). An earlier California study found that 50% of sanctioned attorneys were solo practitioners although solo practitioners compose only 29% of the state's bar. See ROBERT FELLMETH, FIFTH PROGRESS REPORT OF THE STATE BAR DISCIPLINARY MONITOR (1989); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 11 (1991) (arguing that the structure of the disciplinary model is difficult to enforce against large law firms, resulting in disproportionate impact on solo and small firm practitioners); James Evans, *Lawyers at Risk*, CAL. LAW., Oct. 1989, at 45-47.

118. ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG & RIBSTEIN ON PARTNERSHIP § 3.04(b) (2008); see also Scott Baker & Kimberly D. Krawiec, *The Economics of Limited Liability: An Empirical Study of New York Law Firms*, 2005 U. ILL. L. REV. 107; Susan Saab Fortney, *Professional Responsibility and Liability Issues Related to Limited Liability Law Partnerships*, 39 S. TEX. L. REV. 399 (1998) (discussing the history of the rise of LLP's in response to liability exposure of general partnerships after the savings and loan scandal); Susan Saab Fortney, *Tales of Two Regimes for Regulating Limited Liability Law Firms in the U.S. and Australia: Client*

have equivocated about the relevance of the bar's own rules of professional conduct (including evidence of breach of these rules) to malpractice liability.¹¹⁹ In criminal matters the federal constitutional standard for ineffective assistance of counsel in criminal cases is shockingly lax,¹²⁰ and malpractice liability is not only exceedingly difficult to establish, in some states a cause of action against the lawyer is only available where the plaintiff can prove she was innocent of the charges in the underlying criminal case.¹²¹

Protection and Risk Management Lessons, 11 LEGAL ETHICS 230 (2009); Martin C. McWilliams, Jr., *Who Bears the Costs of Lawyers' Mistakes? Against Limited Liability*, 36 ARIZ. ST. L.J. 885 (2004).

119. See *Smith v. Haynsworth*, Marion, McKay & Geurard, 472 S.E.2d 612, 614 (S.C. 1996) (following "the majority of jurisdictions" in allowing evidence of breach of the rules of professional conduct in a malpractice action only where the Bar Rule is "intended to protect a person in the plaintiff's position or . . . addressed to the particular harm"); *id.* at 614 n.6 ("[T]he failure to comply with the [Rules of Professional Conduct] should not . . . be considered as evidence of negligence per se. It is merely a circumstance that, along with other facts and circumstances, may be considered in determining whether the attorney acted with reasonable care in fulfilling his legal duties to a client."); *Hizey v. Carpenter*, 830 P.2d 646, 654 (Wash. 1992) (holding that a jury may not be informed of the Rules of Professional Conduct either in expert testimony or jury instructions); see also MODEL RULES OF PROFESSIONAL CONDUCT Preamble and Scope (2012), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."); Ann Peters, *The Model Rules as a Guide for Legal Malpractice*, 6 GEO. J. LEGAL ETHICS 609, 616–17 (1993) (stating that many courts have declined to use the Model Rules as evidence of the duty of care).

120. See *Hargrave-Thomas v. Yukins*, 374 F.3d 383, 391 (6th Cir. 2004) (Clay, C.J., dissenting) (denying a new trial on procedural grounds despite a district court's finding that counsel had provided "manifestly and flagrantly" ineffective assistance in being too "cocky" to interview any potential witnesses or conduct an investigation before trial); *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) (declining to adopt a *per se* rule that any dozing by the defense counsel during the trial merits a presumption of prejudice); see also Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597 (2011) (summarizing the current law on the right to counsel and describing the numerous gaps that have deprived defendants of the opportunity to win relief for ineffective assistance of counsel); Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L.J. 693, 712–19 (2011) (highlighting how difficult it has become to prove prejudice in criminal ineffective assistance of counsel cases).

121. See *Wiley v. Cnty. of San Diego*, 966 P.2d 983, 991 (Cal. 1998) (ruling that although the plaintiff's underlying conviction for battery had been overturned, the court held he was barred from bringing a malpractice suit unless he could prove actual innocence); *Peeler v. Huges & Luce*, 909 S.W.2d 494, 495 (Tex. 1995) (holding that malpractice suit based on the attorney's failure to convey an offer for full immunity was barred because the plaintiff had pled guilty to the crime); *Ang v. Martin*, 114 P.3d 637, 643 (Wash. 2005) (holding that plaintiffs who had been fully

On the other hand, in many areas where *no* client can be heard to complain of misconduct, rights are overbroad and remedies are over-enforced. Two of the most prominent examples are unauthorized practice statutes and the judicial remedy of disqualification for conflicts of interest. Unauthorized practice laws are embarrassingly over-inclusive and, for the most part, indifferent to the interests of the consumers of legal services they purport to protect. Courts asked to enforce unauthorized practice statutes by a state bar generally do not even consider whether the service rendered by the non-lawyer was competent. The typical plaintiff is not an injured consumer, but rather the state bar's committee charged with ferreting out and deterring non-lawyer competition for legal services in the state.¹²²

Judicial over-enforcement of conflicts of interests via the disqualification remedy has reached nearly epidemic proportions. One study identified a *sixfold* increase in disqualification claims between the 1970s and 1990s.¹²³ Some of the fault lies with overzealous lawyers seeking the tactical advantage of disqualifying an opponent's lawyer of choice. However, by taking a prophylactic approach to conflicts analysis, courts have invited tactical abuse of the remedy. As Bruce Green has explained, in some cases disqualification serves a proper "remedial function" by protecting "a

acquitted at trial still could not bring a malpractice claim unless they could affirmatively prove that they were actually innocent of the charges); *see also* Kevin Bennardo, Note, *A Defense Bar: The "Proof of Innocence" Requirement in Criminal Malpractice Claims*, 5 OHIO ST. J. CRIM. L. 341 (2007) (arguing that the current standard for criminal malpractice cases—legal innocence and actual innocence—is unreasonable).

122. For an example of judicial complicity in over-enforcement of unauthorized practice laws, see *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ. A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999). *See also* Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 81 (1981) ("Not only is the legal knowledge definition inclusive to the point of absurdity, but it is only tenuously related to concerns regarding competence. Members of other occupational groups, such as accountants, real estate brokers, insurance agents, and bankers, will often be more familiar with controlling law in their respective specialties than the average attorney.").

123. Kenneth L. Penegar, *The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts*, 8 GEO. J. LEGAL ETHICS 831, 889 (1995); *see also* Leah Epstein, Comment, *A Balanced Approach to Mandamus Review of Attorney Disqualification Orders*, 72 U. CHI. L. REV. 667, 668 (2005) (noting that the opportunities for disqualification motions are greater now with the increased size of firms and thus the increased likelihood of conflicts).

present or former client from the risks posed by a lawyer's conflict of interest."¹²⁴

In other cases, however, disqualification seems unnecessary or inappropriate as a remedy, because the risks posed by the lawyer's conflict of interest are slight or because those risks seem to be acceptable ones in light of the countervailing harms that disqualification would cause both to the court and to the litigant who would be deprived of the chosen lawyer's services.¹²⁵

Indifference to this distinction has led to disqualifications in cases where no client can rightfully complain that her current or former lawyer has failed to protect interests legitimately arising from the representation.¹²⁶

Modernist simplicity and honesty demand closing these right-remedy gaps. As importantly, if law is a machinery of government in a democratic society the legal profession should seek to maximize access to law, not maximize monopoly rents. We must, with Wright, "insist upon" rather than resist "a basis in Democracy" for our profession. There is lucre enough, indeed, vast markets to be tapped, in the project of maximizing access. And machinery, quite literally, can aid the endeavor. County courts in California are now developing elaborate software to simplify basic legal filings;¹²⁷ Legal Zoom and other online legal service providers are reshaping the market for legal services for middle income Americans;¹²⁸ the Internet

124. Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 FORDHAM L. REV. 71, 72 (1996) (calling for a disqualification jurisprudence that is "less restrictive and less categorical than the conflict rules").

125. *Id.*

126. See *JP Morgan Chase Bank v. Liberty Mut. Ins. Co.*, 189 F. Supp. 2d 20 (S.D.N.Y. 2002); *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F. Supp. 724 (E.D. Va. 1990); Nathan M. Crystal, *Disqualification of Counsel for Unrelated Matter Conflicts of Interest*, 4 GEO. J. LEGAL ETHICS 273 (1990); Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227 (1987); James Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 AM. B. FOUND. RES. J. 421, 432; Thomas D. Morgan, *Suing a Current Client*, 9 GEO. J. LEGAL ETHICS 1157 (1996).

127. See *Online Self-Help Center*, CAL. CTS., <http://www.courts.ca.gov/selfhelp.htm> (last visited Apr. 14, 2013).

128. See *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053 (W.D. Mo. 2011) (holding that Legal Zoom violated Missouri's unauthorized practice of law statutes); Richard Granat & Marc Lauritsen, *The Next Five Years: Predictions for the Future of eLawyering*, 37 ABA L. PRAC. 42 (2011); Catherine J. Lancot, *Does LegalZoom Have First Amendment Rights?: Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law*, 20 TEMP. POL. & CIV. RTS. L. REV. 255 (2011); Cassandra Burke Robertson, *The Facebook Disruption: How Social Media May Transform Civil Litigation and Facilitate Access to Justice*, 65 ARK. L. REV. 75, 84

can dramatically reduce information costs for finding and comparing lawyers;¹²⁹ and the class action procedure is a machine for aggregating claims that would otherwise never be brought and for concentrating the effects of preclusion doctrine in ways that eliminate the repetition of claims.¹³⁰ A properly designed machine can be complex, nimble, and user-friendly at the same time. Like any machine, those designed to maximize access to law may be abused, especially where transparency is wanting and injured consumers have no meaningful remedies.¹³¹ But maximizing access is a far more credible foundation for the professional authority of lawyers in a democratic society than protectionism.

Closing the right-remedy gap and maximizing access to legal services are but two of the most basic reforms that would follow from embracing law as a useful art. To implement them and explore others, the profession must finally make the modernist turn.

(2012); Ronald W. Staudt, *All the Wild Possibilities: Technology that Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117 (2009); Phillip Bantz, *LegalZoom Awaits Ruling in N.C., Facing Lawsuit in S.C.*, N.C. LAWS. WKLY., June 1, 2012; Stephanie Kimbro, *Online Legal Services in Shopping Center Kiosks*, VIRTUAL L. PRAC. (Dec. 12, 2011), <http://virtuallawpractice.org/2011/12/virtual-practice-in-shopping-center-kiosks>; Kim Miller, *Yes, They're Real Lawyers: Booth at Boynton Mall Peddles Foreclosure Advice*, PALM BEACH POST, Dec. 2, 2011, available at <http://www.palmbeachpost.com/news/news/real-estate/yes-theyre-real-lawyers-booth-at-boynton-mall-pedd/nLz9J>; see also CODEX, <http://codex.stanford.edu> (last visited Feb. 19, 2013).

129. See Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 Stan. L. Rev. (forthcoming 2013).

130. See Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337 (1999); Samuel Issacharoff & Richard A. Nagreda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649 (2008); Richard A. Nagreda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105 (2010); cf. Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 723 (1994) ("Current restrictions on subsidizing litigation are frequently evaded, and understandably so. If strictly enforced, they would 'paralyze' entire categories of proceedings, such as class actions and shareholder derivative suits, where no single plaintiff has a sufficient stake to accept liability for expenses.").

131. There is also the opportunity for abuse. See, e.g., Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEG. ETHICS 1485 (2009); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805 (2011).