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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 provide 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.

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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, New 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").
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. 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, 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. Financial services companies were looking to broaden their businesses, and many lawyers were adopting an entrepreneurial approach to their work.

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” restrictions. While some in the organized bar fiercely

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).

9. See Daly, supra note 8.


resisted these developments, and others advocated a compromising approach and a few considered permitting nonlawyers to offer legal services, as well as to manage and invest in organizations providing legal services. More and more prominent lawyers joined professional services firms. 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. If 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.

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


16. See Attorneys—Multidisciplinary Practice: ACCA Backs Multidisciplinary Concept Allowing Lawyers to Join with Nonlawyers, 67 U.S. L. Week. 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 service providers capable of formulating comprehensive solutions which address not only the legal aspect of their problems, but various other facets as well.” Id.

profession’s monopoly on the ground that lawyers maintained the monopoly for their own interests, not those of the public, and that the disciplinary system was underfinanced, ineffective, and biased toward protecting lawyers.

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, as well as viable options for individual consumers who could afford them. 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 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.

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) 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

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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.

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”).
divorces, and courts of limited jurisdiction, like Housing Court, where nonlawyers have traditionally provided assistance to parties. 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, 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. Unfortunately, although prices have been reduced considerably and access has increased greatly since the turn of the century, 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. 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. Students can choose to attend law school classes in person, through the internet, 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 uni-

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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 nonlawyers 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).

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).

formity of rules and enforcement necessary to a market for legal services that was increasingly national and international in scope. Although firms providing services to businesses and wealthy 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) to regulate legal services providers.

NDCLAP’s Federal Code of Ethics generally resembles the Model Rules of Professional Responsibility and Model Code of Professional Conduct 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. The Federal Code similarly requires all legal service providers to have mandatory malpractice insur-


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).
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 conflicts 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 pro-actively 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 mem-


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.” Motion Rules Rule 1.6(b)(1) (1995).

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”).
bers of the public complained that the practice of law had become a business.42 Elite lawyers’ assertion 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 ethic of profes-

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 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 GED. J. LEGAL ETHICS 241, 260; see also GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS, reprinted in 32 A.B.A. REP. I, 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.
48. Id. at 371.
50. See Pearce, supra note 3, at 1257 (quoting commentators).
51. See id. at 1256 (citing polls).
sionalism. They created Professionalism Commissions and required professionalism courses. They sought to increase lawyers’ pro bono contributions. 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. The public reputation of lawyers continued to decline.

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. More and more members of the bar conceded that the paradigm of professionalism was no longer persuasive. 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. What had been a contradiction under professionalism—that purportedly altruistic lawyers sought to make as much money as they could—became a truism. 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 law-

52. See id. at 1230 & n.3, 1257, 1263 & n.196 (providing examples).
53. See id. at 1254-56, 1263 & n.196 (providing examples).
55. See Pearce, supra note 3, at 1265.
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 Sémon, 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”).
60. See Pearce, supra note 3, at 1287.
yers 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. 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. 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.

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. 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 behavior and the bar's increased diversity.

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 republican 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).
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. 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.

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. 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.

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


68. Compare Smigel, supra note 61, with Luban, supra note 63, and Schwartz, supra note 63.


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]nvolved 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 lead the local bar association”); Today’s News: Update, N.Y. L.J., June 15, 1999, at 1 (describing a ceremony honoring a large law firm for accepting many pro bono referrals in the preceding twenty years).
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. 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. 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 lawyers 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. 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 trans-

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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).
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 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. 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. 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.”


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.