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Looking Backward: A Foreward

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LOOKING BACKWARD: A FOREWORD

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The subtitle of the Louis Stein Center's symposium on the legal profession[2] has somewhat mysteriously evolved from Bruce Green's[3] initial conception, "Looking Back," to the current subtitle, "Looking Backward." Professor Green originally conceived of a "Looking Back" symposium where contributors would use a historical starting point to reflect on developments in the legal profession. He hoped that such reflection would offer lessons for contemporary lawyers or lead to reevaluation of understandings of the profession's past. The fourteen superb contributions to this symposium[4] meet and exceed his expectations.

The added significance of the new subtitle, "Looking Backward," is not immediately obvious. *Looking Backward* is the title of Edward Bellamy's classic utopian novel published in 1888.[5] In contrast to the articles and essays in this symposium, *Looking Backward* is an exploration of the future and not the past. The late nineteenth

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1. Professor of Law and Co-Director, Louis Stein Center for Law and Ethics, Fordham University School of Law.

2. For the past ten years, the *Fordham Law Review* and the Stein Center have collaborated on at least one symposium each year relating to the legal profession.

3. Bruce Green is the Louis Stein Professor of Law and Director of the Louis Stein Center for Law and Ethics at Fordham University School of Law. As the text indicates, this symposium is his idea—one of the many wonderful ideas he has contributed through his leadership of Fordham's program on Law and Ethics. I am writing this foreword at his invitation.

4. Thirteen of the pieces are published within this special issue of the *Fordham Law Review*. The fourteenth article, James M. Altman's *Reconsidering the ABA's 1908 Canons of Ethics*, will be published separately in issue number 6 of this volume of the *Fordham Law Review*.

5. Edward Bellamy, Looking Backward (Harper's Modern Classics 1959). Franklin Rosemont has described *Looking Backward* as perhaps "'the most widely read and influential book of the late nineteenth century.'" Anthony Chase, *Historical Reconstruction in Popular Legal and Political Culture*, 24 Seton Hall L. Rev. 1969, 2014 (1994) (quoting Franklin Rosemont, Free Play and No Limit: An Introduction to Edward Bellamy's Utopia, *in* Popular Culture in America 26, 28 (Paul Buhle ed., 1987)). As Avi Soifer has noted, even the United States Supreme Court took notice of the book. Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 L. & Hist. Rev. 249, 260 (1987). Bellamy's book continues to receive attention in legal scholarship today. *See, e.g.*, Chase, *supra*, at 2014; William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 Tul. L. Rev. 1, 29 (1991); David Ray Papke, *Eugene Debs as Legal Heretic: The Law-Related Conversion, Catechism and Evangelism of an American Socialist*, 63 U. Cin. L. Rev. 339, 352 (1994); Carol Weisbrod, *Insurance and the Utopian Idea*, 6 Conn. Ins. L.J. 381, 383, 400-01 (1999/2000).

century *Looking Backward* relates the experience of a man who falls asleep in 1887 to awake in the year 2000.[6] Bellamy's end of the twentieth century world has no lawyers. As the citizens of Bellamy's utopia explain, "'We do without lawyers, certainly.... It would not seem reasonable to us, in a case where the only interest of the nation is to find out the truth, that persons should take part in the proceedings who had an acknowledged motive to color it.'"[7]

Beyond these superficial distinctions lie deeper connections. *Looking Backward* was "widely read and influential."[8] I do not have the hubris to make such a prediction for any law review symposium. But I can say that all of the pieces in this symposium are fabulous reads that I heartily recommend to any scholar, student, or practitioner. I am confident that more than a few of these works will become staples of the literature on the legal profession.

Like *Looking Backward*, these articles grapple with questions of justice across time, place, and context. Contributing to *Looking Backward*'s popularity was a tremendous public debate regarding how to conceptualize and realize the public good.[9] The bar was not immune from controversy. Lawyers and non-lawyers declared that the bar had declined from a disinterested governing class to a business promoting the interests of lawyers and their wealthy clients.[10] Bellamy also had a negative view of lawyers, whom he believed to distort truth.[11] The late nineteenth century bar responded to these critiques. It embraced the new ideology of professionalism, with its promise that the elite would organize and police the bar's commitment to the common good.[12]

Today, lawyers face what has been termed the "crisis of professionalism."[13] The notion that lawyers work to promote the public good has once again been called into question.[14] Widespread among members of the both public and the bar is the perception that lawyers have forsaken professionalism to pursue their own self-

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6. Bellamy, *supra* note 5, at 37.

7. *Id.* at 196.

8. Chase, supra note 5, at 2014 (quoting Rosemont).

9. Widespread disagreement regarding prevailing paradigms leads to a period of reconsidering assumptions and norms. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1235-37 (1995) [hereinafter Pearce, *Professionalism*].

10. Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. Chi. L. Sch. Roundtable 381, 395-99 (2001) [hereinafter Pearce, *Original Understanding*].

11. Bellamy, *supra* note 5, at 193-203.

12. Pearce, *Original Understanding*, *supra* note 10, at 399-403.

13. *See* Russell G. Pearce, *The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 Fordham L. Rev. 1075, 1081 (1998).

14. Pearce, *Original Understanding*, *supra* note 10, at 407-10; Pearce, *Professionalism*, *supra* note 9, at 1256-63.

interest and that of their clients, no matter the harm to society.[15] The governing class has become a guild of hired guns. The organized bar—the solution to the similar crisis in the late nineteenth century—appears powerless to stem this trend.[16]

With the current crisis unresolved, the subjects of this symposium are of great moment.[17] These articles challenge established histories of the American legal profession[18] and reveal lessons from the bars of other nations and eras.[19] They examine the lawyer's obligation to the public good in general terms of lawyer ideology[20] and regulation,[21] as well as in the specific contexts of ensuring justice to criminal defendants[22] and of lawyers' failures to prevent financial scandals[23] or to integrate their own ranks.[24]

Those contributions addressing the ideology of lawyers cover a wide range of times and places. Two pieces dispute the Recent Republican revival in American legal ethics. Rob Atkinson draws on the Roman roots of republican ideology to challenge the recent Republican Revival in constitutional law and legal ethics, and to offer what he

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15. *See* Pearce, *Original Understanding*, *supra* note 10, at 407-10; Pearce, *Professionalism*, *supra* note 9, at 1256-63.

16. *See* Pearce, *Original Understanding*, *supra* note 10, at 407-10; Pearce, *Professionalism*, *supra* note 9, at 1256-63.

17. *See supra* note 9 and accompanying text.

18. James M. Altman, *Reconsidering the ABA's 1908 Canons of Ethics*, 71 Fordham L. Rev. (forthcoming May 2003); Rob Atkinson, *Reviving the Roman Republic: Remembering the Good Old Cause*, 71 Fordham L. Rev. 1187 (2003); Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 Fordham L. Rev. 1299 (2003); Samuel J. Levine, *Professionalism Without Parochialism: Julius Henry Cohen, Rabbi Nachman of Breslov, and the Stories of Two Sons*, 71 Fordham L. Rev. 1339 (2003); Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 Fordham L. Rev. 1397 (2003).

19. Judith L. Maute, *Alice's Adventures in Wonderland: Preliminary Reflections on the History of the Split English Legal Profession and the Fusion Debate (1000-1900 A.D.)*, 71 Fordham L. Rev. 1357 (2003); Amelia J. Uelmen, *A View of the Legal Profession from a Mid-Twelfth-Century Monastery*, 71 Fordham L. Rev. 1517 (2003); Neta Ziv, *Combining Professionalism, Nation Building and Public Service: The Professional Project of the Israeli Bar 1928-2002*, 71 Fordham L. Rev. 1621 (2003).

20. Atkinson, *supra* note 18; Levine, *supra* note 18; Spaulding, *supra* note 18; A. Uelmen, *supra* note 19; Ziv, *supra* note 19.

21. Altman, *supra* note 18; Hayden, *supra* note 18; Maute, *supra* note 19; W. Bradley Wendel, *Regulation of Lawyers Without the Code, the Rules, or the Restatement: Or, What Do Honor and Shame Have to Do with Civil Discovery Practice?*, 71 Fordham L. Rev. 1567 (2003).

22. Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 Fordham L. Rev. 1233 (2003); Kim Taylor-Thompson, *Tuning Up* Gideon's *Trumpet*, 71 Fordham L. Rev. 1461 (2003); Gerald F. Uelmen, *Fighting Fire with Fire: A Reflection on the Ethics of Clarence Darrow*, 71 Fordham L. Rev. 1543 (2003).

23. Nancy B. Rapoport, *Enron, Titanic, and The Perfect Storm*, 71 Fordham L. Rev. 1373 (2003).

24. J. Cunyon Gordon, *Painting By Numbers: "And, Um, Let's Have a Black Lawyer Sit at Our Table,"* 71 Fordham L. Rev. 1257 (2003).

considers a more authentic and persuasive modern republican perspective.[25] Based upon his review of early nineteenth century legal literature, Norman W. Spaulding rejects what he describes as the "myth" that nineteenth century legal elites embraced a civic republican moral activism inconsistent with the lawyer's adversarial role.[26]

Similar concerns regarding the sources and limits of the lawyer's duty to the public good have arisen in different countries at different periods of time. Neta Ziv's history of the Israeli legal profession from 1928-2002 explores these questions for a bar based on a liberal model of excellence in representation of private clients and maintenance of the integrity of the legal system, free of the republican conception of lawyers as a governing class.[27] In contrast to the American lawyers, Israeli lawyers have only recently begun to embrace responsibility for the public good.[28] Amelia J. Uelmen reminds us that these issues were debated in the medieval period when Bernard of Clairvaux and the nascent legal profession grappled with religious and secular conceptions of the lawyer's duty to the public good, the bounds of advocacy, and the propriety of fees for services.[29]

Samuel J. Levine brings these concerns back to the United States, where he sheds new light on Julius Henry Cohen's classic early twentieth century book on whether law is a business or profession. Levine suggests that, in contrast to other proponents of professionalism who asserted that lawyers' status as lawyers made them morally superior to business people, Cohen believed that moral obligation derived from personal character and not status.[30] In a modern application of this lesson, Nancy B. Rapoport asserts that lawyers failed their obligation in the Enron debacle precisely because of a lack of character.[31] J. Cunyon Gordon, in turn, questions the character of the American legal elite in her account of how large firms have failed to integrate their offices.[32]

Another series of contributors focus more on the regulation of lawyers. James M. Altman straddles themes in his history of how the drafters of the 1908 ABA Canons of Ethics sought to construct the normative framework for legal professionalism.[33] Paul T. Hayden's history of the MPRE challenges the view of the MPRE as an artifact of the bar's response to Watergate and, instead, places it in the

25. Atkinson, *supra* note 18, at 1189-91.
26. Spaulding, *supra* note 18, at 1397-1400.
27. Ziv, *supra* note 19, at 1622-23.
28. *Id.* at 1623.
29. A. Uelmen, *supra* note 19, at 1517-19.
30. Levine, *supra* note 18, at 1339-43.
31. Rapoport, *supra* note 23, at 1375-76.
32. Gordon, *supra* note 24, at 1257-61.
33. Altman, *supra* note 18.

context of efforts to nationalize and standardize bar testing.[34] Judith L. Maute explores how the English legal profession originally separated into differentiated statuses and how the modern trend favors reintegration of lawyers' roles.[35] In a novel and challenging article, W. Bradley Wendel examines the interaction of legal and non-legal sanctions in the context of civil discovery.[36]

The themes of justice and of regulation merge in three articles on lawyers in the criminal process. Starting with the history of the trial of Clarence Darrow, Gerald F. Uelmen explores whether defense counsel should act unethically and illegally in response to unethical and illegal government conduct.[37] Kim Taylor-Thompson explains how the Supreme Court undermined *Gideon v. Wainwright*'s[38] promise of counsel for indigent criminal defendants by failing to require that such counsel be competent, and suggests that the community of public defenders step forward to articulate high standards for representing defendants and holding lawyers accountable for meeting them.[39] Marjorie Cohn uses the history and policy of the attorney-client privilege to challenge the government's limitations on the privilege since September 11, 2001.[40]

In sum, the articles in this symposium tell a different story than Bellamy's *Looking Backward*. They belie his contention that lawyers are not needed and his prediction that they would disappear by the year 2000.[41] Nonetheless, they share his concern with examining the relationship of law and lawyers to justice. As today's bar confronts the crisis of professionalism, perhaps these widely diverse perspectives on the history of the legal profession will afford greater understanding of where we have been and where we need to be. If so, they will have served a function in this era that Bellamy's book served in his—as a catalyst for rethinking prevailing norms and assumptions.

34. Hayden, *supra* note 18, at 1299-1302.
35. Maute, *supra* note 19, at 1358-59.
36. Wendel, *supra* note 21, at 1567-77.
37. G. Uelmen, *supra* note 22, at 1543-44.
38. Gideon v. Wainwright, 372 U.S. 335 (1963).
39. Taylor-Thompson, *supra* note 22, at 1461-67.
40. Cohn, *supra* note 22, at 1233-34.
41. Bellamy, *supra* note 5, at 196.