

Nothing New Under the Sun: How the Legal Profession's Twenty-First Century Challenges Resemble Those of the Turn of the Twentieth Century

Rutgers University has made this article freely available. Please share how this access benefits you.
Your story matters. [\[https://rucore.libraries.rutgers.edu/rutgers-lib/57800/story/\]](https://rucore.libraries.rutgers.edu/rutgers-lib/57800/story/)

This work is the VERSION OF RECORD (VoR)

This is the fixed version of an article made available by an organization that acts as a publisher by formally and exclusively declaring the article "published". If it is an "early release" article (formally identified as being published even before the compilation of a volume issue and assignment of associated metadata), it is citable via some permanent identifier(s), and final copy-editing, proof corrections, layout, and typesetting have been applied.

Citation to Publisher Pearce, Russell G. & Jenoff, Pam. (2013). Nothing New Under the Sun: How the Legal Profession's
Version: Twenty-First Century Challenges Resemble Those of the Turn of the Twentieth Century. *Fordham Urban Law Journal* 40(1), 481-502. <https://ir.lawnet.fordham.edu/ulj/vol40/iss1/12>.

Citation to this Version: Pearce, Russell G. & Jenoff, Pam. (2013). Nothing New Under the Sun: How the Legal Profession's
Twenty-First Century Challenges Resemble Those of the Turn of the Twentieth Century. *Fordham Urban Law Journal* 40(1), 481-502. Retrieved from <http://dx.doi.org/doi:10.7282/T37S7S7H>.

Terms of Use: Copyright for scholarly resources published in RUcore is retained by the copyright holder. By virtue of its appearance in this open access medium, you are free to use this resource, with proper attribution, in educational and other non-commercial settings. Other uses, such as reproduction or republication, may require the permission of the copyright holder.

Article begins on next page

March 2016

Nothing New Under the Sun: How the Legal Profession's Twenty-First Century Challenges Resemble Those of the Turn of the Twentieth Century


Russell G. Pearce

Fordham University School of Law

Pam Jenoff

Rutgers University School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Law and Philosophy Commons](#), [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Russell G. Pearce and Pam Jenoff, *Nothing New Under the Sun: How the Legal Profession's Twenty-First Century Challenges Resemble Those of the Turn of the Twentieth Century*, 40 Fordham Urb. L.J. 481 (2012).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol40/iss1/12>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

**NOTHING NEW UNDER THE SUN[†]: HOW THE
LEGAL PROFESSION’S TWENTY-FIRST
CENTURY CHALLENGES RESEMBLE THOSE
OF THE TURN OF THE TWENTIETH
CENTURY**

Russell G. Pearce & Pam Jenoff***

Introduction	482
I. The Imperiled Business-Profession Dichotomy.....	483
II. Lawyers as Servants of the Public Good	488
III. Lawyer Control of the Market for Legal Services	491
IV. Reforming Legal Education	496
V. Managing a Dramatic Increase in the Diversity of the Legal Profession	498
Conclusion.....	501

The past is a foreign country: they do things differently there.
– L.P. Hartley¹

Those who cannot remember the past are condemned to repeat it.
– George Santayana²

† *Kohelet*, in TANAKH: THE HOLY SCRIPTURE 1442 (Jewish Publication Society ed., 1985) (“nothing new Beneath the Sun”).

* Edward & Marilyn Bellet Professor of Legal Ethics, Morality, and Religion at Fordham University School of Law. We are indebted to the outstanding work of research assistants Ross Miller and Ademisope Mojiminiyi.

** Clinical Associate Professor at Rutgers University School of Law–Camden. We would like to thank the participants in the Symposium on The Law: Business or Profession? The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century, Fordham Law School on April 23–24, 2012 for their helpful comments.

1. L.P. HARTLEY, THE GO-BETWEEN 17 (The N.Y. Review of Books 2002) (1953).

2. GEORGE SANTAYANA, THE LIFE OF REASON, REASON IN COMMON SENSE 82 (Prometheus Books 1998) (1905).

INTRODUCTION

These divergent observations reflect the legal profession's uneasy relationship with its past. Central to the work of lawyers is precedent, a form of history. But when it comes to our own history, lawyers, judges, and legal scholars tend to have short memories and to engage in what Martin Flaherty describes as "history lite."³ For example, many bar leaders today refer to the "good old days" when lawyers did not advertise.⁴ In fact, John Marshall, while sitting as Chief Justice, provided a testimonial for a lawyer advertisement, attesting to his "entire confidence" in, and the "ability, integrity, and promptitude" of, attorney David Hoffman, who ironically happened to be the author of the first American code of legal ethics.⁵

In this Essay, we take a small step toward bringing history to bear on debates regarding the legal profession today. Rather than seeking normative lessons, this Essay seeks simply to offer context for contemporary debates. In particular, we explore five crises⁶ that faced the legal profession at the turn of the twentieth century and that face the legal profession once again today. These are: (1) the debate regarding the vitality of the Business-Profession dichotomy; (2) the question of whether lawyers are responsible for encouraging business clients to pursue the public good; (3) the issue of whether lawyers should have control of the market for legal services; (4) the need to reform legal education; and (5) the management of a dramatic increase in diversity in the legal profession.

To examine these five crises, we draw upon Julius Henry Cohen's classic work, *The Law: Business or Profession?*⁷ published in 1916.

3. Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 549 (1995). Flaherty criticizes lawyers, judges, and legal scholars for: failing to reach "both primary and secondary source material generally recognized by historians as central to a given question[.] . . . mak[ing] a fetish of one or two famous primary sources, . . . and [failing] to view events, ideas, and controversies in a larger context." *Id.* at 553-54.

4. See, e.g., Derry Rundlett, *Laywer Advertising!* 17 ME. B. J. 86 (2002).

5. See DAILY NAT'L INTELLIGENCER, July 11, 1835, at 4, col. 2. Of course, other lawyer luminaries, such as Abraham Lincoln, also advertised their legal services. See William E. Hornsby, Jr., *Ad Rules Infinitum: The Need for Alternatives to State-Based Ethics Governing Legal Services Marketing*, 36 U. RICH. L. REV. 49, 53 (2002).

6. In using the term "five crises," we parallel the title, although not the exact subject matter of, the classic piece by Rayman Solomon. Rayman Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 144 (Robert L. Nelson et al. eds., 1992).

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

2012] *NOTHING NEW UNDER THE SUN* 483

Cohen offers what is probably the most extensive contemporary account of the challenges facing the turn of the twentieth century legal profession. Cohen accordingly provides a historical context for the turn of the twentieth century crises that in turn illuminates the similar crises that the bar faces at the turn of the twenty-first century. By comparing Cohen's world to our own, we hope to show how the legal profession's responses to these dilemmas have varied over time and to suggest that today's status quo is neither traditional nor inevitable. Indeed, challenging the legal profession's assumptions regarding its traditions is a necessary step in refining both the descriptions of, and prescriptions for, the current crises.

I. THE IMPERILED BUSINESS-PROFESSION DICHOTOMY

The American legal profession's narrative of its function in society has traditionally relied on the distinction between a business and a profession.⁸ In this narrative, business people seek primarily to maximize their self-interest while professionals seek primarily to maximize the public good.⁹ But in a legal system where lawyers make a living—and sometimes a very good one—from their work, many have questioned whether the Business-Profession dichotomy exists.¹⁰ Julius Henry Cohen illustrates how the legal profession successfully defended the dichotomy from a major challenge in the late nineteenth and early twentieth centuries. Today, the legal profession again faces a similar challenge, although Cohen's prescriptions may no longer offer an effective strategy.

The Business-Profession dichotomy finds its origin in Republicanism, the dominant ideological ideal in early American history, under which the state's role is to foster its people's pursuit of the common good.¹¹ Lawyers were identified as an American governing class uniquely capable of identifying and furthering the public good.¹² This role did not conflict with their business success. Indeed, leaders of the bar believed that the "invisible hand of

8. See 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, 1237–40 (1995).

9. See *id.*

10. See *id.* at 1247–48.

11. See Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381 (2001).

12. See *id.* at 383.

reputation” ensured that the most virtuous lawyers would also be the most financially successful.¹³

In the late nineteenth century, the Business-Profession dichotomy came under attack. Robert Gordon describes “the extraordinary outpouring of rhetoric, from all the public pulpits of the ideal—bar association and law school commencement addresses, memorial speeches on colleagues, articles, and books—on the theme of the profession’s ‘decline from a profession to a business.’”¹⁴ The reasons for this shift are numerous. One of the most notable was the significant growth in the number and size of large law firms and the ways they began to operate more like business enterprises (i.e., the “Cravath Model”).¹⁵ Additionally, elite lawyers began to look and act like business people, forsaking the role of the disinterested professional and taking on work for corporations that more closely resembled business functions.¹⁶ Beyond the elite firms, the plaintiffs’ bar was burgeoning, representing plaintiffs for contingency fees.¹⁷ The influx of immigrant practitioners with their perceived absence of American values gave further rise to concerns.¹⁸

The bar’s response to this crisis was the move toward professionalism, retaining the ideology of lawyers as the governing class while creating mechanisms to ensure that lawyers worked in the service of the public good.¹⁹ Essentially the legal profession sought to redefine commitment to public good and replace virtue with training and experience.²⁰ While the bar retained a fundamental faith in the invisible hand of reputation, the perceived breaches of the Business-Profession dichotomy led bar leaders to believe that an additional safeguard was necessary. Under the rubric of professionalism, they created bar associations to control admission to the profession,

13. *See id.* at 390 (citing GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 75 (Fred B. Rothman & Co. 1993) (5th ed. 1884)).

14. Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870-1910*, in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 61 (Gerard W. Gawalt ed., 1984).

15. Elite law firms moved to adopt the “Cravath system” of specialization and practice, developed by Cravath, Swaine & Moore, in creating the framework for the modern large law firm. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 23–34 (1976).

16. *See* Pearce, *supra* note 11, at 397.

17. *See id.* at 396.

18. *See id.*

19. *See id.* at 395.

20. *See id.* at 407.

2012] *NOTHING NEW UNDER THE SUN* 485

promulgate ethics rules, and discipline offenders.²¹ It was to be a “self-policing organized bar under the leadership of its ‘Best Men.’”²²

Julius Henry Cohen was an exemplar of the professionalism movement. Quoting President Taft, Cohen explained that in the early twentieth century “the profession of the law is more or less on trial.”²³ He recommended as well the observations of Woodrow Wilson that “[l]awyers are not now regarded as the mediators of progress.”²⁴ Cohen himself observed that “in being drawn into modern business instead of standing outside of it, in becoming identified with particular interests instead of holding aloof and impartially advising all interests, the lawyer has lost his old function, is looked askance at in politics, must disavow special engagements if he would have his counsel heeded in matters of common concern.”²⁵ He noted that lawyers “had failed to train ourselves properly for our true place in society; we were deficient in methods of moral training for our acolytes; we could have made a mighty contribution to the new philosophy [of social service] which is to be American democracy’s great gift to the world, and we did not.”²⁶ Cohen opposed practices that brought the law closer to business, such as advertising, fee splitting, and practice of law by corporations and advertising,²⁷ while extolling rigorous standards for admission to the bar, strict codes of conduct, and vigilant discipline.²⁸ Like other bar leaders of his day, he had faith that these changes would serve to guarantee that lawyers would once again serve the public good.

Professionalism, with its belief that the organized bar would lead and police a profession committed to the public good, remained the dominant ideology for most of the twentieth century. However, in

21. *See id.* at 399.

22. *Id.* (quoting John A. Matzko, “The Best Men of the Bar”: The Founding of the American Bar Association, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 75 (Gerard W. Gawalt ed., 1984)) (describing the elite founders of the American Bar Association).

23. COHEN, *supra* note 7, at 32 (quoting WILLIAM HOWARD TAFT, *ETHICS IN SERVICE* (1915)).

24. *Id.* at 31.

25. *Id.* at 31–32.

26. *Id.* at 146.

27. *Id.* at 173–308.

28. *See id.* In Cohen’s view, once solicitation was permitted, the answer to the question posed by his book’s title, *THE LAW: BUSINESS OR PROFESSION?*, was “business.” Solicitation made law a trade, not a profession, and turned one’s clients into customers. Not only did solicitation lead to the lawyer’s dependence upon the client, it turned the lawyer from the ideals of disinterested service to the pursuit of wealth. *See id.* at 1–23; 147–72.

the past several decades, bar leaders have echoed the language of their predecessors in the late nineteenth century as they have once again come to recognize a threat to the Business-Profession dichotomy.²⁹ Indeed, in 1984, Chief Justice Warren Burger “complained that the ‘standards and traditions of the bar’ that had ‘restrain[ed] members of the profession from practices and customs common and acceptable in the rough-and tumble of the marketplace’ were no longer achieving this goal.”³⁰ Unlike the turn of the twentieth century crisis of professionalism, the current crisis has continued into the new century without any sign of resolution. The bar’s efforts to address it through Commissions, CLE, or Pro Bono have had little or no effect.³¹ While the late nineteenth century bar introduced a new paradigm—professionalism—the bar today seeks to protect that paradigm without any significant change in understanding of the work of lawyers.

In explaining the failure of today’s efforts, commentators have argued that the modern transformation of lawyer’s business practices is different than that faced at the turn of the twentieth century. They suggest that firms have become so large and geographically diverse

29. Ben Bratman, *Toward a Deeper Understanding of Professionalism: Learning to Write and Writing to Learn During the First Two Weeks of Law School*, 32 J. LEG. PROF. 115, 119 n.26 (2008) (“During this time period, clients began shopping around for legal services instead of remaining loyal to a single firm. This gave birth to a competitive legal marketplace and a commercial culture in influential large law firms.”).

30. Pearce, *supra* note 8, at 1255 (alteration in original) (quoting Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 63). Ironically, this pronouncement followed the U.S. Supreme Court’s striking down of a number of state regulations that governed commercial activity by lawyers, enabling firms to act more like businesses. See Bratman, *supra* note 29, at 117 (citing the A.B.A. COMMISSION ON PROFESSIONALISM, “IN THE SPIRIT OF PUBLIC SERVICE”: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM, 112 F.R.D. 243, 251 (1986) [hereinafter BLUEPRINT] (Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association)); see also *id.* at 255–57 (discussing *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (prohibition of lawyer advertising violates First Amendment), *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) (fee schedule violates antitrust laws), and *Bhd. of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964) (ban on claim solicitation violates First Amendment)).

31. See Susan Daicoff, *Articles Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1347 (1997); Russell G. Pearce et al., *Revitalizing the Lawyer-Poet: What Lawyers Can Learn from Rock and Roll*, 14 WIDENER L.J. 907, 912–13 (2005); Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 FORDHAM L. REV. 1543, 1556 (2002).

that it is hard to maintain a centralized firm culture.³² Additionally, for much of the twentieth century, joining a firm was intended to be a lifetime commitment.³³ Making partner was the ultimate goal, and leaving to go in-house a distant second choice for those who were unsuccessful.³⁴ Today, attorneys now move between firms and take clients with them.³⁵ Firms have similarly reduced their commitment to the long-term, asking partners who do not continue to bring in business to retire or leave.³⁶ Additionally, firms are gradually recognizing that the one-size-fits-all approach career track is no longer working and are developing new models that reflect a variety of lifestyle choices and personal priorities, including staff associates on the non-partnership track, as well as part time and flexible work arrangements.³⁷ At least one commentator has even suggested that the law firm of the future may not even use the partnership model.³⁸

Similarly, commentators argue that a fundamental transformation has occurred in the relationships between firms and clients. Once a long-term relationship in which a single firm might provide a wide range of legal services, companies now obtain legal services from a wide variety of firms for different matters.³⁹ They require firms to compete for business by periodically holding requests for proposals and determining approved provider lists based on criteria such as

32. See Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S. C. L. REV. 905, 919 (1994). Another related factor that has encouraged this transformation is the rise of e-discovery and the need to process large amount of documents and data. Firms often outsource or subcontract this work to lower-paid attorneys. See *id.* at 922.

33. See *id.* at 919.

34. See Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 959 (2005); Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201, 1202 (1997).

35. See, e.g., Geoffrey Miller, *From Club to Market: The Evolving Role of Business Lawyers*, 74 FORDHAM L. REV. 1105, 1116–19 (2005).

36. See Vanessa O'Connell, *Objection! Older Lawyers Resist Forced Retirement*, WALL ST. J., July 22, 2010, <http://online.wsj.com/article/SB10001424052748704229004575371420213478264.html> (noting that firms “worry, as competition in the industry intensifies, that older partners may be less productive than younger ones”).

37. See Catherine Rampell, *At Well-Paying Firms, a Low Paid Corner*, N.Y. TIMES, May 23, 2011, <http://www.nytimes.com/2011/05/24/business/24lawyers.html>.

38. Molly McDonough, *Will the Law Firm of the Future of Have Partners?*, A.B.A. J. (Sept. 25, 2012), http://www.abajournal.com/news/article/law_firm_of_the_future.

39. See MARY ANN GLENDON, *A NATION UNDER LAWYERS* 25 (1994); MILTON C. REGAN, JR. & JEFFREY D. BAUMAN, *LEGAL ETHICS AND CORPORATE PRACTICE* 256 (2005).

cost, past performance, and diversity.⁴⁰ Moreover, firms were once able to bill clients quarterly or annually for services.⁴¹ Now companies require detailed monthly billing of time in increments as small as tenths of an hour,⁴² so that they may closely scrutinize the bills and negotiate where they consider the costs to be too high.

Faced with the crisis of the Business-Profession dichotomy in redux, the question is: where do we go today? A return to the professionalism model of Cohen's time seems unlikely to work at this time. It is harder to sell to lawyers the idea that they are not business people, and harder to ignore that lawyers *are* business people. One possible solution emerges from Cohen's suggestion that businesses could satisfy the ethical standards of a profession⁴³—the construction of a professional commitment to public service that does not require a Business-Profession dichotomy.⁴⁴

II. LAWYERS AS SERVANTS OF THE PUBLIC GOOD

Another parallel between Cohen's time and ours is the question of whether lawyers can and should help ensure that business clients comply with the law and promote the public good. Bar leaders in Cohen's era believed that lawyers served as guardians of the law and the public good. This belief, fundamental to professionalism, required lawyers to promote the public responsibility of business. When they failed to do so, and they helped those clients "override or circumvent the law"⁴⁵ and were "sucked into the channels of business . . . and bec[a]me part of the mercantile structure rather than part of the general social structure of our commonwealths."⁴⁶ A lawyer who

40. See, e.g., Carmelite M. Bertaut & Cheryl A. LeeVan, *How Responding to RFPs Fits Within Your Business Development Plan*, WOMAN ADVOCATE, Fall 2008, available at http://apps.americanbar.org/litigation/litigationnews/practice_areas/womanadvocate-RFP-respond.html.

41. See Niki Kuckes, *The Hours: The Short, Unhappy History of How Lawyers Bill Their Clients*, LEGAL AFFAIRS, Sept./Oct. 2002, at 40, available at http://legalaffairs.org/issues/September-October-2002/review_kuckes_sepoct2002.msp.

42. *Id.*

43. See COHEN, *supra* note 7, at 36–43, 318–19.

44. See, e.g., THOMAS MORGAN, THE VANISHING AMERICAN LAWYER 217–33 (2010); Judith A. McMorrow, *In Defense of the Business of Law*, 40 FORDHAM URB. L.J. 459 (2012); Pearce, *supra* note 8, at 1229; Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 44–48 (2011).

45. COHEN, *supra* note 7, at 150 (quoting Theodore Roosevelt).

46. *Id.* at 32 (quoting Woodrow Wilson).

2012] *NOTHING NEW UNDER THE SUN* 489

performed the function of a hired gun had “become narrowed to a technical function”⁴⁷ and “prostitute[d] his profession for personal gain.”⁴⁸ Such lawyers “have been focused on business success, on the chase for the dollar, where success seems to have justified some departure from the strict propriety or fairness, so long as it has not brought on criminal prosecution or public denunciation.”⁴⁹

Like his fellow bar leaders, Cohen believed that professionalism would succeed in restoring lawyers to their role as gatekeepers. He observed that “[t]he Bar is now awake. It has found and will find more ways of making its ideals real.”⁵⁰ Cohen’s contemporary, ABA President Henry St. George Tucker, described those ideals: “the profession of the law [has] more potential for good than any other profession, excepting the Christian ministry, and in some respects more powerful for good than even that high profession.”⁵¹ In advising and representing clients, therefore, an ethical lawyer “inculcat[ed] a respect for law and order in and for its own sake” and brought “about better and more just relations between man and man.”⁵² Cohen explained that such a lawyer would find success because “business men will realize that in the modern lawyer the quality of trustworthiness is as important as the quality of celerity, and that loyalty to the ideals of the profession is quite as much a requisite as business acumen.”⁵³

Rayman Solomon has documented how these understandings remained dominant until the 1960s⁵⁴ and Erwin Smigel’s famous research on the Wall Street lawyer similarly confirmed that in the 1960s, elite lawyers viewed themselves primarily as guardians of the law and the public good.⁵⁵

But by the 1980s the dominant approach had become that of a hired gun, exactly the perspective that Cohen and his fellow bar leaders criticized, and that understanding of the lawyer’s role has remained dominant today.⁵⁶ This conception asks lawyers to act as

47. *Id.*

48. *Id.* at 311.

49. *Id.* at 40 (quoting Taft).

50. *Id.* at 156.

51. *Id.* at 151.

52. *Id.* at 318.

53. *Id.* at 313.

54. *See* Solomon, *supra* note 6.

55. *See* ERWIN SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* (1969).

56. *See* Pearce, *supra* note 11, at 2, 14–15.

“extreme partisans,” to forego moral accountability for their actions and those of the lawyer within the bounds of the law, and to abstain from advising lawyers on the moral implications of their actions.⁵⁷

Like Cohen and his contemporaries, David Luban, Deborah Rhode, and William Simon, together with quite a few other commentators, have sought to revive an understanding that the lawyer must factor the public good into her counseling.⁵⁸ At the same time, in the corporate context, commentators have urged lawyers to serve as gatekeepers,⁵⁹ and the federal government has imposed new duties under the Sarbanes-Oxley regulation.⁶⁰

Nonetheless, efforts to persuade lawyers to embrace the public good in their work have proved unavailing.⁶¹ Has the understanding of lawyers as hired guns become so dominant among the elite that it has become impossible to restore the vision of lawyers as wise counselors to business? In Cohen’s time, the legal profession was able to argue that lawyers retained that capacity as it offered a new paradigm of professionalism that would address the failures of the older republican paradigm. Is Cohen’s lesson for us that today only a new paradigm that explains and addresses the failures of the professionalism paradigm⁶² can provide lawyers with a coherent and persuasive understanding of their role in encouraging clients and society to be mindful of the public good? One possibility, similar to

57. See Russell G. Pearce & Eli Wald, *The Obligation to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 28 (2011); see also Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669, 672–75 (1978); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988). But see William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

58. See DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); RUSSELL G. PEARCE ET AL., *PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH* ch. 9 (2011); Deborah L. Rhode, *Moral Character As A Professional Credential*, 94 YALE L.J. 491 (1985); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

59. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215 (1983); John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5 (1985); John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

60. See 17 C.F.R. § 205.3 (2012).

61. Eli Wald & Russell G Pearce, *Beyond Cardboard Lawyers in Legal Ethics*, 15 LEGAL ETHICS 147, 154 (2012).

62. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 153 (2d ed. 1970); see Pearce, *supra* note 8, at 1236.

2012] *NOTHING NEW UNDER THE SUN* 491

our analysis of the fate of the Business-Profession dichotomy, is that a new paradigm will redefine business and the public good to explain how they coexist.⁶³

III. LAWYER CONTROL OF THE MARKET FOR LEGAL SERVICES

Cohen chronicles how the American legal profession gained control of the market for legal services in the late nineteenth and early twentieth centuries.⁶⁴ Prior to this period, entry into the legal profession was relatively easy and nonlawyers were free to provide transactional legal services.⁶⁵ Entry to the profession was largely unregulated and state requirements minimal.⁶⁶ Indeed, Cohen notes that horse doctoring and indeed even horse shoeing in Minnesota were subject to more stringent entry requirements than the practice of law.⁶⁷

The largely unregulated market for legal services offered a significant advantage. It resulted in the provision of affordable legal services to many low- and middle-income clients. Although only lawyers could generally practice before courts, regulation of lawyers was relatively relaxed and decentralized. Cohen and other bar leaders were highly critical of the quality of services provided. Cohen describes what he considered abuses by lawyers providing services to low- and middle-income clients. He identifies a law firm for railway workers that “employs 45 salaried railroad employees as solicitors, maintains a hospital and medical staff, . . . employs lecturers, and sends out literature.”⁶⁸ He described another firm with “branch offices in 32 cities, with solicitors, in such cities as Winnipeg, Houston, New York, Los Angeles and Jacksonville.”⁶⁹ Moreover, in the nineteenth and early twentieth century, nonlawyers often provided transactional services without any regulation. Cohen quotes an advertisement by a bank⁷⁰:

63. *See supra* note 55.

64. COHEN, *supra* note 7, at 125.

65. *Id.* at 244–45, 252.

66. *Id.* at 130–31.

67. *Id.*

68. *Id.* at 183.

69. *Id.*

70. *See id.* at 244–45, 252.

.....

YOUR WILL

is the most important document you will ever sign. It should be prepared by an expert in the law of wills and administration. This may be done in our Trust Department.

CONSULTATION FREE.

.....

Cohen's solution, and that of bar leaders, was to ban these activities altogether as unauthorized practice, rather than to regulate them. Indeed, the logic of professionalism required this result. If lawyers had inaccessible expertise and commitment to the public good that contrasted with business people, only they were qualified to provide legal services.

The rhetoric of professionalism provided lawyers with a political tool for gaining control of the market for legal services.⁷¹ They succeeded in persuading legislatures to outlaw practice of law by nonlawyers, including corporations.⁷² Lawyers employed rhetoric that explained professionalism as a bargain between lawyers and society: lawyers were to be given control over delivery of legal services in exchange for commitment to use that control to promote the public good.⁷³ Thus, a system emerged by which the practice of law is closely regulated, with significant barriers to becoming a lawyer, a detailed ethical code, and a disciplinary system,⁷⁴ at the same time that unauthorized practice of law by nonlawyers became illegal.⁷⁵ As a result, nonlawyer ownership of firms and multi-disciplinary practice were prohibited in order to preserve lawyers' independence and ability to act in the public interest.⁷⁶

71. See RICHARD L. ABEL, *AMERICAN LAWYERS* (1989); Pearce, *supra* note 8.

72. See Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115 (2000); Pearce, *supra* note 11, at 1238-40.

73. Pearce, *supra* note 8, at 1238.

74. Russell Pearce & Sinna Nasser, *The Virtue of Low Barriers to Becoming a Lawyer: Promoting Democratic and Liberal Values*, INT'L J. LEGAL PROF. (forthcoming); Pearce, *supra* note 8, at 1238-40.

75. See Pearce, *supra* note 11, at 399.

76. *Id.*; see also Russell G. Pearce, *A Cautionary Tale from the Multidisciplinary Practice Debate: How the Traditionalists Lost Professionalism*, 72 TEMP. L. REV. 985, 986 (1999).

Challenges to lawyer control of the legal services market have reemerged in the late twentieth century.⁷⁷ A small but influential group of leaders of the bar, including Professor Deborah Rhode and the 1986 ABA Commission on Professionalism, sought with minimal success to expand permissible nonlawyer practice in order to make affordable services available to low- and middle-income persons.⁷⁸ In the same period, two unsuccessful efforts failed to open multidisciplinary practice.⁷⁹ But as the twenty-first century progresses, challenges to both of these approaches are only expanding with developments in technology and globalization.⁸⁰

Efforts are increasing to permit nonlawyer ownership interests in law firms. In May 2011, the law firm of Jacoby & Myers filed lawsuits challenging state laws that prohibit nonlawyer ownership of law firms, arguing that allowing small firms to raise capital would level the playing field with larger firms.⁸¹ A bill is also pending in North Carolina on nonlawyer ownership.⁸² In Australia, the firm Slater & Gordon became publicly traded in 2007.⁸³ Similarly, effective October 2011, the U.K. has permitted nonlawyers to acquire ownership interests in law firms,⁸⁴ as well as to expressly permit multidisciplinary practices, called alternative business structures.⁸⁵ Seeming to sense the shift that has made simply ignoring the issue impossible, the ABA Commission on Ethics 20/20 in August 2011 directed its reporter to prepare a proposed draft for comment of a change to the ethics rules that would allow minority nonlawyer

77. See DEBORAH L. RHODE, *ACCESS TO JUSTICE* 87–91 (2005).

78. See *id.*

79. See Pearce, *supra* note 76; Laurel S. Terry, *A Primer on MDPs: Should the "No" Rule Become a New Rule?*, 72 TEMP. L. REV. 869 (1999).

80. See Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 41–42 (2012).

81. See Mark Hamblett, *Suit Challenges N.Y. Prohibition of Non-Lawyer Firm Ownership*, N.Y. L.J., May 20, 2011, http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202494645339&Suit_Challenges_NY_Prohibition_of_NonLawyer_Firm_Ownership&slreturn=20120905165400.

82. See Daniel Fisher, *North Carolina Bill Would Let Non-Lawyers Invest in Law Firms*, FORBES (Mar. 11, 2011), <http://www.forbes.com/sites/danielfisher/2011/03/11/north-carolina-bill-would-let-non-lawyers-invest-in-law-firms/>.

83. See Milton C. Regan, Jr., *Lawyers, Symbols & Money: Outside Investment in Law Firms*, 27 PENN ST. INT'L L. REV. 407, 407 (2008).

84. See Legal Services Act, 2007, c. 29, pt. 5 (Eng. and Wales); 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).

85. See Legal Services Act, 2007, c. 29, §89, sch. 13 (Eng. and Wales).

ownership in firms.⁸⁶ Although the commission ultimately rejected any such change, its consideration of the topic has placed the issue back in contention.⁸⁷

As we move forward in considering nonlawyer ownership and practice, as well as multidisciplinary practice, Cohen's account offers a helpful framework. Then, as now, our first imperative must be to decide how best to act in the public good. With respect to the question of multidisciplinary practice, are we to provide exclusively legal services or may we join with accountants and other providers to the benefit of clients?⁸⁸ More commentators are questioning whether such a rigid divide best serves clients, or whether new models can be adopted without compromising our ethical values.⁸⁹

Similarly, policy makers need to weigh the extent to which opening the practice of law can help promote diversity and access to justice. In the United States, where racial minorities are dramatically underrepresented in the legal profession,⁹⁰ nonlawyer and multidisciplinary practice can provide more opportunities for all people to participate in the delivery of legal services. Similarly, most low- and middle-income people cannot afford needed legal services.⁹¹ Opening the market will provide more affordable services. Indeed, Cohen himself seemed to recognize that the public good of providing affordable legal services was a pragmatic concern that might sometimes trump the formal constraints of professionalism.⁹² Despite his visceral distaste for what he viewed as ethically questionable contingency fee arrangements that were so popular with the plaintiff's bar, he

86. See James Podgers, *Ethics 20/20 Commission Seeks Input on Alternative Business Structures for Law Firms*, A.B.A. J. (Apr. 5, 2011), http://www.abajournal.com/news/article/ethics_20_20_commission_seeks_input_on_alternative_business_structures_for_/.

87. See Memorandum from Jamie S. Gorelick and Michael Traynor, Co-Chairs, ABA Comm'n on Ethics 20/20, to ABA Entities, Courts, Bar Ass'ns (State, Local, Specialty & Int'l), Law Schs., & Individuals (Dec. 2, 2011), available at http://www.nysba.org/AM/Template.cfm?Section=Resources_for_Local_Bars&Template=/CM/ContentDisplay.cfm&ContentID=64300.

88. See Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193 (2010); Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-as-Business Paradigm*, 27 FLA. ST. U. L. REV. 9 (1999) [hereinafter Pearce, *Law Day 2050*]; Pearce, *supra* note 76; Terry, *supra* note 79.

89. See Pearce, *Law Day 2050*, *supra* note 88; Pearce, *supra* note 76; Terry, *supra* note 79.

90. See Pearce & Nasser, *supra* note 74.

91. See Rhode, *supra* note 77, at 3–5.

92. See COHEN, *supra* note 7, at 209.

2012] *NOTHING NEW UNDER THE SUN* 495

conceded, “[W]here the client is poor, this is perhaps the only way by which he may get adequate professional assistance.”⁹³

Second, in considering restrictions to the market for legal services, the assumptions built into these questions must also be tested. For example, since Cohen’s time, we have presumed that lawyers are uniquely situated to provide legal services. However, there is ample empirical data today that contradicts this assumption. Studies in England and Wales, for example, found that, “nonlawyers provided better legal service in civil matters such as welfare benefits, debt, housing, and employment than solo and small-firm practitioners provided.”⁹⁴ In a United States study, Herbert Kritzer compared lawyers and nonlawyers in representing clients in administrative proceedings and found that, “[f]ormal training (in the law) is less crucial than is day-to-day experience.”⁹⁵ Another study in California of “people who had obtained assistance in litigating pro se, [found that] a higher percentage of those who had obtained help from paralegals were satisfied than of those who received help from lawyers.”⁹⁶

Further, any question of how we operate must not be considered in a vacuum but in the broader societal context. Cohen, for example, places the behavior of lawyers in the context of business and examines the reality of law practice by banks and notaries.⁹⁷ Similarly, we cannot ignore the realities of Legal Zoom⁹⁸ and nonlawyers who are able to offer legal advice on the internet⁹⁹ in considering how best to regulate the delivery of legal services.

In evaluating whether and how to restrict access to the practice of law, Cohen was particularly adept at looking at various models from various states and from overseas.¹⁰⁰ His approach amply demonstrates the utility of other countries as laboratories in

93. *Id.* at 209.

94. Pearce & Nasser, *supra* note 74 (quoting CLIFFORD WINSTON ET AL., *FIRST THING WE DO, LET’S DEREGULATE ALL THE LAWYERS* 87 (2011)).

95. HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK* 76, 108, 148–49, 190–91 (1999).

96. See Carl M. Selinger, *The Retention of Limitations on the Out-of-Court Practice of Law by Independent Paralegals*, 9 *GEO. J. LEGAL ETHICS* 879, 910 (1996).

97. COHEN, *supra* note 7, at 256–63.

98. Paul F. Kirgis, *The Knowledge Guild: The Legal Profession in an Age of Technological Change*, 11 *NEV. L.J.* 184, 189, 196–98 (2010).

99. See MICHAEL LEWIS, *NEXT: THE FUTURE JUST HAPPENED* ch. 2 (2001) for the story of Marcus Arnold, a fifteen year old with no legal training who became a leading online source of legal advice.

100. See COHEN, *supra* note 7.

contemplating the future of our legal profession.¹⁰¹ But we must be careful to recognize the limitations in such comparisons. For example U.K. lawyers may operate in a different environment that might make nonlawyer ownership interests more viable there than in the United States. Similarly, we must be cautious not to overstate the effect of such overseas developments on the U.S. system. We do not yet know whether the competitive advantage U.K.-based firms obtain through new sources of capital are likely to provide them with a significant competitive advantage over U.S.-based firms. As we evaluate these new developments, we should both learn from international comparisons and remain mindful of our value commitments to the good of the public and of our legal system.

IV. REFORMING LEGAL EDUCATION

The turn of the twentieth century saw the emergence of what has become the dominant model of legal education today—three years of classroom education predominate over skills-based training or apprenticeship.¹⁰² Cohen was a proponent of this model, having expressed frustration with the traditional lack of formal requirements to practice law.¹⁰³

Today, this turn of the twentieth century model is under assault.¹⁰⁴ Critics challenge the high cost of a law school education, which leaves

101. *See id.* chs. IV–VII.

102. The premise of elite legal education was that the student could not properly learn how to be a lawyer through practice as the apprenticeship system promised. *See* SAMUEL HABER, *THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS 1750–1900*, at 221–22 (1991); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 25, 117 (1983). Indeed, in the second half of the nineteenth century and the early twentieth century, elite institutions excluded practical training from the curriculum. *See* ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA* 260, 284, 378–439 (1921). Not surprisingly, tensions arose between legal academics who preferred theoretical approaches to the study of law and practitioners who favored more vocational training. *See* REED, *supra* at 260.

103. *See* COHEN, *supra* note 7.

104. *See* David Lat, *Above the Law's Top Ten Most Popular Stories of 2011*, ABOVE THE LAW (Dec. 31, 2011), <http://abovethelaw.com/2011/12/above-the-laws-top-ten-most-popular-stories-of-2011/> (“In terms of overall topics, the most popular category page for the year was Law Schools, for the second year in a row. This shouldn’t come as a surprise, since the year was an eventful one for the legal academy. It would be fair to describe 2011 as an annus horribilis for the law school world, with various forces laying siege to the ivory tower. The attackers include not just unemployed lawyers turned scambloggers, but the mainstream media, led by

2012] *NOTHING NEW UNDER THE SUN* 497

students in debt that they may not be able to repay, limits the supply of lawyers, drives up legal fees, and makes legal services inaccessible to many low- and middle-income people.¹⁰⁵ These considerations require us to ask whether we can reform the costs of legal education within the current model or whether we need to explore alternative models.

The second major criticism of legal education today is that it does not prepare graduates for practice.¹⁰⁶ As the job market tightens, employers place a higher premium on law graduates being ready to practice law. At the same time, large law firms, the segment of the market that does not factor skills development in law school into hiring because they train the graduates themselves,¹⁰⁷ downsized or eliminated their entering classes during the economic downturn and hired lateral associations who had already gained practical training elsewhere.¹⁰⁸

All aspects of legal education are now on the table—cost, training, character formation, and the organization of law schools.¹⁰⁹ Some have suggested that the basic law degree should become an undergraduate degree.¹¹⁰ Others call for expansion of internet-based education, lower faculty salaries, less investment in scholarship, more focus on training, greater emphasis on professionalism, and

David Segal of the *New York Times*, plaintiffs' lawyers, who have already sued several law schools (and have announced plans to sue at least 15 more in 2012); and even a tenured law professor calling for reform (Paul Campos, currently in the lead for 2011 Lawyer of the Year.”).

105. See also Clifford Winston, *Are Law Schools and Bar Exams Necessary?*, N.Y. TIMES, Oct. 24, 2011, <http://www.nytimes.com/2011/10/25/opinion/are-law-schools-and-bar-exams-necessary.html>.

106. See *id.*

107. See Elise Young, *A Residency Program for Lawyers*, INSIDE HIGHER ED. (June 26, 2012), <http://www.insidehighered.com/news/2012/06/26/arizona-state-plans-create-law-firm-hire-and-train-recent-graduates> (“‘Large law firms, public agencies, and other organizations have taken a hit from the faltering economy, and many have cut programs that trained new graduates,’ [Arizona State law dean Douglas] Sylvester said, ‘[s]o what we now see is either the agencies or firms are not willing to hire untrained attorneys.’”)

108. See Altman Weil, Inc. et al., *2011 Law Firms in Transition*, ALTMAN WEIL 6 (May 2011), http://www.altmanweil.com/dir_images/upload/docs/SummaryAnalysis2011LawFirmsinTransitionSurvey.pdf (“Last year 45% of firms reduced or discontinued hiring first-year associates; this year 22% plan to do so.”).

109. See Eli Wald & Russell G. Pearce, *Making Good Lawyers*, MICH. ST. L. REV. (forthcoming 2012).

110. See John O. McGinnis & Russell D. Mangas, *First Thing We Do, Let's Kill All the Law Schools*, WALL ST. J. (Jan. 17, 2012), <http://online.wsj.com/article/SB10001424052970204632204577128443306853890.html>.

shortening law school to two years.¹¹¹ Whether law schools continue in the path set during Cohen's time or whether they chart a new course is far from certain.¹¹²

V. MANAGING A DRAMATIC INCREASE IN THE DIVERSITY OF THE LEGAL PROFESSION

Today, as at the turn of the twentieth century, the legal profession faces a challenge of diversity. In the period from the 1880s to the 1920s, the demographics of the bar changed dramatically.¹¹³ Until then, lawyers were largely White Protestant men.¹¹⁴ As large numbers of White European Catholic and Jewish immigrants poured into the United States at the turn of the twentieth century,¹¹⁵ many of them entered the bar.¹¹⁶ Facilitating their entry was the ease of becoming a lawyer—admission did not even require a high school degree in most jurisdictions until the twentieth century.¹¹⁷ Often, men from immigrant families worked as manual laborers in the day, and attended law school in the evening.¹¹⁸ To promote Americanization of the immigrants, the YMCA created a chain of law schools.¹¹⁹

The White Protestant elite of the bar often did not respond positively to this diversity.¹²⁰ Indeed, in some sense many of the entry

111. *See supra* note 105.

112. *See* Wald & Pearce, *supra* note 109.

113. *See* BURTON J. BLEDSSTEIN, *THE CULTURE OF PROFESSIONALISM* 185–86 (1976).

114. *See id.*

115. *See id.* at 185–86 (as the states removed barriers to entry into legal practice, “[t]he homogeneity of the older elite group dissolved as white, Protestant, middle-class sons from families of small businessmen, clerks, tradesmen, and artisans began entering the profession in significant numbers”).

116. *Id.*

117. *See, e.g.,* 1903 *Preliminary Examination*, PENN. BOARD L. EXAMINERS, http://www.pabarexam.org/board_information/history/prelim.htm (last visited Oct. 5, 2012) (noting that bar exam in 1903 did not require a high school diploma).

118. *See* Michael L. Rustad & Thomas H. Koenig, *A Hard Day's Night: Hierarchy, History & Happiness in Legal Education*, 58 SYRACUSE L. REV. 261, 282 (2008).

119. *See, e.g.,* Paul McBride, *Peter Roberts and the YMCA Americanization Program 1907–World War I*, 44 PENN HIST. 145, 146 (1977).

120. *See, e.g.,* Russell G. Pearce, *The Legal Profession as Blue State*, 75 FORDHAM L. REV. 1339, 1345 (2006) (“[N]otions of the superiority of whites, of Protestants, and of men . . . were widespread among bar leaders from the late nineteenth through the twentieth centuries.”); *see also* Auerbach, *supra* note 15, at 5, 25–30, 51, 100; AM. BAR ASS'N, REPORT OF THE THIRTY-FIFTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 12–16 (1912) (resolving that “it has never been contemplated that members of the colored race should become members of this Association”).

requirements imposed by the bar in the late nineteenth and early twentieth century were a hostile response to increased diversity.¹²¹ The bar's largely White Protestant leaders were nevertheless faced with the question: how could the drive toward greater uniformity of attorney standards accommodate the realities of members of the profession from ethnic and immigrant backgrounds, whose practices looked quite different from the Ivy League lawyers at "white shoe firms"?

Cohen was one of the bar leaders who offered lawyers another way to respond. Cohen, of course, was Jewish and, therefore, predisposed to constructing an understanding of a diverse legal profession that would include him, as well as Catholics and other non-Protestant Americans. Thus, as Sam Levine has noted, Cohen sought to focus on what he perceived as the legitimate needs of the profession without becoming bogged down in the racist, nativist, and anti-Semitic rhetoric that was so prevalent at the time.¹²² Rather, Cohen viewed qualifications for admission as a means for individuals to have the ability to advance based on abilities and hard work, regardless of background.¹²³ He noted that "the passage through the universities and the law schools of poor men's sons shows that these obstacles have been overcome in our day as they were overcome in the past by men of real merit."¹²⁴ He concludes that law as a profession is embedded in virtually every culture and that an attorney's moral obligation derived from personal character and not status.¹²⁵ It took the leadership of the American bar many years to adopt Cohen's perspective. The American Bar Association, for example, did not accept African-American members until after World War II.¹²⁶

The modern legal profession also faces a diversity challenge. Following the 1960s, the doors of the legal profession began to open to significant numbers of African Americans, Latinos, Asian

121. See Auerbach, *supra* note 15, at 50 (suggesting that "[t]he ethical crusade that produced the Canons concealed class and ethnic hostility" toward Jewish and Catholic lawyers).

122. 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. LEG. HIST. 1 (2005). As Levine has noted, Cohen shared the concerns about the quality of legal education but not those terms instead focused on independent thinking, intellectual honesty and analytical rigor.

123. See *id.*

124. COHEN, *supra* note 7.

125. See *id.*

126. See Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 757-58 (2000).

Americans, and Women,¹²⁷ as well as to welcome lesbians and gays.¹²⁸ For example, an AM Law Daily survey showed that women made up only 17% of partners at large firms in 2010, “even though they have represented about 51[%] of law school graduates in the last 20 years.”¹²⁹ In addition, 45% of the women partners who work at multi-tier firms have equity status as compared to 62% of the male partners at these firms.¹³⁰ As Deborah Rhode notes, “Women and minorities remain overrepresented at the bottom and underrepresented at the top of professional status and reward structures.”¹³¹

The source of these lingering inequities is perhaps in part a firm system still set in a rigid, one-track model that does not work as well for all groups. New models have been proposed but have yet to take hold.¹³² These include firms that follow a more corporate model without partners or firms that retain existing models but employ a model of racial or difference learning to promote diversity, in contrast to the “bleaching out”¹³³ perspective that dominates today. To borrow from the employment discrimination context, the partnership tournament creates at least the appearance of disparate impact—facially neutral policies that disadvantage protected classes, such as women and people of color. This effect, coupled with “second generation discrimination” resulting from informal networking and inherent biases, results in essentially a two class system not unlike that of Cohen’s time when the division was between the White

127. *Id.* at 755.

128. *See, e.g.*, Dale Carpenter, *How the Law Accepted Gays*, N.Y. TIMES, Apr. 29, 2011, <http://www.nytimes.com/2011/04/29/opinion/29carpenter.html>. *But see* MASS. LESBIAN & GAY BAR ASS’N, THE PREVALENCE OF SEXUAL ORIENTATION DISCRIMINATION IN THE LEGAL PROFESSION OF MASSACHUSETTS (1994), available at <http://www.lgbtbar.org/assets/ThePrevalenceOfSexualOrientationDiscriminationInTheLegalProfessioninMassach.pdf>.

129. Vivia Chen, *Looking into the Equity Box: Women and Partnership Status*, AM L. DAILY (Sept. 2, 2010), <http://amlawdaily.typepad.com/amlawdaily/2010/09/womenequity.html>.

130. *Id.*

131. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE 38–39 (2000).

132. *See* Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2093–99 (2005); Rampell, *supra* note 37 (discussing challenges of implementing new models in traditional firm culture); Molly McDonough, *Will the Law Firm of the Future Have Partners?*, A.B.A. J. (Sept. 25, 2012), http://www.abajournal.com/news/article/law_firm_of_the_future/.

133. Pearce, *supra* note 132, at 2094 (quoting Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 584 (1999)).

2012] *NOTHING NEW UNDER THE SUN* 501

Protestant Male elite and the Catholic and Jewish male immigrant lawyers.¹³⁴

Accordingly, even though the legal profession has adopted Cohen's approach of formal equality since the 1960s, it has not discovered how to make equality a reality within its own ranks. Whether the legal profession continues to follow Cohen's dictum or seeks to rethink existing institutional arrangements is a challenge facing the twenty-first century bar as it wrestles with the contradiction between its stated commitment to equality and the reality of continuing differential treatment of women, people of color, and LGBTQ lawyers.

CONCLUSION

A comprehensive vision for the legal profession is well beyond the scope of this paper. Rather, we offer history as a valuable lens on the challenges facing the legal profession today. Despite the very different contexts of Cohen's time and our own, the questions facing our profession today are surprisingly parallel. Moreover, some problems that Cohen's generation was able to resolve appear unsolvable today. These dynamics suggest a few factors worth considering in confronting today's crises.

First, it appears that profession will accomplish little simply by resisting change. Cohen's generation moved boldly to innovate. They replaced the fraying paradigm of Republicanism with that of Professionalism. But today the leaders of the profession appear to lack the vision or the energy for bold innovation. If they fail to innovate, the legal profession will either stagnate or find itself at the mercy of outside forces. Second, in evaluating challenges and reforms, the profession should prioritize its primary values and not necessarily cling to an irrational attachment to institutional arrangements that no longer serve those values. It must, for example, ask whether restrictions are necessary to maintain lawyer independence and ethics, or primarily restrain competition. Perhaps Cohen's model of professionalism without parochialism offers a valuable framework for beginning a reexamination of the status quo today.

Cohen's hybrid and multi-faceted assessment reflects the reality that, even a century ago, the rigid distinction between business and

134. See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001).

profession, and the inclination to shun the former wholesale, was under strain when given close scrutiny in light of the realities of the world in which lawyers operated. The Business-Profession dichotomy has further eroded in the intervening century as law practice has come to more closely and obviously resemble a business.¹³⁵ As we integrate this reality into our understanding of what it means to be a lawyer, it is worth bearing in mind Cohen's observation that exemplary businesses will reflect professional values. Perhaps this framework will help provide a useful way for the legal profession today to navigate its role in the century to come.¹³⁶

135. See Pearce, *supra* note 8.

136. See *id.*