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# IMPLICATIONS OF GLOBALIZATION FOR THE PROFESSIONAL STATUS OF LAWYERS IN THE UNITED STATES AND ELSEWHERE

Nancy J. Moore\*

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## INTRODUCTION

In 1916, Julius Henry Cohen—the subject of this conference—took up the now-perennial debate concerning whether law is a business or a profession, coming down on the side that, although legal practice had become too commercialized of late, law was and should be a profession.<sup>1</sup> In 2010, Tom Morgan—one of the participants in this conference—addressed the same question in his book *The Vanishing American Lawyer* and provocatively concluded, contrary to Cohen, that “Law in America is not a profession—and that’s a good thing.”<sup>2</sup>

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1. JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* 318–19 (1916). For an excellent discussion of this book, see Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1 (2005).

2. THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 66 (2010) [hereinafter MORGAN, *THE VANISHING AMERICAN LAWYER*]. He has addressed these questions in other publications as well. See, e.g., Thomas D. Morgan, *Calling Law a ‘Profession’ Only Confuses Thinking About the Challenges Lawyers Face*, 9 UNIV. OF ST. THOMAS L.J. (forthcoming 2013) [hereinafter Morgan, *Calling Law a Profession*], available at <http://ssrn.com/abstract=2007296>; Thomas D. Morgan, *Toward Abandoning Organized Professionalism*, 30 HOFSTRA L. REV. 947 (2002) [hereinafter Morgan, *Abandoning Organized Professionalism*]. In my discussion of Morgan’s views throughout this Article, I will draw from these two articles, as well as from the book itself.

For Cohen, the commercialization of law practice—including not only advertising, but also the growing number of lawyers serving the interests of business clients—was antithetical to the ideals of professionalism, in which rather than “being drawn into modern business,” lawyers should be “standing outside it.”<sup>3</sup> For Morgan, however, lawyers are and should be recognized as primarily economic actors.<sup>4</sup> Indeed, he encourages them to work toward breaking down the barriers that continue to exist between lawyers and other business persons who can offer comparable (perhaps even better) services at lower prices.<sup>5</sup>

What, if any, are the implications of globalization—including the increased globalization of law practice<sup>6</sup>—for the perennial debate concerning the professional status of lawyers in the United States and elsewhere? Of course, Cohen did not live to witness the globalization phenomenon and therefore was unable to comment on its implications for his ideal of law as a profession. Morgan, on the other hand, is an astute observer of globalization and its impact on law practice, including radical changes in lawyer regulation recently enacted in the U.K. and Australia<sup>7</sup>—changes that have many U.S. lawyers “up in arms.”<sup>8</sup> For Morgan, globalization represents the culmination of a lengthy process of eliminating restrictive barriers that were established at the behest of lawyer organizations such as the American Bar Association (ABA), in an effort to establish and reinforce lawyers’ monopoly over a wide range of commercial activity.<sup>9</sup>

According to Morgan, this process of breaking down barriers between lawyers and nonlawyers—and between elite and non-elite lawyers—began in the United States in the 1960s with a series of Supreme Court decisions striking down various anticompetitive rules adopted by state courts at the request of lawyer organizations, such as

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3. COHEN, *supra* note 1, at 31 (quoting Woodrow Wilson’s 1910 address to the American Bar Association).

4. MORGAN, THE VANISHING AMERICAN LAWYER, *supra* note 2, at 25.

5. *See, e.g.*, MORGAN, THE VANISHING AMERICAN LAWYER, *supra* note 2, at 97 (disapproving as “self-defeating” lawyers’ efforts to challenge the use of online services helping people attempting to draft their own legal documents).

6. *See, e.g.*, Colloquium, *Globalization and the Legal Profession*, 80 FORDHAM L. REV. 2305 (2012).

7. *See* MORGAN, THE VANISHING AMERICAN LAWYER, *supra* note 2, at 90.

8. Jennifer Smith, *Law Firms Split Over Nonlawyer Investors*, WALL ST. J., Apr. 2, 2012, at B1 (quoting one U.S. lawyer as saying, “I can’t think of anything more pernicious or ill-considered”).

9. *See* MORGAN, THE VANISHING AMERICAN LAWYER, *supra* note 2, at 71–83.

minimum legal fees, advertising bans, and restrictions on the efforts of nonlawyer organizations to secure affordable legal services for their members.<sup>10</sup> More recently, changes in the economy itself—including the lifting of trade barriers and revolutions in transportation and information technology—have led to an unprecedented growth in international commerce, accompanied by a “degree of competitive pressure unknown when markets were more narrow and balkanized.”<sup>11</sup> As a result of these changes, U.S. lawyers seeking to participate in the new global economy must be prepared to provide the services that their clients need, in all parts of the world, at prices that are competitive with those offered by other legal service providers—lawyers and nonlawyers alike—who are themselves located throughout the world, including China, India, Russia, Brazil, and Dubai.<sup>12</sup>

Morgan recognizes that U.S. lawyers are affected by international developments in lawyer regulation, including international trade agreements like the General Agreement on Trade and Services (GATS), which aims to break down barriers to the smooth flow of goods and services (including legal services) between the world’s nations.<sup>13</sup> Among the other important developments Morgan cites are the recent reforms in lawyer regulation in the U.K. and Australia,<sup>14</sup> which permit not only nonlawyer participation in the management and ownership of law firms, but also the creation of entirely new business structures in which lawyers will collaborate with nonlawyers to provide a wide range of legal and nonlegal services.<sup>15</sup>

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10. See *id.* at 73–77. Here, Morgan discusses such seminal cases as *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (striking down minimum legal fees), *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (striking down prohibition of lawyer advertising of fixed fees for routine legal services), and *Brotherhood of Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964) (striking down ethical standards that prevented a union from establishing a list of lawyers whom the union had found to be competent in handling job-related deaths or injuries).

11. MORGAN, THE VANISHING AMERICAN LAWYER, *supra* note 2, at 87.

12. *Id.* at 85.

13. *Id.* at 89.

14. See *supra* note 7 and accompanying text.

15. For a description of these changes, see generally Judith Maute, *Global Continental Shifts to a New Governance Paradigm in Lawyer Regulation and Consumer Protection: Riding the Wave*, reprinted in *ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGINING THE PROFESSION* 11 (Francesca Bartlett et al. eds., 2011). See also Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice*, 2009 J. PROF. LAW 13, 15 (2009); Steve Mark et al., *Preserving the Ethics and Integrity of the Legal Profession in an Evolving Market: A Comparative Regulatory Response* (n.d.) (unpublished manuscript), available at

At first glance, these international developments appear to constitute unequivocal support for Morgan's view that, if law ever was a profession in the United States and elsewhere, globalization inevitably will hasten its demise, forcing lawyers into head-to-head competition with nonlawyers and encouraging them to combine with nonlawyers to form business structures just like those encountered elsewhere in the commercial world. But closer inspection may yield a different interpretation of these events. In my view, what globalization suggests is that U.S. lawyers should adopt a more nuanced view of the perennial debate, shedding light not only on what it means for an occupation to constitute a profession, but also on the question whether professions and professionalization might ultimately provide a net benefit to society and are therefore worth preserving, although in a somewhat different form than they have previously taken.

In Part I of this Article, I address the implications of globalization for answering the question of whether law *is* indeed a profession. In Part II, I address the implications of globalization for the entirely separate question of whether law *should* be a profession—that is, whether lawyer organizations and individual lawyers ought to continue to work toward realizing a vision of professionalism that can benefit the public in the United States and elsewhere. I then conclude by discussing the continuing relevance of Julius Henry Cohen's views for the ongoing debate over the future of law as a profession.

### I. *IS* LAW A PROFESSION?

For all their differences, Cohen and Morgan appear to share a vision of what it means to claim that law is a profession rather than a business. Both focus almost exclusively on the assumption that an occupation is a profession only if its members actually serve the public interest by placing the needs of the community above their own selfish interests.<sup>16</sup> Cohen then presents some evidence that lawyers in fact have acted in the public interest—for example, by

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[http://www.lawlink.nsw.gov.au/lawlink/olsc/ll\\_olsc.nsf/vwFiles/UK\\_paper.doc/%24file/UK\\_paper.doc](http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/vwFiles/UK_paper.doc/%24file/UK_paper.doc).

16. See COHEN, *supra* note 1, at 31–32 (citing Woodrow Wilson's 1910 address to the American Bar Association, in which Wilson appealed to individual lawyers not to be "sucked into the channels of business" but rather to become "statesmen," that is, "lawyers who can think in the terms of society itself"); MORGAN, THE VANISHING AMERICAN LAWYER, *supra* note 2, at 50–51 (citing ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953)).

volunteering their services to “purg[e] the profession of those who fall below the standards of the profession itself.”<sup>17</sup>

Morgan, however, argues that law is *not* a profession, citing a lack of evidence that lawyers are or ever were “a separate and superior class.”<sup>18</sup> Indeed, Morgan also argues that lawyers themselves made no such claim until the ABA and others orchestrated a professionalism project, that is, a campaign designed to “achieve political influence and economic advancement,”<sup>19</sup> including a monopoly over the right to render legal services and control over the admission and regulation of lawyers. In his view, although some individual lawyers have the personal characteristics typically associated with the professions (dedication to the public good and willingness to sacrifice one’s individual well-being for higher goals), the organized bar has abused whatever privileges it has obtained, citing “lawyers’ tendency to use that supposed authority to pursue their own political agendas and self-interest over the interests of justice and the public.”<sup>20</sup>

For sociologists like Eliot Freidson, however, what primarily distinguishes a profession from other occupations is the fact that the members of a profession “control their own work.”<sup>21</sup> In connection with his service as a member of the ABA Commission on Professionalism, Freidson defined the legal profession as “[a]n occupation whose members have special privileges, such as exclusive

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17. COHEN, *supra* note 1, at 22. Cohen then poses the following rhetorical question to business men: “How many of your craft give ten per cent per annum of their time to eliminating from their industry or trade the black sheep that are freely roaming about?” *Id.*

18. MORGAN, *THE VANISHING AMERICAN LAWYER*, *supra* note 2, at 40.

19. *Id.* at 55.

20. Morgan, *Calling Law a Profession*, *supra* note 2, at 7; *see also* Morgan, *Abandoning Organized Professionalism*, *supra* note 2, at 950 (to warrant privilege of self-regulation, the occupation must present evidence that the “occupation as a corporate body is able to control itself without abusing its privilege” because of the ‘good character’ as well as the competence of its members” (quoting Eliot Freidson, *Professionalism as Model and Ideology*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 220 (Robert L. Nelson et al. eds., 1992))). For Morgan’s view that the praiseworthy traits identified under the rubric of professionalism ought to be viewed as the “personal traits” of individual professionals, not of groups, *see, e.g.*, MORGAN, *THE VANISHING LAWYER*, *supra* note 2, at 21.

21. Eliot Freidson, *Professionalism as Model and Ideology*, in *LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 215 (Robert L. Nelson et al. eds., 1992).

licensing, that are justified by [certain] assumptions.”<sup>22</sup> These assumptions concern: 1) the existence of specialized knowledge; 2) the inability of clients to evaluate the quality of service, resulting in the need for clients to trust the practitioner; 3) the willingness of practitioners to subordinate their own self-interest to the public good (thereby justifying the client’s trust in the practitioner); and 4) the self-regulating nature of the occupation, which is accomplished when the occupation organizes itself “in such a way as to assure the public . . . that its members are competent, do not violate their client’s trust, and transcend their own self-interest.”<sup>23</sup> Of course, these assumptions may turn out to be ill-founded, in which case we would expect the occupation to lose its “special privileges.”<sup>24</sup> Nevertheless, so long as the public permits the occupation to be self-regulating, the occupation would appear, as a matter of descriptive reality, to constitute a “profession.”<sup>25</sup> Morgan apparently concedes this point;<sup>26</sup> nevertheless, he continues to insist that lawyers’ conduct—particularly, the conduct of lawyer organizations—has never justified

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

23. *Id.*

24. *See, e.g.*, Nancy J. Moore, *Professionalism Reconsidered*, 12 AM. B. FOUND. RES. J. 773, 784 (1987).

25. *Cf.* John M. Conley, *Is Law Really a Profession? Review of The Vanishing American Lawyer*, by Thomas D. Morgan, 24 GEO. J. LEGAL ETHICS 1183, 1187 (2011) (arguing that law is a profession “in one—perhaps the most—important sense” because lawyers “have a monopoly over the provision of many kinds of services” and “[s]tate governments have also delegated to us the privilege of self-regulation”).

26. *See* MORGAN, *THE VANISHING AMERICAN LAWYER*, *supra* note 2, at 66 (“No one can deny, for example, that the right to practice law is extensively regulated. One must take special training, undergo special testing and be specially licensed to practice law, and the license may be taken away if the lawyer fails to adhere to a jurisdiction’s rules of professional conduct. The rules to which lawyers are held, in turn, have been proposed by bar associations composed of lawyers and imposed by judges who are themselves lawyers. The sociologist’s definition of a profession would seem to be confirmed.” (footnotes omitted)). Elsewhere, however, Morgan rejects the “contract” version of professionalism, insisting that there never was a “social contract” and that for the “hypothetical contract” to have credibility “there must be a sense that people at the time of the alleged contract would have seen it as desirable.” *Id.* at 25. I argue, to the contrary, that the fact that public representatives have permitted the organized bar to play a significant role in the regulation of lawyers is evidence supporting the “hypothetical contract” model for professional self-regulation. I have endorsed this model elsewhere. *See, e.g.*, Moore, *supra* note 24. For more recent support of the hypothetical contract model, see Neil Hamilton, *The Profession and Professionalism Are Dead? A Review of Thomas Morgan, The Vanishing American Lawyer*, 20 PROF. LAW. 14 (2010).

their historical ability to play a significant role in their own regulation. In that sense, he argues, law has never been a true profession.

With respect to the “self-regulating” character of the legal profession, Morgan believes that lawyer organizations vastly overstate their authority to make their own rules. For example, in a recent article, Morgan described the ABA’s recent effort to defeat a “collaborative law” initiative proposed by the National Commission on Uniform State Laws.<sup>27</sup> As part of that effort, the ABA argued that “acknowledging the power of states to adopt new legal processes and lawyer regulation [through legislation] was contrary to the professional ideal that lawyers regulate themselves.”<sup>28</sup> Morgan rejects this claim as “preposterous,”<sup>29</sup> and he is right to do so. Consider, for example, the extent to which some U.S. state legislatures actively regulate various aspects of lawyer conduct,<sup>30</sup> as well as the recent proliferation of lawyer regulations that the executive and legislative branches of the federal government have promulgated.<sup>31</sup> But Morgan may not be correct in his conclusion that such partial incursions on the autonomy of lawyers necessarily prove that law is no longer a profession (if it ever was).<sup>32</sup>

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27. Morgan, *Calling Law a Profession*, *supra* note 2, at 11–13.

28. *Id.* at 12 (adding that “[n]ever 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”).

29. *Id.* at 13.

30. In California, for example, the state legislature is a co-regulator of the legal profession, along with the California Supreme Court. *See* CAL. BUS. & PROF. CODE div. 3, arts. 5, 6 (West 2003) (Attorneys); CAL. RULES OF PROF’L CONDUCT R. 1-100 (2013). In some other jurisdictions, courts are the primary regulators, but they permit a wide range of legislative regulation that does not directly conflict with the state court’s authority to regulate. *See, e.g.*, *Crowe v. Tull*, 126 P.3d 196 (Colo. 2006) (upholding use of state consumer protection law to sue lawyers for false advertising); *Newton v. Cox*, 878 S.W.2d 105 (Tenn. 1994) (upholding legislation limiting attorney’s fees in medical malpractice cases).

31. *See, e.g.*, John Leubsdorf, *Legal Ethics Falls Apart*, 55 BUFF. L. REV. 959 (2009); Schneyer, *supra* note 15.

32. Morgan is also aware, as others have frequently noted, that lawyers and lawyer organizations have never been truly self-regulating in the United States because it is courts (and not lawyer organizations) that adopt and enforce rules of professional conduct. *See* MORGAN, *THE VANISHING AMERICAN LAWYER*, *supra* note 2, at 66 & n.168. Nevertheless, he observes, as others have, that “[t]he rules to which lawyers are held . . . have been proposed by bar associations composed of lawyers and imposed by judges who are themselves lawyers.” *Id.* at 66; *see also* Schneyer, *supra* note 15, at 14 (describing the “self-regulatory” nature of U.S. regulatory traditions as “still the most comprehensive feature of our regulatory framework”).



What do globalization and the recent developments in lawyer regulation in the U.K. and Australia contribute to the question of whether law is or can remain a self-regulatory profession in any meaningful sense of the term? Consider the fact that, even prior to recent reforms, the authority to regulate lawyers in both the U.K. and Australia was located in the legislative branch of government, not the courts, as it is in most U.S. states.<sup>33</sup> Nevertheless, the legislatures in those countries had historically delegated the regulation of lawyers directly to the relevant professional bodies.<sup>34</sup> In this respect, lawyers in both the U.K. and Australia were more self-regulating than U.S. lawyers, who are regulated primarily by the judicial branch of state government, with courts providing a not insignificant check on the ability of bar associations to write their own rules and discipline their own members.<sup>35</sup> As a result of the recent reforms, however, these same legislatures intervened to override particular professional rules, that is, rules that restricted the ability of lawyers to collaborate with nonlawyers in the provision of legal or multidisciplinary services.<sup>36</sup> In addition, the legislatures created independent, external agencies that will now play a significant role in the regulation of lawyers, including oversight of the lawyer disciplinary process and primary responsibility for consumer complaints seeking redress from legal professionals.<sup>37</sup> Moreover, in the U.K., that agency, the Legal Services Board, will have a chairperson and a majority of its members who are

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33. See, e.g., Schneyer, *supra* note 15, at 14 ("Like the state supreme courts in the U.S., the legislatures in [the U.K. and Australia] traditionally delegated a substantial regulatory role to the organized bar.").

34. See, e.g., Maute, *supra* note 15, at 14 (describing 1993 report on the disciplinary process as administered by the professional bodies in New South Wales, Australia); *id.* at 19 (describing a thirty-year effort by U.K. government to pressure legal professional bodies to improve the quality of self-regulation, including a 1990 act creating a legal Services Ombudsman to oversee complaint handling by the same bodies).

35. See, e.g., Nancy J. Moore, "In the Interests of Justice": *Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775, 1788-89 (2002) (arguing that "many state courts have done quite well in carrying out their responsibility to promulgate state ethics codes with provisions that reflect not merely the bar's desires and wishes, but also the public interest"); Fred Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009).

36. See SRA CODE OF CONDUCT R. 8 (2007) (U.K.) (prohibition against fee-sharing with nonlawyers); *id.* R. 12 (prohibition against practicing in partnership with nonlawyer); *id.* R. 14 (prohibition against practicing in corporate body with nonlawyer director, member or shareholder).

37. Maute, *supra* note 15, at 14-16 (Australia); *id.* at 19 (U.K.).

laypersons—that is, individuals who are not authorized to engage in activities reserved to legal professionals.<sup>38</sup>

Nevertheless, despite these radical incursions on lawyer self-regulation, the relevant lawyer organizations in the U.K. and Australia have not become mere trade associations, as “deprofessionalization”<sup>39</sup> would appear to dictate; rather, they have become “co-regulators,”<sup>40</sup> along with the legislatively established external agencies. In the U.K., the Law Society created the Solicitors Regulatory Authority (SRA) as a regulatory entity independent from the Law Society, which remains as the representative association of solicitors.<sup>41</sup> The SRA will have primary authority as a “frontline” regulator<sup>42</sup> for “‘regulatory arrangements’ concerning rules of conduct, discipline, education, licensure, indemnification and compensation for redress or misconduct,”<sup>43</sup> although the legislation itself dictates the regulatory objectives that the SRA must promote and establishes an independent Office of Legal Complaints (OLC) to investigate and resolve all complaints seeking redress from solicitors and other legal service providers.<sup>44</sup> In Australia, state legislation in New South Wales, Queensland and Victoria also established “co-regulatory systems in which an independent Legal Services Commissioner (LSC [or OLSC]) oversees enforcement activities, which may be delegated to the relevant professional bodies.”<sup>45</sup>

What about the new business structures in which lawyers will share ownership and management with nonlawyers? In the U.K., the recent legislation established both Legal Disciplinary Practices (LDP), in which approved nonlawyers may participate so long as they do not own or control more than twenty-five percent of the practice,

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38. *Id.*

39. See Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 LAW & SOC'Y REV. 713, 715 & n.3 (1999) (distinguishing between the use of the term “postprofessionalism” to mean deprofessionalization and to mean changes resulting in “a wholesale reshaping of this ‘turn-of-the-millennium institution’”).

40. See Schneyer, *supra* note 15, at 27 (describing U.K. and New South Wales reforms as providing for “co-regulation”); Maute, *supra* note 15, at 13 (noting that both the U.K. and Australia have adopted a “co-regulatory model”).

41. See Schneyer, *supra* note 15, at 26 & n.48 (describing the perceived conflict between the Law Society’s representative and regulatory authority, resulting in the requirement of the Legal Services Act of 2007 that each professional body to delegate its regulatory authority to an independent organization).

42. See Schneyer, *supra* note 15, at 27.

43. Maute, *supra* note 15, at 26.

44. *Id.* at 25–26.

45. *Id.* at 14.

and Alternative Business Structures (ABS), including multidisciplinary practices and external ownership of legal businesses (both private and public), in which the participation of approved nonlawyers is not limited to any fixed percentage.<sup>46</sup> Any firm that intends to employ a nonlawyer as a manager of an LDP or as an owner or manager of an ABS must apply to the SRA for approval of that individual as “fit and proper to assume that role.”<sup>47</sup> Lawyers in both LDPs and ABSs remain subject to the regulatory authority of the SRA, including discipline for violating the SRA-promulgated rules of professional practice.<sup>48</sup> Indeed, in LDPs, all employees are regulated by the SRA; thus even nonlawyers are subject to all the rules and regulations that are applicable to lawyers.<sup>49</sup> An ABS must have at least one manager who is authorized to provide the legal services offered by the ABS and must appoint a Head of Legal Practice (HOLP), who is a lawyer responsible for ensuring compliance with the ABS’s license and for reporting to the licensing authority any failure to comply with the terms of the license.<sup>50</sup>

In New South Wales, recent legislation approved multidisciplinary practices (MDPs) and incorporated legal practices (ILPs), including publicly listed practices.<sup>51</sup> Solicitor members of both MDPs and ILPs continue to be governed by the same rules as other solicitors; moreover, upon incorporation, a legal practice must appoint at least one legal practitioner director, who is generally responsible for the management of any legal services provided.<sup>52</sup> In addition to fulfilling his or her own professional obligations, the legal practitioner director must “implement and maintain ‘appropriate management systems’ to enable the provision of legal services in accordance with the professional obligations of solicitors and the other obligations imposed under [the 2004 legislation],”<sup>53</sup> including the responsibility to

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46. Mark et al., *supra* note 15, at 27–30.

47. *Id.* at 33.

48. *See, e.g.*, Schneyer, *supra* note 15, at 27 (describing the Law Society, acting through the SRA, as one of several frontline regulators for each class of licensed lawyers, with “responsibility for the day-to-day processing of complaints that allege serious professional misconduct and for prosecuting disciplinary cases before a specialized tribunal”).

49. Mark et al., *supra* note 15, at 29.

50. *Id.* at 32.

51. *Id.* at 3.

52. *Id.* at 5–6.

53. *Id.* at 22. With respect to publicly listed legal practices, the OLSC has encouraged firms

report to the Law Society of New South Wales any misconduct of a solicitor employed by the practice. The purpose of such requirements is “to ensure that the ethical and professional duties of solicitor members of MDPs and corporations cannot be disturbed by the requirements of other members.”<sup>54</sup>

As described above, the recent legislation in the U.K. and Australia clearly contemplates that lawyer organizations will continue to play a significant role in regulating their own conduct. Indeed, implementation of the legislation in both situations suggests an even stronger role not only for individual lawyers (through their lawyer organizations), but also for law firms. Both the SRA in the U.K. and the OLSC in New South Wales have announced the intended implementation of “proactive, firm-based regulation”<sup>55</sup> in which firms are required to adopt an “ethical infrastructure,” that is, “formal and informal management policies, procedures and controls, work-team cultures, and habits of interaction . . . that support and encourage ethical behavior.”<sup>56</sup> As Ted Schneyer has observed, the type of firm-based regulation now being developed outside the United States, particularly in New South Wales, contemplates the regulator as more of a “*consultant* than an enforcer.”<sup>57</sup> Indeed, Schneyer concludes that “the emphasis on firm *self*-assessment and the concept of ‘working toward compliance’ suggests that the program is truly collaborative,”<sup>58</sup> thereby reflecting a continuing desire on the part of the public representatives in those countries that lawyers remain significantly independent and self-regulatory, in the manner of true professionals.

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to preserve the ethics of legal practice by explicitly stating in the prospectus, constituent documents and shareholder agreements that

- the primary duty of the legal practice is to the court
- the secondary duty is to the client;
- the third duty is to the shareholder; and
- that where there is a clash between legal profession regulation and the Corporations Act, the legal profession regulation will prevail.

*Id.* at 6–7 (emphasis omitted).

54. *Id.* at 21.

55. Schneyer, *supra* note 15, at 30.

56. Schneyer, *supra* note 15, at 30–31 & n.63 (quoting STEVE MARK, THE FUTURE IS HERE: GLOBALIZATION AND THE REGULATION OF THE LEGAL PROFESSION, VIEWS FROM AN AUSTRALIAN REGULATOR (2009)). Unlike the legislation in New South Wales, the U.K. legislation itself mandated that approved regulators such as the SRA develop a system of firm-based regulation. *Id.* at 33 n.77.

57. *Id.* at 34.

58. *Id.*

## II. *SHOULD LAW BE A PROFESSION?*

When professionalism is defined in accordance with what Morgan describes as the sometimes “preposterous”<sup>59</sup> claims of “professionalism rhetoric”<sup>60</sup>—that is, claims that characterize lawyers as a “separate and superior class”<sup>61</sup>—it is difficult to disagree with Morgan that “professionalism in the sense developed by the ABA during the twentieth century is—and should be seen as—dead.”<sup>62</sup> Although Morgan often focuses on this particular aspect of professionalism, he does not limit his disparagement of the concept to such excesses of rhetorical zeal. Rather, he challenges the wisdom of continuing to recognize lawyers as a separate occupational group and permitting them—through “strong central organizations”—to play a significant role in regulating the practice of law.<sup>63</sup> He also objects to “restrictive rules of practice,” which he views as integral to the professionalism project.<sup>64</sup>

As we have seen, legislatures in both the U.K. and Australia have continued to delegate significant self-regulatory functions to lawyer organizations; moreover, they continue to reserve certain (but not all) lawyer functions to particular segments of the legal profession.<sup>65</sup> They may have done so out of political necessity,<sup>66</sup> but it is just as likely that they did so because they believed that the public benefits when lawyers continue to be recognized and treated like independent and self-regulatory professionals. Cohen clearly believed that law should be a profession,<sup>67</sup> whereas Morgan is adamant that the concept of law as a profession and lawyers as professionals is good neither for

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59. See *supra* note 29 and accompanying text.

60. MORGAN, THE VANISHING AMERICAN LAWYER, *supra* note 2, at 20; see also Morgan, *Calling Law a Profession*, *supra* note 2, at 5.

61. See *supra* note 18 and accompanying text.

62. MORGAN, THE VANISHING AMERICAN LAWYER, *supra* note 2, at 68–69.

63. Morgan, *Toward Abandoning Organized Professionalism*, *supra* note 2, at 976.

64. *Id.*

65. See, e.g., Maute, *supra* note 15, at 26 (describing how recent legislation in the UK “identifies types of reserved legal activities”); *Legal Profession Act 2004* (NSW) s 14 (Austl.) (outlining New South Wales’s general prohibition on unauthorized legal practice, with exceptions).

66. See Maute, *supra* note 15, at 19–28 (providing a detailed history of events leading up to the adoption of the Legal Services Act of 2007, including changes to the proposed legislation that were made after members of the Law Society, judges, and European bar associations objected to earlier proposals that would have limited lawyer organizations to a lesser role than was finally adopted).

67. See *supra* note 3 and accompanying text.

lawyers (at this time in history)<sup>68</sup> nor for the public at large.<sup>69</sup> Whether it is good for lawyers is perhaps beside the point. The more important question is whether the public would be better off jettisoning any meaningful concept of professionalism and thereby regulating lawyers in the same manner as other, non-professional occupations.

Morgan's brief against the public benefits of lawyer self-regulation is twofold. First, he argues that, historically, lawyers have not, in fact, organized and regulated themselves in a manner that promotes the public interest; as a result, there is no reason to assume they will do so in the future.<sup>70</sup> Second, he argues that, given the changes that have produced globalization (including the internationalization of commerce and the revolution in information technology), the assumptions underlying the hypothetical contract that Freidson and others have described are simply irrelevant "to the reality facing lawyers today,"<sup>71</sup> therefore, the public has no good reason to continue allowing lawyers to play a significant role in regulating their own conduct.

I agree that any claim that the history of lawyers represents "a long tradition of professional training, self-regulation, and dedication to public service" is patently false.<sup>72</sup> I also agree that the early campaigners for educational requirements, proficiency examinations, licensing, and prohibitions against unauthorized practice were motivated at least in part by a desire for both higher social standing and state protection from market competition.<sup>73</sup> I disagree, however, that the motivations of these early professionalism campaigners—either individually or in organizations like the ABA—were *merely* protectionist or that professionalism did not, at least sometimes,

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68. See, e.g., MORGAN, *THE VANISHING AMERICAN LAWYER*, *supra* note 2, at 128 ("Lawyers who do not take the new, inescapable realities seriously are going to find themselves irrelevant to their clients, and thus irrelevant to those who matter to them most.").

69. See, e.g., *id.* at 129 ("[T]oday's purchasers of legal services require their services to be delivered promptly, at high quality, and potentially anywhere in the world. [L]awyers and law firms must have the imagination and flexibility to deliver legal services of the kind and in the manner clients are likely to require.").

70. See, e.g., Morgan, *Toward Abandoning Organized Professionalism*, *supra* note 2, at 973 (referring to Deborah Rhode's call for a "culture of commitment," Morgan argues that "[i]t is possible that this kind of appeal to professional tradition will have more effect in the future than it has had in the past, but it is hard to see why").

71. MORGAN, *THE VANISHING AMERICAN LAWYER*, *supra* note 2, at 24.

72. Moore, *supra* note 24, at 782.

73. *Id.* at 781–82.

perform a genuine public service at the same time that it enhanced the standing and remuneration of the lawyers themselves.<sup>74</sup>

Both lawyer disciplinary codes and lawyer disciplinary enforcement have evolved over time, and these changes have often benefited the public. For example, lawyer disciplinary codes began as simple statements of ideals that were not meant to be the equivalent of statutes or regulations, or even the specific basis for lawyer discipline.<sup>75</sup> Through the adoption of the ABA Model Code and then the ABA Model Rules (including the ongoing process of amendment), lawyer ethics codes have become highly specific<sup>76</sup> and currently are used not only as a basis for disciplinary action, but also as a standard of conduct underlying such remedies as lawyer disqualification, malpractice, and breach of fiduciary duty lawsuits.<sup>77</sup> As for disciplinary enforcement, the formation of bar associations and the establishment of peer discipline replaced an earlier system of ad hoc exercises of power by individual judges; most recently, courts have reasserted their authority over lawyer regulation, creating court-supervised agencies that employ staff lawyers to conduct both investigations and prosecutions and that are beginning to include an aspect of public oversight in their disciplinary processes.<sup>78</sup> Many of these beneficial changes in both the content of lawyer codes and the “professionalization” of the disciplinary process came at the behest of members of the organized bar, including the ABA Standing Committee on Professional Discipline.<sup>79</sup>

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74. *Id.* at 782–83 (citing more balanced accounts of the professional tradition and modern scholars who “increasingly note both the benefits and the detriments of the professionalization process”). In the end, it does not necessarily matter what the motivations of professionalism proponents are if the net results of their efforts are favorable for the public. Nevertheless, all things being equal, actors who are genuinely motivated to serve the public interest are probably more likely to succeed in their efforts than those who are not. In my work with the organized profession, including my service as Chief Reporter for the ABA Commission on the Evaluation of the Model Rules of Professional Conduct, I have observed many lawyers and lawyer groups who, I am convinced, are sincerely motivated by the desire to promote the public good.

75. See Nancy J. Moore, *The Usefulness of Ethical Codes*, 1989 ANN. SURV. AM. L. 7, 15.

76. See *id.*

77. See Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541, 543 (1997).

78. See Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1, 6 (2010).

79. See *id.*

I am not so naïve as to ignore or even downplay the serious detriments of having lawyers participate actively in their own regulation. Undoubtedly, many of the rules adopted by or at the behest of lawyers have *not* been in the public interest, including those restrictions that the U.S. Supreme Court subsequently struck down<sup>80</sup> and some that remain (at least theoretically) intact, such as unduly broad prohibitions against the unauthorized practice of law by nonlawyers.<sup>81</sup> Nevertheless, before condemning in toto the process of professional self-regulation, I would want to know what alternatives were realistically available at any given point in time. For example, if lawyer organizations had not promulgated rules of professional conduct, what rules would govern lawyers' use of client funds?<sup>82</sup> Would the application of general fiduciary principles be as beneficial to clients as the strict rules adopted in lawyer ethics codes?<sup>83</sup> How many clients would have benefited from the application of such general fiduciary principles, given that they are usually applied only in cases in which it is worthwhile for clients to file lawsuits against

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80. See, e.g., MORGAN, *THE VANISHING AMERICAN LAWYER*, *supra* note 2, at 73–79.

81. See generally Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981). As Morgan observes it is becoming increasingly difficult for the legal profession to prevent nonlawyers from competing with lawyers in the provision of legal services. See MORGAN, *THE VANISHING AMERICAN LAWYER*, *supra* note 2, at 131 (American lawyers representing individual clients “are likely to find themselves increasingly in competition with banks, insurance companies, investment advisors, and other organizations that employ legally trained, salaried personnel”).

82. Model Rule 1.15 requires lawyers to strictly segregate client funds from the lawyers' own funds and to maintain and preserve complete records of client trust accounts. MODEL RULES OF PROF'L CONDUCT R. 1.15(a) (1983). This rule is often interpreted to be a rule of strict liability, which means that lawyers may be disciplined for trust violations even when such violations are unintentional, or even non-negligent. See Moore, *supra* note 78, at 35–37. Sanctions for violations of this rule are among the harshest sanctions imposed: many courts begin with a presumption that absent compelling extenuating circumstances an intentional misuse of client funds—including intentional “borrowing” with an intent to repay—is grounds for disbarment. See, e.g., *In re Addams*, 579 A.2d 190 (D.C. 1990); see also *In re Wilson*, 409 A.2d 1153 (N.J. 1979) (stating that intentional misappropriation will, without exception, result in disbarment). In addition, many states have adopted a system of randomly selecting lawyers to produce their books and records to be audited. See, e.g., *In re Doughty*, 832 A.2d 724 (Del. 2003) (disciplining a lawyer after a random audit revealed frequently trust fund accounting violations).

83. For example, under common law principles, agents are generally subject to duties to safeguard a principal's funds and other property that are similar to those set forth in lawyer conduct rules; unlike the lawyer conduct rules, however, an agent's common law duties are subject to modification upon the agreement of the principal. See RESTATEMENT (THIRD) OF AGENCY § 8.12 (2006).



their lawyers?<sup>84</sup> Would state legislatures have established client protection funds for the reimbursement of clients whose funds were misused?<sup>85</sup> Would they have developed the system of random audits of client trust funds that exists in many states today?<sup>86</sup> What about rules concerning client confidentiality and conflicts of interest?<sup>87</sup> Is it clear that leaving the development of such rules to common law or to state legislation would have resulted in better protection for clients and the public?<sup>88</sup>

It is not my purpose to prove or even to argue that the benefits of self-regulation outweigh the costs. Instead, my position is that such a question can be answered only after carefully identifying and examining, for each historical period (including the present and the future), not only the specific costs and benefits of self-regulation, but also the advantages and disadvantages of alternative forms of governance.<sup>89</sup> In this respect, I find it noteworthy that elsewhere in the world public representatives have studied the effects of globalization and decided that, despite some glaring failures of self-regulation (particularly in the U.K., where the Law Society

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84. Breach of a fiduciary duty may entitle a principal to obtain monetary damages and non-monetary relief such as an injunction, but such remedies inevitably require the filing of a lawsuit to obtain enforcement. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d (2006) (discussing remedies available for breach of agent's duty to principal). Moreover, in the absence of random audits, a lawyer's breach may remain undetected, such as when a lawyer does not remit to the client all of the funds to which the client is entitled upon settlement of a lawsuit or otherwise.

85. *See generally* ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 45 (2002) (discussing client protection funds collected from lawyers through either mandatory court assessment or through voluntary contributions and disbursed to clients suffering financial loss as a result of a lawyer's dishonesty when there is no alternative source for reimbursement).

86. *See supra* note 82.

87. *See, e.g.*, Moore, "In the Interests of Justice", *supra* note 35, at 1789 (crediting state bar associations for "initiating or supporting potentially far-reaching proposals, such as those requiring lawyers to put fee agreements or conflicts waivers in writing").

88. *See, e.g., id.* at 1786-91 (arguing against suggestions that the public would be better served by direct public regulation of lawyers through legislatures or administrative agencies, using state court regulation of confidentiality as evidence "that the present system is working pretty well, at least with respect to the promulgation of ethics codes").

89. *See generally id.* (arguing in favor of continuing self-regulation by lawyers, including discussion of disadvantages of regulation by state legislatures or administrative agencies because of possibility of "capture" by lawyer organizations and the lack of public understanding of legal institutions and their role in "areas of particular sensitivity" such as the representation of criminal defendants and the allocation of decision-making authority).

repeatedly ignored warnings concerning grave deficiencies in processing client complaints),<sup>90</sup> professional organizations can and should continue to play an important (although not exclusive) role in regulating legal practice.

Indeed, recent developments in the U.K. and in Australia might be interpreted to reflect the following judgment: although lawyers cannot necessarily be trusted to implement, on their own initiative, appropriate rules governing restrictions on the various forms of legal practice, including the structure of law firms and the role of nonlawyer owners and managers (in both law firms and alternative business structures), lawyers nevertheless may play a useful role in developing beneficial standards for other aspects of legal practice, including rules governing such important issues as conflicts of interest, confidentiality, and the protection of client funds. They may also play a beneficial role in the disciplinary process, whether by acting as frontline regulators (as in the U.K. and in Australia) or by continuing to note deficiencies in the current procedures and to advocate for useful reforms<sup>91</sup> (as in the United States, where court agencies are typically the frontline regulators in the disciplinary process)<sup>92</sup>. Using lawyers and lawyer organizations as co-regulators, rather than as sole regulators (as they had previously been in the U.K. and Australia), may be the right way forward, rather than insisting, as Morgan appears to do, that lawyer organizations play no role in regulating lawyers' conduct. In other words, rather than look to *deprofessionalization*, what lawyers and others ought to do is to work toward a form of *reprofessionalization*, in which the contract between society and the profession is modified to take into account the "need for systems of regulation that are themselves fit for the new moral and political economy."<sup>93</sup>

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90. See, e.g., Maute, *supra* note 15, at 20–24.

91. For example, it was the ABA that, based on developments in other countries, recommended the creation of client protection funds in 1959. See ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT, *supra* note 85.

92. See Mary Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 921–33 (1994) (describing the development of disciplinary procedures from the use of volunteer lawyers to the hiring of professional legal staff under court supervision).

93. Julian Webb, *The Dynamics of Professionalism: The Moral Economy of English Legal Practice—and Some Lessons for New Zealand?*, 16 WAIKATO L. REV. 21, 37 (2008) (noting, in connection with developments preceding the adoption of the Legal Services Act of 2007, that the debate had moved "beyond a crude deregulation agenda" toward the establishment of regulations designed to be "efficient, systematic, transparent and accountable"). Other commentators have characterized the current period as one involving "postprofessionalism" as opposed to

Morgan is perhaps most persuasive when he argues that the current developments underlying globalization have created a reality in which the assumptions underlying the current hypothetical contract between law and society no longer hold true, making it unlikely that even a more limited form of professionalism will result in a net benefit to the public. For example, he argues that a growing proportion of the bar is representing business entities rather than individuals and that business clients—particularly those with in-house counsel—are increasingly sophisticated, thereby making it likely that the typical client is now in a good position to evaluate and direct its lawyers.<sup>94</sup> Similarly, he argues that advances in information technology, coupled with the rising disaggregation and commodification of legal services, make it possible for persons who are trained in law (but who are not lawyers) to master the discrete knowledge required for any particular legal task,<sup>95</sup> thereby undermining the sociologist's understanding that the practice of law necessarily requires "substantial intellectual training and the use of complex judgments."<sup>96</sup> Indeed Morgan concludes that, given the increasing specialization by lawyers, there is no longer a "common body of knowledge" that lawyers "bring to bear on a similar range of problems;" as a result, there is no reason to even attempt to inculcate a "common professional identity" among law-trained persons.<sup>97</sup>

In the long run, Morgan's assessment of the implications of globalization for the future practice of law may prove to be correct.

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"deprofessionalization." See, e.g., Kritzer, *supra* note 39, at 721 (describing postprofessionalism as taking into account "changing patterns of political influence, rationalization of knowledge, and the growth of technology as a tool of accessing this knowledge"); see also Andy Boon et al., *Postmodern Professions? The Fragmentation of Legal Education and the Legal Profession*, 32 J.L. SOC'Y 473, 487 (2005) ("Some may argue that we are seeing the decline of professionalism; others may suggest that it is less drastic and can be interpreted as the modernization of professionalism, in a 'third way' sense. Whichever assessment is correct, our conceptions of professionalism are changing."). To me, the term "postprofessionalism" does not adequately convey the extent to which the organized profession continues to play a significant and meaningful role in the regulation of lawyers in U.K. and Australia. The term "reprofessionalization" is designed to suggest a reformulation of the manner and terms on which the organized profession plays a role in its own self-governance, but I am not especially attached to this particular formulation.

94. MORGAN, *THE VANISHING AMERICAN LAWYER*, *supra* note 2, at 25, 110–23.

95. *Id.* at 91–98.

96. *Id.* at 22–23 n.12 (quoting sociologist Eliot Freidson's definition of a profession in connection with his work as a member of the ABA Commission on Professionalism).

97. *Id.* at 129.

Indeed, some commentators have already questioned whether lawyer organizations in the U.K. can continue to play a meaningful role in lawyer regulation, given both the proliferation of licensed legal practitioners other than solicitors<sup>98</sup> and the fragmentation of lawyers that has resulted from increased specialization.<sup>99</sup> The question, however, is not whether Morgan will ultimately be proved right, but rather whether lawyers and lawyer organizations should work to prove him wrong, that is, whether there is at least some reason to believe that reprofessionalism, along the lines suggested by the current reforms in the U.K. and Australia,<sup>100</sup> can work for the benefit of the public in the United States and elsewhere.

In my opinion, there are several reasons to be optimistic in assessing the outlook for the legal profession. First, aside from overly restrictive regulations concerning the structure of law practice, the current rules of professional conduct, particularly those concerning such important issues such as conflicts of interest, confidentiality and the protection of client funds, are generally beneficial and in accordance with the public interest.<sup>101</sup> Indeed, except for concerns about lack of uniformity as a result of state court regulation,<sup>102</sup> it is unlikely that either state or federal legislation would produce a better alternative.<sup>103</sup> Second, lawyers and lawyer organizations have been

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98. See, e.g., Boon et al., *supra* note 93, at 490 (questioning future role of Law Society “[i]f lawyers will be only one component in a portfolio of practitioners delivering legal services”); Maute, *supra* note 15, at 28 (noting the uncertainty concerning the future roles of the Law Society and Bar Council, given that membership is not voluntary and other entities represent the interests of other legal professionals).

99. See, e.g., Webb, *supra* note 93, at 36 (raising questions concerning the “capacity of a single regulatory body to maintain . . . its legitimacy, and its capacity to regulate . . . [with] a single professional code”).

100. I do not purport to address the difficulty of importing the changes in the U.K. and Australia to the United States or other countries, given the different manner in which the profession historically has been regulated in different parts of the world. For a discussion of the manner in which similar reforms might be adopted in the United States, see generally Schneyer, *supra* note 15; Maute, *supra* note 15.

101. See *supra* notes 82–86 and accompanying text (protection of client funds); *supra* notes 87–88 and accompanying text (confidentiality). For my assessment of the lawyer rules on conflicts of interest, see Moore, *supra* note 77.

102. See, e.g., Maute, *supra* note 15, at 29–33 (discussing problems arising as a result of “[b]alkanized state-based regulation”).

103. Elsewhere, in a co-authored article, I suggested “that it may be time for Congress to impose national standards in selective areas, such as conflict of interest rules for lawyers engaged in multistate or multinational practice.” Janine Griffiths-Baker & Nancy J. Moore, *Regulating Conflicts of Interest in Global Law Firms: Peace in Our Time?*, 80 *FORDHAM L. REV.* 2541, 2560 (2012).

largely or at least partially responsible for changes in other aspects of lawyer regulation that likewise benefit the public, such as improvements in funding for disciplinary enforcement and the use of full-time disciplinary counsel,<sup>104</sup> as well as the growing emphasis on probation and diversionary programs that take single instances of minor neglect or incompetence and handle them administratively in a manner designed to protect the public by educating and assisting lawyers to develop better practice standards.<sup>105</sup> Finally, it may happen infrequently in the United States, but there are times when an independent legal profession does serve as an important “bulwark against arbitrary government authority”<sup>106</sup> or other oppression,<sup>107</sup> as recently happened when the legal community vehemently objected to a top Pentagon official’s call for a corporate boycott of law firms representing Guantanamo prisoners,<sup>108</sup> resulting in the resignation of that official.<sup>109</sup>

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104. See, e.g., Mary Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 921–27 (1994) (discussing reforms in disciplinary procedures, including providing adequate funding for professional staff to process complaints under the centralized control of the state’s highest court, as recommended in 1970 by the ABA’s Special Committee on Evaluation of Disciplinary Enforcement, chaired by former U.S. Supreme Court Justice Tom Clark (known as the Clark Committee)).

105. See, e.g., ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G) (1986) (providing that “[s]ingle instances of minor neglect or minor incompetence . . . should be removed from the disciplinary system and handled administratively”). For a discussion of the “consumer-oriented” approach to lawyer regulation, focused on client protection, see Leslie Levin, *The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 25–28 (1998). For an analysis of the results of the diversion program adopted in one state, see Diane Ellis, *Is Diversion a Viable Alternative to Traditional Discipline? An Analysis of the First Ten Years in Arizona*, 14 PROF. LAW. 1, 13 (2002) (suggesting that lawyers completing the diversion program were statistically less likely to become the subject of serious disciplinary complaints in the future).

106. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1275 (1995) (describing but then rejecting this argument in favor of an independent bar as “overstated”).

107. See Webb, *supra* note 93, at 44 (“Legal practice continues to play a significant role in state formation and reconstruction; it is deeply [implicated] in the creation of global capital, and, on a good day, the profession still has the power and the privilege to act as a bulwark against oppression of many kinds.”).

108. *Top Pentagon Official Calls for Boycott of Law Firms Representing Guantanamo Prisoners*, DEMOCRACYNOW! (Jan. 17, 2007), [http://www.democracynow.org/2007/1/17/top\\_pentagon\\_official\\_calls\\_for\\_boycott](http://www.democracynow.org/2007/1/17/top_pentagon_official_calls_for_boycott).

109. *Guantanamo Remarks Cost Policy Chief His Job*, CNN (Feb. 2, 2007, 7:24 PM), <http://edition.cnn.com/2007/US/02/02/gitmo.resignation/>.

The Pentagon call for a boycott illustrates not only the continuing need for a legal profession that (among other public benefits) will occasionally stand up against oppression, but also the ongoing capacity for different segments of the profession to unite and express a common understanding of their professional identity. Many of the lawyers representing the Guantanamo prisoners are partners in the largest and most prestigious corporate law firms—firms that have committed substantial resources to provide pro bono representation in an obviously unpopular cause.<sup>110</sup> Thus, despite Morgan’s belief that in today’s legal environment corporate lawyers have little in common with criminal defense and legal services lawyers, the Guantanamo episode proves, to the contrary, that broadly educated lawyers—despite their location in different “hemispheres” of the bar<sup>111</sup>—continue to have much in common with each other.<sup>112</sup> This is a hopeful sign that lawyers do indeed maintain a common identity, something that is essential to the success of any professional project.

### CONCLUSION

The title of this conference is “The Law: Business or Profession? The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century.” I have said very little about Cohen’s views, focusing most of my remarks in an attempt to refute Morgan’s thesis that law is not and should not be considered a profession in any meaningful sense of that term. I would like to conclude, however, by addressing the continuing relevance, if any, of the views expressed in Cohen’s 1916 landmark book *The Law: Business or Profession?* for the debate going forward.

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110. See *supra* note 108 (including remarks of Stephen Oleskey, a litigation and real estate partner in WilmerHale, who was representing pro bono six Guantanamo detainees).

111. MORGAN, THE VANISHING AMERICAN LAWYER, *supra* note 2, at 111 (citing John Heniz & Edward Laumann’s study of the Chicago bar, which divided lawyers into the two separate “hemispheres” consisting of the corporate sector and the individual/small business sector).

112. Despite Morgan’s previously stated belief that, given lawyer specialization, there is no longer a “common body of knowledge” that lawyers “bring to bear on a similar range of problems,” and thus no room for inculcating a “common professional identity” among lawyers, see *supra* note 97 and accompanying text, recent studies demonstrate that there is more mobility for lawyers now than in the past and that new lawyers frequently move between different practice settings. See RONIT DINOVIETZ ET AL., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 54–55, 65–66 (2009).

According to Sam Levine, one of the organizers of this conference and an expert on Julius Henry Cohen, "Cohen's book represents the first full-length consideration of the business/profession dichotomy, an issue that attracted considerable attention around the turn of the century and has remained a perennial concern for legal scholars and practitioners alike."<sup>113</sup> Cohen took the business/profession dichotomy seriously, arguing that the increasing commercialization of law practice threatened to reduce law from a profession to a business. In other words, Cohen apparently believed that if law is treated like a business or "trade," then it cannot also be considered a profession.<sup>114</sup> To some extent, these views are anachronistic. Here I agree with Morgan that "the law/business labels are not alternatives"<sup>115</sup> and that the adoption of more bureaucratic, more efficient business methods as part of modern conceptions of law office management are by no means antithetical to the public interest. Indeed, the use of such methods—including at least some lawyer advertising—may be essential to increasing the availability of affordable legal services.<sup>116</sup>

Although some of Cohen's views may no longer be useful in assessing the status of the legal profession, the views of his that I find most relevant today are those that emphasize the potential public benefits of lawyers considering themselves to be professionals, with duties that differ significantly from those of business persons generally. With respect to self-regulation, I have already noted Cohen's observation that many lawyers volunteered their time each year to "purging the profession of those who fall below the standards of the profession itself."<sup>117</sup> These volunteers were extremely important, as it was not until the 1970s that many states began to hire

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113. Email from Samuel J. Levine to Nancy J. Moore (May 30, 2011) (on file with author).

114. For example, Cohen wrote about "men who combine business skill with the professional training of the law." COHEN, *supra* note 1, at 211. He suggested that readers "[w]alk into a modern law office and you will think you are in the executive office of a large business institution." *Id.* Cohen's negative attitude toward such lawyers is obvious in his conclusion that "[l]iving in such an atmosphere, with his office window closer to the Stock Exchange than it is to Trinity Church . . . the modern New York lawyer catches the atmosphere he breathes and fast loses the larger perspective of his profession." *Id.* at 212.

115. MORGAN, THE VANISHING AMERICAN LAWYER, *supra* note 2, at 101.

116. *See, e.g.*, ABA COMM'N ON ADVER., LAWYER ADVERTISING AT THE CROSSROADS: PROFESSIONAL POLICY CONSIDERATIONS 91–97 (1995) (finding that lawyer advertising enables low-income families to find legal representation); *id.* at 130 (finding that lawyer advertising may decrease price of legal services and increase access to lawyers).

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

staff lawyers to investigate and present disciplinary matters.<sup>118</sup> Moreover, in addition to making the disciplinary system work as well as it did, lawyer volunteers formed bar associations and staffed bar association committees that not only drafted canons of ethics, but also provided advice to lawyers concerned with the application of these canons to situations arising in their daily practice of law.<sup>119</sup> And while some of the activities of bar associations may have been motivated by or at least been entirely consistent with the interests of the lawyers themselves (such as efforts to enjoin the unauthorized practice of law), a substantial portion of the work of bar associations has been directed toward distinguishing lawyers from others based on the existence of heightened duties towards clients and others, particularly courts.<sup>120</sup>

Sam Levine characterizes “Cohen’s dedication to his unique form of professionalism” as based on “his insistence on independent thinking, intellectual honesty, and analytical rigor.”<sup>121</sup> As a result, it is not surprising that Cohen himself readily acknowledged that some of the very reforms he championed in the public interest were being championed by other lawyers in a self-interested effort to control the level of competition—a motivation he unconditionally rejected.<sup>122</sup> Apparently, Cohen had a far more nuanced view of the business/professionalism debate than many others of his time or even of ours. And, as I have tried to demonstrate in this Article, what globalization and the recent reforms in the U.K. and Australia suggest to me is that U.S. lawyers should themselves adopt a more nuanced view of the business/professionalism debate—one that focuses very carefully on the question whether continuing to permit lawyers to play a significant role in their own regulation is likely to provide a net benefit to society, despite the costs that Morgan and others have so correctly identified.

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118. *See supra* note 78 and accompanying text.

119. *See* COHEN, *supra* note 1, at xvi–xvii, 157–71.

120. *See id.* at 321–32 (Appendix A: Code of Ethics Adopted by the American Bar Association, including Canons 1, 3, 9, 15, 17, 18, 21–23, 25, 30–31).

121. Levine, *supra* note 1, at 20.

122. COHEN, *supra* note 1, at 258.



