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Calling Law a “Profession” Only Confuses Thinking About the Challenges Lawyers Face¹

Thomas D. Morgan²

Abstract: It is appropriate to want lawyers to be mature, moral people and to help legal education reinforce those qualities. It is also appropriate to be sure students understand lawyers’ fiduciary responsibilities and the ways lawyers fall short of meeting them. It only confuses work on those issues, however, to call them part of teaching "professionalism." Law is not a "profession" as that term has traditionally been used. Calling law a profession does not help understanding the challenges lawyers face.

I was invited to participate in this symposium, I believe, primarily because I have argued that “law is *not* a profession and that’s a good thing.”³ Professor Neil Hamilton of the St. Thomas faculty criticized my position⁴ and I expect that the terms “professional” and “professionalism” may be an important part of others’ papers. I predict that – at the end of the day – most of us will agree on many kinds of behavior we believe represent good lawyer conduct, but I think that how we reach and express our conclusions matters, both to us and to others we are trying to help think more clearly about their lives and careers. I offer these

¹Symposium paper for: “What is the Nature of the Lawyer’s Role and the Implications for How We Educate Lawyers?,” University of St. Thomas Law School, September 23, 2011.

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³THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 66-69 (2010). See also, Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947 (2002). I have not been alone in asserting this position. See, e.g., Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995); Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689 (2008).

⁴Neil Hamilton, *The Profession and Professionalism Are Dead?: A Review of Thomas Morgan, The Vanishing American Lawyer* (2010), 18 THE PROFESSIONAL LAWYER, No. 2, p. 14 (2010). See also, John M. Conley, *Is Law Really a Profession?: Review of The Vanishing American Lawyer, by Thomas D. Morgan*, 24 GEO. J. LEGAL ETHICS 1183 (2011).

remarks to further that conversation.

In my view, “professionalism” is a feel-good term, but a term without content. We may think we can recognize good professional behavior when we see it, but the terms “professional” and “professionalism” tend to mean what a given speaker wants them to mean. Too often, people who invoke professionalism use it to stop analysis rather than further it. In short, professionalism tends to be a rallying cry, not a concept.

What I hope to do in this paper is look at several ways the term “professionalism” has been defined and used. I will suggest that professionalism best describes qualities of personal character, not occupational role. I will acknowledge that persons who practice law are required to behave in ways associated with their role but I will suggest that calling those obligations “professional” does not advance understanding or behavior. I will suggest that yet other uses of the terms “professional” and “professionalism” have been destructive and should be abandoned.

I. Sociologists’ Understanding of a Profession

Sociology is a field that studies how human societies organize themselves. Thus, it is not surprising that sociologists have had to address the concept of professions and professional work.⁵ The story sociologists have told about professions, in turn, has influenced how lawyers sometimes think about themselves. Professor Hamilton summarizes the sociological account and its implications for law and lawyers very well when he says:

“Since the late 1800s, the peer-review professions in the United States, including the legal profession, have gradually worked out stable social contracts with the public in both custom and law. The public grants a profession autonomy to regulate itself through

⁵Leading analyses of professions include MAGALI S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988); ELIOT FRIEDSON, *PROFESSIONALISM: THE THIRD LOGIC: ON THE PRACTICE OF KNOWLEDGE* (2001); WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* (2nd ed. 2004).

peer review, expecting the profession's members to control entry into and continued membership in the profession, to set standards for how individual professionals perform their work so that it serves the public good in the area of the profession's responsibility and to foster the core values and ideals of the profession.

“In return, each member of the profession and the profession as a whole agree to meet certain correlative duties to the public: to maintain high standards of minimum competence and ethical conduct, to serve the public purpose of the profession and to discipline those who fail to meet these standards; to promote the core values and ideals of the profession; and to restrain self-interest to some degree to serve the public purpose of the profession. The term “professionalism” * * * captures the correlative duties of the profession's social contract for each individual professional.”⁶

Sociologist Eliot Friedson goes on to assert that professional work “is so specialized as to be inaccessible to those lacking the required training and experience, and [thus] * * * cannot be standardized, rationalized or * * * commodified.”⁷ The premise of both Professor Hamilton and Professor Friedson's descriptions of the legal profession, then, is that law and legal issues are largely impenetrable by non-lawyers and that responsibility for both has been entrusted to the legal profession.

⁶Neil Hamilton, *Professionalism Clearly Defined*, 18 THE PROFESSIONAL LAWYER 4-5 (No. 4, 2008). In the context of lawyers' work, sociologist Eliot Friedson, a member of the ABA Commission on Professionalism, defines a profession as “an occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions:

- (1) That its practice requires substantial intellectual training and the use of complex judgments;
- (2) That since clients cannot adequately evaluate the quality of the service, they must trust those they consult;
- (3) That the client's trust presupposes that the practitioner's self interest is overbalanced by devotion to serving both the client's interest and the public good; and
- (4) That the occupation is self-regulating – that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client's trust, and transcend their own self-interest.”

ABA COMM'N ON PROFESSIONALISM, “... IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10 (1986).

⁷ELIOT FRIEDSON, PROFESSIONALISM: THE THIRD LOGIC: ON THE PRACTICE OF KNOWLEDGE 17 (2001).

In reality, the social contract story bears little or no relation to lawyers, either across American history or as we know them today. Large parts of America began with no lawyers at all.⁸ None came over on the Mayflower, and the first lawyer who arrived in Massachusetts was disbarred for jury tampering.⁹ Clergy acted as the judges in many of the colonies, and while the Maryland, Virginia and South Carolina colonies tolerated lawyer practice, they set such restrictive limits on lawyers' fees that few could make a living.¹⁰ While there were professional lawyers in the late 18th and early 19th centuries, by the time of Andrew Jackson's election in 1836, the situation had completely changed. Professor Lawrence Friedman explains:

“[W]ith the rise of Jeffersonian and Jacksonian democracy, the leading political party opposed the idea of government by experts. * * * [Thus,] it would have been surprising if a narrow, elitist [legal] profession grew up – a small exclusive guild. No such profession developed. There were tendencies in this direction during the colonial period; but after the Revolution the dam burst, and the number of lawyers * * * has never stopped growing. In Massachusetts, in 1740, there were only about 15 lawyers (the population was about 150,000). A century later, in 1840, there were 640 lawyers in the state – ten times as many in ratio to the population.”¹¹

In fairness, Professor Hamilton dates the social contract with American lawyers as the “late 1800s,” after the period of Jacksonian influence. In effect, however, Professor Hamilton is thus conceding that the idea of law being a profession is largely a creation of the American Bar Association, founded in 1878. The ABA used little professionalism rhetoric in its early years,

⁸JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?: RESOLVING DISPUTES WITHOUT LAWYERS* 8 (1983).

⁹Richard B. Morris, *The Legal Profession in America on the Eve of the Revolution*, in HARRY W. JONES, ED., *POLITICAL SEPARATION AND LEGAL COMMUNITY* 5 (1976). See also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 94-97 (1985). Professor Friedman importantly reminds readers, however, that each colony was different and generalizations about colonial experience are inevitably oversimplified. *Id.* at 36-37, 98-99.

¹⁰Richard B. Morris, *The Legal Profession in America on the Eve of the Revolution*, in HARRY W. JONES, ED., *POLITICAL SEPARATION AND LEGAL CONTINUITY* 4-11 (1976). See also, Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 *SMU L. Rev.* 1385, 1414-23 (2004).

¹¹LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 304 (2nd ed. 1985).

but wounded by criticism that lawyers largely existed to help large corporations evade the law,¹² people like Dean Wigmore seized on the concept of law as a “profession” when he said in 1915:

* * * “The law as a pursuit is not a trade. It is a profession. It ought to signify for its followers a mental and moral setting apart from the multitude, – a priesthood of Justice. * * *

“How the present attitude has come about is easy to see. * * * In a country where all men started even and each man had to earn his living, – where tradition and privilege were cast aside, – * * * the law took its place with other livelihoods; and its gainful aspect became emphasized. And then * * * came the commercial expansion following the Civil War; and the lawyer was more and more drawn into the intimate relations as adviser of the business man. And now, in the large cities, the commercial standards have spread to the Law, and the profession has been merged into the trade.

“Nevertheless, that is all an error. That is, the inherent nature of things demands always that the law shall be a profession.”¹³

During the 1920s, professionalism rhetoric was again largely laid aside, and it was not until 1936 that the ABA strenuously renewed its call for lawyer professionalism. President Franklin Roosevelt had backed “Codes of Fair Competition,” prepared by tripartite institutions of labor, management and government, but that arguably had little legal basis. Many lawyers (and their corporate clients) were anxious about the New Deal, and sought to make the work of law and lawyers seen as independent of the work of political institutions. Just two years earlier, Justice Harlan Fiske Stone had argued:

¹²One such charge was heard from the “bully pulpit” of President Theodore Roosevelt in his 1905 Harvard commencement address. THEODORE ROOSEVELT, IV PRESIDENTIAL ADDRESSES AND STATE PAPERS 407 (1910), as quoted in James M. Altman, *Considering the A.B.A.’s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2304 (2003). President Roosevelt’s charge is given credence in Robert W. Gordon, *“The Ideal and the Actual in the Law”*: *Fantasies and Practices of New York City Lawyers, 1870-1910*, in GERARD W. GAWALT, ED., *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* (1984).

¹³John H. Wigmore, Preface to ORRIN N. CARTER, *ETHICS OF THE LEGAL PROFESSION* xxi (1915). The year earlier, Louis Brandeis had published his own important book, “BUSINESS A PROFESSION” (1914), that called upon business itself to place the public interest above profit. See also, JOHN R. DOS PASSOS, *THE AMERICAN LAWYER AS HE WAS – AS HE IS – AS HE CAN BE* (1907).

* * * “[W]e may rightly look to the Bar for leadership in the preservation and development of American institutions. Specially trained in the field of law and government, invested with the unique privileges of his office, experienced in the world of affairs, and versed in the problems of business organization and administration, to whom, if not to the lawyer, may we look for guidance in solving the problems of a sorely stricken social order?”

“Throughout the history of Anglo-American civilization, the professional groups have been among the most significant of those non-governmental agencies which promote the public welfare. Although in smaller measure, * * * their function has been not unlike that of the medieval guilds. * * * While it has not inherited the completely independent status of the English bar, to no other group in this country has the state granted comparable privileges or permitted so much autonomy. No other is so closely related to the state, and no other has traditionally exerted so powerful an influence on public opinion and public policy.”¹⁴

Giving authority to the new ABA House of Delegates that included state bar associations and other potentially-influential professional groups gave the ABA hope that it could help lawyers marshal public influence behind common positions.¹⁵ Among the first things the newly-transformed American Bar Association aggressively – and successfully – opposed was President Roosevelt’s court packing plan.¹⁶ Then, after World War II the ABA asserted political ideals favorable to loyalty oaths and other parts of the anti-Communist movement.¹⁷

It was in that context that Dean Roscoe Pound in 1953 defined “professionalism” in terms that the ABA Commission on Professionalism picked up again in 1986 and that proponents of professionalism use today:

¹⁴Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 1-5 (1934).

¹⁵EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK 173-76.

¹⁶See, e.g., ABA President Frederick H. Stinchfield, *The Supreme Court Issue*, 23 ABA J. 233 (1937). The same volume of the ABA Journal contains a discussion by a member of the House of Delegates about the need to increase lawyer income by reducing the number of new lawyers. John Kirkland Clark, *Limitation of Admission to the Bar*, 23 ABA J. 48 (1937).

¹⁷JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 231-259 (1976).

“The term refers to a group of men pursuing a learned art as a common calling in the spirit of a public service – no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.”¹⁸

II. Abusive Uses of the Professionalism Ideal

What has bothered me most about the idea that professionalism requires ceding lawyers control over their work has been lawyers’ tendency to use that supposed authority to pursue their own political agendas and self-interest over the interests of justice and the public. During the time that Dean Pound was espousing professionalism and decrying “gaining a livelihood,” in at least equal measure, the ABA was concerned about the economic health of post-World War II lawyers. An ABA publication, “The 1958 Lawyer and his 1938 Dollar,” asserted that the average lawyer in 1954 earned less than \$7,382, a figure said to be less than “a living wage.”¹⁹ To change their economic fortunes, lawyers were urged to get over their failure “to utilize techniques that smack of commercial enterprise.”²⁰ The key to lawyer economic success, the volume went on, lay in increasing the lawyer’s return from each hour worked. The concept sounds familiar to modern lawyers even if the numbers do not:

“There are only approximately 1300 fee-earning hours per year unless the lawyer works overtime. Many of the 8 hours per day available for office work are consumed in personal, civic, bar, religious and political activities, general office administration and other non-remunerative matters * * * [so] chargeable time will average 5 hours per day [for 260 days per year].”²¹

¹⁸ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

¹⁹ABA SPECIAL COMMITTEE ON ECONOMICS ON LAW PRACTICE, *THE 1958 LAWYER AND HIS 1938 DOLLAR* 9 (1958).

²⁰*Id.* at 6.

²¹*Id.* at 10.

Lawyers were urged to set a target income for themselves and divide it by 1300 to set their hourly rate. Not all cases would support that rate, the authors noted, but in that case the lawyer “must secure additional business and increase his number of working hours, the greater number of chargeable hours at the present hourly rate giving him the desired gross.”²²

Further, lawyers long tried to restrict clients’ ability to retain other lawyers who might take the clients away or who might represent clients challenging the status quo. Ultimately, in several cases, the Supreme Court has struck down professional standards embodying such ambitions.

In *NAACP v. Button*,²³ for example, the state of Virginia had prohibited contact of potential clients by agents of any person or association that “employs, retains or compensates” any attorney in a judicial proceeding in which the person or organization “is not a party and in which it has no pecuniary right or liability.”²⁴ As applied to the NAACP, the provision prohibited lawyers from cooperating with efforts to organize citizens to challenge racial segregation in the public schools.²⁵ The state asserted that lawyers’ attempts to obtain legal work are not speech protected by the First Amendment, but the Supreme Court brushed the argument aside. “[L]itigation is * * * a means for achieving the lawful objectives of equality of

²²ABA SPECIAL COMMITTEE ON ECONOMICS ON LAW PRACTICE, THE 1958 LAWYER AND HIS 1938 DOLLAR 10 (1958). In the case of a law partnership, the report observed, “the estimated earning power of the younger men should include an anticipated profit to be realized [by the partners] from their services.” *Id.* at 14.

²³371 U.S. 415 (1963).

²⁴Code of Virginia §54-78 (1950).

²⁵Perhaps the Court found it relevant that the Virginia statute had been passed in 1956, just two years after *Brown v. Board of Education*, 347 U.S. 483 (1954), had created the legal rights that the NAACP sought to enforce. However, the Court expressly said that it would have reached the same result if the older ABA Canons of Ethics had been the source of the prohibition. 371 U.S. at 429 n. 11.

treatment * * * for the members of the Negro community in this country,”²⁶ Justice Brennan wrote for the Court. Whatever propriety the ABA Canons and Virginia Rules had as applied to lawyers seeking pecuniary gain, the Court said, in this context lawyers’ ethical standards did not enjoy immunity from constitutional review.²⁷

Even more significant in exposing the lawyers to the same regulations under which almost everyone else works was the Court’s 1975 decision in *Goldfarb v. Virginia State Bar*.²⁸ When Lewis Goldfarb tried to buy a house in Fairfax County, Virginia, he found that all the lawyers he consulted proposed to charge him exactly the same fee. The legal issue became the validity of the minimum fee schedule recommended by the Fairfax County Bar Association, a voluntary bar, but one that was recognized by the Virginia State Bar, the group with disciplinary authority over the state’s lawyers. Although compliance with the fee schedule was said not to be mandatory, the State Bar had opined that a lawyer’s “habitual” failure to comply with a local

²⁶371 U.S. at 429.

²⁷Id. at 439-43. It seems clear that the Court understood what it was doing. A vigorous dissent by Justices Harlan, Clark and Stewart reminded the majority that it had invaded “the domain of state regulatory power over the legal profession.” Id. at 448-65. Of course, *Button* was focused on a challenge to ethics rules that affected the vindication of civil rights, but the Supreme Court refused to so limit it when it decided *Brotherhood of Railway Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964). the next year. There, the Union had made a list of lawyers whom it encouraged railway employees or their survivors to consult about job related deaths or injuries. These were ordinary damage actions from which lawyers sought “pecuniary gain” found not to be present in *Button*. Union members had traditionally been the victims of incompetent lawyers and aggressive claims adjusters, the Court asserted. The union’s program was not “ambulance chasing” and the union was not itself practicing law; it was simply recommending that, before settling their cases, union members consult counsel whom the union had found to be competent. Use of ethics standards to bar such recommendations was held to violate First Amendments rights of both free speech and free association. 377 U.S. at 5-6. See also, *United Mine Workers of America v. Illinois State Bar Ass’n*, 389 U.S. 217 (1967) (gives constitutional protection to a union’s practice of employing a salaried lawyer to represent members wanting to prosecute worker’s compensation claims before the state’s Industrial Commission); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971) (Constitution requires a state to permit a union to recommend lawyers to pursue suits under the Federal Employers’ Liability Act and to secure a commitment from those lawyers not to charge a fee in excess of 25% of the amount recovered).

²⁸421 U.S. 773 (1975).

fee schedules would “raise a presumption” that the lawyer was improperly soliciting cases.²⁹

In an opinion by Chief Justice Burger, who later became a critic of “commercialization” of the legal profession, the Court found that the “voluntary” fee schedule had the practical effect of fixing prices for legal services in Fairfax County. More significantly for lawyers who thought themselves sheltered from outside regulation, the Court expressly rejected a contention that, as a “learned profession,” the practice of law is not subject to antitrust constraints, saying:

“The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions. * * * Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is ‘commerce’ in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect.”³⁰

The combination of First Amendment and Sherman Act attacks made it inevitable that the idea that, as professionals, lawyers could look only inward for their regulation was gone forever. The *coup de grace* was inflicted two years later in *Bates v. State Bar of Arizona*.³¹ Once again, the case involved the prohibition of solicitation. This time, John Bates and Van O’Steen had opened a “legal clinic” in Phoenix and had published a newspaper advertisement describing routine services they would perform such as uncontested divorces, adoptions, name changes, and simple personal bankruptcies for relatively low fees. The Court’s response to

²⁹Virginia State Bar Committee on Legal Ethics, Opinion No. 170 (1971).

³⁰421 U.S. at 787-88. The Court closed: “In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.” Id. at 793. However, that qualification has not reduced the significance of the decision. Just three years later, when an engineering association tried to rely on this language to justify its ethical restraint on competitive bidding, the Court quickly brushed aside the special character of professions. See *National Society of Professional Engineers v. United States*, 453 U.S. 679 (1978). See also *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (fee schedule for particular doctor services).

³¹433 U.S. 350 (1977).

arguments that professionalism required prohibition of such advertising was withering:

“We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated. * * * But we find the postulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception. * * * In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession’s failure to reach out and serve the community.”³²

My point in this section, then, is that lawyers have used professionalism rhetoric in the past to defend practices that outside observers could easily see served the interest of lawyers but not the interest of the public or the interest of justice. That use of professionalism continues to this day. Recently, in August 2011, the ABA House of Delegates again made my point when it invoked professionalism and professional standards to deny support for – and indeed condemn – a form of dispute resolution that is in use in several states.

“Collaborative law” is an effort to negotiate resolutions of controversies involving people who recognize they will want to deal constructively with their present adversary in the future. Divorced spouses may have differences today, for example, but they may want to come out of the disputes better able to share child raising over time. Likewise, a manufacturer and its principal supplier may dispute the quality of a particular shipment, but they may both want to strengthen their relationship rather than end it.

Even today, the ABA Model Rules would permit a single lawyer to try to represent both

³²433 U.S. at 368-70. “False, deceptive, or misleading” advertising may be regulated, and “limited” disclaimers may be required as to lawyer’s claims about themselves. However, “truthful advertisement concerning the availability and terms of routine legal services,” is protected by the First Amendment. Other cases upholding First Amendment protection of most lawyer advertising include *In re R.M.J.*, 455 U.S. 191 (1982); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Shapiro v. Kentucky Bar Ass’n*, 486 U.S. 466 (1988); *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91 (1990). But see *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding prohibition of targeted direct mail within 30 days of an accident or disaster).

clients in a good-faith effort to resolve their differences.³³ If the negotiations broke down, that lawyer could not represent either client in later litigation.³⁴ What collaborative law does is define a similar role for two lawyers, one representing each party but both explicitly trying to reach a settlement rather than a judicially-imposed result. The National Commission on Uniform State Laws has worked out such a collaborative process that can be adopted as state legislation or rules of court.³⁵

The response from the Section of Litigation was indignant opposition, centered around the concept of professionalism. First, the idea that the ABA could acknowledge the power of states to adopt new legal processes and lawyer regulation was said to be contrary to the professional ideal that lawyers regulate themselves. Never before, the opponents argued, had the ABA recognized a legislative power of lawyer regulation, and even though the NCUSL proposal took the form of proposed court rules as well, the ABA could not take the risk that a legislature might act instead.

Second, the proposal required that if a collaborative negotiation process failed, statements made during the negotiation should be deemed privileged. Lawyers involved also were required to withdraw and turn the matter over to others for the litigation. Never before, opponents argued, had the ABA required lawyer disqualification, ignoring of course that the current intermediation principle – indeed most of our conflict-of-interest regime – requires

³³MODEL RULES OF PROF'L CONDUCT R. 1.7, Com. 28-33. Prior to 2002, the substance of these Comments were found in Rule 2.2 (Intermediation).

³⁴MODEL RULES OF PROF'L CONDUCT R. 1.7, Com. 29. See also, ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 07-447 (Aug. 9, 2007).

³⁵Uniform Collaborative Law Act, adopted by the National Conference on Uniform State Laws in 2009, and amended in 2010 to respond to earlier ABA concerns.

exactly that. Throughout the debate, the premise was that the greatness of our legal system is found in the clash of strong advocates, each assuming the other lawyer's client is trying to take advantage of his or her own client. Asking the ABA to abandon this ideal of professionalism at its best, the opponents successfully argued, would be more than lawyers should have to bear.

In telling this contemporary story, my point is not that collaborative law should be for every lawyer or every case. Indeed, it may be that parties will find that the regime sounds better on paper than it works in reality. My point is simply that "professionalism" was invoked this past summer in defense of preposterous claims. The concept was invoked so as to stop analysis rather than assist it. My purpose in opposing "professionalism" as a concept or a category of argument, then, is to try to limit the harm the term has caused and continues to cause today.

III. Others' Efforts to Make Sense of "Professionalism"

Seen in historical context, the American view of law as a profession is at most a little more than a century old and, more realistically, a project of the 1950s and 1980s. Far from representing a social contract, the professionalism label has largely been applied by lawyers to themselves in an effort to achieve political influence and economic advancement.

Over the years, I have noticed that others whom I admire – including Professor Hamilton and others at this conference – have not always joined in my view of professionalism. They seem to have accepted the term as simply part of the lawyer landscape, or they have tried to "redeem" the term by claiming that it supports their own view of how lawyers should behave.

What keeps the idea of professionalism alive and encourages calls for its restoration? In part, it is surely that professional status is flattering to many lawyers, and appeals in the name of professionalism are taken more seriously as a result. But it is also true that many elements of

professionalism represent personal qualities or styles of behavior that appropriately appeal to lawyers' aspirations to live good lives and act in ways that serve the public interest. In this part of the paper, I will try to describe a few of those other views and explain why they have not persuaded me to change my mind.

A. Professionalism as Aspiration Higher than Rules

One recurring theme in professionalism debates is that Rules of Professional Conduct³⁶ represent reasonable floors, i.e., minimally-acceptable conduct, but professionalism calls lawyers to aspire to higher standards of behavior.³⁷ That distinction might initially seem inspirational, but it largely misunderstands the multiple functions of the Rules of Professional Conduct.

A few rules are indeed floors. One function of the Model Rules is to identify when there is a basis for imposing sanctions, and to do that, some rules are expressed in terms of minimum standards. Rule 1.1, for example, requires a lawyer to act with “competence,” i.e., to avoid legal malpractice, whereas most lawyers would aspire to excellence. But even Rule 1.1 does more than set a low bar. It defines four elements against which competence is to be judged – legal knowledge, skill, thoroughness and preparation – and it describes what a lawyer may and should do in an emergency when a client needs assistance that the lawyer does not really have the competence to provide.

Other Rules of Professional Conduct are much the same. Rule 1.3 prohibits a lawyer

³⁶As a practical matter, what I will be describing are the ABA Model Rules of Professional Conduct, but because the only rules with legal effect are those adopted for use in a given jurisdiction, I will tend to use this more generic description.

³⁷In “Professionalism Defined,” the Florida Bar quotes approvingly from an interview with Georgia Chief Justice Harold G. Clark: “Professionalism differs from ethics in the sense that ethics is a minimum standard * * * while professionalism is a higher standard expected of all lawyers. Professionalism imposes no official sanctions. It offers no reward. Yet, sanctions and rewards exist unofficially. Who faces a greater sanction than lost respect? Who faces a greater reward than the satisfaction of doing right for right’s own sake.” See <http://www.floridabar.org>.

from acting with less than “reasonable diligence and promptness”³⁸ but then urges even greater attention to a client’s matters.³⁹ Rule 1.5 prohibits charging an “unreasonable” fee, but then offers valuable guides as to what should go into setting a fee.⁴⁰ These and other rules⁴¹ clearly do set floors, but each is couched in terms that encourage a lawyer to perform at a higher level and none require use of the term “professionalism” to do so.⁴²

Many rules, however, are not floors at all; they give a lawyer some discretion how to act in situations where important values are in conflict. Rule 1.6, for example, asserts the important principle that a lawyer must protect a client’s confidential information. It defines confidential information broadly⁴³ and then identifies specific exceptions where the protection of the client may give way to protection of others.⁴⁴ Similar calls for exercise of reasonable judgment are found in Rule 1.14 on representing clients with diminished capacity⁴⁵ and Rule 2.1 on giving a client “candid advice.”⁴⁶ It is reasonable to disagree about whether the breadth of the underlying

³⁸MODEL RULES OF PROF’L CONDUCT R. 1.3.

³⁹Id. at Comment 3.

⁴⁰MODEL RULES OF PROF’L CONDUCT R. 1.5(a).

⁴¹See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.4 (communication); R 1.13 (organization as client); R 4.2 (communication with person represented by counsel).

⁴²Timothy P. Terrell & James H. Wildman, *Rethinking “Professionalism,”* 41 EMORY L. J. 403 (1992), argues that professionalism largely means delivering very good legal services. I have no disagreement with the desire to do that, but use of the term “professionalism” does little to advance that ideal.

⁴³MODEL RULES OF PROF’L CONDUCT R. 1.6(a).

⁴⁴Id. at R. 1.6(b).

⁴⁵MODEL RULES OF PROF’L CONDUCT R. 1.14 (urging the lawyer to “as far as reasonably possible, maintain a normal client-lawyer relationship with the client, but where necessary to “take reasonably necessary protective action”).

⁴⁶MODEL RULES OF PROF’L CONDUCT R. 2.1 (reminding the lawyer that “advice couched in narrow legal

protection – or the focus of the exceptions – are properly defined, but it seems to me meaningless to say that Rule 1.6 defines a “minimum” standard of conduct or that a lawyer behaving “professionally” should follow different standards.

I have spent many years of my career trying to “restate” the law governing lawyers and writing and critiquing rules that regulate lawyer conduct. I share the views of many in the field of legal ethics that we must try to articulate principles better and that situations can arise in which civil disobedience is the most appropriate course. What does not follow, in my view, is that terms like “professional behavior” or “professionalism” advance the effort to improve conduct.

B. Professionalism as Civility

When many advocates speak of professionalism, they seem to have in mind “civility,” which in turn comes down to moderating the intensely adversary spirit that many lawyers bring to their work. The Lawyer’s Creed of Professionalism, for example, says:

“I will endeavor to achieve my client’s lawful objectives in business transactions and in litigation as expeditiously and economically as possible. * * * I will advise my client that civility and courtesy are not to be equated with weakness. * * * I will cooperate with opposing counsel when scheduling changes are requested. * * * I will make every effort to agree with other counsel * * * on a voluntary exchange of information * * *. [And i]n civil matters, I will stipulate to facts as to which there is no genuine dispute.”⁴⁷

The smooth progression of litigation is important to the courts, and it is not surprising to see judges encouraging more voluntary cooperation and fewer matters for the court to decide. I

terms may be of little value * * * especially where practical considerations * * * are predominant”).

⁴⁷The ABA House of Delegates in 1988 proposed this creed for use by state bar associations and their members, but made clear that its principles did not replace any part of the Model Rules of Professional Conduct. See THOMAS D. MORGAN & RONALD D. ROTUNDA, 2011 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 675.

also share the view that there could be more nuance in the Model Rules of Professional Conduct that discuss how litigation is to be conducted, but the rules already mandate honesty in dealings with a court⁴⁸ and third parties.⁴⁹ They say a lawyer may not “embarrass” or “burden” any person, even an opposing party.⁵⁰ There is a practical limit to how many ways one can tell a lawyer who is a jerk how to behave as a mature adult.

Further, it is not obviously preferable that lawyers fail to protect their clients’ interests if such protection might cause them to be less civil than others might wish. Civility is a behavior whose very definition depend on context. Much of the time, polite behavior is both desirable and produces results that will be in a client’s long-run interest.⁵¹ Describing “professionalism” as a synonym for “civility,” however, does not advance the analysis.

In trying to find an idea comparable to professionalism, one possibility might be “sportsmanship.” It seems churlish not to want someone to be a good sport, but does the term sportsmanship have any real content? Is sportsmanship a quality of personal conduct and attitude that cuts across all sports, indeed possibly all of life? Does sportsmanship take its content from context, e.g., the sport being played, or whether a game is being played for something more than exercise? The more one considers such questions, the more “sportsmanship” as a stand-alone concept does not constitute a guide to conduct. I believe the same is true of professionalism. Neither concept gives effective guidance for lawyers trying to

⁴⁸MODEL RULES OF PROF’L CONDUCT R. 3.3(a).

⁴⁹MODEL RULES OF PROF’L CONDUCT R. 4.1.

⁵⁰MODEL RULES OF PROF’L CONDUCT R. 4.4(a).

⁵¹On this subject, I would acknowledge the civility of Professor Neil Hamilton in showing me a draft of his review of my book in advance and in writing that review in a tone that reflects our long friendship. I appreciate that civility and value that friendship and hope that the tone on this article reflects the same spirit.

behave appropriately.

C. Professionalism as Acting as a Check on Client Conduct

One can argue that preserving the rule of law is a special obligation of lawyers. One can argue as well that a lawyer's duty to see that his or her clients obey the law is as great as the duty to protect clients against abuses the legal system can impose.⁵² Arguably, some things are matters of law that should not be subject to partisanship or self-interest.⁵³ In an address in 1910 to the American Bar Association, for example, Woodrow Wilson said:

“You are not a mere body of expert business advisers in the field of civil law, or a mere body of expert advocates for those who get entangled in the meshes of the criminal law. You are servants of the public, of the state itself. You are under bonds to serve the general interest, the integrity and enlightenment of law itself, in the advice you give individuals.”⁵⁴

Professors Robert Gordon and William Simon have tried to “redeem” this view of professionalism in a way that fits their own ideals. Each has argued that lawyers should maintain a critical independence from their clients' values, an independence facilitated by the sense that lawyers as professionals are inherently different from other kinds of advisers.⁵⁵

⁵²See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

⁵³See, e.g., PAUL G. HASKELL, WHY LAWYERS BEHAVE AS THEY DO 85-92 (1998); SOL M. LINOWITZ WITH MARTIN MAYER, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 4, 9-18 (1994) (rule of law is diminished when lawyers see their role as to help clients get what they want rather than what they are entitled to); Kenneth M. Rosen, *Lessons on Lawyers, Democracy, and Professional Responsibility*, 19 Geo. J. Legal Ethics 155 (2006) (law schools have a duty to teach lawyers their role in preserving democratic institutions).

⁵⁴Quoted in ORIE L. PHILLIPS & PHILBRICK MCCOY, CONDUCT OF JUDGES AND LAWYERS: A SURVEY OF PROFESSIONAL ETHICS, DISCIPLINE AND DISBARMENT 57 (1952).

⁵⁵See Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in ROBERT L. NELSON, DAVID M. TRUBEK & RAYMAN L. SOLOMON, EDS., LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION (1992), at 230. See also Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990); William H. Simon, *Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives*, 23 GEO. J. LEGAL ETHICS 987 (2010).

The problem with such a view, of course, is that lawyers cannot truly be independent of their clients.⁵⁶ Quite apart from their status as fiduciaries who are legally required to pursue their client's interests, they have value to the clients only as they serve those interests. People do not retain a lawyer to preserve the rule of law; they retain a lawyer for an instrumental reason, i.e., to get a useful service. Indeed, lawyer creativity in helping business firms find ways to do things differently than they had previously tried has been arguably one of the things that has made economic development as dynamic as it has been.

What observers like to hope happened is that, in the process, lawyers also restrained excesses in which corporate officials would have engaged. Some of that may have occurred.⁵⁷ Elihu Root is quoted as saying, for example, that "half of what a lawyer must do is tell his client he is a damn fool."⁵⁸ It's a wonderful line; urging clients to adhere to the law is an important part of the counseling that lawyers do.⁵⁹ The problem is that there is no evidence that even Root's clients took his advice. Calling moral business counsel "professionalism" may do little harm, but it is also unlikely to add much to realistic analysis of the actual advice a lawyer should convey.

D. Professionalism as Pro-Bono Service

Some of the most promising calls for professionalism are those for lawyers to engage in

⁵⁶See, e.g., Stephen Pepper, *Integrating Morality and Law in Legal Practice: A Reply to Professor Simon*, 23 GEO. J. LEGAL ETHICS 1011 (2010).

⁵⁷There certainly was rhetoric to that effect at the time the ABA first prepared its Canons of Ethics in 1908. See Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992); Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1 (1999).

⁵⁸ERWIN O. SMIGEL, *THE WALL STREET LAWYER* 4 - 7 (1964).

⁵⁹MODEL RULES OF PROF'L CONDUCT R. 2.1.

public service, including pro bono legal services. Few would deny the value of pro bono service to poor clients and its role in establishing legal principles that assist people other than the clients themselves. Given the fact that neither the ABA Model Rules nor the rules of any state require that lawyers engage in *any* pro bono service,⁶⁰ one can argue that rule compliance does not capture this aspect of a lawyer's behavior.

There is some evidence that large firm lawyers are doing more pro bono service than in earlier years,⁶¹ although whether the reason is that lawyers today simply have more time on their hands is open to speculation. In any event, the personal instincts to subordinate self-interest and come to the aid of another unquestionably deserves applause. The question is whether it adds anything to call the behavior a sign of "professionalism."

Lawyers claim pro bono service as a common heritage, but Professor Richard Abel points out that even the most generous groups of lawyers typically contribute only about 1% of their collective time to such service.⁶² Particular lawyers who provide pro bono service deserve personal credit, but the fact they do so does not make lawyers part of a profession.

Voluntary legal aid societies around the country have delivered legal services to the poor

⁶⁰MODEL RULES OF PROF'L CONDUCT R. 6.1 describes pro bono service as a lawyer's "professional responsibility" but then says only that a lawyer "should aspire" to render such service. The voluntary nature of pro bono services was not an oversight. A proposal for mandatory pro bono service was so vigorously opposed in the ABA House of Delegates in 1983 that it put in danger the entire Model Rules project. Then, when the ABA Ethics 2000 Commission revisited the issue, full-time lawyers in legal services agencies opposed mandatory pro bono service, arguing that they did not want to spend their time training "amateurs." ABA REPORT OF THE COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, Rule 6.1 (2000).

⁶¹See, e.g., Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357 (2010).

⁶²Richard L. Abel, *The Paradox of Pro Bono Service*, 78 FORDHAM L. REV. 2443, 2444 (2010).

since at least the founding of the New York society in 1876.⁶³ Sadly, however, many programs of legal service for the poor have had as much to do with the interests of lawyers as the interests of clients. Concerns about meeting the legal needs of “persons of moderate means” arose at the end of World War II as soldiers who had received free legal services while in the military came home and needed to buy houses, start businesses, and the like. The expressed concern was about how to meet their needs. “Lawyer reference plans” (now lawyer referral services) were one response; legal services offices were another.⁶⁴

By 1951, the depression was a recent reality; lawyers had returned from World War II and pro bono services were justified as part of both the battle against communism, i.e., a way to show the poor that the rule of law was their friend,⁶⁵ and an effort to see lawyers fully occupied in professional activity.⁶⁶ The legal aid movement was funded heavily by what we would today call the United Way, not primarily by voluntary services of lawyers,⁶⁷ and in the context of the time, the movement was primarily a way to give experience to law students and practical training

⁶³See, e.g., EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES* (1951); JOHN MACARTHUR MAGUIRE, *THE LANCE OF JUSTICE: A SEMI-CENTENNIAL HISTORY OF THE LEGAL AID SOCIETY 1876-1926* (1928); REGINALD HEBER SMITH, *JUSTICE AND THE POOR* (1919).

⁶⁴Reginald Heber Smith, *Legal Service Offices for Persons of Moderate Means*, 1949 WIS. L. REV. 416, 417-24.

⁶⁵E.g., “It is a fundamental tenet of Marxian Communism that law is a class weapon used by the rich to oppress the poor through the simple device of making justice too expensive. * * * Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with; but injustice makes us want to pull things down.” Introduction by Reginald Heber Smith to EMERY A. BROWNELL, *LEGAL AID IN THE UNITED STATES: A STUDY OF THE AVAILABILITY OF LAWYERS’ SERVICES FOR PERSONS UNABLE TO PAY FEES* xiii (1951).

⁶⁶Legal clinics for the poor were also seen as a way to provide practical training for young lawyers who had gone into military service and now wanted to get experience before setting out on their own. Returning lawyer veterans were denied the G.I. Bill because the government reasoned they were already trained. Reginald Heber Smith, *Legal Service Offices for Persons of Moderate Means*, 1949 WIS. L. REV. 416, 437-44.

⁶⁷ALBERT P. BLAUSTEIN & CHARLES O. PORTER, *THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION* 86 - 90 (1954).

to young lawyers who had gone into military service and wanted to brush up their skills before setting out on their own.⁶⁸ Creation of the Legal Services Corporation, indeed, was in part a government response to a need that lawyers individually had refused to assume.⁶⁹ However lawyers might like to claim the core value of furthering access to the legal system, then, their basis for doing so is doubtful.

IV. Professionalism as Qualities of Personal Character

Each of us tends to recognize good lawyer behavior when we see it. My point in this symposium is simply that most of the behavior we admire is that of good people who only happen to be lawyers. We would affirm the behavior whether or not a person was practicing law. The issue whether lawyers engage in role-differentiated behavior has, of course, been with us for a long time. Typically, the question put is whether a lawyer may do something that ordinary morality would prohibit.⁷⁰ My own view is that there are relatively few occasions when persons who do the kinds of things lawyers do – receive confidential information from others,

⁶⁸Reginald Heber Smith, *Legal Service Offices for Persons of Moderate Means*, 1949 WIS. L. REV. 416, 437-44.

⁶⁹The organized Bar was also concerned that if lawyers did not at least appear to assume such public responsibilities, the government would “socialize” the profession:

“For selfish and unselfish reasons we hope that the new world will be attracted by our form of government and the American way of life so that, in other nations, free peoples will set up democratic regimes and institutions. In order that our general system may make its maximum appeal, and because we are not hypocrites, we are engaged in reexamining our own institutions. We want to keep what is good, and add what is found needed. Law is the foundation of our whole structure. We are determined that it shall be strong. We know that law is not self-enforcing, and that lawyers are essential.”

Reginald Heber Smith, *Legal Service Offices for Persons of Moderate Means*, 1949 WIS. L. REV. 416, 444.

⁷⁰The competing positions are helpfully addressed in, e.g., Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980)

for example – have moral responsibilities different than those of lawyers.⁷¹ The question sometimes posed today is whether lawyers have *greater* responsibilities than others in some situations, for example, a special duty to do justice and seek to free someone who has been improperly convicted.⁷² Once again, while lawyers’ special skills may make them best suited to undertake such efforts, in my view anyone with the useful skills – a police officer, for example – similarly would have the moral obligation to use them.

Indeed, I believe what Professor Hamilton calls “professionalism clearly defined”⁷³ ultimately can best be seen as such personal rather than professional characteristics. Under his principles of professionalism, each good lawyer:

“1. Continues to grow in personal conscience over his or her career;

“2. Agrees to comply with the ethics of duty – the minimum standards for the lawyer’s professional skills and ethical conduct set by the Rules;

“3. Strives to realize, over a career, the ethics of aspiration – the core values and ideals of the profession including internalizing the highest standards for the lawyer’s professional skill and ethical conduct,

“4. Agrees both to hold other lawyers accountable for meeting the minimum standards set forth in the Rules and to encourage them to realize core values and ideals of the profession; and

“5. Agrees to act as a fiduciary where his or her self-interest is overbalanced by devotion to serving the client and the public good in the profession’s area of responsibility: justice.

⁷¹One example might be whether a lawyer has a different responsibility than a doctor to reveal that a person the doctor has examined has a life-threatening condition, i.e., the problem presented by *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962). Today, AMA Ethics Opinion 10.03 requires such disclosure; ABA Model Rule 1.6(b)(1) permits disclosure. I do not believe the responsibilities should differ; both the doctor and lawyer should disclose in order to save the person’s life.

⁷²A prosecutor’s duty to do so is spelled out in MODEL RULES OF PROF’L CONDUCT R. 3.8(g) & 3.8(h). See also MODEL RULES OF PROF’L CONDUCT, Preamble [1].

⁷³Neil Hamilton, *Professionalism Clearly Defined*, 18 THE PROFESSIONAL LAWYER 4, 8 (No. 4, 2008).

“a. Devotes professional time to serve the public good, particularly by representing pro bono clients; and

“b. Undertakes a continuing reflective engagement, over a career, on the relative importance of income and wealth in light of the other principles of professionalism.”⁷⁴

The first and last of Professor Hamilton’s principles – growth in personal conscience and reflection on the place in one’s life of income and wealth – clearly point to personal character. I agree that both are critical parts of mature ethical living, and both are relevant whether one is a lawyer, a farmer or a government official. The first of them is also the aspect of professionalism that Professor Hamilton has tested and found important to effective law practice.⁷⁵

The second Hamilton principle, adherence to the standards that regulate lawyer conduct, I take as self-evident. The same goes for adhering to required fiduciary standards. Thus, it is the remaining four principles that require further consideration.

Professor Hamilton argues that ethical standards are not private. That is, people exist in society and values are not ours to choose wholly privately. We share a common humanity and learn ethical conduct from others.⁷⁶ I agree. Where I disagree is with the implication that the only or even best understanding of good lawyer behavior is provided by other lawyers. One does require a law license to have important views as to the balance between confidentiality and third party interests, for example. Such issues are not unique to lawyers, and we lawyers often

⁷⁴Id. (internal footnotes deleted).

⁷⁵Professor Hamilton has been joined in the empirical work by Dr. Verna Monson. See Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137 (2011); Neil Hamilton & Verna Monson, *Answering the Skeptics on Fostering Ethical Professional Formation (Professionalism)*, 20 THE PROFESSIONAL LAWYER 3 (No. 4, 2011).

⁷⁶Neil Hamilton, *Professionalism Clearly Defined*, 18 THE PROFESSIONAL LAWYER 4, 9-10 (No. 4, 2008).

have too much self interest wrapped up in the issues to think about them perceptively.⁷⁷

My point is not that moral decision making comes naturally or that character education is unimportant. Again, my point is simply that the proper resolution of moral issues facing lawyers should be undertaken on their own merits. Calling issues “professional” and looking primarily to lawyers’ views about the issue is often problematic rather than helpful. The Conference of Chief Justices, the association of leaders of our nation’s state courts, were correct when they concluded:

“Professionalism ultimately is a personal, not an institutional characteristic. * * * The institutional framework of the legal profession can create a climate in which professionalism can flourish, but individual lawyers must be the ones to cultivate this characteristic in themselves.”⁷⁸

V. The Changing World Facing the American Lawyer

Objecting to calling law a profession might seem a strange cause. The professional label is a measure of status in which lawyers take pride, and if only status were at stake, challenging the label would not be worth the effort. But more is involved. Changes in the world current and future lawyers will face are almost inevitable. The changes are likely to transform the way legal services are delivered and even the way the term “lawyer” has been understood.⁷⁹ The changes will be matters of substance, not semantics. They are likely to affect important ways in which

⁷⁷Which conflicts of interest should be subject to consent and which not are similarly questions about which teaching from fellow professionals may be more misleading than helpful.

⁷⁸CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (1999), quoted in Neil Hamilton, *Professionalism Clearly Defined*, 18 THE PROFESSIONAL LAWYER 7 (No. 4, 2008). See also, Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 NOTRE DAME J. L. ETHICS & PUB. POL. 305 (2000); Alice Woolley & W. Bradley Wendel, *Legal Ethics & Moral Character*, 23 GEO. J. LEGAL ETHICS 1065 (2010); David Luban, *How Must a Lawyer Be? A Response to Woolley and Wendel*, 23 GEO. J. LEGAL ETHICS 1101(2010).

⁷⁹The changes make up a large part of THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER (2010). See also, ELLIOTT A. KRAUSE, DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM,

lawyers understand who they are and the role they are likely to play in national life. I will mention just three.

A. *Globalization*

Although trained in local law and licensed by state courts, American lawyers will not be able to ignore the effects of globalization on their practice. First, globalization requires lawyers to know the legal principles that allow clients' international commerce to proceed. Indeed, a client engaged in e-commerce may do virtual business everywhere in the world simultaneously, and a lawyer who focuses only on what was once important will neither serve her clients well nor retain her clients long. The day has come and gone when national borders – and a fortiori state borders – likely have any real significance in deciding how a transaction should be structured or a matter litigated.

American lawyers' professional standards are also likely to be affected by globalization as the General Agreement on Trade in Services (GATS) tends to break down barriers that today limit lawyers to practice in their home countries. The day will come when French lawyers can open a practice in the United States just as the European Union permits French lawyers to practice in Germany. When that happens, of course, it seems inevitable that a state such as California will have to also allow New York lawyers to open a practice in San Francisco.⁸⁰ In that kind of world, talk of "professional" standards will become more and more theoretical.

1930 TO THE PRESENT 283 (1996).

⁸⁰For additional information see, e.g., Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNATL. L. 989 (2001); Laurel S. Terry, *But What Will the WTO Disciplines Apply To?: Distinguishing Among Market Access, National Treatment and Article VI:4 Measures When Applying the GATS to Legal Services*, 2003 THE PROFESSIONAL LAWYER 83 (Symposium Issue). See also, Carol Silver, *Winners and Losers in the Globalization of Legal Services: Situating the Market for Foreign Lawyers*, 45 VA. J. INT'L L. 897 (2005) (discussing the increase in programs at U.S. law schools for foreign lawyers, many of whom hope to practice with U.S. firms).

These developments, in turn, will be magnified by changes occurring in lawyer regulation in other parts of the world. British lawyers, for example, have recently experienced the most radical change in the regulation in their history. As a result of the Legal Services Act of 2007,⁸¹ the number of activities that only a lawyer may do has been reduced,⁸² a law firm may have non-lawyer investors,⁸³ and the lawyer-client privilege extends to communications with people who are not lawyers.⁸⁴ If American lawyers ignore the fact that their direct competitors play by different rules, they will have only themselves to blame when clients seek the same or better services at lower cost elsewhere.

B. Technology

Next, the increasing importance of information technology to law practice promises to transform tasks that used to be seen as complex, unique and worthy of substantial fees into simple, repetitive operations provided to clients by the lowest bidder. Technology available on the simplest personal computer can instantly allow a lawyer to copy a document used in one transaction and change the names and terms for use in the next. Knowing what changes are needed to fit a new situation will always be a big part of the professional's service, but the benefits of standardizing forms in transactions promises to be enormous.⁸⁵

⁸¹Legal Services Act of 2007, 2007 Chapter 29.

⁸²Id. at § 12.

⁸³Legal Services Act of 2007, 2007 Chapter 29, Schedule 13.

⁸⁴Id. at § 190.

⁸⁵A rationale for wide use of boilerplate clauses is developed in Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033 (2006). Ahdieh notes: "Contrary to the rhetoric sometimes used to describe bargaining, the ultimate goal is not to win but to agree." Id. at 1036. Boilerplate reduces transaction costs without eliminating the possibility of seeking strategic advantage. Depending on the standard clauses proposed, parties can seek advantage but minimize misunderstanding because the boilerplate terms are "focal points" that have meanings

The transformation of standardization from a shortcut to a virtue probably began in the real estate industry with the development of the standard form real estate contract. Similarly, the increased use of form wills and trusts can help assure that the drafter will not have forgotten important provisions necessary for desirable tax treatment.⁸⁶ Form commercial documents can provide increased security that representations and warranties are standard for commercial transactions. Even in litigation, form complaints can help assure that each element of a claim has been properly pled.⁸⁷ The result of document standardization, of course, is that it is now an open secret that what lawyers do is no longer always a complex task requiring expertise worthy of premium pay. Much of what lawyers do is what most merchants do, i.e., sell commodities that ultimately command only a price set in competition with many potential sellers.⁸⁸

Another technology-based reality that will transform lawyers' practice is the world of free information that lawyers have traditionally sold, but that is now available on the Internet. Books about law have been around for years, but technology now makes the information

parties know from prior experience. Indeed, in bargaining, even small departures from boilerplate terms can make agreement more difficult as the "changes raise the question, 'Why?'" Id. at 1046.

⁸⁶There are a number of web sites that offer legal documents, some with additional services and some without. See, e.g., legalzoom.com, uslegalforms.com, legaldocs.com, and lawdepot.com.

⁸⁷The key books in this area are RICHARD SUSSKIND, *THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY* (1996), and RICHARD SUSSKIND, *TRANSFORMING THE LAW* (2000).

⁸⁸It would be a mistake, of course, to assume that globalization will occur equally rapidly in every line of commerce. High-touch personal services are likely to continue to be delivered locally. Part of the challenge in considering the impact of globalization on lawyers, then, will lie in distinguishing which lawyer roles are more like the making of machine parts and which require a local touch. Thomas Friedman says:

"[N]o matter what your profession – doctor, lawyer, architect, accountant – if you are an American, you better be good at the touchy-feely service stuff, because anything that can be digitized can be outsourced to either the smartest or the cheapest producer, or both."

THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 13-14 (2005). Mr. Friedman also reports that it is likely over a half-million tax returns brought to CPAs in the United States are now outsourced to India.

ubiquitous. It is often provided free at websites ranging from Wikipedia to specialized blogs, and the effect is to render a great deal of formerly exotic legal information broadly accessible. Prepared by thousands of authors, these alternative information sources threaten the monopoly on which lawyers have depended for a steady client base.⁸⁹ Clearly, lawyers will tend to be able to assimilate and apply information from these sources more quickly and accurately than clients can, but the breakthrough is that a lawyer's knowledge is no longer a black box incapable of client penetration.⁹⁰ Whether free or for a charge, ubiquitous help from information services increasingly will be available to individuals planning their own affairs, drafting their own documents, and even appearing pro se in litigation, just as software helps millions of former accounting clients prepare their own tax returns.⁹¹

C. The Diminished Significance of Licensing

⁸⁹See, e.g., DON TAPSCOTT & ANTHONY D. WILLIAMS, WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING 11 (2006) (“credentialed knowledge producers share the stage with ‘amateur’ creators who are disrupting every activity they touch”); CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 156-160 (2006).

⁹⁰Management consultant Tom Peters quotes Michael Lewis as saying: “Parents, bosses, stockbrokers, even military leaders are starting to lose the authority they once had. ... There are all these roles that are premised on access to privileged information. What we are witnessing is a collapse of that advantage, prestige and authority.” TOM PETERS, REIMAGINE!: BUSINESS EXCELLENCE IN A DISRUPTIVE AGE 67 (2003).

⁹¹Technological breakthroughs are not new to the legal profession. “Automation and technological change posed dangers to lawyers, just as they posed dangers to other occupations. Social invention constantly threatened to displace them. It was adapt or die. For example, lawyers in the first half of the [19th] century had a good thing going in title searches and related work. After the Civil War, title companies and trust companies proved to be efficient competitors. By 1900, well-organized, efficient companies nibbled away at other staples of the practice, too: debt collection and estate work, for example. Nevertheless the lawyers prospered. 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. In so amorphous a profession, lawyers drifted in and out; many went into business or politics because they could not earn a living at their trade. Others reached out for a new form of practice. At any rate, the profession did not shrink to (or rise to) the status of a small, exclusive elite.” LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 634 (2nd ed. 1985).

A third change in the world American lawyers face is the declining significance of being licensed before providing legal services. A traditional, useful working definition of the practice of law has been that it consists of applying the general body of law to a specific client's question or problem.⁹² One might think that definition will make the boundaries of law practice sufficiently clear that the idea of being a lawyer will remain constant. But as we have seen, changes ranging from globalization to the way clients get information foreshadow changes in what it will mean to be a lawyer. Prohibitions of the unauthorized practice of law are likely to have very little effect in protecting American lawyers against these changes.⁹³

Lawyers themselves are breaking down traditional unauthorized practice barriers as they assist clients, not only in the states in which the lawyer is licensed to practice, but in other states or nations where the client has legal needs.⁹⁴ It used to be an open secret that many lawyers regularly violated unauthorized practice rules by taking depositions, negotiating contracts and even giving legal advice in states where they were not licensed. Then, the California Supreme

⁹²This definition was used in ABA Code of Professional Responsibility, Ethical Consideration 3-5 (1970). A law professor does not practice law when teaching, for example, because he or she teaches the law as it relates to hypothetical, not real, clients. Similarly, one who writes a book about law is not thereby engaged in law practice.

⁹³Bar associations have set up unauthorized practice of law committees whose responsibility has been to seek injunctions against those providing services that lawyers believed they alone were entitled to provide. Increasingly, the effectiveness of those efforts also has been reduced. When the State Bar of Texas tried to enjoin sale of a CD-ROM called Quicken Family Lawyer, the state legislature responded within a month with a statute declaring such sales to be legal. *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*, 179 F.3d 956 (5th Cir. 1999) (vacating injunction based on the new statute). The public did not find theories of professionalism and the social contract to be effective arguments against letting technology help them avoid using lawyers. And after an earlier unauthorized practice of law case, *State Bar of Arizona v. Arizona Land Title and Trust Co.*, 366 P.2d 1 (Ariz. 1961), the state of Arizona even amended its constitution to assure real estate brokers the right to fill in the blanks on a real estate sales contract. Ariz. Const., Art. 26, § 1.

⁹⁴See, e.g., Demetrios Dimitriou, *Legal Ethics in the Future: What Relevance?*, in GARY A. MUNNEKE, ED., *SEIZE THE FUTURE: FORECASTING AND INFLUENCING THE FUTURE OF THE LEGAL PROFESSION* (2000).

Court struck terror into lawyers' hearts with its *Birbrower* decision⁹⁵ that denied lawyers the right to collect a fee for such work. States responded with changes in their rules to approve at least "temporary" work in states where a lawyer is unlicensed,⁹⁶ and lawyers continue to push to expand the boundaries within which they may practice.

More important, lawyers and law firms have long used paralegal personnel, nominally working under the lawyer supervision that ethical standards require, to help them deliver legal services. Corporate legal offices are similarly in a position to use non-lawyers to provide services they need done. Negotiating contracts, troubleshooting discrimination claims, even preparing court documents can all be done by non-lawyers within an organization receiving a level of lawyer supervision and training to which unauthorized practice rules cannot effectively speak.⁹⁷

Often, the non-lawyers will benefit from lawyer assistance, and current legal ethics rules require a lawyer in a private law firm to supervise and take responsibility for the non-lawyer's work,⁹⁸ but within a corporation or other organization client, lawyer supervision need only be provided if it is cost-effective to do so.⁹⁹

⁹⁵*Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1988).

⁹⁶MODEL RULES OF PROF'L CONDUCT R. 5.5.

⁹⁷Professor Herbert Kritzer calls such persons "law workers" and sees them as examples of the kinds of people with whom lawyers are likely to compete in the future. See Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917 (2002). See also, HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS & ORDINARY LITIGATION* (1990); HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* (1998); Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 LAW & SOC'Y REV. 3 (1999).

⁹⁸MODEL RULES OF PROF'L CONDUCT R. 5.3.

⁹⁹See, e.g., Susan Hackett, *Inside Out: An Examination of Demographic Trends in the In-House Profession*, 44 ARIZ. L. REV. 609, 616 (2002) (compliance programs in areas such as environmental, human resources, tax, marketing/antitrust, health/safety, are often under the direction of non-lawyer compliance officers

VI. Implications of this Discussion for Legal Education

Looking back at non-self-serving efforts in the name of professionalism, one must acknowledge that often more was involved than hollow phrases. Efforts to improve the law's fairness, to eliminate invidious discrimination, and to enhance opportunities for all citizens have occupied the public careers of many of the nation's finest lawyers, often at real personal cost to themselves. We all benefit from the uniform laws, simplified procedures, and important reforms that lawyers have to show for their work. There is no reason such work should end; indeed, legal educators should hope to encourage their graduates to do more of it.

But I believe such good works by lawyers were the product of good people who did some of their work using legal skills. In my view, professionalism as an ideal is nebulous and largely irrelevant to the issues lawyers face. In my view, professionalism in the sense asserted by the ABA during the 19th and 20th centuries – and by Professor Hamilton and others today – should be seen as dead.

The implication of my argument for legal education is that I join Professor Hamilton in saying that there is an important place for moral formation in education generally and legal education in particular. I would offer two additional reasons, however, for not making that effort part of a broader proposal for “professionalism” education.

First, in times of change and uncertainty for lawyers, one of the first places the ABA looks to cast blame and propose reform is the law schools. I represent the AALS in the ABA

who have access to lawyers but do not necessarily report to them). But see Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY L.J. 1113, 1163-75 (1997) (assuming a more proactive role for corporate counsel in developing compliance programs).

House of Delegates,¹⁰⁰ and I have met more than a few delegates who would like to exercise authority over law school admissions, curriculum, faculty hiring, and the like. The ABA Section on Legal Education has released proposals for increasing professionalism education in U.S. law schools.¹⁰¹ About the time law schools agree to take on the task of forming “professional” identity, I can virtually guarantee that the ABA House of Delegates will determine that it is the final arbiter of the substance of what will be taught.

It is no criticism of the delegates personally to say that most have no experience teaching law, and even less background in the field of professional formation. Even if I disagree with Professor Hamilton on occasion, his efforts to prepare better people and better lawyers have been informed and subject to reasoned discussion. Having educational content prescribed by the ABA Standing Committee on Professionalism,¹⁰² the ABA Section on Legal Education¹⁰³ – and certainly the ABA House of Delegates¹⁰⁴ – however, is not a promising prospect.

¹⁰⁰Nothing in this article necessarily represents the view of the AALS officers or Executive Committee.

¹⁰¹July 2011 proposed ABA Accreditation Standard 302(b)(4)(ii) would require that an accredited law school’s graduates demonstrate “knowledge, understanding and appreciation of ... the legal profession’s values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law.”

¹⁰²See, e.g., Ronald C. Minkoff, *Reviving a Tradition of Service: Redefining Lawyer Professionalism in the 21st Century*, 19 THE PROFESSIONAL LAWYER 1 (No. 4, 2009).

¹⁰³See, e.g., Amy Timmer & John Berry, *The ABA’s Excellent and Inevitable Journey to Incorporating Professionalism in Law School Accreditation Standards*, 20 THE PROFESSIONAL LAWYER 1 (No. 1, 2010), citing Donald J. Polden, *Statement of Principles of Accreditation and Fundamental Goals of a Sound Program of Legal Education*, 40 SYLLABUS (ABA SEC. OF LEGAL EDUC.) 2 (Spring 2009). Ethical and professional education is one of the few substantive requirements to survive in the proposed ABA Standards for the Accreditation of Law Schools. The vehicle for ABA action is thus ready to be set in motion.

¹⁰⁴At the August 2011 ABA Annual Meeting, the House of Delegates overwhelmingly adopted Resolution 10B, proposed by the New York State Bar Association on the eve of the meeting with no prior warning. It places the ABA on record in favor of all law schools devoting additional resources to making graduates practice ready and the accompanying report purports to tell law schools how to do it. No serious weight was given by the House to the concern of the ABA Section on Legal Education & Admission to the Bar that it had not had time to evaluate or estimate the costs involved in implementing such a requirement.

Second, I would discourage making formation of professional identity a law school objective because of the important data coming out about placement of U.S. law graduates. Last year, about 1/3 of U.S. law graduates were required to take jobs that did not require bar passage, i.e., they are apparently not practicing law at all. Legend has it that entering law students were once told, “Look to your right; look to your left. One of you will fail your courses and not be here next year.” Today, most law schools wait to make that speech until graduation; few of our students fail their course work but many fail to become professional lawyers.

I believe that is likely to remain true for a significant number of graduates for a number of years into the future, and the important question for our students will be what we teach that will be of lasting value no matter how they use their education. We need to be sure that law students have good information about what their chances of particular kinds of employment are, but it may actually be liberating for law schools and their students not to be limited to making all students “practice ready.” In the kind of world our graduates face, lawyers – like all citizens – will have a moral obligation to devote their best efforts to using their skills in ways that contribute to the public interest, whatever form their own employment may take.¹⁰⁵ The goal of our law schools should be to help make our graduates’ productive human beings, not just more “professional” lawyers.

¹⁰⁵Deborah Rhode has called on lawyers to become leaders and for law schools to help them become so. E.g., Deborah L. Rhode, *Lawyers and Leadership*, 20 THE PROFESSIONAL LAWYER 1 (No. 3, 2010); Deborah L. Rhode, *Where is the Leadership in Moral Leadership?*, in MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY 4 (Deborah L. Rhode, ed., 2006). The call updates some of the message of ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993). The suggestion is appropriate and perhaps now even more plausible.