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# A CODE OF ONE'S OWN\*

DEAN JOSEPH P. TOMAIN\*\*

## INTRODUCTION

Virginia Woolf once wrote that it is the first duty of a lecturer "to hand you after an hour's discourse a nugget of pure truth to wrap up between the pages of your notebooks and keep on the mantel-piece forever."<sup>1</sup> She made those remarks in 1928 when she was asked to give a lecture at the Newnham and Girton Colleges, two women's colleges, at Oxford.

Her assigned topic was women and fiction, which she found to be a less than stimulating proposition. Instead of attacking her topic frontally and directly, she addressed a small piece of it and developed the single point that "a woman must have money and a room of her own if she is to write fiction."<sup>2</sup> Those lectures were subsequently published under the name, *A Room of One's Own*, and I commend these lectures for the force of their language, for the wit and insight of Virginia Woolf, but even more so for the structure of her argument.

Like Virginia Woolf, I find the topic of professionalism less than stimulating, and here you can read "less than stimulating" to mean a topic that threatens to be dry and boring. The word "professionalism" tends to make the eyes glaze over because it runs toward cliché at one extreme and toward preaching at the other. Indeed, it is difficult to find something to say about professionalism that has not been said before. Still, professionalism does lie at the heart of what we do as lawyers, and it is worth pondering.

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\* This paper is an exercise of the idea that we can learn about professionalism by reflecting on the humanities. The paper is modeled after Virginia Woolf's *A Room of One's Own*, which is based on lectures in six chapters. This idea was developed through co-teaching a course, entitled "Law in Literature and Philosophy," and by attending a Great Books retreat/seminar sponsored by the Ohio State Bar Association, called the "Glenmoor Institute of Justice for the Legal Profession."

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1. VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 4 (Harvest Book 1989).
2. *Id.*

I hope to imitate Woolf by doing here what she did in her lectures, which was to talk about a small part of the topic and to develop as fully and freely as I can the train of thought which led me to these remarks. The small piece of the topic I intend to develop is that each of us, as lawyers, needs a code of our own. Nevertheless, like Woolf, I am afraid that these remarks will leave the true nature of the topic of professionalism unsolved and, like Woolf, “[l]ies will flow from my lips, but there may perhaps be some truth mixed up with them; it is for you to seek out this truth and to decide whether any part of it is worth keeping.”<sup>3</sup>

Woolf starts by describing her day at the men’s college at Oxbridge and goes into great detail about a luncheon that began with sole and a “counterpane of the whitest cream,” followed by partridges, “their retinue of sauces and salads,” potatoes “thin as coins,” and ended with “a confection which rose all sugar from the waves. To call it a pudding and so relate it to rice and tapioca would be an insult.”<sup>4</sup> She finishes by writing:

Meanwhile the wineglasses had flushed yellow and flushed crimson; had been emptied; had been filled. And thus by degrees was lit, halfway down the spine, which is the seat of the soul, not that hard little electric light which we call brilliance, as it pops in and out upon our lips, but the more profound, subtle, and subterranean glow, which is the rich yellow flame of rational intercourse.<sup>5</sup>

After that luncheon, she talks about dining with a friend in the women’s college that was less grand by many orders of magnitude and that they were lucky to find hidden in a cupboard something to drink. They ate rather ordinary food from plain china and she concludes, “The lamp in the spine does not light on beef and prunes.”<sup>6</sup>

Woolf’s comparison of the two meals and the circumstances of the men’s and women’s colleges at Oxbridge was as telling as it was simple. I make a similar comparison between law practice in the “good old days” of the not-too-distant past and law practice today as a way of plumbing the depths of professionalism.

We can recall the good old days of law practice twenty-five or more years ago. Then, the structure of firms was very simple and the rules were very clear. Law firms had only two categories of attorneys—partners and associates. Their bills were not itemized and were for “services rendered,” and there was relative job

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3. *Id.* at 4-5.

4. *Id.* at 10-11.

5. *Id.* at 11.

6. *Id.* at 18.

security, that is, if an associate made partner after three to five years, then the associate would be a partner for life, as the firm enjoyed a secure and loyal client base. Today's practice, as we shall see and as we know, differs markedly.

Then the public image of lawyers still held the lingering memory of Perry Mason, respected the aspirations of Atticus Finch, and admired the character of E.G. Marshall in *The Defenders*. Even later, senior partner Leland McKenzie was a throwback to the benevolent despot of a firm, but by the time he was on *L.A. Law*, we could see that younger Turks were squeezing him out. Do we really want Ally McBeal and the whining Bobby Donnell of *The Practice* as our model lawyers? Here, however, I must admit a guilty fascination with Al Pacino as the lawyer-devil in *Devil's Advocate*.

Woolf began her remarks about women and fiction by reflecting on what the great poets said about the subject. We can follow Woolf's path and walk through the halls of the legal academy; yet, instead of confronting the poets as she does, we confront the giants of legal literature. Doing so, we learn from Holmes that "[t]he life of the law has not been logic: it has been experience,"<sup>7</sup> and that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified. . . ."<sup>8</sup> It is hard to find a non-Holmes quote as quotable. Cardozo stated, "My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law."<sup>9</sup>

I include one of my favorite passages:

Law reflects, but in no sense determines, the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven, there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell, there will be nothing but law, and due process will be meticulously observed.<sup>10</sup>

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7. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1963).

8. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

9. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1921).

10. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 110-11 (1977).

I suspect that many lawyers have heard all of those quotes and all lawyers have heard at least two of them. The great jurists and legal scholars are our poets and ought to do for us what the poets did for Virginia Woolf, that is, to give us pause to stop and reflect about our calling and let their words touch us in some way.

My guess is that these great quotations more often than not do not move us. Perhaps these words are too abstract or too general. Perhaps they are too familiar. Perhaps they state the unattainable. Perhaps the sentiments are just too grand for the pressures of day-to-day law practice. Even if we grant that such grand quotes address professionalism, what do they tell us?

### I. NECESSARY CONDITIONS

After reflecting upon her day at Oxbridge, Woolf poses the question, "What conditions are necessary for the creation of works of art?"<sup>11</sup> A similar question is posed for us: What are the necessary conditions of professionalism? We can begin to answer this question by defining the word "profession." In 1953, Roscoe Pound interpreted profession as "pursuing a learned art as a common calling in the spirit of public service . . ."<sup>12</sup> In 1987, Pound's definition was adopted by the A.B.A.'s Stanley Commission in its widely distributed report, . . . *In the Spirit of Public Service: A Blueprint for Rekindling Lawyer Professionalism*,<sup>13</sup> and that definition was adopted again as recently as 1996 in a report of the Professionalism Committee of the A.B.A. Section on Legal Education and Admissions to the Bar, entitled *Teaching and Learning Professionalism*.<sup>14</sup>

The conditions for a profession are easy to state and include: (1) learned knowledge; (2) skill in applying laws to facts; (3) thorough preparation; (4) practical and prudential wisdom; (5) ethical conduct and integrity; (6) dedication to justice and the public good.<sup>15</sup> The challenge, of course, is to flesh out the con-

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11. WOOLF, *supra* note 1, at 25.

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

13. A.B.A. COMM'N ON PROF., . . . *In the Spirit of Public Service: A Blueprint for Rekindling of Lawyer Professionalism* (1986), reprinted in 112 F.R.D. 243; see also Thomas D. Morgan, *The Fall and Rise of Professionalism*, 19 U. RICH. L. REV. 451 (1985).

14. A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, *TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE* 5-6 (1996) [hereinafter *TEACHING AND LEARNING PROFESSIONALISM*].

15. *Id.* at 6-7.

tent of these professional characteristics and to construct a meaningful definition of professionalism.

Woolf's method for answering the question about necessary conditions was research, and she conducted hers in the British Museum. As Woolf wrote, "[i]f truth is not to be found on the shelves of the British Museum, where, I asked myself, picking up a notebook and a pencil, is truth?"<sup>16</sup>

She was right, of course. The only practical way for a lawyer to answer the question about the necessary conditions for professionalism is through research and where is truth to be found, I asked myself, if not in a law library. So charged, I performed two types of research. The first type of research was the simple one of going through my personal library and looking at the books, which affected me as a law student and young lawyer and intrigue me even today. While there are books of scholarship that mean much to me in my work, those that mean the most to me as a lawyer are biographies and stories of great cases. The recent biography of John Marshall by Jean Edward Smith<sup>17</sup> immediately comes to mind as does Evan Thomas' biography of Edward Bennett Williams, *The Man To See*,<sup>18</sup> Sheldon Novick's recent biography of Holmes,<sup>19</sup> William Harbaugh's biography of John W. Davis, *Lawyer's Lawyer*,<sup>20</sup> Roger Newman's *Hugo Black*,<sup>21</sup> and Gerald Gunther's biography of Learned Hand.<sup>22</sup> For case studies, there is none better than the full story behind *Brown v. Board of Education*,<sup>23</sup> in *Simple Justice*<sup>24</sup> by Richard Kluger and the highly popular *A Civil Action*.<sup>25</sup> These biographies and case studies are stories of professionalism and give us more insights into what it means to be a professional lawyer than yet another bar report. Notice, I have not said anything about John Grisham. I prefer to keep him a secret addiction. He writes about professionalism but does so by misdirection. His lawyers, for the most part, are flawed, and his view of the legal profession is decidedly not opti-

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16. WOOLF, *supra* note 1, at 26.

17. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION (1998).

18. EVAN THOMAS, THE MAN TO SEE: EDWARD BENNETT WILLIAMS, ULTIMATE INSIDER, LEGENDARY TRIAL ATTORNEY (1992).

19. SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES (1989); *see also* EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1995).

20. WILLIAM H. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS (1990).

21. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY (1997).

22. GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1995).

23. 347 U.S. 483 (1954).

24. RICHARD KLUGER, SIMPLE JUSTICE (1977).

25. JONATHAN HARR, A CIVIL ACTION (1996).

mistic regardless of how lucrative for Mr. Grisham. Still, his stories do arouse a sense of what counts as professionalism—or not.

The second form of research that I undertook in my search for understanding professionalism was in that great law library known as Lexis-Nexis, in other words, the computer. It should not surprise anyone to realize that when the word “professionalism” is plugged into the computer and a search is performed for materials prior to 1980, the computer yields an identifiable number of articles using that word either in their body or in their title. If, however, the word “professionalism” is searched post-1980, the number of hits is so high that the computer literally cannot spit them all out. The topic of professionalism resulted in a notably smaller number of traditional law review articles that address the topic of professionalism than the number of articles appearing in bar journals with the exception of the three journals dedicated to legal ethics.<sup>26</sup>

You are many times more likely to find articles on professionalism in the journals and publications of bar associations than in law reviews, and I think there are three reasons why you should read the articles in the bar journals rather than in traditional law reviews first. The primary reason is that bar association journals tend to be a lot more readable; let me give you an example.

The American Bar Association House of Delegates in August 1988 adopted a Creed of Professionalism which is not dissimilar to that adopted by the Ohio Supreme Court. Both documents are worth reading. The bibliography to the A.B.A.’s Professionalism Creed cites several law review articles on professionalism, and the first citation is to an article, entitled *Toward a Modern/PostModern Reconstruction of Ethics*.<sup>27</sup> The article opens with a few lines from a poem by Coleridge, and then the author writes, “In his poem Coleridge recounts the futile meanderings of a narcissistic self, a self he broadly identified with the modern liberal subject constituted in the bourgeois democratic revolutions.”<sup>28</sup> That is the first sentence of the article. Nearly 90 pages and 393 footnotes later, the author concludes:

The moment of commitment is aesthetic in its orientation. It demands not only the capacity for judgment, but also the ability to dream of what-is-not-yet. The ethical cannot be

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26. *The Notre Dame Journal of Law, Ethics & Public Policy; The Georgetown Journal of Legal Ethics*, and the *Journal of the Legal Profession*.

27. Drucilla Cornell, *Toward a Modern/PostModern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985).

28. *Id.* at 292.

reduced to an aesthetic, but neither can it do without an aesthetic. There is a truth, then, in Unger's romantic vision of transcendence and context-smashing. The loss to our shared ethical life would be great indeed if the dreamer in each of us were to be silenced.<sup>29</sup>

Does such writing really help the cause? The philosophical field of professional ethics is indeed important, and there are significant contributions from legal ethics scholars.<sup>30</sup> Still, professional ethics are applied ethics and, as such, intelligibility is a valuable attribute.

The second reason, in addition to readability, is that articles in bar journals are short, and the third is that, for the most part, they are written by lawyers. Now short, lawyerly articles may be readable, but they are not necessarily profound and oftentimes become too specific. For example, surfing through the list of professionalism articles yields such titles as: *Ethics and Professionalism in Oil and Gas Practice*<sup>31</sup> and *Ethics and Professionalism for the Family Law Practitioner*.<sup>32</sup> The list also includes every bar association President's message or column in every monthly edition of every journal ever printed. One only prays, then, for that much needed article, *The End of Professionalism*.

A moment ago, I noted that these articles have the advantage of being short and readable, but that they are not profound. Unfortunately, when one does find the more profound, or at least the more thought-provoking literature, it is not a very pretty sight. At this juncture, I would point you to four recent, important books about the legal profession<sup>33</sup> and a law review article<sup>34</sup> that generated much controversy. These publications together

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29. *Id.* at 380.

30. *See, e.g.*, THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed. 1983); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); and WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998). *See also* JOHN KULTGEN, ETHICS AND PROFESSIONALISM (1988).

31. James N. Castleberry, Jr., *Ethics and Professionalism in Oil and Gas Practice*, 42 INS. ON OIL & GAS L. & TAX'N 6-1 (1991).

32. St. B. of Tex, Advanced Family Law Course: Ethics and Professionalism for the Family Law Practitioner (July 1990).

33. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 17-108 (1994); ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993); SOL M. LINOWITZ, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994); Michael H. Trotter, Profit and the Practice of Law: What's Happened to the Legal Profession (1997).

34. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).



with a significant research paper published by the A.B.A.—the *MacCrate Report*—have been deeply critical of the legal profession as a whole, which is to say the bench, the bar, and the academy.<sup>35</sup> These criticisms are worth reading; yet, they tell only a partial story of professionalism.

There are two significant and important things to note about these publications. First, they represent an Ivy League critique. One book is written by the Dean of the Yale Law School, another by a professor at the Harvard Law School, a third by a Harvard-trained senior partner at a major national law firm, and the fourth book is written by a Cornell law graduate and former ambassador and general counsel for a major Fortune 100 company. The article is authored by a very respected judge of the D.C. Circuit Court of Appeals, Harry J. Edwards, and is still generating controversy today. And the progenitor of the *MacCrate Report* is a senior partner of the Sullivan & Cromwell law firm.

To call these analyses an Ivy League critique is not to do so in any pejorative or condescending way. Rather, if the best and the brightest among us are critiquing our profession, then we should pay attention.

More importantly, the second significant, and for me very troubling, aspect of these analyses is that the critique is internal, coming from the members of our profession. More and more lawyers are experiencing dissatisfaction about their work lives, and this is cause for concern. This concern is particularly acute for the legal educators among us who are preparing students to enter the profession.

The basic critique has become a mantra at bar association meetings: *law is becoming more of a business and less of a profession*. Nevertheless, if one is going to write a book-length treatment of that slogan, one has to have more to say than that, and indeed the critics do.

To better appreciate the current situation of professionalism, we can benefit from understanding the more specific critiques of the legal profession and of legal education. These critiques, in turn, reveal much about how society views lawyers; and, more introspectively, how lawyers view themselves.

In fairly brief compass, we can survey four decades of critique. In the 1960's, the critique of the legal profession was that

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35. See A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (1992) [hereinafter *MACCRATE REPORT*]; see also *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATION IN THE AMERICAN LEGAL PROFESSION* (Robert N. Nelson et al. eds., 1992).

*access* to the profession and to law was denied, particularly to women and minorities, as well as to the poor. In the 1970's, the critique was that the *quality* of lawyering was suffering; this critique was led by no less a personage than the Chief Justice of the United States Supreme Court, Warren Burger. In the 1980's, the critique ranged from persons as disparate as Dan Quayle to Bill Clinton to Lester Thurow, who argued that the *productivity* of lawyers was a negative productivity and a drain on our economy. Finally, in the 1990's, the critique was one about *values*, led by the Ivy Leaguers to whom I have already referred.

Critics of legal education were equally forceful in their evaluation. In the 1960's, the critique was that law was too formal, too doctrinal, and in the argot of the time, was not "relevant." In the 1970's, presumably in an effort to become more relevant, was a period that we can call the "law and . . ." period. Law & Economics. Law & Literature. Law & Sociology. I must offer a disclaimer at this point. My disagreement with the "law and . . ." movement is not that it had nothing to offer to the law. Indeed, learning about literature, economics, and politics have been very illuminating and enjoyable and I teach them in my courses. The criticism is that these efforts do not offer full and complete theories of law as they sometimes purport to do. They provide insights and useful information; they do not explain law. The 1980's was a period of "fancy theory," a term coined by Harvard's Professor Duncan Kennedy, himself a progenitor of fancy theory as he brought to the legal academy continental philosophers, such as Hans Gadamer, Jacques Derrida, and Michel Foucault. The quotation earlier from Drucilla Cornell has embedded in it these influences. The critique of the 1990's is in some fashion a culmination of all that preceded it insofar as, to use Judge Edwards' phrase, there is a growing disjunction between legal education and law practice, a disjunction that the *MacCrate Report* sought to repair.

The critiques of the legal profession and of legal education reflected and informed the public perception of law and lawyers. In the 1960's, the public perception was that social justice was lacking in our society and this was the decade of "movements," including the Civil Rights Movement, the Anti-War Movement, the Women's Movement, and the beginnings of the environmental and consumer movements.

Largely because of Watergate, the 1970's were seen as a decade of a breach of faith. Lawyers hurt our government in such deep ways that I wonder if we have recovered from our cynicism. Indeed, the proliferation of "gates"—Irangate, Whitewatergate,

Monicagate—seem to have left us immune to the damage to the law and to our governmental institutions.

As if things were not bad enough for lawyers, in the 1980's, lawyers, as well as investment bankers, were caught up in the "greed is good" phenomenon of Wall Street. In the 1990's, society saw simply too much law, particularly as we stretched class action lawsuits to their most greedy breaking point.

In her trip through the British Museum, Virginia Woolf found a bunch of men writing about women and found most of the writing to be angry. It seems obvious to me, of course, that the critiques that we have just described also express anger and provoke the same question that Virginia Woolf raised "[W]hy are they angry?"<sup>36</sup>

I believe that we can explain the surface anger very easily. The critics are angry about a loss of innocence. In other words, the critiques are a form of nostalgia. The critics are angry at having lost the good old days, a calmer time, a more peaceful time, a time of more camaraderie, a time when the rules were understood and things were done informally, and a time in which a lawyer's future was relatively secure.

But isn't there always something behind the anger? Doesn't fear lurk there? Aren't the cries for greater civility and greater professionalism attempts to reduce our anger as well as dispel our fears? But fear of what? Certainly not a fear of a lost past that perhaps never was.

## II. A MASS OF INFORMATION

Again, Woolf is instructive. In order to understand the anger and the fear, she wrote, "What one wants, I thought . . . is a mass of information."<sup>37</sup> I agree.

Perhaps we can best understand our current situation with information. In his book, *Profit and the Practice of Law*, Michael H. Trotter, a senior lawyer in Atlanta, writes:

The years 1960 to 1995 witnessed the transformation of corporate law firms in America from small, dignified, prosperous, conservative, white male professional partnerships dedicated to serving their clients and communities into large, aggressive, wealthy, self-promoting, diverse business organizations where money is often valued more highly than service to clients or community.<sup>38</sup>

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36. WOOLF, *supra* note 1, at 33.

37. *Id.* at 45.

38. TROTTER, *supra* note 33, at xv.

The data surrounding changes in the legal profession supports Trotter's claim.<sup>39</sup> In 1960, the total number of lawyers in the United States was 285,933—or slightly over one-quarter of a million lawyers—or 1 lawyer for every 627 persons.<sup>40</sup> In 1970, the ratio dropped to 1 lawyer for every 572 persons.<sup>41</sup> In 1980, the United States had 1 lawyer for every 418 persons.<sup>42</sup> In 1990, there were 770,119—or over three-quarters of a million lawyers—or 1 for every 320 persons.<sup>43</sup> I suspect that in the year 2000, we can look forward to a Million Lawyer March or 1 lawyer for every 250 persons, and by the year 2023, to steal a line from Dean Robert Clark of the Harvard Law School, if the trends continue, we will have more lawyers than people.<sup>44</sup>

The shift relative to women and minorities among the bar is also noticeable. In 1965, women constituted 4.2% of all law students.<sup>45</sup> This figure jumped to 8.6% in 1970, 34.2% in 1980, and 42.5% in 1991.<sup>46</sup> Law schools have been graduating as many, if not more, women than men for the last dozen or more years. In short, there is parity in the younger bar between men and women, but not for minorities. In 1970, minorities constituted 4.3% of all law students and in 1990, 13.1%,<sup>47</sup> which is still below national averages.

In addition to demographics, other data is quite illuminating. In 1960, the largest firm in America was the New York City firm of Shearman, Sterling, and Wright with 125 lawyers and starting salaries of about \$500 per month or \$6,000 per year.<sup>48</sup> Today, the larger firms are ten times that size and a 125-lawyer operation is a small firm in a big city. Starting salaries are \$500 per day and are topping \$120,000 per year with signing bonuses reportedly up to \$50,000.<sup>49</sup> Clearly, firms have become larger,

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39. See generally MACCRATE REPORT, *supra* note 35; Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 *FORDHAM L. REV.* 275 (1992); RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 1-17 (1995); Stephen P. Magee, *The Optimum Number of Lawyers: A Reply to Epp*, 17 *L. & SOC. INQUIRY* 667 (1993); and Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 *CASE W. RES. L. REV.* 345 (1994).

40. MACCRATE REPORT, *supra* note 35, at 15.

41. *Id.*

42. *Id.*

43. *Id.*

44. Clark, *supra* note 39, at 275 n.1.

45. MACCRATE REPORT, *supra* note 35, at 18.

46. *Id.*

47. Nelson, *supra* note 39, at tbl.13.

48. TROTTER, *supra* note 33, at 9.

49. See generally THE NATIONAL ASSOCIATION FOR LAW PLACEMENT, *NATIONAL DIRECTORY OF LEGAL EMPLOYERS* (2000).

and have expanded their services to lobbying, consulting, policy planning, and multidisciplinary practice (MDP). Today, law practice involves beauty contests, blended rates, multiple tracks, management committees, professional managers, newsletters, marketing, discounting, and consultants of all sorts. In today's world, mentoring has been replaced by associate leverage. "Services rendered" has become the billable hour and the path to partnership is less secure. Even a name on the letterhead lacks permanence.

The practice of law also has changed significantly with new types of technology and new types of publicity. Such things as websites, business links, electronic communications, paperless trials, Internet access, counsel connect, and faxes and voicemail have put time pressures on the practice of law unknown to us previously. The law business has become a subject of national interest, as demonstrated by such publications as the *National Law Journal*, the *American Lawyer*, *Court TV*, and the regular law sections of *The Wall Street Journal* and *The New York Times*. These changes have also led to greater democratization of law practice, just like the greater democratization of every other social institution. What is sometimes difficult to recognize is that there are costs associated with that greater democratization. So be it. We have the training to weather the challenges and rekindle the spirit of professionalism.

The consequence of changes in demographics and changes in the practice of law is increased competition and decreased loyalty. There is increased competition from non-lawyers, and increased competition for lawyers and clients. There is increased competition from in-house counsel. There is decreased loyalty between associates and partners and between clients and lawyers. These changes have resulted in a more competitive environment.

I believe increased competition and decreased loyalty is the basis of our fears about the profession. Most apparent is the lack of job security for lawyers. Becoming partner is no longer like tenure. Also, because competition is keen, so too are the risks and rewards. A lawyer can make fabulous amounts of money. Are we afraid of being seduced by such extravagance? Are we fearful of being perceived as naïve if we do not? Most importantly, concerns about security and compensation combined with increased pressures for billable hours have two pernicious effects. Such pressures contribute to the increasing dissatisfaction of lawyers with their professional lives *and* erode a commitment to professionalism.

However, one can regard these changes more positively. Yes, competition has increased; yes, more varied jobs are availa-

ble; yes, there are more opportunities. With a small amount of creative insight and entrepreneurial spirit, lawyers today can fashion law practices that are different and exciting, which deliver services to clients in need. Also, lawyers can develop a code of our own.

### III. THE IDEAL OF THE LAWYER STATESMAN

Perhaps the most trenchant of the critics of the legal profession is Anthony Kronman, the Dean of the Yale Law School and author of *The Lost Lawyer: Failing Ideals of the Legal Profession*.<sup>50</sup> Dean Kronman took his ideal-type—the lawyer-statesman—from a speech by Chief Justice William Rehnquist, who referred to some of the great lawyers of history, namely Thomas Jefferson, Alexander Hamilton, Henry Stimson, Dean Acheson, John McCoy, and Robert Jackson. To the list we can add great judges and advocates, such as Daniel Webster, Rufus Choate, and the two Marshalls, John and Thurgood.

For Kronman, the basic elements of the lawyer-statesman consist of being a devoted citizen who cares about the public good, has a special talent for discovering where the public good lies, and knows how to fashion arrangements needed to secure it. The essential aspect of the lawyer-statesman's work is "to help those on whose behalf he is deliberating come to a better understanding of their own ambitions, interests, and ideals and to guide their choice among alternative goals."<sup>51</sup> According to Dean Kronman, the lawyer-statesman distinguishes herself by the exceptional wisdom she displays as well as her great excellence in the art of deliberation. In fact, this wisdom is a trait of character; it is a trait of habitual feelings and desires. Indeed, what we call judicial temperament is the temperament of the supreme lawyer-statesman. Preeminent among those abilities is the trait of prudence or practical wisdom. The only way a lawyer can achieve the ideal of a lawyer-statesman is by acquiring these values of character. In another article, Dean Kronman says:

The good lawyer . . . is the lawyer who possesses the full complement of emotional and perceptual and intellectual powers that are needed for good judgment, a lawyer's most important and valuable trait. The process of training to become a lawyer . . . [involves gathering] the soul's powers

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50. ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

51. KRONMAN, *supra* note 33, at 15.

in a way that confirms one's sense of wholeness as a person and sense of being wholly engaged by one's work. . . .<sup>52</sup>

In talking about ideal types, we risk distancing ourselves from acquiring such traits because they seem remote and available only to the extraordinary. That distancing is a mistake. While it is likely that only one of us will be the next Chief Justice of the United States Supreme Court, it is a near certainty that we will be in a position to advise a client and help him improve his life. As lawyers, our daily calling is to help people realize their dreams to build a business or an estate, to promote an idea, to fight for their rights. As lawyers we also protect people from their fears of the state and from abuses of public and private power. Such advice takes the prudence and talent of the lawyer-statesman.

For quite some time I was highly critical of such nostalgia, believing it to be misplaced, because I felt that Kronman and other critics were yearning for a time that never was. Criticisms that law was more of a business and less of a profession have always been with us, and we can point to historical examples galore to demonstrate that lawyers have never been the most beloved souls on earth. Now, however, I think that if we look more deeply at how law is practiced today, we might see the critique as something more than misplaced nostalgia.

#### IV. LAW PRACTICE TODAY

In her journey through modern literature in preparation for her talk, Virginia Woolf uncovered a fictional author, named Mary Carmichael. In Carmichael's writing, she found that, "[f]ear and hatred were almost gone. . . ."<sup>53</sup> What she found in Carmichael's writing was a sense of a woman writing in her own voice without obsessing about past injustices or about a past time.

Mary Carmichael, the reader is led to believe, was a living writer whose fiction had a peculiar authenticity because Mary wrote, not in opposition to men writers, but wrote true to herself. I suggest that in trying to understand professionalism, we consider following the path of Mary Carmichael and think about our own lives as lawyers as distinguished from what some lofty critics have tried to tell us about the subject. I think it would be wrong-headed for us to believe that the practice of law today is so similar to what it had been that the old structures and forms are sufficient.

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52. Anthony T. Kronman, *Chapman University School of Law Groundbreaking Ceremony Friday, November 21, 1997*, 1 CHAPMAN L. REV. 1, 5 (1998).

53. WOOLF, *supra* note 1, at 92.

There are deep changes in the nature and practice of law. The traditional paradigm of lawsuits was that they were bipolar. In other words, each lawsuit had a plaintiff and a defendant and the winner took all. In its most basic form, a lawsuit involved the resolution of a past dispute and lawsuits were not relational. In other words, at the conclusion of a case, plaintiff and defendant went their merry ways.

In lawsuits today, however, we can point to health care, the environment, class actions, transactional work, international work, telecommunications, and all types of intellectual property as examples to see that modern lawsuits hardly fit the traditional paradigm. Today, the new lawsuits are multi-party, involving public and private interests represented by individual and institutional parties. They are multi-jurisdictional, involving multiple states, as well as federalism issues. They are also multi-fora. In other words, lawsuits are carried out at the negotiating table, before administrative law judges, and in legislatures, as well as before the bench. In addition, the new lawsuits not only look to past disputes for resolution, they also look to future relations. The whole alternative dispute resolution (ADR) movement speaks to this phenomenon. While it is true that issues in the past must be settled, it is most often the case that parties will have a continuing relationship post-lawsuit and that their future must be made to work as smoothly as possible.

In addition, the new lawsuits have interdisciplinary complexities. Many suits involve economics at a high level, as well as science and technology to degrees that none of us can really master. In addition, today's lawsuits are fraught with normative and positive uncertainties. In other words, these suits are based upon guesses about what the future will hold. The whole nature of class action lawsuits, for example, is based upon guesses of the probabilities of the number of lawsuits and the probabilities of successful litigation. In short, these types of complex lawsuits, filled with the uncertainties that they are, increase business risk. It is no wonder that firms are growing larger as the demands of clients grow larger, and the need to reduce uncertainty becomes compelling because it is a way of reducing business and financial risks to clients.

This shift in the nature of today's legal issues is neither good, nor bad—it simply is. As lawyers, we should be trained to deal with law's dynamism and do so efficiently and effectively. The shift brings more challenges, of course, but who better to meet these challenges than lawyers? Do we really want to cede this ground to Andersen Consulting?



The slogan that “law has become more of a business and less of a profession” is not without some basis in fact. The tougher question is how do we wish to regard this phenomenon and what does it have to do with professionalism?

## V. A CODE OF ONE’S OWN

In the last chapter of her book, Virginia Woolf says that for a woman writer, indeed for all writers, to be true to their art, they must have a unity of the mind, in which she means that there ought to be harmony within themselves regarding how women and men view each other.<sup>54</sup> My thesis is that we should have a unity of mind; we should be in harmony with the realities of law practice. Law practice embraces both the business and the profession and embraces the traditional and the contemporary situation of the law. The lawyering skills that we learned in law school, the aspirational ideals that excited us, and the contributions we make to society are as pertinent today as they were yesterday.

Professionalism is simply a code of one’s own. What constitutes that code is what excites us and what attracted us to the practice of law. We can begin to construct that code if we ask ourselves very simple questions such as: Why did we go to law school in the first place? I suspect for most, if not for all of us, there are multiple and vague answers to the question. We weren’t diligent (read smart) enough to become doctors. We reached law through a process of elimination. We saw law as an opportunity to do good things and make big money. We saw law as a way to be a leader and a positive figure in the community.

It may be the case that answering the question of why we went to law school does not yield a tremendous amount of information. Let me pose other questions then.

As a law student or young lawyer, when you were studying a case or researching an issue, were you ever impressed by legal reasoning and saw what the mathematicians call elegance? If so, you have just uncovered a story of craft.<sup>55</sup>

Similarly, as a law student or a young lawyer reading an opinion, did you ever perceive that a case was legally correct and morally wrong? If so, you have experienced a story of justice.

As a law student or young lawyer, were you ever impressed by the temperament and dispassionate analysis or problem-solving

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54. *See id.* at ch.6.

55. *See* James R. Elkins, *Ethics: Professionalism, Craft and Failure*, 73 Ky. L. J. 937 (1984).

ability of a lawyer or judge or teacher? If so, you have observed a story of character.

These stories of craft, justice, and character are all stories of professionalism. I am willing to bet that we have all had one or all of these experiences. I would even go further and suggest that if you have had none of these experiences, then this is the wrong profession for you. These stories are within us; they are within our daily lives. They constitute a code of professionalism that we can design for ourselves and call our own.

In conclusion, and again following Woolf, I should say that, “[h]ere I would stop, but the pressure of convention decrees that every speech must end with a peroration . . . . I find myself saying briefly and prosaically that it is much more important to be oneself than anything else.”<sup>56</sup> At this point then, I recommend two books that read together can stimulate your thinking about the unity of mind of bridging professionalism and business to allow one to develop a code of one’s own. The first book, by David H. Maister, is entitled *True Professionalism: The Courage to Care About Your People, Your Clients, and Your Career*.<sup>57</sup> Maister is a business consultant and his book reads like that of any other management type, but his message is a real one. If lawyers and law firms think in a more business-like way, then they will act more professionally. Law firms must go beyond the bottom-line and assess the needs of their clients and the needs of their lawyers and staff. They must invest in human capital more so than in capital technology. If so, then they will increase value to clients and will increase the service and loyalty to staff and to young lawyers. They will also increase the satisfactions from practice because it will be building a more successful firm.

The other book is by Steven Keeva and entitled *Transforming Practices: Finding Joy and Satisfaction in the Legal Life*.<sup>58</sup> Keeva unabashedly writes about the “spirituality” of the practice of law. Keeva is a senior editor of the *ABA Journal/Lawyers Magazine* and is a journalist by profession. His book makes the point that there are real lives involved in what we do and that there is real service to be delivered and that our greatest asset is that we can deliver that service to real people. Our jobs are dynamic and through the successful delivery of legal services, we increase our own abilities and talents. I recommend these books because, unlike the

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56. WOOLF, *supra* note 1, at 110-11.

57. DAVID H. MAISTER, *TRUE PROFESSIONALISM: THE COURAGE TO CARE ABOUT YOUR PEOPLE, YOUR CLIENTS, AND YOUR CAREER* (1997).

58. STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (1999).

others I have mentioned, these have something positive to say about being a lawyer.

Earlier this fall, I attended a seminar for senior lawyers, judges, and law teachers, entitled *The Glenmoor Institute of Justice for the Legal Profession*. Over the course of four days, in sumptuous surroundings, with copious cocktails and fine dining and with a series of readings from the "Great Books," we discussed our lives in the law. We also discussed general questions, such as the nature of justice, the nature of professionalism, the nature of service, and the future of the legal profession and its image. While we had background readings, the significant bases for discussion were the contributions of the participants. The beauty of having experienced lawyers, judges, and teachers at a seminar table was that their experiences deeply informed the discussion. What we found was that without directly addressing the topic, we talked about professionalism, its character and its elements based upon our experiences and based upon our hopes for what the practice of law could be for us and for others. Those issues are alive in each of us and need only to be addressed. I invite you to do so as you construct a code of your own.

I hope that these remarks have not been the usual fare for a professionalism discussion. I further hope to have left you with some small "confection which rose all sugar from the waves" rather than with "beef and prunes."