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### Foreword to the Conference: The Law: Business or Profession? The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century

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## CONFERENCE

# THE LAW: BUSINESS OR PROFESSION? THE CONTINUING RELEVANCE OF JULIUS HENRY COHEN FOR THE PRACTICE OF LAW IN THE TWENTY-FIRST CENTURY

## FOREWORD

*Samuel J. Levine\**

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## INTRODUCTION

On April 23–24, 2012, Fordham Law School hosted a Conference, *The Law: Business or Profession? The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century*, co-sponsored by the Louis Stein Center for Law and Ethics, Touro Law Center, and the *Fordham Urban Law Journal*.<sup>1</sup>

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\* Professor of Law & Director of the Jewish Law Institute, Touro Law Center. I thank Fordham Law School for hosting the Conference, and in particular, Bruce Green, Director of the Stein Center, Russ Pearce, Co-Director, and Sherri Levine, Associate Director, as well as the editors and staff of the *Fordham Urban Law Journal*, for all of their work on the Conference. In addition, I thank Dean Patty Salkin and former Dean Larry Rafal for their support and Touro Law Center for co-sponsoring the Conference.

1. See LOUIS STEIN CTR. FOR LAW & ETHICS ET AL., *Conference Program and Schedule, The Law: Business or Profession? The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century* (Apr. 23–24, 2012),

Julius Henry Cohen was an influential lawyer who played a substantial role in numerous matters of public interest in the first half of the twentieth century.<sup>2</sup> For example, Cohen assisted in the formation of the Port Authority of New York and New Jersey and served as its general counsel for more than twenty years; he served as a founding member of the American Arbitration Association; along with Louis Brandeis, he helped resolve the 1910 garment workers' strike in New York;<sup>3</sup> and, in opposition to Louis Marshall and much of the legal establishment, he defended the 1920 Emergency Rent Laws through the New York Court system up to the United States Supreme Court.<sup>4</sup>

Yet, for scholars of legal ethics and the legal profession, Cohen's most significant legacy may be his landmark book, *The Law: Business or Profession?*, published in 1916.<sup>5</sup> Cohen's book represents the first full-length consideration of the business/profession dichotomy,<sup>6</sup> an issue that attracted considerable attention around the turn of the twentieth century<sup>7</sup> and has remained a perennial concern for legal scholars and practitioners alike.<sup>8</sup>

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available at <http://calendars.fordham.edu/displaymedia.aspx?whatToDo=atth&id=75>; *Touro Law Co-Sponsors Conference on Law as Business or Profession*, TOURO L. (Apr. 19, 2012), <http://law.touro.edu/News/NewsDetails.aspx?id=107>.

2. See JULIUS HENRY COHEN, *THEY BUILT BETTER THAN THEY KNEW* (1946); Gerald Fetner, *Public Power and Professional Responsibility: Julius Henry Cohen and The Origins of Public Authority*, 21 AM. J. LEGAL HIST. 15 (1977); Samuel J. Levine, *Louis Marshall, Julius Henry Cohen, Benjamin Cardozo, and the New York Emergency Rent Laws of 1920: A Case Study in the Role of Jewish Lawyers and Jewish Law in Early Twentieth Century Public Interest Litigation*, 33 J. LEGAL PROF. 1 (2008); *J.H. Cohen Dies; Ex-Counsel to Port Authority*, N.Y. HERALD TRIB., Oct. 7, 1950, at 12; *Julius Cohen, 77, Lawyer 53 Years*, N.Y. TIMES, Oct. 7, 1950, at 19; *Necrological: Julius Henry Cohen*, N.Y. L.J., Oct. 18, 1950.

3. See sources cited *supra* note 2.

4. See Levine, *supra* note 2, *passim*.

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

6. See Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1, 2 n.5 (2005). The phrase "business-profession dichotomy" was coined by Russ Pearce. 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, 1230 (1995).

7. See, e.g., RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 158-63 & 160 n.6 (1955) (citing sources); Laura Kalman, *Professing Law: Elite Law School Professors in the Twentieth Century*, in *LOOKING BACK AT LAW'S CENTURY* 337 (Austin Sarat et al. eds., 2002); Levine, *supra* note 6, at 1 n.1 (citing George W. Bristol, *The Passing of the Legal Profession*, 22 YALE L.J. 590 (1913); Robert Treat Platt, *The Decadence of Law as a Profession and Its Growth as a*

In exploring the question posed succinctly in the title of his book, Cohen closely examined a number of aspects of legal practice that, nearly one hundred years later, remain central in the work of both scholars and bar associations. Among other issues, Cohen addressed: standards of legal education, including evening law school programs;<sup>9</sup> standards of admission to the bar, including discrimination on the basis of race or ethnicity;<sup>10</sup> prohibitions on unauthorized practice of law and lay participation in legal practice;<sup>11</sup> the structure and atmosphere of large corporate law firms and the commercialization of legal practice;<sup>12</sup> advertising for lawyers;<sup>13</sup> and the role of the lawyer in society.<sup>14</sup>

Significantly, although Cohen was far from alone in raising concerns over changes in both law and society that threatened the status of law as a profession, Cohen's discussions stand out in both the rigor of his analysis and the rhetoric of his arguments. Cohen carefully avoids simplistic characterizations of legal practice, recognizing the inherently commercial nature of the work of lawyers while at the same time calling on lawyers to uphold the noble ideals of contributing to the good of society.<sup>15</sup> Likewise, although Cohen insists on maintaining high standards of legal education and admission to the bar, he rejects outright the ugly prejudices that entered into both the discourse and the policies of many of his contemporaries.<sup>16</sup> In place of empty platitudes and ugly rhetoric, Cohen's advocacy of law as a profession relies on a thoughtful and intellectually honest consideration of the nature and relationship between salient aspects of law and society.

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*Business*, 12 YALE L.J. 441 (1903); George F. Shelton, *Law as a Business*, 10 YALE L.J. 275 (1901)).

8. 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, 1130 & n.66 (2000) (describing "the perennial debate over whether law is a 'profession' or a 'business'").

9. See COHEN, *supra* note 5, at 44–141; Levine, *supra* note 6, at 16–20.

10. See COHEN, *supra* note 5, at 258–85; Levine, *supra* note 6, at 3–13.

11. See COHEN, *supra* note 5, at 258–85; Levine, *supra* note 6, at 20–24.

12. See COHEN, *supra* note 5, at 211–12; 239–41, 271–72; Levine, *supra* note 6, at 29–33.

13. See COHEN, *supra* note 5, at 173–200; Levine, *supra* note 6, at 25–29.

14. See COHEN, *supra* note 5, *passim*.

15. See, e.g., COHEN, *supra* note 5, at 109; 157–71; Levine, *supra* note 6, at 25–29.

16. See Samuel J. Levine, *Professionalism Without Parochialism: Julius Henry Cohen, Rabbi Nachman of Breslov, and the Stories of Two Sons*, 71 FORDHAM L. REV. 1339 (2003); Levine, *supra* note 6, at 3–20.

The Fordham Conference brought together scholars of legal ethics and the legal profession, representing a variety of scholarly interests, who engaged each other over the course of two days in a wide-ranging consideration of the abiding relevance of the themes and analysis found in *The Law: Business or Profession?* Echoing both the substance and tone of Cohen's book, the Conference produced a thoughtful and open exchange of ideas and perspectives on the underlying question of whether to characterize the law and legal practice as a business or a profession. Taking Cohen's analysis as a springboard for further research, many of the participants examined the business/profession dichotomy in the context of contemporary and international legal practice, while a number of speakers applied interdisciplinary methodologies, undertaking modes of historical, sociological, and empirical analysis to consider some of the assumptions underlying views of law as a business or a profession.

On a substantive level, the presentations at the Conference explored a number of interrelated and overlapping themes. Building on the broad-ranging character of Cohen's analysis, the speakers applied Cohen's framework to a variety of concerns, both historical and contemporary, from the regulation of lawyers to broader considerations of the lawyer's responsibilities to the client and to society. Likewise, reflecting the complex nature of Cohen's vision of professionalism, the participants expressed differing views of the business/profession dichotomy, ranging from those supporting the notion that law is and should be viewed as a profession, to others who prefer to adopt a business model for the practice of law, to still others who offer a more nuanced account that incorporates aspects of both.<sup>17</sup>

### I. PROFESSIONALISM IN HISTORICAL CONTEXT

Among other notable aspects of his vision for the practice of law, Cohen's articulation of law as a profession relied on an idealistic and intellectually honest appraisal of the qualities and virtues he deemed central to legal professionalism.<sup>18</sup> He rejected the rhetoric of ethnic prejudice, classism, elitism, and general attitudes of exclusivity that often infected the discourse of many of Cohen's friends, associates,

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17. In addition to the papers collected in this Issue, the Conference proceedings included insightful comments by the panel moderators, Elizabeth Chambliss, Michele DeStefano, Thomas Morgan, Alexandra Lahav, Howard Erichson, Stephen Gillers, William Nelson, David Luban, and Susan Carle. See LOUIS STEIN CTR. FOR LAW & ETHICS ET AL., *supra* note 1.

18. See Levine, *supra* note 6, at 3–20.

and closest allies.<sup>19</sup> As Rebecca Roiphe documents in her historical study of American legal professionalism, “the rhetoric of the professions has . . . been used to justify the exclusion of newcomers of all sorts, particularly ethnic and racial minorities and women. It has been used to create hierarchies within the profession and reinforce unjustified monopolies.”<sup>20</sup> In contrast, Roiphe notes,

[Cohen] used the rhetoric of the professions to proclaim the potential for human transformation. He used professionalism to argue and fight for the removal of permanent barriers to admission and success. In the same breath, he drew on the rhetoric of the professions to replace fixed barriers to success with contingent categories that individuals of whatever creed could transcend with hard work, dedication, and a strong moral sense.<sup>21</sup>

Accordingly, Roiphe sets forth in an effort to “revive[] and defend[] a largely discredited history of professionalism.”<sup>22</sup> Following a brief history and a helpful historiography of the place of the professions and the rhetoric of the professions in American society, Roiphe turns to Cohen’s life and work to illustrate her thesis. Although she acknowledges that professionalism was used by some “to exclude immigrants and establish a kind of professional aristocracy,”<sup>23</sup> Roiphe concludes that “Cohen use[d] the rhetoric of the professions to argue that outsiders and immigrants become not only acceptable members of the profession but critical ones. They connect the bar to a constantly changing democratic spirit while simultaneously controlling the meaning and interpretation of the country’s laws.”<sup>24</sup>

Roiphe likewise concedes that Cohen’s “faith in the educational system to instill knowledge and virtue, reward merit, and provide equal opportunities to all certainly seems outdated.”<sup>25</sup> Indeed, she suggests that Cohen may be something of a “relic,” advocating an “antiquated” form of professionalism.<sup>26</sup> Still, Roiphe counters:

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19. *See id.*

20. Rebecca Roiphe, *A History of Professionalism: Julius Henry Cohen and the Professions as a Route to Citizenship*, 40 *FORDHAM URB. L.J.* 33, 34 (2012).

21. *Id.* at 38.

22. *Id.* at 33.

23. *Id.* at 59.

24. *Id.* at 61.

25. *Id.*

26. *Id.* at 38.

it is precisely the blend of elitism and equality in the professional ideal that makes it relevant and worth salvaging. It is precisely the exclusivity that offers the real promise of success . . . . The ideal gives individuals and the community as a whole something to strive for and demand. As long as that is not completely futile then it is worthwhile to maintain the legal profession's promise and try to make good on it.<sup>27</sup>

Ultimately, Roiphe maintains, "there is a way of preserving the legal profession as a means of social integration without adopting the cultural hegemony of Cohen's era or the arrogance of the melting pot ideal."<sup>28</sup> In short, "professions can play a critical part in a world which respects difference but seeks and embraces substantive common values at the same time. The legal profession, in particular, can play an important role in negotiating and translating values in a heterogeneous world and working toward this set of shared goals."<sup>29</sup>

## II. PROFESSIONALISM AND THE REGULATION OF LAWYERS

Other speakers at the Conference, who addressed the impact of professionalism and the rhetoric of professionalism on the regulation of lawyers, struck a decidedly more mixed—if not negative—note. For example, having labeled professionalism a "pathology,"<sup>30</sup> Ted Schneyer repeatedly criticizes what he calls the "idiom" of professionalism,<sup>31</sup> at one point referring to it as a "mantra in bar policymaking on the business aspects of law practice."<sup>32</sup>

Schneyer's critique focuses, in part, on the decision in 2012 by the American Bar Association's Commission on Ethics 20/20 declining to recommend that the ABA's House of Delegates adopt any changes that would permit lawyers to practice law in firms owned by nonlawyers.<sup>33</sup> According to Schneyer, this decision "meant heeding

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27. *Id.* at 73.

28. *Id.* at 38.

29. *Id.* at 39.

30. Ted Schneyer, "Professionalism" as Pathology: The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities, 40 FORDHAM URB. L.J. 75 (2013).

31. *Id.*, *passim*.

32. *Id.* at 87. In a similar vein, others have analogized legal professionalism to a form of religious declaration. See, e.g., Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 263 (1995); Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217, 220 (2002).

33. Schneyer, *supra* note 30, at 118–36.

the profession's predominately negative attitude toward all forms of nonlawyer ownership of law practices."<sup>34</sup> Moreover, he finds, "[t]he nature of that negative reaction is revealed in the remarkably uniform rhetoric that opponents used to express their opposition."<sup>35</sup> Yet, Schneyer's concern over the deleterious effects of the "idiom of professionalism" go well beyond this most recent incident. Indeed, Schneyer undertakes a study of "the development and deployment of the idiom of professionalism from the early twentieth century to date."<sup>36</sup>

To be sure, not unlike Roiphe, Schneyer does not ascribe to Cohen some of the negative rhetoric and motivations behind other campaigns for legal professionalism. Recognizing that the idea of professionalism need not prove pathological, Schneyer acknowledges Cohen's willingness to part ways with those whose motives were less noble than his own, characterizing Cohen as "an idealist, but not naïve."<sup>37</sup> Accordingly, Schneyer refers to Cohen as a "pioneer in building the institutions of professional self-regulation,"<sup>38</sup> while accepting the sincerity of Cohen's assertion that the effort to prevent unauthorized practice of law was intended to maintain the status of the legal profession as "exist[ing] primarily for the benefit of the community."<sup>39</sup>

Still, Schneyer concludes that Cohen helped develop a number of "foundational ideas to what eventually became a full-blown idiom or ideology of professionalism"<sup>40</sup>: (1) treating the business/profession distinction as "a sharp dichotomy"; (2) "ground[ing] the business/profession dichotomy on motives he considered to be in profound tension: profit-seeking in business versus public service in the legal profession"; (3) treating "market competition [as] a business phenomenon, inimical to professional solidarity, and, thus, a force that professional regulation should suppress, not promote"; and (4) maintaining "a commitment to professional *self*-regulation under the auspices of the organized bar (acting in tandem with the state supreme courts)."<sup>41</sup>

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34. *Id.* at 83.

35. *Id.* at 84.

36. *Id.* at 85.

37. *Id.* at 91.

38. *Id.*

39. *Id.*

40. *Id.* at 93.

41. *Id.*



Schneyer reaches the disturbing conclusion that, as these aspects of professionalism evolved into an idiom or mantra followed by the organized bar, they had a negative impact on both the work of the ABA and, perhaps more ominously, the prospect he sees for the future of the ABA. According to Schneyer, by relying on the rhetoric and attitudes underlying professionalism, the ABA established policies that “put in question the ABA’s legitimacy as the principal ethics rulemaker for legal practice.”<sup>42</sup> As Schneyer notes, such a consequence “would be deeply ironic because preserving the bar’s privilege of self-regulation is one of the core values the idiom of professionalism treats as sacrosanct.”<sup>43</sup>

Bruce Green and Jane Moriarty likewise build on Cohen’s work to critique another area of contemporary regulation of lawyers: the disciplinary process. As Green and Moriarty observe, Cohen’s book begins with a chapter titled “Disbarment,”<sup>44</sup> in which Cohen depicts a “reciprocal relationship between professionalism and discipline.”<sup>45</sup> Specifically, they explain, according to Cohen, “to maintain the practice of law as a profession, it was essential to have professional regulation,” while “a robust, well-functioning disciplinary process required lawyers’ willing participation, which would not be forthcoming absent a sense of commitment to law as a profession.”<sup>46</sup> In Cohen’s own words, “Take away the conception of the practice of law as a profession—make it a business—and at once you destroy the very basis of professional discipline.”<sup>47</sup>

Placing Cohen’s views in historical context, Green and Moriarty note that Cohen “was describing the formal disciplinary process in its infancy,”<sup>48</sup> and, they suggest, “[o]ne might expect that over the period from Cohen’s time to the present, courts would have developed an increasingly sophisticated understanding of lawyer deviance, not only from deciding many cases, but from following developments outside the field of attorney discipline.”<sup>49</sup>

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42. *Id.* at 87.

43. *Id.*

44. Bruce Green & Jane Campbell Moriarty, *Rehabilitating Lawyers: Perceptions of Deviance and its Cures in the Lawyer Reinstatement Process*, 40 FORDHAM URB. L.J. 139, 141 (2012).

45. *Id.* at 142.

46. *Id.*

47. *Id.* (quoting COHEN, *supra* note 5, at 22–23).

48. *Id.*

49. *Id.* at 144.

Disappointingly, however, they find that understandings about the causes and predictors of lawyer misconduct that underlie courts' decisions about which "sanctioned lawyers should be allowed to resume the practice of law have not significantly evolved over the past century."<sup>50</sup> Indeed, in some respects, "courts' decision-making about discipline and reinstatement remains virtually unchanged from their approach a century ago during the time of Julius Henry Cohen."<sup>51</sup> Of particular concern, "[a]lthough science has progressed in explaining behavior in the intervening century, courts have made virtually no use of insights from other disciplines in structuring their disciplinary decision making."<sup>52</sup>

Green and Moriarty aim to remedy this defect in the disciplinary process, taking into consideration "the wealth of information about human behavior that has developed since Cohen's time" to "explore whether scientific insights can be useful to courts in the reinstatement process."<sup>53</sup> Focusing on lawyers sanctioned for conduct involving deception, the authors draw on social science to critique courts' predictions about the behavior of readmitted lawyers as "based on little more than guesswork."<sup>54</sup>

Complementing Green and Moriarty's critique of the disciplinary process, Susan Fortney finds contemporary notions of professionalism and the contemporary regulation of lawyers inadequate in holding lawyers accountable to clients in cases of professional liability. As Fortney observes, Cohen's vision of professionalism emphasized the responsibility of lawyers toward their clients: "Ours is a profession . . . We are all in one boat. The sins of one of us are the sins of all of us. Come, gentlemen, let us clean house."<sup>55</sup> Thus, she explains, Cohen advocated principles that would promote accountability and serve to protect clients and the public from unethical conduct by lawyers. For example, Cohen called for higher standards of legal education and bar admission, requiring that lawyers demonstrate "adequate learning and purity of character."<sup>56</sup> In addition, once admitted to the

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50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 145.

55. Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 *FORDHAM URB. L.J.* 177, 177 (2012) (quoting COHEN, *supra* note 5, at 109) (internal quotation marks omitted).

56. *Id.* at 178 (quoting COHEN, *supra* note 5, at 288) (internal quotation marks omitted).

profession, unethical lawyers should be subject to “prompt and summary accountability through a collective enterprise” among the practicing bar.<sup>57</sup>

Nevertheless, Fortney notes, Cohen devoted “[f]ar less attention” to the “accountability of lawyers who depart from standards of care applicable in professional liability cases.”<sup>58</sup> Finding a similar “gap” in contemporary approaches to the regulation of lawyers,<sup>59</sup> Fortney considers “lawyers’ collective campaign to limit their vicarious liability, as well as developments related to lawyers carrying legal malpractice insurance.”<sup>60</sup> According to Fortney, “[a]n examination of legislation and regulatory decisions related to lawyers’ professional liability over the last two decades reveals that accountability concerns may not have been adequately considered due to the absence of advocacy on behalf of consumers and the public.”<sup>61</sup>

To support her conclusions, Fortney tracks the rise of the “limited liability movement,” which “resulted in the most radical departure from a civil liability regime holding lawyers accountable for the acts and omissions of their law partners.”<sup>62</sup> As Fortney puts it, “[i]n lawyers’ campaign for limited liability, public protection was largely a secondary concern.”<sup>63</sup> Indeed, she documents the role of bar association and bar-related groups in supporting legislation that “eliminated ‘even the moderate restrictions on limited liability.’”<sup>64</sup> In the context of the rhetoric of professionalism, Fortney finds it particularly disappointing that “[b]ar leaders and other lawyers who preached the status of law as a profession said little about how the limited liability movement dramatically changed the remedies available to persons injured by lawyers’ acts and omissions. Rather, lawyers operated out of self-interest.”<sup>65</sup>

Moreover, Fortney uncovers a similar attitude among those who oppose rules that would mandate disclosure by lawyers who do not

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57. *Id.* at 177.

58. *Id.* at 178.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 179.

63. *Id.*

64. *Id.* at 184 (quoting ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT (2001), at 14 (2011)).

65. *Id.* at 186.

carry professional liability insurance. Here too, she finds, “[m]any lawyers espouse professionalism rhetoric, while placing their own financial interests over those of clients and injured persons. Evidently, they do not agree that financial accountability is an important aspect of practicing law as a profession.”<sup>66</sup>

In response to these concerns, Fortney urges law school educators and bar leaders to “challenge lawyers to examine the role that client protection plays in professional practice,”<sup>67</sup> and she calls on courts to exercise their inherent authority to regulate lawyers in a way that “hold[s] them to strict accountability for the performance and observance of their professional duties.”<sup>68</sup> Perhaps most pointedly, Fortney declares, “those who espouse the status of law as a profession should recognize and promote financial responsibility as a professional virtue.”<sup>69</sup> Indeed, she argues, “[i]f we fail to protect those who rely on us, we fail to fulfill our obligations as a protected profession.”<sup>70</sup>

To Fortney, the present conditions pose a stark choice: “[w]ill lawyers function as a trade group protecting their own personal interests over public interests, or will lawyers embrace accountability as a defining attribute of law as a profession?”<sup>71</sup> Fortney insists that “[t]o answer this question, we need not take a position that law is a business or profession.”<sup>72</sup> Instead, she concludes, “law is a business of relationships in which lawyer conduct should be guided by professional ideals and values. What distinguishes law practice from other business pursuits is how we treat, and remain accountable, to those who trust us.”<sup>73</sup>

Nancy Moore’s complex analysis of contemporary American regulation of lawyers draws upon a variety of sources, including a close reading of Tom Morgan’s approach, captured in Morgan’s decidedly provocative declaration that “Law in America is not a profession—and that’s a good thing.”<sup>74</sup> Morgan’s thesis relies, in large

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66. *Id.* at 209.

67. *Id.* at 214.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 214–15.

73. *Id.* at 215.

74. Nancy J. Moore, *Implications of Globalization for the Professional Status of Lawyers in the United States and Elsewhere*, 40 *FORDHAM URB. L.J.* 217, 217 (2012) (quoting THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 66 (2010)).

part, on the effects of globalization, including “radical changes in lawyer regulation recently enacted in the U.K. and Australia”<sup>75</sup> that “permit not only nonlawyer participation in the management and ownership of law firms, but also the creation of entirely new business structures in which lawyers will combine with nonlawyers to provide a wide range of legal and nonlegal services.”<sup>76</sup>

Moore acknowledges that:

At first glance, these international developments appear to constitute unequivocal support for Morgan’s view that, if law ever was a profession in the US and elsewhere, globalization will inevitably hasten its demise, forcing lawyers into head-to-head competition with nonlawyers and encouraging them to combine with nonlawyers to form business structures just like those encountered elsewhere in the commercial world.<sup>77</sup>

Nevertheless, she counters:

[C]loser inspection may yield a different interpretation of these events. In my view, what globalization suggests is that U.S. lawyers should adopt a more nuanced view of the perennial debate, shedding light not only on what it means for an occupation to constitute a profession, but also on the question whether professions and professionalization might ultimately provide a net benefit to society and are therefore worth preserving, although in a somewhat different form than they have previously taken.<sup>78</sup>

Likewise, Moore applies a careful analysis to the historical record. She “agree[s] that the early campaigners for educational requirements, proficiency examinations, licensing and prohibitions against unauthorized practice were motivated, at least in part, by a desire for both higher social standing and state protection from market competition.”<sup>79</sup> Yet, Moore does not accept the notion that the “motivations of these early professionalism campaigners—either individually or in organizations like the ABA—were *merely* protectionist or that professionalism did not, at least sometimes, perform a genuine public service at the same time that it enhanced the standing and remuneration of the lawyers themselves.”<sup>80</sup>

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75. *Id.* at 218.

76. *Id.* at 219.

77. *Id.* at 220.

78. *Id.*

79. *Id.* at 229.

80. *Id.* at 230.

Indeed, in some ways, Moore finds in Cohen's vision an analogue to her own nuanced approach to legal professionalism. Although she understands Cohen to adopt the "anachronistic" view that to be a profession, law has to reject the label and methods of business,<sup>81</sup> Moore finds abiding relevance and lessons in Cohen's emphasis on "the potential public benefits of lawyers considering themselves to be professionals, with duties that differ significantly from those of business persons generally."<sup>82</sup>

Perhaps most significantly, with respect to lawyers' self-regulation, Moore concludes that:

[W]hile some of the activities of bar associations may have been motivated by or at least been entirely consistent with the interests of the lawyers themselves (such as efforts to enjoin the unauthorized practice of law), a substantial portion of the work of bar associations was directed toward distinguishing lawyers based on the existence of heightened duties towards clients and others, particularly courts.<sup>83</sup>

Ultimately, Moore declares, "U.S. lawyers should themselves adopt a more nuanced view of the business/professionalism debate—one that focuses very carefully on the question whether continuing to permit lawyers to play a significant role in their own regulation is likely to provide a net benefit to society."<sup>84</sup>

### III. PROFESSIONALISM AND LAWYERS' VIRTUES

Other Conference speakers addressed broader questions of whether calls for professionalism help instill in lawyers a greater commitment to virtue and a stronger sense of fidelity to clients. Here again, the speakers presented a variety of perspectives, looking to other professions and other countries, while employing a range of different methodologies including empirical and comparative frameworks.

Sande Buhai begins her discussion by posing threshold questions: "What is a 'profession'? Is law a 'profession'? And why might anyone care?"<sup>85</sup> Buhai first rejects the "trivial" definition of professions as requiring "prolonged training," "formal qualification,"

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81. *Id.* at 238.

82. *Id.*

83. *Id.* at 239.

84. *Id.*

85. Sande Buhai, *Profession: A Definition*, 40 *FORDHAM URB. L.J.* 241, 242 (2012).

and “knowledge of [a] field.”<sup>86</sup> After all, she explains, “When lawyers assert that law is a ‘profession,’ not a business, they clearly mean something more.”<sup>87</sup> Thus, Buhai refines her questions, borrowing at length from the introduction to Cohen’s book:

Why should there be a class enjoying special privileges? Why should there be a group of men amenable to summary court process for professional misconduct? Why any standards of professional conduct? Why shouldn’t anyone be permitted to draw up papers, appear in court—argue about facts? What is the *raison d’être* of the whole professional scheme? Why shouldn’t lawyers advertise or solicit business, as businessmen do? Why shouldn’t they pay ‘commissions’ for getting business?<sup>88</sup>

In setting out to answer these questions, Buhai likewise rejects the simplistic assertion that lawyers evidence their professionalism through their “altruistic spirit.”<sup>89</sup> Buhai responds rhetorically: “Altruistic? Lawyers are professionals, not mere businessmen, because they are unusually altruistic? Who are we kidding? On this account, some lawyers may be ‘professionals’ but many, perhaps most, are not.”<sup>90</sup> Instead, Buhai undertakes her analysis of law as a profession within the context of a broader examination of the “professions,” identifying and exploring “common characteristics” that law shares with medicine and accounting.<sup>91</sup>

Specifically, Buhai finds that the professions all provide a service that requires specialized education and the exercise of independent judgment.<sup>92</sup> As a result of the information disparities between professionals and their clients, “trust of the service provider . . . is . . . essential.”<sup>93</sup> In turn, a professional earns the client’s trust by “put[ting] someone else’s interests ahead of [his] own and therefore requires an ethos different from business’s standard profit maximization norm. Such an ethos supports internalized codes of conduct and occupational self-regulation . . . .”<sup>94</sup> Moreover,

86. *Id.*

87. *Id.*

88. *Id.* at 243 (quoting COHEN, *supra* note 5, at xiii–xiv).

89. *Id.* at 244.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 281.

professionals “have duties to the public in addition to duties to their individual clients.”<sup>95</sup>

Having identified these distinguishing characteristics shared by professions, Buhai rejects the argument that “calling something a profession really does not have any added value.”<sup>96</sup> Rather, she concludes, “[a]s clients or patients we expect that our professional service provider will put our interests above their own and use their best independent judgment to assist us, even while recognizing that they may have duties to the public as well.”<sup>97</sup> In contrast, “[w]e do not necessarily have the same expectation that a shoe salesman will put their own interests in making a high commission aside when helping us find the right pair of shoes.”<sup>98</sup> Finally, Buhai closes with the observation that “Julius Henry Cohen wrote his book at the beginning of this debate when it was important for many reasons to have lawyers viewed as professionals. Even 100 years later, professionals still have an important role to play in our society.”<sup>99</sup>

Turning to an international setting, Philip Genty similarly finds much to gain from professionalism, this time as applied to contemporary Russian legal practice. Notably, as Genty observes, Cohen dedicated three chapters of his book to a comparative and historical survey of the practice of law in number of countries, including twelve pages that focus on the history of the legal profession in Russia.<sup>100</sup> Reflecting upon his own experiences at a legal ethics conference in Moscow in November 2011, Genty finds that Cohen’s descriptions of Russia, though nearly a century old, “could easily be adapted to describe today’s Russian legal profession.”<sup>101</sup>

For example, Genty cites Cohen’s depiction of reforms that had taken place in Russia in 1864, establishing a self-regulating bar, but one that included “a kind of ‘caste’ system made up of three tiers of lawyers, in descending order: ‘Counselors-at-Law,’ ‘Attorneys-at-Law,’ and ‘Solicitors.’”<sup>102</sup> As a result of the difference in status, “Counselors-at-Law and Attorneys-at-Law were members of the

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95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Phillip M. Genty, *Dichotomy No Longer? The Role of the Private Business Sector in Educating the Future Russian Legal Professions*, 40 *FORDHAM URB. L.J.* 283, 283–84 (2012).

101. *Id.* at 286.

102. *Id.* at 285.



relevant General Assemblies, while Solicitors were not. In addition, Attorneys-at-Law could rise to the status of Counselors-at-Law, while Solicitors could not.”<sup>103</sup> As Genty explains, in Cohen’s view, “this three-tiered structure undermined the otherwise promising qualities of the developing Russian legal professions.” In the words of a colleague quoted by Cohen:

After an acquaintance of 22 years with the courts and lawyers of this country (America), I am led to believe that on the whole the professional standing of the lawyers in Russia is higher than it is here. Of course, one must always bear in mind that this applies only to Counselors-at-Law, and the Attorneys-at-Law, who form a sort of aristocracy of the bar in Russia. The “Solicitors” are, on the contrary, looked down upon as a lower estate.<sup>104</sup>

Moving ahead to contemporary Russia, Genty observes that “[t]here is a robust set of ethical regulations in Russia.”<sup>105</sup> However, “the ethical statute and the Code apply only to ‘advocates’” who comprise but one of at least five different Russian legal professions and around twelve percent of Russian lawyers.<sup>106</sup>

Of particular relevance to a consideration—or reconsideration—of the business/profession dichotomy, Genty finds “fascinating” the participation of Russian law firms at the ethics conference he attended in Moscow, including substantial commitment in both resources and personnel.<sup>107</sup> In identifying a possible motivation for law firm involvement in the conference, Genty suggests that, with “almost 90% of the lawyers operating without any clear ethical standards[,] . . . the efforts of the law firms to provide ethics education and, by extension, to promote efforts to bring all attorneys within the existing ethical standards, make perfect sense.”<sup>108</sup> Specifically, “[c]lear professional standards for lawyers will ultimately improve the business climate by providing the stability and predictability that businesses require. *In other words, higher ethical standards in the legal professions are good for business.*”<sup>109</sup>

According to Genty:

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103. *Id.*

104. *Id.* at 285–86 (quoting COHEN, *supra* note 5, at 75 (quoting correspondence from Dr. Isaac A. Hourwich)).

105. *Id.* at 286.

106. *Id.* at 287–88.

107. *Id.* at 293.

108. *Id.* at 294.

109. *Id.*

This congruence of commercial and ethical interests in Russia challenges the notion of a business-profession dichotomy. The involvement of global law firms such as White & Case and DLA Piper indicates that the private sector has become a major force in promoting higher ethical standards within the legal professions. This union of the idealistic with the practical is undoubtedly a very good thing. Those who wish to establish such standards for lawyers—to make them more “professional”—now have powerful allies in the commercial sector.<sup>110</sup>

Returning once more to Cohen, Genty wonders “whether Julius Henry Cohen could have envisioned such a thing and, if so, what he would have thought about it.”<sup>111</sup> Genty reasons that, although Cohen “argues in *The Law: Business or Profession?* that the practice of law should not be *about* generating business, it seems likely that he would have applauded efforts to promote higher ethical standards *even if* they are undertaken, in part, for practical commercial motives.”<sup>112</sup> After all, Cohen’s “central mission was to instill a concept of professionalism in the Bar; in the case of law firms promoting higher ethical standards for business reasons, he might well have concluded that the end justifies these means.”<sup>113</sup> Finally, Genty concludes, in light of Cohen’s “particular interest in Russia, he probably would have found these initiatives to be important and exciting, although he would likely have been distressed to learn that the challenges confronting the Russian professions today are similar to those he described in 1916.”<sup>114</sup>

In an article co-authored with Christine Parker and Vibeke Lehmann Nielsen, Robert Rosen relies on both an international perspective and an empirical methodology to evaluate whether there is a “lawyer cast of mind” grounded in a notion of professionalism that entails not only “thinking like a lawyer” but also a degree of virtue and good character.<sup>115</sup> To illustrate one response to this question, the authors look to Cohen’s vision of professionalism, in which “having a lawyer-identity is consequential to the lawyer’s

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110. *Id.*

111. *Id.* at 296.

112. *Id.*

113. *Id.*

114. *Id.*

115. Robert Eli Rosen, Christine E. Parker & Vibeke Lehmann, *The Framing Effect of Professionalism: Is There a Lawyer Cast of Mind? Lessons from Compliance Programs*, 40 *FORDHAM URB. L.J.* 297, 299 (2012).

motives and actions and aligns them with ethics.”<sup>116</sup> In fact, they suggest that “[t]he existence of a powerful lawyer cast of mind was crucial to . . . Cohen because it enabled him to implicate democratic values into the profession: Immigrants could become lawyers and they could join with non-immigrants to be forces for justice because they learned to think . . . alike.”<sup>117</sup> In short, “[t]he lawyer cast of mind to Cohen . . . support[s] diversity in the legal profession [and] . . . makes possible common cause between lawyers.”<sup>118</sup>

At the same time, the authors continue, “[t]his position also meant that the guardians of the profession should be eternally vigilant to preserve the lawyer cast of mind since what can be acquired can also be lost. Julius Henry Cohen was one of those guardians.”<sup>119</sup> Thus, Cohen also advocated preserving the lawyer cast of mind “by vigilantly imposing strictures on how lawyers behave, maintaining the ‘dignity’ of the lawyer office, disciplining wayward lawyers, and regulating law schools.”<sup>120</sup>

An alternative position maintains that

virtue and good character are traits that are developed outside of legal training. Who one is, not the lawyer cast of mind one has been educated into, informs ethical choices in legal practice. One’s character is tested by law practice. Passing tests on professionalism bears little relation to behavior in practice.<sup>121</sup>

Under this view, accordingly, “[l]egal practice . . . needs to be limited to good men. Character and fitness committees should be emboldened to guard against miscreants entering the profession.”<sup>122</sup>

Rosen and his co-author assess these alternative views in the context of considering “the framing effects of professionalism on organizational compliance structures and practices, with particular attention to the distinctive influence, if any, of the lawyer cast of mind.”<sup>123</sup> Specifically, they ask, “When lawyers are compliance managers, do companies’ structures and practices of compliance differ from when a chief financial officer or specialized compliance professional, company secretary, or chief executive officer is the

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116. *Id.* at 304.

117. *Id.*

118. *Id.* at 305.

119. *Id.* at 304.

120. *Id.* at 305 (quoting COHEN, *supra* note 5, at 313).

121. *Id.* at 304.

122. *Id.*

123. *Id.* at 301.

manager of compliance?”<sup>124</sup> In response, they “use survey data to measure the framing effects of professionalism and the distinctiveness of the lawyer cast of mind on compliance structures and practices.”<sup>125</sup>

Based on their research, which employs an empirical study to apply a theoretical model to Australian businesses, the authors reach an intriguing finding: “for the most part, the professional background of the individual responsible for compliance in the company makes very little difference to the company’s compliance management structures and practices nor to its assessment of compliance risks.”<sup>126</sup> The authors note some limited exceptions to these findings; for example, “[h]aving a lawyer in charge . . . has an effect on implementation of both formal compliance system elements and substantive compliance management through the lawyer’s influence on the firm’s increased perception of risk from third parties and the regulator.”<sup>127</sup> They conclude, however, that there is little evidence “that having a lawyer in charge of compliance has any effect on compliance management in practice.”<sup>128</sup>

Rosen and his co-authors are plainly disappointed with the “lack of evidence of the influence of a lawyer cast of mind in compliance management.”<sup>129</sup> In response to the “idealization of the profession” and the belief in “[t]he ability of the profession[] to enter situations and remake them, bringing the weight of culture and a profound skill set,” the authors state bluntly that “[u]nfortunately, we find little evidence here.”<sup>130</sup> Nevertheless, the authors close on a note of optimism, expressing the “hope” that

our negative findings spur others to be explicit about the parameters and consequences of socialization by legal education and practice experiences. We hope our negative findings spur lawyers who come to lead compliance programs to do more than write manuals and lecture to employees, perhaps leading the company to substantively value compliance with the law.<sup>131</sup>

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124. *Id.*

125. *Id.*

126. *Id.* at 352–54.

127. *Id.* at 353.

128. *Id.*

129. *Id.* at 365.

130. *Id.* at 366.

131. *Id.* at 366–67.

## IV. PROFESSIONALISM AND THE LAWYER'S ROLE IN SOCIETY

Several other speakers at the Conference looked more broadly at the impact of professionalism on the lawyer's role in society, including the lawyer's obligation to promote the public good. Once again, the speakers articulated different attitudes toward and understandings of Julius Henry Cohen, legal professionalism, and the business/profession dichotomy. Rakesh Anand opens his article with praise for Cohen as "a man concerned with the social good" who "understood law to have a place in our thinking about that subject" and "also understood the professional practice associated with it to be an activity different in kind from the practice of commerce."<sup>132</sup> In short, Anand admires Cohen for "challeng[ing] the commercialization of the practice of law and, correspondingly, . . . defend[ing] a vision of lawyering as a profession."<sup>133</sup>

Sharing many of Cohen's concerns, Anand likewise laments what he views as the "increasing sway of commercialism" on contemporary legal practice.<sup>134</sup> For Anand, however, the challenges of commercialism go beyond the business/profession dichotomy. Instead, Anand expands upon Cohen's framework, addressing the "broad social issue" of "commercialism's growing impact on society as a whole and how we might think about law and the role for lawyers in light of this state of affairs."<sup>135</sup> In so doing, Anand develops "a distinct perspective on the essential character of commercialism and law . . . understand[ing] each to be a cultural practice of a set of ideas and, as such, to be a way of knowing, or being in, the world, at least in the United States."<sup>136</sup> Accordingly, he explains:

[T]he subject to be addressed is the growing influence of the *cultural form* of commercialism on society as a whole—or, more precisely, the growing influence of the cultural form of economics, commercialism being the practice of a set of economic ideas—and how we might think about the *cultural form* of law and the role for its most representative figures in light of this state of affairs.<sup>137</sup>

Anand summarizes his analysis through three main points:

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132. Rakesh K. Anand, *Resisting Commercialism*, 40 FORDHAM URB. L.J. 369, 369 (2012).

133. *Id.*

134. *Id.* at 370.

135. *Id.*

136. *Id.*

137. *Id.* at 371 (footnotes omitted).

(a) . . . the cultural form of economics occupies a significant place in the American political order, one that has a pronounced, negative effect on society; (b) the cultural form of law offers the hope of an alternative mode of being in and through which to engage political life, one that provides for a more healthy social condition and, correspondingly, a space in and through which to resist the cultural form of economics and its negative social effects; and (c) the role for the lawyer in America today is to help realize the promise of the cultural form of law and, correspondingly, push against the manifestation of the cultural form of economics and its detrimental social consequences.<sup>138</sup>

Or, as he puts it more broadly:

[C]ause for concern exists—the American embrace of the cultural form of economics has put the political order in a bad place and, thus, the social situation is a troubled one—and the cultural form of law and the legal profession represent a locus within which to assist society in moving in the direction of change.<sup>139</sup>

Addressing the specific role of the lawyer in contemporary American society, Anand contends that “[i]n confronting the challenges of the prevailing economic conditions in the United States, the legal profession must maintain a commitment to the legal way of life and the manner in which it organizes and understands experience.”<sup>140</sup> Anand emphasizes, however, that “this boundary to conduct permits a wide array of action,” and that even “[t]o the extent that various parts of the profession need to restructure themselves, a broad range of possibilities is available to legal professionals.”<sup>141</sup>

At the same time, Anand acknowledges that the boundary to conduct “does place a significant limitation on the behavior of the profession. Specifically, any reorganization of any part of the profession must not arise from a commitment to the pursuit of profit per se. It must not be rooted in a dedication to profit-maximization.”<sup>142</sup> Thus, he rejects proposals to open up private firms to outside investment or for law schools “to understand themselves in more business-oriented terms and in turn to adopt curriculums that

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138. *Id.* at 372 (footnote omitted).

139. *Id.*

140. *Id.* at 390.

141. *Id.*

142. *Id.* at 391.

will produce graduates that are more market-ready.”<sup>143</sup> Anand concludes his article with a call for action among lawyers to work to improve the American social condition.<sup>144</sup>

Steven Hobbs similarly finds reason to praise Cohen for the social impact of his work and ideas. Viewing Cohen through an “entrepreneurial lens,”<sup>145</sup> Hobbs sees Cohen’s book “as an exercise in social entrepreneurship that goes beyond the mere question of whether the practice of law is a business or a profession and entails the question of what type of society Cohen desired to construct by having quality lawyers as he described them.”<sup>146</sup> From this perspective, Hobbs depicts Cohen as envisioning “the looming threat to the profession as an opportunity to chart a higher path towards honor, integrity and professional excellence” and Cohen’s book as “the strategic planning process that identifies fiscal and human capital capable of achieving the vision.”<sup>147</sup>

Indeed, according to Hobbs:

Overall, what Cohen accomplishes is nothing less than a penetrating critique of the legal profession’s fall from grace and the countervailing wave of regulatory efforts to raise the organized Bar to a level of practice that would be the envy of the world. The creative response to such a threat to the integrity of the Bar is the development of national and local bar associations designed to lift the professional character and credentials of the Bar and to discipline those who fail to meet baseline qualifications.<sup>148</sup>

In short, Hobbs declares, “[Cohen’s] project is about making fundamental changes in the community of lawyers.”<sup>149</sup>

Hobbs finds it “hardly surprising” that “Cohen viewed the world of practice from an entrepreneurial perspective.”<sup>150</sup> After all, Cohen was “an entrepreneur of the highest rank and he tarried in several different vineyards.”<sup>151</sup> As Hobbs puts it, Cohen was “the

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143. *Id.*

144. *Id.* at 392–93.

145. Steven H. Hobbs, *An Entrepreneurial Perspective on the Business of Being in Our Profession*, 40 FORDHAM URB. L.J. 395, 398 (2012) (citing Benjamin Means, *Foreword: A Lens for Law and Entrepreneurship*, 6 OHIO ST. ENTREPREN. BUS. L.J. 1 (2011)).

146. *Id.*

147. *Id.* at 400.

148. *Id.* at 404.

149. *Id.* at 405.

150. *Id.* at 408.

151. *Id.*

quintessential social entrepreneur.”<sup>152</sup> Cohen’s “life was animated by a commitment to creatively improve a variety of social systems. He was a promoter, a person who could take ideas about recognized problems, push them, and . . . ensure that solutions came to fruition.”<sup>153</sup>

Nevertheless, notwithstanding the admiration he expresses for Cohen’s spirit of social entrepreneurship, Hobbs also expresses a considerable measure of disappointment in Cohen, portraying Cohen as removed from vital social issues revolving around race and civil rights. According to Hobbs, Cohen’s “field of vision was limited in scope[,] . . . neglect[ing] the rapid social changes that were occurring at that time—changes of which an officer of the court, dedicated to the rule of law and the triumph of the administration of justice, should have been concerned.”<sup>154</sup> Moreover, Cohen’s survey of noble attorneys “woefully misses some who were valiantly engaged in the pursuit of liberty, freedom and justice for all of America’s citizens. . . . [T]heir stories are written in many significant legal battles and their efforts to promote social justice.”<sup>155</sup>

Notably, Hobbs observes,

[W]ithin that pursuit of justice there were lawyers who acted in much the way Cohen would have found to be instrumental in developing a theory of ethics and professionalism . . . lawyers who were social engineers advocating in the best traditions of the profession to achieve revolutionary changes in the society . . . lawyers, both black and white, who were laboring in the vineyards of freedom<sup>156</sup>

and others “who came of age during the time [Cohen] was engaged in his professionalism project.”<sup>157</sup>

To be sure, Hobbs acknowledges both the perils of “view[ing] Cohen through the lens of contemporary historical knowledge” and “the fact that Cohen [is writing] primarily to lawyers involved in the business world.”<sup>158</sup> Likewise, Hobbs “leave[s] for others the task of doing further forensic work on the psychological, intellectual, and

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152. *Id.* at 409.

153. *Id.* at 410.

154. *Id.* at 410–11.

155. *Id.* at 411.

156. *Id.* at 420.

157. *Id.* at 424.

158. *Id.* at 429.



social motivations for the perspectives Julius Henry Cohen developed about the profession.”<sup>159</sup>

Still, Hobbs insists, “[o]ne cannot proclaim a commitment to democratic ideals and miss the social tension that would shape (and continues to shape) the American odyssey.”<sup>160</sup> Indeed, Hobbs concludes “[a]n entrepreneurial lawyer steeped in the law of commerce, [Cohen] missed the teleological essence of his own work.”<sup>161</sup> Specifically:

We attorneys are professionals, but . . . in the sense that we have been licensed to exercise a special power that requires specialized training and experience. The power can be exercised for good or for evil. . . . Evil also applies to those in society who suppress the citizenship rights and human dignity of a significant portion of the nation.<sup>162</sup>

Hobbs closes with the words of Charles Hamilton Houston: “A lawyer’s either a social engineer or he’s a parasite on society.”<sup>163</sup> For Hobbs, “that is an alternative answer to what it means to be a professional.”<sup>164</sup>

Likewise placing Cohen in historical context, Norman Spaulding offers a more heavily critical review of twentieth century legal professionalism, and—at least to some degree—of Cohen as well. Spaulding characterizes Cohen’s book as “utterly anachronistic” and “a prologue to the bar’s discredited regulatory venture in the twentieth century.”<sup>165</sup> According to Spaulding, the themes Cohen sets forth in his book are familiar to any student of the history of the legal profession: “Nostalgia for the supposedly more tame, dignified, gentlemanly mores of the past is mixed with hand wringing about public anti-lawyer sentiment, increased commercialization, and lax standards of admission and discipline reducing the character, ethics, manners, and quality of the bar.”<sup>166</sup> Moreover, he finds, Cohen’s “core argument picks up in the spirit” of other adherents to the

159. *Id.* at 431.

160. *Id.* at 429.

161. *Id.* at 431.

162. *Id.*

163. *Id.* at 432 (citing GENNA RAE McNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 84 (1983)).

164. *Id.*

165. Norman W. Spaulding, *The Practice of Law as a Useful Art: Toward an Alternative Theory of Professionalism*, 40 *FORDHAM URB. L.J.* 433, 438–39 (2012).

166. *Id.* at 439.

professionalism movement, “emphasizing ‘[t]he degree to which our profession has been commercialized since the Civil War.’”<sup>167</sup>

Notwithstanding his stinging critique of the rhetoric, sentiment, and practices of the “culture of professionalism,”<sup>168</sup> Spaulding is, at times, somewhat more charitable toward Cohen. For example, Spaulding concludes that “Cohen was not naïve about the intersection between law and business,”<sup>169</sup> and he finds Cohen “sincere”<sup>170</sup> in his portrayal of a more idealized past, noting that Cohen “devotes several chapters [of his book] to comparative evidence running back to the classical period to establish that law was everywhere regarded as more than a mere trade concerned with profit.”<sup>171</sup> Furthermore, apparently recognizing Cohen’s rejection of the classism that figured prominently in the discourse of many of Cohen’s contemporaries,<sup>172</sup> Spaulding does not seem to include Cohen among the “anti-democratic element of the elite bar’s conception of professionalism.”<sup>173</sup> Finally, in contrast to his harsh reading of Cohen’s book, Spaulding makes clear that “Cohen’s biography . . . , by all the evidence, suggests that he admirably embodied the ethic of service that was espoused by many elite lawyers searching for ways to mediate the contradictions of the profession’s ideals at the time.”<sup>174</sup>

Indeed, Spaulding’s most sustained argument, criticizing Cohen’s book for “its remove from the modernist movement of the early 1900s,”<sup>175</sup> is directed more pointedly toward twenty-first century lawyers and contemporary advocates of the rhetoric of legal professionalism. Like Hobbs, Spaulding contrasts Cohen’s attitudes with the dynamic changes that were concurrently taking place in American society. While Hobbs emphasizes social changes reflected in the early civil rights movement, Spaulding focuses primarily on “modernists of the same period in the visual arts, architecture, music, and psychology, who sought to break decisively from bourgeois values, to openly challenge ‘conventional sensibilities,’ and to

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167. *Id.* at 441 (quoting COHEN, *supra* note 5, at 106).

168. *Id.* at 437.

169. *Id.* at 442.

170. *Id.* at 443.

171. *Id.* at 441.

172. *See* Levine, *supra* note 6, at 14–20.

173. Spaulding, *supra* note 165, at 444.

174. *Id.* at 439 n.39.

175. *Id.* at 445.

cultivate a ‘principled self-scrutiny.’”<sup>176</sup> In this context, Spaulding finds the early twentieth century “culture of professionalism” to have been “remarkably complacent.”<sup>177</sup>

Turning his attention to the present, Spaulding declares, “[if] Cohen and his cohort can be forgiven for missing or ignoring the spirit of modernism, we twenty-first century lawyers cannot. More than ever we need a modernist commitment to witheringly ‘principled self-scrutiny.’”<sup>178</sup> Moreover, Spaulding insists, “that commitment would have to be shared by the bar’s internal critics, especially those in the legal academy, who are largely removed from the demands of practice and . . . as attached to the ‘conventional sensibilities’ of criticism as the bar has been to its protectionist project.”<sup>179</sup>

Spaulding extends these arguments to critique a number of areas of contemporary legal practice. For example, “principled self-scrutiny should expose the embarrassingly pervasive gaps between right and remedy for actual professional misconduct in the service of clients. There is currently no meaningful remedy for many common types of breach of professional duty.”<sup>180</sup> In addition, “[u]nauthorized practice laws are embarrassingly over-inclusive and, for the most part, indifferent to the interests of the consumers of legal services they purport to protect,” while “[j]udicial over-enforcement of conflicts of interests via the disqualification remedy has reached nearly epidemic proportions.”<sup>181</sup> According to Spaulding, “[m]odernist simplicity and honesty demand closing these right-remedy gaps.”<sup>182</sup> “As importantly,” Spaulding continues, “if law is a machinery of government in a democratic society the legal profession should seek to maximize access to law, not maximize monopoly rents,”<sup>183</sup> because “maximizing access is a far more credible foundation for the professional authority of lawyers in a democratic society than protectionism.”<sup>184</sup> Thus, Spaulding concludes, “[c]losing the right-remedy gap and maximizing access to legal services are but two of the

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176. *Id.* at 447 (quoting PETER GAY, MODERNISM: THE LURE OF HERESY 3–4 (2008)).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 452.

181. *Id.* at 455.

182. *Id.* at 456.

183. *Id.*

184. *Id.* at 457.

most basic reforms that would follow from embracing law as a useful art.”<sup>185</sup>

Judith McMorro likewise critiques efforts to portray the practice of law as a profession rather than a business, finding such models not only inadequate, but often detrimental to promoting the responsibilities of lawyers toward their clients and to society. Like Spaulding, McMorro reserves some words of praise for Cohen, while at the same time lamenting implications of professionalism for contemporary legal practice. McMorro refers to Cohen’s book as a “readable and thoughtful analysis”<sup>186</sup> that emphasizes the value of lawyering to society.<sup>187</sup> Nevertheless, she argues that Cohen’s “rhetorical device . . . ‘[law] versus business,’” precludes an integrated model that allows us to talk about the role of business best practices in achieving these goals, thereby “seriously impair[ing] our ability to address some of the central challenges to lawyers fulfilling these important values.”<sup>188</sup>

Focusing on three areas of challenge to contemporary American lawyers, McMorro contends that “improving adherence to core values requires not just training lawyers to internalize a model of professionalism, and continuing commitment to self-regulation in some form, but also *implement[ing] improved business practices.*”<sup>189</sup> Specifically, she delineates three compelling concerns:

- (i) the problem of neglect, poor client communication, and poor management of client funds;
- (ii) the need to improve the ethical infrastructures in practice setting to enhance both routine practice and ethical decision-making when lawyers confront ethical challenges, and
- (iii) the challenge of provid[ing] legal services to the poor and working class.<sup>190</sup>

Through a careful examination of each of these issues, McMorro concludes, “a significant part of our failures as a profession are business failures,” which “occur at the individual, firm and market levels.”<sup>191</sup> Accordingly, “at each level we need to consider the business structures that enhance or impair improved practices,”

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185. *Id.*

186. Judith A. McMorro, *In Defense of the Business of Law*, 40 *FORDHAM URB. L.J.* 459, 459 (2012).

187. *See id.* at 460.

188. *Id.*

189. *Id.* at 461.

190. *Id.* at 460–61.

191. *Id.* at 461.

recognizing that “[b]usiness, good business, it not the enemy of lawyers but an important tool to implement our service profession.”<sup>192</sup> Therefore, in place of the “either/or approach” that adopts a “dichotomous” conception of law as either business or profession, McMorrow calls for a “sharper and richer discussion of the business perspective of professional practice,” incorporating “a stronger interdisciplinary conversation with the field of business ethics.”<sup>193</sup> In short, “[w]e must envision business as both a partner and a tool to achieve our larger social goals.”<sup>194</sup>

Still, despite her rejection of the “false dichotomy” between law as a business or profession<sup>195</sup> and her call for “creative, unapologetic attention to the business of law” to “enhance ethics and professionalism,”<sup>196</sup> McMorrow acknowledges that “obvious concerns arise.”<sup>197</sup> Just as McMorrow rejects a professionalism model that ignores the business aspects of legal practice, she avoids an alternative model that simplistically embraces the characterization of law as a business. In fact, notwithstanding her critique of certain elements of Cohen’s thesis, McMorrow relies on Cohen to “remind[] us of the limits of the business paradigm in our service business.”<sup>198</sup> As McMorrow further notes, “the concept of ‘business’ is just as vast and elastic as the word ‘profession.’ It has affirmative and negative manifestations.”<sup>199</sup>

Instead, McMorrow advocates that lawyers “focus on the positive aspects of a service business: core values, excellent service, good infrastructure, proper capitalization, clear business plan, efficiencies, cost controls, and employee development,” in addition to forming “a powerful alignment with the field of business ethics” and “draw[ing] lessons from the expanding and creative field of corporate social responsibility.”<sup>200</sup> Thus, she concludes “I do not see the business

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192. *Id.*

193. *Id.* at 461.

194. *Id.*

195. *Id.* at 477.

196. *Id.* at 478.

197. *Id.*

198. *Id.*

199. *Id.* at 479 (citing Neil Hamilton, *The Profession and Professionalism Are Dead?: A Review of Thomas Morgan, The Vanishing American Lawyer* (2010), 20 *PROF. LAW.* 14, 14–17 (2010)).

200. *Id.*

aspects of legal services as bad or the enemy. To provide legal services, lawyers must be good business people as well.”<sup>201</sup>

Looking back at one particularly transformative era in American law, society, and culture, George Conk recounts his experiences at Rutgers Law School in Newark, New Jersey, from 1970 to 1974. Conk recalls that “[t]hree great shifts were underway, and Newark’s legal community and Rutgers Law School were at the heart of it all.”<sup>202</sup> Specifically, as “African-Americans’ demands for an end to poverty and discrimination, the anti-war movement, and the women’s liberation movement converged,”<sup>203</sup> legal education at Rutgers focused on “[p]overty law, civil rights and liberties, women’s rights, employment discrimination, and public education.”<sup>204</sup>

This progressive focus was the result of the efforts of a core of faculty assembled at Rutgers-Newark in the mid 1960s “that would make great innovations in legal education—clinical education by professors who conceived of and built the school as a law-reform institution.”<sup>205</sup> Conk characterizes the “key faculty” at Rutgers as “an honor roll of progressive lawyers” whose “creed was not neutral observation but to make a difference—for legal, social, and economic equality of all but particularly for African Americans and Latinos, to advance the rights of women, to expand and protect the fundamental rights of speech, privacy, and due process of law.”<sup>206</sup> In addition, Rutgers was “far ahead of the curve in admitting women” and “its affirmative action program brought many minority students to the school,” while the school’s “Minority Student Program provided mentoring, internship and other guidance to minority students.”<sup>207</sup>

For Conk, Rutgers “presented a model of engaged legal education that was and is unique,” such that he declares, “[t]o my knowledge no other law school has been so thoroughly characterized by a broad progressive social agenda.”<sup>208</sup> Indeed, Conk proudly asserts, “Newark—not Berkeley, Cambridge, New Haven, or Washington,

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201. *Id.* at 480.

202. George W. Conk, *People’s Electric—Engaged Legal Education at Rutgers-Newark Law School in the 1960s and 1970s*, 40 *FORDHAM URB. L.J.* 503, 504 (2012).

203. *Id.*

204. *Id.* at 505.

205. *Id.* at 506.

206. *Id.* at 507.

207. *Id.* at 505.

208. *Id.*

D.C.—was the most exciting place to be a law student or law professor in the mid 1960s to late 1970s.”<sup>209</sup>

After recounting various examples in which “[t]he unique activism of Rutgers-Newark . . . had a huge impact in the development of the law,”<sup>210</sup> Conk undertakes to answer the question: “Why Newark?”<sup>211</sup> In Conk’s view, four interrelated factors contributed to the significance of both Rutgers and Newark: First, Conk observes, “the sixties and seventies were the high water mark of public higher education.”<sup>212</sup> As a public university, Rutgers offered a legal education that was “practically free,” allowing students to “enter[] law school with no dread of acquiring debt that would constrain our career choices. Confident in American prosperity our concerns as students were for meaningful careers, not debt service.”<sup>213</sup> Second, the “quiet leadership of Dean Willard Heckel brought extraordinary talent to the law school, and accommodated the activism of the clinical professors.”<sup>214</sup> Third, “the spirit of the times gave great confidence to reformist litigators.”<sup>215</sup> Fourth, “credit must be given to the New Jersey Supreme Court[’s] . . . progressive jurisprudence.”<sup>216</sup>

Above all, though, Conk emphasizes:

The activist faculty and the clinics engaged law students deeply in innovative and intense litigation regarding the most important and controversial issues of the day . . . . No other law school in the country can begin to match its record in the 1970s. . . . Students learned from extraordinarily talented lawyers whom they assisted. Their successes showed students how to succeed by really trying. We left Rutgers confident that we knew how to, and could, change the law, confident that we could make a difference.<sup>217</sup>

In one of the final Conference presentations, Russell Pearce and Pam Jenoff offered an analytical framework to place in historical context the various themes that had been explored among the participants over the course of two days. In so doing, the authors identify “five crises that faced the legal profession at the turn of the

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209. *Id.* at 507.

210. *Id.* at 545.

211. *Id.* at 546.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 548.

217. *Id.* at 545.

twentieth century and that face the legal profession once again today.”<sup>218</sup> Specifically, they address:

(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 of legal education; and (5) the management of a dramatic increase in diversity in the legal profession.<sup>219</sup>

Like other Conference participants, Pearce and Jenoff turn to Julius Henry Cohen’s book to provide historical perspective for each of these issues, finding that “the questions facing our profession today are surprisingly parallel” to those in Cohen’s time, and that “some problems that Cohen’s generation was able to resolve appear unsolvable today.”<sup>220</sup> Thus, “[t]hese dynamics suggest a few factors worth considering in confronting today’s crises.”<sup>221</sup>

“First” they argue “it appears that the profession will accomplish little simply by resisting change. Cohen’s generation moved boldly to innovate.”<sup>222</sup> In contrast, according to Pearce and Jenoff, “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.”<sup>223</sup>

“Second,” the authors continue, “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.”<sup>224</sup>

Ultimately, again echoing the views of many others at the Conference, they suggest that “[p]erhaps Cohen’s model of

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218. Russell G. Pearce & 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.* 418, 482 (2012).

219. *Id.*

220. *Id.* at 501.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*



professionalism without parochialism<sup>225</sup> offers a valuable framework for beginning a reexamination of the status quo today.”<sup>226</sup>

### CONCLUSION

Building on a portrait of Julius Henry Cohen and his vision of professionalism that emerged throughout the Conference, Pearce and Jenoff conclude that:

Cohen’s hybrid and multi-faceted assessment reflects the reality that, even a century ago, the rigid distinction between business and 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. . . . 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.<sup>227</sup>

Indeed, more generally, the works in this Conference Issue of the *Fordham Urban Law Journal* extend Cohen’s analysis to new and emerging dimensions of the study of legal practice and legal ethics. Thus, taken together, the scholarship presented at the Conference demonstrates that the concerns and ideas raised by Cohen in the early twentieth century remain not only relevant, but of vital importance to our understanding of the practice of law in the early twenty-first century.

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225. See also Levine, *supra* note 16.

226. Pearce & Jenoff, *supra* note 218, at 501.

227. *Id.* at 502.