ON THE DECLINING IMPORTANCE OF LEGAL INSTITUTIONS

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2012 Mich. St. L. Rev. 255

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INTRODUCTION

I have been asked to try to provide a context for this symposium. The basic premise of the symposium is that lawyers historically have been among the principal guardians of legal institutions and the rule of law. A second premise is that current business, regulatory, and educational challenges threaten that historic role. I suggest the reality is not that simple.

Lawyers play an important part in keeping the rule of law alive, but we do so largely in our own interest. As lawyers’ monopoly over the delivery of legal services has eroded, lawyer incentives to care about legal institutions have diminished, and other parts of our society have shown little inclination to assume the public role traditionally maintained by lawyers. At

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the same time, some legal institutions are themselves changing and the public seems relatively disinterested in their declining importance.

I. LAWYERS AS GUARDIANS OF THE RULE OF LAW IS A RELATIVELY RECENT IDEA

It is tempting to posit a world when all was well or at least much better off than it is today; usually, however, the predecessor time did not really exist. Whatever name one gives the fact that many contemporary lawyers put financial success above the rule of law and legal institutions, the phenomenon did not begin with lawyer marketing, the 9/11 attack, or the housing finance fiasco that led to the recession of 2008.

Part of the confusion on this issue arises from the lingering belief of many American lawyers that our own profession is derived from the British tradition of a Bar that engaged in a largely unsupervised process of admitting, training, promoting, and disciplining its members. Under such a system, lawyers have a powerful incentive to perpetuate institutions that will take care of them during their lifetimes and honor their memory when they are gone. That world of lawyer dominance of the legal system was never more than partly true in the United States, and it is rapidly changing in Great Britain.

Jerold Auerbach writes that large parts of America began as lawyer-free zones "whose Edenic visions of New World possibilities consigned lawyers to a role only slightly above the Biblical serpent." Professor Auerbach suggests that societies without lawyers succeeded because they were


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Communities whose values were not adequately captured in civil law. Quakers in Philadelphia, Jews in New York, Amish in Iowa, Chinese on the west coast, and Mormons in Utah all tried, for periods of time, to settle disputes and regulate other relationships without civil law and lawyers.

Lawyers today take pride in the number of lawyers who led our new nation. Our fellow lawyers rose to positions of prominence when British Parliamentary Acts came for enforcement in colonial courts, and it was lawyers who were first called upon to articulate the “natural rights” principles under which the laws were unenforceable. When the Revolution began, however, a large percentage of lawyers cast their lot with Great Britain; 40% of Massachusetts lawyers were loyal to the mother country and at least 200 left the country because they were British loyalists.

As the new nation emerged from its revolutionary birth, its lawyers no longer limited themselves to recording deeds and handling modest claims. “The leaders of the Bar in the period after 1790 are not the land conveyancers . . . of the earlier period, but for the first time, the commercial lawyers.” Lawyers developed a practice of resolving cases on questions of law and reducing judges’ deference to jury decisions in commercial disputes. Overall, American lawyers would probably not have called themselves advocates for the rich, but they apparently did see themselves moderating what could otherwise be wide swings of mood and policy in a democracy.

5. Id. at 3-17.
6. Id. at 19-68, 82-83. “‘As for the Business of an Attorney,’ wrote the evangelical preacher George Whitefield, ‘I think it unlawful for a Christian, or at least exceeding dangerous: Avoid it therefore, and glorify God in some other Station.’” Id. at 41 (quoting ALAN HEIMERT, RELIGION AND THE AMERICAN MIND: FROM THE GREAT AWAKENING TO THE REVOLUTION 180 (1966)). “Brigham Young described lawyers as ‘a stink in the nostrils of every Latter-Day Saint.’” Id. at 55. Even now, some urge evangelical Christians to take a similar court-avoidance approach. See generally LYNN R. BUZZARD & LAURENCE ECK, TELL IT TO THE CHURCH (1982).
8. Id. at 23-27; see also BLOOMFIELD, supra note 3, at 139 (noting that one-fourth of prewar practitioners left the country).
9. FRIEDMAN, supra note 3, at 303-04.
11. Id. at 142-45, 150-55. Three procedural devices were developed to keep merchant cases away from juries. Id. at 141. First was the “‘special case’” that allowed submitting points of law to the court alone. Id. at 142. Second was the “award of . . . new trial[s] for verdicts” that were “‘contrary to the weight of the evidence,’” thus giving courts the power to avoid jurors’ mistakes. Id. Third was instructing juries rather than letting them decide both the facts and the law. Id. at 143.
It was in this sense of American lawyers as relatively-worldly figures in a backwoods society that Alexis de Tocqueville offered his description of lawyers as "a sort of privileged class among [persons of] intelligence." But what he said next is far less flattering to modern readers looking for defenders of the rule of law:

Hidden at the bottom of the souls of lawyers one therefore finds a part of the tastes and habits of aristocracy. They have its instinctive penchant for order, its natural love of forms; they conceive its great disgust for the actions of the multitude and secretly scorn the government of the people.

Indeed, in the years after de Tocqueville’s visit in the 1830s, the “people” reciprocated some of the disgust he found to have been felt by lawyers. States eased barriers to becoming a lawyer, and educational standards became low or nonexistent. Roscoe Pound called the period from 1836 to 1870 the “Era of Decadence” and attributed many of its problems to the decline of lawyers’ status. But Professor Lawrence Friedman describes the period in different terms:

It was a society where many people, not just the noble or the lucky few, needed some rudiments of law, some forms or form-books, some know-how about the mysterious ways of courts or governments. ... In many ways, then, loose standards were inevitable. Perhaps they even enhanced the vigor of the bar. Formal restrictions tended to disappear; but the market for legal services remained, a harsh and sometimes efficient control. It pruned away deadwood; it rewarded the adaptive and the cunning. Jacksonian democracy did not make every man a lawyer. It did encourage a scrambling bar of shrewd entrepreneurs.

In response to this phenomenon, in 1870, “the ‘decent part’ of the profession” created the Association of the Bar of the City of New York. Later that same decade, Simeon E. Baldwin led a call for a national bar association, and under his leadership, 100 leading lawyers from around the coun-

14. Id.
15. FRIEDMAN, supra note 3, at 318.
16. POUND, supra note 2, at 221-49.
17. FRIEDMAN, supra note 3, at 318.
19. Baldwin, a Yale law professor, later became Chief Justice and then Governor of Connecticut. EDSON R. SUNDERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK 3 (1953). Earlier, in 1849, a much broader group called the American Legal Association had been established, and in 1850 its founder, John Livingston, published the names and addresses of all known practicing lawyers and judges in the United States, a total of 21,979. BLOOMFIELD, supra note 3, at 154-55; FRIEDMAN, supra note 3, at 633. The organization never really got traction, however, and it collapsed in 1854. See BLOOMFIELD, supra note 3, at 154-55.
try formed the American Bar Association (ABA) in 1878, in Saratoga, New York.20

No matter how they tried to increase their sense of respectability, however, prominent lawyers could not get away from the fact they largely represented large corporations and their owners. These lawyers were subjected to intense criticism for undercutting public faith in the rule of law. President Theodore Roosevelt told Harvard graduates in 1905:

> We all know that . . . many of the most influential and most highly remunerated members of the Bar in every centre of wealth make it their special task to work out bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws which are made to regulate in the interest of the public the use of great wealth. Now, the great lawyer who employs his talent and learning in . . . enabling a very wealthy client to override or circumvent the law is doing all that in him lies to encourage the growth in this country of a spirit of dumb anger against all laws and of disbelief in their efficacy.21

The ABA adopted its first Canons of Ethics in 1908 in large part to deflect such charges,22 and in 1923, ABA President John W. Davis called for a federal union between the ABA and state bar associations so that the ABA could speak “with the accredited voice of the united bar of the entire country” and give all bar organizations “a broader sense of professional solidarity and responsibility.”23 But when we think of today’s ABA, with over 400,000 members and a national lobbying network, it is easy to forget that, after President Davis’s call, it took until 1936 for the ABA to become the broad national organization that we now know.24

In 1936, the Depression was near its deepest and the Roosevelt administration had backed “Codes of Fair Competition,” prepared by tripartite institutions of labor, management, and government, but that otherwise had a controversial legal basis. Just two years earlier, Supreme Court Justice Harlan Fiske Stone had warned:

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22. In 1908, the ABA adopted its Canons of Ethics. Orie L. Phillips & Philbrick McCoy, Conduct of Judges and Lawyers: A Study of Professional Ethics Discipline and Disbarment 12 (1952). A committee to amend it was appointed in 1923, and the amendments were approved in 1928. See id. Canons of Judicial Ethics were adopted in 1924. Id. All but four states adopted the ABA Code or something close to it, although by 1950, in only eighteen of the states was the Code adopted by the state Supreme Court. Id. at 15.


24. See id. at 173. In 1936, the ABA had 28,228 members, of whom about 10% came to the annual meeting. Id. at 221. By 1950, ABA membership had increased to 42,121, of whom 3,233 came to the annual meeting. Id.
We meet at a time when, as never before in the history of the country, our most cherished ideals and traditions are being subjected to searching criticism. . . . [W]e may rightly look to the Bar for leadership in the preservation and development of American institutions. Specially trained in the field of law and government, invested with the unique privileges of his office, experienced in the world of affairs, and versed in the problems of business organization and administration, to whom, if not to the lawyer, may we look for guidance in solving the problems of a sorely stricken social order? 25

Giving authority to a new House of Delegates that included state bar associations and other potentially-influential professional groups gave the ABA hope that it could help marshal public influence behind common positions. 26 Among the first things the transformed ABA aggressively—and successfully—opposed was President Roosevelt’s court packing plan. 27

Later, prominent lawyers such as Reginald Heber Smith, the father of Legal Aid, were concerned that if lawyers did not assume greater responsibilities to see that law met the needs of ordinary citizens, the government would “socialize” the profession and do it for them:

For selfish and unselfish reasons we hope that the new world will be attracted by our form of government and the American way of life so that, in other nations, free peoples will set up democratic regimes and institutions. . . . Law is the foundation of our whole structure. We are determined that it shall be strong. We know that law is not self-enforcing, and that lawyers are essential. 28

It was in that context that lawyers called for a renewal of the vision of lawyers as the principal custodians of American law and the American way of life. 29 Those of us who came to the bar in the 1960s tend to think lawyers were calling for civil rights and civil liberties, but one of recent history’s great ironies is that leaders of the ABA up to the early 1950s were generally

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26. See Sunderland, supra note 19, at 173-76. Among the other groups represented in the House of Delegates were the American Law Institute and the American Judicature Society. Id. at 177-78. The meeting at which these changes were adopted is reported in detail in 22 A.B.A. J. 661 (1936).
29. See, e.g., Pound, supra note 2, at 20, 353.
highly conservative. They sought far reaching power for common-law courts just as the Supreme Court moved the law in ways then-leaders of the bar did not imagine possible.\textsuperscript{30}

There is, of course, much more one could say about the ambiguous interplay between lawyers, legal institutions, and the rule of law over time. But I think that in all of it what we are largely seeing is that law is a derivative profession. What lawyers do is—and mostly always has been—derived from what their clients do and want to do. Our professional challenge has been to help clients muddle through whatever confusing reality they face.

II. CHANGES IN THE WORLD HAVE IMPACTED LAWYERS’ ABILITY TO PLAY THE GUARDIAN ROLE

To be sure, there was a time when lawyers asserted a greater role as guardians of legal institutions and the rule of law than they seem to do today. I suspect that was because it was a time when lawyers believed they had control of the institutions in and through which they worked. As recently as the 1960s, lawyers largely organized how law was practiced, played an important part in bar admission, and played a significant role in policing ethical violations. That seeming control over the system in which they worked gave lawyers a professional identity and a stake in maintaining systems that they and their clients could perceive as fair and reliable.

There are a number of ways to characterize what has changed over the last half-century, but I will concentrate on five changes in the world that lawyers face. These changes—far more than increased lawyer selfishness and decreased lawyer morality—are what I believe have led to the seemingly declining sense of lawyer responsibility for legal institutions and the rule of law.

A. Courts Have Eliminated Self-regulation and Made Lawyers Another Group of Economic Actors

Throughout much of the 1950s and 1960s, lawyers could convince themselves they were part of a self-regulating profession. Unauthorized practice prohibitions—often enforced by criminal sanctions—defined work that only lawyers could do. Within that zone of protected activity, rules of

professional conduct had been established by bar associations working through state supreme courts whose justices had been lawyers only a few years before. Insulation from outside influence on lawyer conduct was never complete, but it seemed nearly so until the United States Supreme Court began systematically to break down the special protections lawyers enjoyed. In *NAACP v. Button*, for example, the state of Virginia had extended the traditional ban against lawyer solicitation of new clients beyond the usual prohibition against hiring ambulance drivers to pass out a lawyer’s cards. The state had prohibited contact of potential clients by agents of any person or association that “employs, retains or compensates any attorney” in a “judicial proceeding in which” the person or organization “is not a party and in which it has no pecuniary right or liability.” As applied to the NAACP, the provision would have prohibited lawyers from cooperating with efforts to organize citizens to challenge racial segregation in the public schools. The state asserted that lawyers’ attempts to obtain legal work are not speech protected by the First Amendment, but the Supreme Court said that, in this context, lawyers’ ethical standards enjoyed no immunity from constitutional review.

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

33. *Id.* at 423-26.
34. *Id.* at 424 n.7 (quoting VA. CODE ANN. § 54-78 (1958)).
35. Perhaps the Court found it relevant that the Virginia statute had been passed in 1956, just two years after *Brown v. Board of Education* had created the legal rights that the NAACP sought to enforce. *Id.* at 417-18. But the Court expressly said that it would have reached the same result if the older ABA Canons of Ethics had been the source of the prohibition. *Id.* at 429 n.11.
36. *Id.* at 438-39.
38. *Id.* at 776.
39. *Id.* at 775.
fee schedule would ""raise[] a presumption"" that the lawyer was improperly soliciting cases.40

In an opinion by Chief Justice Burger, a unanimous Supreme Court found that the "'voluntary'" fee schedule had the practical effect of fixing prices for legal services in Fairfax County.41 More significantly for lawyers who thought themselves sheltered from outside regulation, the Court expressly rejected a contention that, as a "'learned profession,' the practice of law is not subject to antitrust constraints:

The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, . . . nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions . . . Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is "'commerce'" in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect.42

The combination of First Amendment and Sherman Act attacks made it inevitable that the idea that, as a profession, lawyers were self-regulating and thus needed to look only inward was gone for good. The coup de grace was inflicted two years later in Bates v. State Bar of Arizona.43 As in Button, the case involved the prohibition of solicitation.44 This time, John Bates and Van O'Steen had opened a "'legal clinic'" in Phoenix and had published a newspaper advertisement describing routine services they would perform such as uncontested divorces, adoptions, name changes, and simple personal bankruptcies for relatively low fees.45 The Court's response to arguments that professionalism required prohibition of such advertising was withering:

We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated. . . . But we find the pos-

40. Id. at 777-78 (quoting Va. State Bar Comm. on Legal Ethics, Formal Op. 98 (1960)).
41. Justice Powell, long a member of the Virginia State Bar, did not participate in the decision. Id. at 793.
42. Id. at 787-88 (citations omitted). The Court closed: "'In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions'" Id. at 793. However, that qualification has not reduced the significance of the decision. Just three years later, when an engineering association tried to rely on this language to justify its ethical restrain on competitive bidding, the Court quickly brushed aside the special character of professions. See Nat'l Soc'y of Prof'l Eng'rs v. United States, 453 U.S. 679, 686-88 (1978); see also Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 332-33 (1982) (addressing a fee schedule for particular doctor services).
44. Id. at 353.
45. Id. at 354. Earlier, in 1972, Leonard Jacoby and Stephen Meyers had opened their own "'legal clinic'" in California, but the Arizona courts acted more quickly than those in California so the Bates case reached the Supreme Court first. In re Review of Op. 475 of Advisory Comm. on Prof'l Ethics, 444 A.2d 1092, 1094-95 (N.J. 1982).
tulated connection between advertising and the erosion of true professionalism to be severely strained. At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception. . . In fact, it has been suggested that the failure of lawyers to advertise creates public disillusionment with the profession. The absence of advertising may be seen to reflect the profession’s failure to reach out and serve the community.46

In 1985, the American Law Institute—acknowledging that legal ethics is more about law than ethics—began to prepare the Restatement of the Law Governing Lawyers.47 At the same time, civil regulation of lawyers dramatically increased as malpractice suits became more common.48 An important source of the move toward malpractice remedies was the failure of savings and loan associations in the 1980s, often after the mistaken advice of their lawyers that their loan practices were not in violation of federal regulations.49 As a result of such cases, violation of ethical standards hit lawyers in the pocketbook, and malpractice insurance companies became some of the most important reviewers and regulators of lawyer conduct. In 2002-2003, the ABA again modified the Model Rules, this time in part to conform them to the statements of governing principles found in the Restatement.50 By then it was clear that the legal profession no longer exists in a protective bubble, and its regulation is no longer the business of lawyers alone.51

46. Bates, 433 U.S. at 368-70 (footnote omitted). “False, deceptive, or misleading” advertising may be regulated, and “limited” disclaimers may be required as to lawyers’ claims about themselves. Id. at 383. However, “truthful advertisement concerning the availability and terms of routine legal services” is protected by the First Amendment. Id. at 384. Other cases have upheld First Amendment protection of most lawyer advertising. E.g., In re R.M.J., 455 U.S. 191 (1982); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985); Shapero v. Ky. Bar Ass’n, 486 U.S. 466 (1988); Pecl v. Attorney Registration & Disciplinary Comm’n, 496 U.S. 91 (1990). But see Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (upholding prohibition of targeted direct mail within thirty days of an accident or disaster). In Bates, Bates and O’Steen had also challenged advertising restrictions under the Sherman Act. Bates, 433 U.S. at 359. However, the Arizona Supreme Court had specifically imposed the bar to lawyer advertising in a court rule. Id. Thus, under the rule of Parker v. Brown, 317 U.S. 341 (1943), federal antitrust law had to give way to the state regulation. Bates, 433 U.S. at 359.


48. See 1 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice §§ 1.6-1.7 (2005).


51. Additional Supreme Court cases overturning lawyer self-regulation include In re Griffiths, 413 U.S. 717, 723-27 (1973) (requiring bar applicants to be U.S. citizens denies equal protection); Supreme Court of N.H. v. Piper, 470 U.S. 274, 288 (1985) (requiring bar applicants to reside in state violates the privileges and immunities clause); and Supreme Court of Va. v. Friedman, 487 U.S. 59, 61 (1988) (allowing only state residents to be admit-
B. The Growth in the Number of Lawyers Has Diluted Many Lawyers’ Sense of Common Purpose

It was not until 1963-1964 that law school enrollments equaled those immediately after World War II, but they have been growing ever since. Over the last forty years, the American bar has grown more rapidly and changed more profoundly than in any comparable-length period in history. Academic year 1972-1973 was the year of the most dramatic growth in the number of U.S. law students. The number of students enrolled in law school in that year was approximately 30% of the total number of U.S. lawyers in the same year. As a result, the total number of U.S. lawyers went on to double during the decade of the 1970s.

Growth in applications was in part from returning Vietnam War veterans, but the largest source of the increase could be attributed to a new interest in law school among women and members of minority groups—both of which had previously been greatly under-represented among lawyers. Since the 1970s, student interest in becoming lawyers has remained strong, and one effect has been a quadrupling of the size of the legal profession from about 300,000 in 1970 to close to 1,200,000 lawyers today.

54. See id.
55. Id. at 1 n.3. In round numbers, there were just over 300,000 lawyers and 100,000 students were in law school. Id. Indeed, the authors were so alarmed by the growth that they predicted that “up to half of the graduates in the near future may have to seek employment in fields where traditionally legal training is not a prerequisite.” Id. at 31.
57. See Richard L. Abel, The Transformation of the American Legal Profession, 20 LAW & SOC’Y REV. 7, 7 (1986); Barbara A. Curran, American Lawyers in the 1980s: A Profession in Transition, 20 LAW & SOC’Y REV. 19, 19, 25 (1986). For reasons no one seems to have been able to explain fully, the number of white males in law school each year has remained almost constant since 1973. See Curran, supra, at 19.
58. For a critique of law schools’ role in this development, see, for example, Bamhizer, Children, supra note 1, at 31-36. A chronic problem in determining the number of lawyers is the lack of data on lawyer deaths and retirements and the fact that many people with law degrees are not practicing law.
As a result, one inescapable reality facing today's lawyers is the greatly increased number of fellow lawyers chasing the same work. The demand for lawyers has also increased, although not proportionately. University of Chicago economist Peter Pashigian has convincingly shown that the most important stimulus for the need for legal services is not the growth in population or the degree of regulation, not the receptivity of courts to new legal theories, indeed not anything internal to the legal system; instead, demand for legal services correlates most closely with growth in gross domestic product (GDP), the level of economic activity in the country generally.

The nation's GDP in constant dollars has grown at about the same rate as the number of lawyers in times of prosperity. Lawyers did well during the economic bubble that drove GDP growth to 4% in many years. But the effect of recessions in the late 1970s, early 1990s, early 2000s, and now again since 2008—while production of lawyers remained high—has produced a "surplus" of lawyers that understandably makes the pressure to attract clients feel more intense today than it did forty years ago.

Growth in numbers of lawyers this extensive and this rapid has had an inevitable effect of reducing the level of informal sanctions that characterized earlier efforts to enforce appropriate—what used to be called "professional"—conduct. I would say that one is more likely to treat a fellow lawyer well when one expects to meet that lawyer again. But the informal penalties for behaving badly go down when the numbers of lawyers makes it less likely a pay-back time will ever come. The current legal environment tends not to reward building of the rule of law and legal institutions and not to penalize individual lawyers who fail to do so.

C. The Impact of Globalization on Lawyers and the Practice of Law

As the world's supply of lawyers grows, the world is getting smaller and more interdependent. It is not the presence of international exports and imports that is new; global merchants have been at work throughout history.

59. See generally CURRAN & CARSON, supra note 56. Unfortunately, the American Bar Foundation has not continued to produce comparable data on the number and distribution of lawyers.


62. Indeed, my work in the mid-1990s to update the Pashigian numbers indicated that by even then, growth in the supply of lawyers was at least 15% greater than the growth in demand. See id. at 628-30.
What "globalization" describes is the recent unprecedented reduction of tariffs, growth in the volume of international commerce, and heightened competitive pressure that imported products and exported work impose on lawyers and their clients.  

Not everyone views the trend toward globalization as benign. Concern is high that competitive pressure to attract business may cause states and nations to lure their people into dead-end jobs and even undercut the ability of democratic governments to promote social justice. And the volatile capital markets experienced around the world in late-2008 have tended to confirm that bad credit practices in advanced countries can upset the lives of people all over the rest of the world. Economists argue that intense competition among producers will ultimately benefit consumers everywhere. In the meantime, however, lawyers' clients experience global competition in the form of an often excruciating need to control costs. Some call this the "Wal-Mart effect" because it is seen so clearly in the pressure that retailers put on suppliers to lower their prices by wringing every last fraction of a cent out of costs. 

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

Further, companies involved in global commerce hire or send employees all over the world. Those employees will create family relationship, taxation, and other financial issues that were largely unknown to previous lawyer generations. No lawyer can be an expert in all law everywhere, but


64. See, e.g., JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 85 (2002) ("Lower wages might lead some firms to hire a few more workers; but the number of newly hired workers may be relatively few, and the misery caused by the lower wages on all the other workers might be very grave."); see also GEORGE SOROS, GEORGE SOROS ON GLOBALIZATION 4-6 (2002). See generally DAVID M. SMICK, THE WORLD IS CURVED: HIDDEN DANGERS TO THE GLOBAL ECONOMY (2008).

65. See generally CHARLES FISHMAN, THE WAL-MART EFFECT: HOW THE WORLD'S MOST POWERFUL COMPANY WORKS—AND HOW IT'S TRANSFORMING THE AMERICAN ECONOMY (2006). Wal-Mart has now hired pharmacists to run what at one time were independent professional pharmacies. Id. at 41-44. Who is to say they might not try to have lawyers set up an office in a Wal-Mart store?
even the drafter of a will today must assume that some of the beneficiaries or some of the property could be in other states or nations.

Finally, American lawyers’ professional standards are likely to be affected by globalization as the General Agreement on Trade in Services (GATS) tends to break down barriers that today limit lawyers to practice in their home countries. GATS is not yet an accomplished fact, but the clear intention seems to be that French lawyers will be permitted to open a practice in the United States just as the European Union permits French lawyers to practice in Germany. When that happens, of course, it seems inevitable that a state such as California will have to also allow New York lawyers to open a practice in San Francisco.

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


69. Id. § 12.

70. Id. sched. 13.

71. Id. § 190.

72. See, e.g., John Flood, The Consequences of Clementi: The Global Repercussions for the Legal Profession After the Legal Services Act of 2007, 2012 MICH. ST. L. REV. 537, 549. It would be a mistake, of course, to assume that globalization will occur equally rapidly in every line of commerce. High-touch personal services are likely to be delivered locally. Part of the challenge in considering the impact of globalization on lawyers, then, will lie in distinguishing which lawyer roles are more like the making of machine parts and which require a local touch.
D. The Transformation of Lawyers’ Work by Modern Information Technology

Another factor contributing to globalization—and accelerated by it—has been the revolution in computer storage and communications technology that has occurred over roughly the same period as the rest of the revolution involving lawyers. The transformation of information technology has led to a variety of effects.

First, in less than a decade, lawyers have gone from marketing their services locally through newspaper ads and Yellow Pages to global marketing on the world wide web. Some have chosen clever web addresses such as “lawyersforless.com,” “thegunslinger.com,” and “voiceoftheinjured.com.”73 Others have created the web-equivalent of attractive brochures with color pictures of the firm’s lawyers and dramatic pictures of them in action.

Second, lawyers—and nonlawyers—now have a capacity for legal research that is quick and current. There is no easy excuse for overlooking a new statute or recent case. Many lawyers still prefer to read law out of books, but almost no lawyers can afford to stock books about the law across the nation and around the world. Now, technological advances have put the world’s largest library on every lawyer’s desk top, albeit at a high price. Reverence for the research methods of the past will not change the direction of this new reality.

Third, technology makes it possible for lawyers and clients to have ready access to each other and each other’s files, either with respect to a particular matter or more generally. Today, technology allows virtually as easy communication with a law firm across the country—or around the world—as with lawyers down the hall.74 A law firm and its client can use an intranet, for example, to share access to all the files on a given client matter. Or, a law firm can prepare compliance checklists, send them to clients for completion, and offer advice about places where the client appears not to be in compliance. Significant questions about proper billing for—and potential lawyer liability for—information and advice provided through such technology will remain,75 but if the advantages of dealing in this way are real, one can expect firms will compete to deliver those advantages.


74. The technologies are widely advertised in lawyer publications, and even discounted for puffing, the implications are enormous. See, e.g., Neil Cameron, Client Portals: 20 Years Late but Moving Fast, Am. Law., July 2001 (advertising insert).

75. See generally Andrew Beckerman-Rodau, Ethical Risks from the Use of Technology, 31 Rutgers Computer & Tech. L.J. 1 (2004); Catherine J. Lancot, Attorney-Client Relationships in Cyberspace: The Peril and the Promise, 49 Duke L.J. 147 (1999); Natacha
Fourth, the increasing importance of information technology to law practice promises to transform tasks that used to be seen as complex, unique, and worthy of substantial fees into simple, repetitive operations provided to clients by the lowest bidder. Technology available on the simplest personal computer can instantly allow a lawyer to tailor a 500-page document used in one transaction—change the names and terms—and use it in another deal. Obviously, the result will be a disaster if the document is not equally relevant to the new situation, so the malpractice risk created by the ease of copying can be substantial. Knowing what changes are needed to fit a new situation will always be a big part of the professional’s service, but the benefits of standardizing forms in transactions promises to be enormous. 76 Another result of document standardization, of course, will become the open secret that what lawyers do is no longer always a complex task requiring expertise worthy of premium pay. Much of what lawyers do is what most merchants do, that is to say, sell commodities that ultimately command only a price set in competition with many potential sellers. 77

Fifth, another technology-based reality that will transform lawyers’ practice is the world of free information that lawyers have traditionally sold but is now available on the Internet. Books about law have been around for years, but technology now makes the information ubiquitous. It may be provided for no cost at websites ranging from Wikipedia to specialized blogs, and the effect is to render a great deal of formerly exotic legal information broadly accessible. 78 Prepared by thousands of authors, these alternative information sources threaten the monopoly on which lawyers have depended for a steady client base. 79 Clearly, lawyers will tend to be able to assimilate and apply information from these sources more quickly and accurately


78. For more about this phenomenon, see generally Ori Brafman & Rod A. Beckstrom, The Starfish and the Spider: The Unstoppable Power of Leaderless Organizations (2006).

than clients can, but the breakthrough is that a lawyer's knowledge is no longer a black box that clients cannot penetrate.

Information may be provided free in a form available to all or only to those who have directly or indirectly paid a fee for the access. So far, the free or open-source approach has been much more pervasive than most Americans might have imagined. Whether free or for a charge, however, ubiquitous help from information services increasingly will be available to individuals planning their own affairs, drafting their own documents, and even appearing pro se in litigation just as software helps millions of former accounting clients prepare their own tax returns.\(^8^0\) Up to now, lawyer responses to such developments have largely been self-defeating. In Texas, an unauthorized practice of law challenge was brought against the sale of the Quicken Family Lawyer CD-ROM for use by people trying to draft their own legal documents.\(^8^1\) From the standpoint of lawyers, use of such tools might seem amateurish and risky, but to many potential clients, the cost saving seems sensible. Notwithstanding lawyers' views, the Texas legislature promptly took the side of client freedom and made clear that the sale or use of such computer software does not involve the unauthorized practice of law.\(^8^2\) Clients' desire to avoid lawyer services might bother lawyers, but that desire is a reality lawyers ignore at their peril.

The rise of e-commerce has transformed many brick-and-mortar businesses, and lawyers are not immune from such a transformation. Lawyers have traditionally been sources of legal information. Pressure will be substantial to replace lawyers with people who can quickly help clients find what they need on the Internet, and, at most, review a filled-in form before it is filed. As the example illustrates, even where the need for lawyers is not replaced by free information, the character of legal services is likely to change. Rather than retaining a lawyer to take a matter from beginning to end, clients are likely to buy only parts of a traditional representation. Disaggregating legal services in this way is often likely to be in the client's interest, and lawyers will have to respond accordingly. Clients ultimately will do what they conclude is in their interest; the opportunities created by the availability of technology will transform the clients' choices.\(^8^3\)

83. Indeed, we may not be far from future development of "expert systems" that can begin to do even basic legal reasoning and analysis. SUSSKIND, FUTURE, supra note 77, at xvii. For as long as computers are restricted to dealing with language rather than abstracts concepts, human beings are likely to be better at discerning patterns in apparently disparate information, but there seems little doubt that in areas of the law where words are regularly
E. Transformation of the Relative Power of In-House and Outside Counsel

But the growth of law firms and the major shift of law practice toward corporate work pale by comparison to the rising power of in-house counsel. Thirty years ago, and in many cases much more recently, lawyers in private firms saw their role to be providing legal services to lay officers or employees of corporate clients. Today, that is far less true. The people many of today's lawyers have to please are other lawyers—this time lawyers acting in the role of general counsel to corporations, government agencies, and other organizations. In short, private law firms advise—and market their services to—corporate lawyers who decide what outside services the corporate client requires and why. 84

For many years, employment by a single client—as in the case of a company general counsel—was considered ethically suspect. 85 Having only one client was said to expose the lawyer to client pressure to act improperly because the lawyer could not afford to lose his or her only job. 86 Now, however, close to 25% of all lawyers act as employed counsel in government or other single client situations. 87 Of those, 40%—or 10% of all lawyers—act as inside corporate counsel. 88 It is the in-house lawyers—not the partners in large law firms—who primarily counsel corporate management. 89 It is they who hire outside counsel and who sometimes pressure outside counsel to conform to management's demands. 90 Robert Nelson, for example, found:

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84. Carl Liggio, former general counsel of Arthur Young & Co., says that the "golden years" for in-house corporate counsel were the 1920s and 1930s. See Carl D. Liggio, The Changing Role of Corporate Counsel, 46 EMORY L.J. 1201, 1201 (1997); see also EVE SPANGLER, LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK 70-106 (1986); Robert Eli Rosen, The Inside Counsel Movement, Professional Judgment and Organizational Representation, 64 IND. L.J. 479, 481-90 (1989) (calling this the "age of enlightenment" for in-house counsel).


86. See id. at 597-99.


89. Id. at 612 (noting that over 61% of in-house general counsel who responded to a survey said that they report to the CEO of their organization, while another 15% report to the president); see also MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 34-36 (1994).

Even if law firm counsel were inclined to act as the conscience of their clients, their opportunity to do so has diminished as a result of the rise of internal counsel inside the corporation and the changing nature of relationships with corporate clients. . . . Through the process of advocating the interests of clients, large-firm attorneys come to strongly identify with them. It is highly unlikely, therefore, that lawyers in large law firms will act as an independent voice that checks the self-interest of clients. 91

Recruiting in-house lawyers rather than depending exclusively on outside firms began as a way to permit clients to avoid high, law firm billing rates and as a form of vertical integration that reduced the cost of searching for lawyers to do recurring tasks. 92 It also was a response to expanding government regulation and the consequent burden of continuing compliance and litigation. 93 But a strong, internal lawyer staff also helps assure that legal service decisions are made by people who understand the client’s business, know the type of legal work that is required, and are able to help managers think about the issues inherent in important business decisions.

In the current environment, companies hire outside counsel for more than half the client’s legal needs, but they tend to see it as company managers see any other make-or-buy decision the company faces. 94 A company might choose to make spare parts itself, for example, or buy them on an as-needed basis from an outside firm. So it is with outside legal help. Law firms are familiar with the practice of hiring “contract lawyers,” in other words, lawyers hired to do particular tasks when the firm is especially busy on a case or regulatory filing but whom the firm will not need in the long run.


93. See generally Rosen, supra note 84.

94. Two excellent analyses of this process are Larry Smith, Inside/Outside: How Businesses Buy Legal Services (2001) and Steven L. Schwarz, To Make or to Buy: In-House Lawyering and Value Creation, 33 J. Corp. L. 497 (2008).
run.95 Today, private law firms can best be understood as inside counsel’s version of contract lawyers. Sometimes they may be retained for commodity legal work that can be done inexpensively, such as by firms in India or elsewhere.96 Or, private firms might be retained when it is more cost-effective to consult experienced outside counsel than to hire an expert internally.97

In any event, most corporations view both inside and outside counsel as overhead costs rather than contributions to the bottom line. More and more, in-house counsel are cutting the number of outside firms a company retains, requiring highly-detailed case budgets, early assessments, regular updates, use of specific technology, and minimum experience levels for lawyers working on their cases (for example, no first-year associates).98 Inside counsel are more likely to receive rewards for reining in outside firms, not for coddling them.99 Successful outside firms will be those who project a sense that they understand the new rules and are prepared to be as entrepreneurial as the business people.100 The ultimate challenge for outside lawyers, in turn, will be to demonstrate the value added that their services bring to a given client’s situation.101


97. Sometimes the reasons for going outside are less clearly economic. Inside counsel may want someone else to take the heat or assume liability for a risky decision, for example, or to make a record that inside counsel sought “the best” advice so as to avoid criticism if the advice leads to an unsuccessful result. See, e.g., SPANGLER, supra note 84, at 104; Chayes & Chayes, supra note 90, at 294 (noting that outside counsel “tend more to be ‘hired guns,’ chosen for a particular job, and less and less members of an ongoing relationship with responsibility for the client’s overall well-being”).


This kind of close review mirrors the frequent impersonality of modern commercial dealings. Lawyers remember—or imagine they remember—the days when relationships with clients and within firms seemed like family ties. Not too long ago, at least some entrepreneurs were not well-educated, and a lawyer-counselor was valued in part because he was more worldly.102 The lawyer may even have been from a higher social class and able to introduce the business person to bankers and others that needed to get a business off the ground.103 Today, business people are often extremely well educated and better connected in the wider world than are most lawyers. Lawyers, thus, have become more valued for information than for their counsel.

There is no escaping the reality that the practice of law has become more competitive and lawyers are more personally insecure.104 In addition, corporations now use nonlawyers to help deliver a total package of services that they need done.105 Negotiating contracts, troubleshooting discrimination claims, even writing court documents can all be done by nonlawyers within an organization receiving a level of lawyer supervision and training to which unauthorized practice rules cannot effectively speak.106 Nonlawyers can help lower costs, but more importantly, they can help the client get its whole problem solved, not just the legal elements. Often, the nonlawyers will benefit from a degree of lawyer supervision, but particularly where a law firm opens an ancillary or law-related entity, the nonlawyers might be accountants or lobbyists, economists or nurses, statisticians or business specialists who are more than capable of acting on their own. Current legal ethics rules require a lawyer in a private law firm to supervise and take responsibility for the nonlawyer’s work,107 but that requirement is easily met.

103. Id. at 12-19, 30-31. Linowitz tells the personal story of his relationship with the founder of Xerox and of other lawyers’ relationships with founders of large companies. Id. at 60-65, 73-77. As was once not uncommon, Linowitz in effect served as inside counsel and hired himself as outside counsel. Id. at 83-90. He did not see the tension between his desire for independence as inside counsel and his recognition that corporate lawyers very much like him are the ones doing the evaluating and selecting of outside counsel. Id.
106. Professor Kritzer calls such persons “law workers” and sees them as examples of the kinds of people with whom lawyers are likely to compete in the future. See id; see generally HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION (1990); HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK (1998); Herbert M. Kritzer, The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World, 33 LAW & SOC’Y REV. 713 (1999).
107. MODEL RULES OF PROF’L CONDUCT R. 5.3 (2010).
and within an organizational client, lawyer supervision need only be provided if it is cost-effective to do so.\textsuperscript{108}

\textbf{CONCLUSION: REASONS FOR CONCERN BUT ALSO FOR HOPE}

The vision of the lawyer once held out to the world is largely vanishing for reasons that do not primarily represent moral failing. We are no longer in charge of the legal system, if indeed we ever were. Lawyers must understand themselves in terms of the world in which they work and whose changing dynamics they cannot ignore. Our society will continue to have persons specially trained to deal with legal issues, but lawyers seem destined primarily to provide a form of consulting services not limited to traditional legal advice and litigation. Like our forebears at the bar, we will have to develop the practical skills of muddling through.

When lawyers controlled the legal system, in effect, society “paid” us to manage it effectively. As legal services become more like commodities, in turn, lawyers have less incentive to provide these public goods. I do not see the clock turning back on any of the changes we have discussed, but three kinds of issues raised by these developments will be especially significant to the evolution of law and legal institutions as we move farther into the 21st century.

First, other public institutions will be forced to help in efforts to preserve the rule of law and legal institutions if they are to be preserved at all. If we posit that law is important and that delivering it on a more commercial, and hopefully cheaper, basis is inevitable, public funding for our legal institutions will have to increase. As we know, however, today’s public climate is about cutting spending of all kinds, not increasing spending even for essential public services.

Our nation’s state court systems, even in good times, have received no more than about 1% to 2% of state and federal budgets.\textsuperscript{109} But the effect of having court budgets frozen, or now even decreased by 10% to 25%, have been devastating.\textsuperscript{110} At least fourteen state court systems have been required

\textsuperscript{108} See, e.g., Hackett, supra note 88, at 616 (showing that compliance programs in areas such as environmental, human resources, tax, marketing/antitrust, and health/safety are often under the direction of nonlawyer compliance officers who have access to lawyers but do not necessarily report to them). But see Richard S. Gruner, General Counsel in an Era of Compliance Programs and Corporate Self-Policing, 46 EMORY L.J. 1113, 1163-75 (1997) (arguing for assuming a more proactive role for corporate counsel in developing compliance programs).


\textsuperscript{110} \textit{Id.} at 4.
to close one or more days each week.\textsuperscript{111} At least one Georgia circuit is now unable to hear any civil case.\textsuperscript{112} Time required to resolve cases in Los Angeles will go from less than two years in 2009 to more than four and a quarter years in 2012.\textsuperscript{113}

The problems of our judicial system are not going to be automatically self-correcting, and while lawyer organizations have been at the forefront of calls for more public support, they have tended not to call for lawyer pro bono mediation or acting judge programs in which lawyers would volunteer to absorb part of the cost themselves.\textsuperscript{114} A functioning system of justice remains in lawyers' interest as well as the interest of our clients, but we now expect others to pay for it and it remains to be seen whether they will.

Second, we have traditionally thought of law as publicly produced—by legislatures or the courts—but there seems to be an increasing reality of the private production of law. Private contracts have long created a form of law, for example, that let parties define their respective rights. Add an arbitration clause to the mix and perhaps courts will become less significant.\textsuperscript{115}

Case law today has become privatized by law publishers, with Lexis and Westlaw being the only source of many "unpublished" opinions.\textsuperscript{116} Legal principles are restated by the American Law Institute and treated by the courts as reliable and almost authoritative.\textsuperscript{117} Model laws are created by the

\begin{itemize}
\item \textsuperscript{111} Id. at 5 (citing NAT'L CTR. FOR STATE COURTS, BUDGET IMPACTS (2010)).
\item \textsuperscript{112} Id. (citing testimony from Georgia Supreme Court Chief Justice Carol Hunstein). Citizens in that circuit cannot get a divorce, address child custody matters, or try any business or personal injury cases. Id.
\item \textsuperscript{117} See Kristin David Adams, Blaming the Mirror: The Restatements and the Common Law, 40 IND. L. REV. 205 (2007); Michael Traynor, The First Restatements and the Vision of the American Law Institute, Then and Now, 32 S. ILL. U. L.J. 145 (2007).
\end{itemize}
National Commission on Uniform State Laws, and the ABA copyrights its Model Rules of Professional Conduct and sells them to state courts and lawyers.\textsuperscript{118}

Such developments can be jarring to those who see law as free and freely available, but I would suggest that this legal privatization may not be altogether bad. Although it may initially seem counterintuitive, the ability to create law as a product may well make it more available to middle-class consumers. One example is LegalZoom, the increasingly popular source of documents that allow individual citizens to create wills, trusts, corporations, and the like.\textsuperscript{119} Such documents formerly were available only from lawyers at far higher prices, and there is a danger that turning clients into form-buyers will render legal services impersonal and make the lawyer-client relationship more shallow. If we look at the alternatives, however, it may be that a shallow, less-expensive relationship will be better than no relationship at all.

Third, my own view is that we are likely to find an institutional delivery of legal services replace the delivery of services by individual lawyers. Today, many of us receive medical care from clinics composed of several doctors, any of whom we might see on any given visit. That is less personal than the old days of having a single family doctor, but the system tends to allow the doctors more regular hours and the patients a range of doctors to meet specialized problems. That kind of model already describes the legal service many private firms offer corporate clients. It is also the kind of legal service provided by liability insurance companies and at many legal aid offices. I expect the pressures and possibilities of technology will make service to individual private clients soon delivered on the same basis.

Professor Ted Schneyer urged twenty years ago that discipline be imposed on law firms, not exclusively individual lawyers.\textsuperscript{120} He was right, and if I am right, our focus should be on creating a regulatory regime that gives law firms a stake in producing quality work and building their reputations. Providing multi-disciplinary services from a single firm,\textsuperscript{121} allowing non-
compete agreements to reduce lawyer mobility, and permitting nonlawyer investment in law firms would likely be part of the picture. That is the direction Great Britain and Australia have taken, and although U.S. lawyers have resisted these changes, I believe the resistance is ultimately likely to break down.

It is tempting to wish we could return to the past that never was. As I believe the other articles in this symposium suggest, our challenge is rather to prepare for a future that is inevitable, to take steps that are possible, and to help build a system that—while possibly different—will be one in which lawyers can continue to take pride.

122. This would require changes in the traditional understanding of the Model Rules' "[r]estictions [o]n [r]ight [t]o [p]ractice." Id. at R. 5.6(a).

123. This would require changes in the traditional understanding of the rule that prohibits practicing in a firm in which "a nonlawyer owns any interest therein." Id. at R. 5.4(d).
