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## Faith in Legal Professionalism: Believers and Heretics

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# Essay

## FAITH IN LEGAL PROFESSIONALISM: BELIEVERS AND HERETICS

SAMUEL J. LEVINE\*

### INTRODUCTION

In 1995, Professor Fred Zacharias observed that “[o]ver the past two decades, hundreds of articles and speeches have focused on the meaning of professionalism, its perceived ‘decline,’ and steps the bar should take to improve it.”<sup>1</sup> Since then, the concern expressed by commentators over the vitality of professionalism within the legal community has only increased.<sup>2</sup>

Professor Eugene Gaetke, observing the distress concerning professionalism within the legal community, pointed out that the “distinct yearning, by those within and without the bar, for lawyers to display more ‘professionalism,’” has precipitated a “crisis of professionalism at the dawning of the new century.”<sup>3</sup> The erosion of professionalism

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1. Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1307 n.11 (1995).

2. As Professor Therese Maynard recently noted, “[t]he literature teems with articles that describe, often in rather distressing terms, the crisis within the legal profession today.” Therese Maynard, *Teaching Professionalism: The Lawyer as a Professional*, 34 GA. L. REV. 895, 895 n.2 (2000).

3. Eugene R. Gaetke, *Foreword: Renewed Introspection and the Legal Profession*, 87 KY. L.J. 903, 909-10 (1998-99) (footnotes omitted). A number of commentators have examined the causes and implications of the modern professionalism crisis. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994) (examining fundamental changes in the nature of the legal profession, and the effect those changes are having on American society); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1347 n.33 (1997) (using empirical research to argue that lawyers have personality characteristics that are the source of the professionalism problem); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1277-80 (1991) (describing the legal profession’s “crisis” as a loss of legitimacy caused by economic and political change); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995) (offering a method of teaching legal ethics during the crisis of professionalism). See generally *Professionalism Symposium*, 52 S.C. L. REV. 443 (2001) (discussing the need for improvements to the professionalism of the legal community and exploring various solutions to the professionalism problem).

has been attributed to the cynical image of the lawyer propounded by the media, the relative absence of “positive image-building of the lawyer,”<sup>4</sup> and the failure of practitioners and professors to “shap[e] . . . law students and new lawyers into ethical practitioners.”<sup>5</sup>

However, the prevailing trend within the legal community has been to associate the decline of professionalism in the practice of law with the emergence of increasing commercialism, indicating that law has become more a business than a profession.<sup>6</sup> The practice of law has been “transformed . . . from an honorable calling to an ordinary business” by “lawyers [themselves], clients, and market conditions.”<sup>7</sup> This shift from “professionalism” to “commercialism” has occurred “as practitioners increasingly focus upon profit, surrender professional independence and employ unprincipled tactics to achieve clients’ ends.”<sup>8</sup>

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4. Jeffrey W. Stempel, *Embracing Descent: The Bankruptcy of a Business Paradigm for Conceptualizing and Regulating the Legal Profession*, 27 FLA. ST. U. L. REV. 25, 29 (1999). Professor Stempel criticizes depictions of lawyers in popular culture in the following manner:

Instead of Perry Mason, we have Ally McBeal, L.A. Law, and The Practice. McBeal is embarrassingly airheaded, and more focused on finding a good nightclub than practicing good law. The gang in L.A. Law struck a number of blows for conspicuous consumption and moral decline but relatively few for justice. The Practice does somewhat better, but needs its share of material goods and torrid embraces as well. If popular culture is any indication, lawyer professionalism is not merely going through a low point—it has reached Death Valley.

*Id.* at 29-30.

5. Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705, 707 (1998).

6. See Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 516-17 (1994) (stating that “[m]any lawyers believe [the practice of law] is now as much a business as a calling or a profession”); Anthony T. Kronman, *Professionalism*, 2 J. INST. FOR STUDY LEGAL ETHICS 89, 90 (1999) (observing that “a new and aggressive culture of commercial values, which claims for itself a moral as well as a material superiority, is spreading through the profession as a whole”); Luban & Millemann, *supra* note 3, at 32 (describing the “widespread perception [of] . . . a more diffuse erosion of values—from ‘professionalism’ to ‘commercialism’”); see also Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 145, 173 (Robert L. Nelson et al. eds., 1992) (attributing the “loss of confidence in the legitimacy of the profession” to the “perceived lack of separation between law and business”); cf. Warren E. Burger, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 949 (1995) (noting that “[t]he law is not and never has been a ‘business[,]’ [b]ut we are well on the way to making it less than a profession”). See generally 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 (1995) (describing the transformation of law practice from a profession to a business and predicting an emerging business paradigm).

7. Eleanor W. Myers, “Simple Truths” About Moral Education, 45 AM. U. L. REV. 823, 827 (1996).

8. Wm. Reece Smith, Jr., *Teaching and Learning Professionalism*, 32 WAKE FOREST L. REV. 613, 613 (1997).

Many scholars argue that the movement towards law-as-business instead of law-as-profession has introduced the values of the market-driven economy into the practice of law, thus replacing its “moral traditions.”<sup>9</sup> Some prominent scholars who have noted this shift actually embrace the business model, claiming that adopting the business model will “promot[e] a shared commitment to the common good.”<sup>10</sup>

Despite the evidence apparently supporting the position that law has evolved into a business, others have responded by reaffirming the professionalism model, arguing that legal practice remains true to its professional ideals.<sup>11</sup> Dean Anthony Kronman, one of the most prominent defenders of the professionalism model, recently stated his belief that “the ethical, spiritual, and moral traditions of our profession have a durability that will allow us . . . to look back to these traditional ideals and to find guidance and support and strength in them as we

9. Transcript, *The Second Driker Forum for Excellence in the Law*, 42 WAYNE L. REV. 115, 118-19 (1995) (remarks of Anthony T. Kronman) [hereinafter *The Second Driker Forum*].

10. Pearce, *supra* note 6, at 1276; Ward Bower, *Law Firm Economics and Professionalism*, 100 DICK. L. REV. 515, 516 (1996). For example, Professor Bower points out that “[t]he economic pressures in the law firm today are real and the focus on profitability necessary. . . . [T]hese challenges need not cause a lawyer or a firm to compromise detachment, professionalism, ethical practices, or competent lawyering [because] [e]ffective management and good business practices are *not* inconsistent with traditional ‘professional’ lawyering.” *Id.*; see also John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 143 (2000) (stating that “it is not clear why lawyers desiring to maximize their profits . . . is a bad thing for their clients or for society in general”).

Other scholars believe that viewing the practice of law as both a business and a profession opens new doors to the legal community and strengthens the profession. As Professor Michael J. Kelly states:

Law is, and always has been, a business as well as a profession. . . . The refusal . . . to keep both of these dimensions of law practice in view, is the special myopia of the efforts of the organized bar to lead a revival of “professionalism.” Once one escapes from the clutches of thinking of “profession” and “business” as dichotomies, and comes to terms with the fact that, whether we like it not, they are joined at the hip in private practice, a refreshing set of possibilities reveals itself.

Michael J. Kelly, *Thinking About the Business of Practicing Law*, 52 VAND. L. REV. 985, 992-93 (1999) (footnotes omitted); see also Milton C. Regan, *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 33 (1999) (stating that “[o]ne problem with treating law as profession as the opposite of law as business . . . is that it ignores how the material conditions of practice have shaped the opportunities of lawyers to pursue non-commercial values”); Joseph P. Tomain, *A Code of One’s Own*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 153, 169 (2001) (positing that “[i]f lawyers and law firms think in a more business-like way, then they will act more professionally. . . . [T]hey will increase value to clients and will increase the service and loyalty to staff and to young lawyers”).

11. See, e.g., Anthony T. Kronman, *Foreword: Chapman University School of Law Ground-breaking Ceremony Friday*, 1 CHAP. L. REV. 1 (1998); Milton V. Freeman, *The Profession of Law is NOT on the Decline*, 96 DICK. L. REV. 149 (1992); Maynard, *supra* note 2.

try to work our way” out of the current professionalism crisis.<sup>12</sup> In fact, some scholars, while noting the crisis within the legal community, still express the pride they feel towards the profession they chose. As Professor Maynard has explained:

I am proud to call myself a member of the legal profession. Yes, even in these times, I walk tall, hold my head high, and proudly announce to my students that I am a licensed member of the California Bar . . . because I believe lawyering continues to be a noble profession.<sup>13</sup>

These scholars admit that the professional paradigm is not without its flaws, but argue that it is more likely to lead to a better practice of law than the business paradigm.<sup>14</sup>

This Essay suggests that the abiding faith many scholars have expressed in the professionalism model more closely parallels a declaration of religious belief than an empirical or analytical conclusion developed through systematic reasoning or observation.<sup>15</sup> This critique is certainly not intended as an endorsement of what one scholar has called a “dogma[ ] of liberalism” that “religious beliefs are irrational or non-rational and therefore cannot meet the standards of public reason.”<sup>16</sup> Rather, consistent with the ideas I have expressed elsewhere,<sup>17</sup> I draw a parallel here specifically to those religious argu-

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12. *The Second Driker Forum*, *supra* note 9, at 118-19.

13. Maynard, *supra* note 2, at 895-96 (footnotes omitted).

14. *See, e.g.*, Stempel, *supra* note 4. Some legal scholars who believe that the professionalism paradigm is the best hope for the legal profession do not believe that the legal profession can be saved. For example, Professor Robert F. Cochran, Jr., stated:

There is a new emphasis on professionalism within legal education and the organized bar. The leaders of the profession call on lawyers to go beyond the incentives of the market . . . [where] the moral basis for this call to service is our status as professionals.

. . . .

Though I wish the new professionalism well, I am not hopeful. . . . I fear that the foundations for professionalism are gone.

Robert F. Cochran, Jr., *Professionalism in the Postmodern Age: Its Death, Attempts at Resuscitation, and Alternate Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 305-06 (2000).

15. *See* Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995) (describing and critiquing the religious nature of the professionalism movement).

16. Ronald F. Thiemann, *Religion and Legal Discourse: An Indirect Relation*, 81 MARQ. L. REV. 289, 296 (1998).

17. *See, e.g.*, Samuel J. Levine, *Capital Punishment and Religious Arguments: An Intermediate Approach*, 9 WM. & MARY BILL RTS. J. 179 (2000) (arguing for the use of religious arguments as a comparative law model during the examination of complex legal issues); Samuel J. Levine, *Law, Ethics, and Religion in the Public Square: Principles of Restraint and Withdrawal*, 83 MARQ. L. REV. 773 (2000) (examining the reasons why a religious adherent would want to avoid reliance on religious doctrine in issues of public debate).

ments that, because they are accessible only to believers, are unlikely to be persuasive to others.<sup>18</sup>

Specifically, this Essay engages in an examination of the views of Dean Kronman, whose position is instructive both because of his status in the legal community and because his views appear to have evolved over the course of more than a decade. Part I broadly traces Kronman's loss of faith in the legal profession in the early 1990s, followed by his more recent reaffirmation of the professionalism model. Part II offers a closer look at the evolution of Kronman's views, noting his current use of both religious imagery and a seemingly religious methodology to support his belief in professionalism. Part III carries the analysis one step further, examining the methods of response used by Kronman and other believers to attack the heretical views of those who favor alternative models of legal practice, such as a business model. This Essay concludes that the approach of the believers, perhaps useful in preaching to the converted, is unlikely to be an effective means of convincing nonbelievers that such faith in legal professionalism is justified.

## I. KRONMAN AND PROFESSIONALISM: FAITH LOST AND REGAINED

Among the adherents to the professionalism model,<sup>19</sup> Dean Anthony Kronman may be its most notable proponent. In addition to

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18. Cf. KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 102 (1995) (acknowledging that, although "[s]ome claims about religion are based on standards of truth that are similar to standards of truth for some nonreligious moral and political claims . . . some claims of truth are self-consciously less subject to interpersonal evaluation than are others").

19. Rather than insisting on the adoption of a specific definition, this Essay relies on a more general understanding of the notion of "professionalism" in legal practice, particularly as implied by the contrast between a "professionalism model" and a "business model."

As many commentators have noted, there is no uniform definition of "professionalism." See, e.g., Atkinson, *supra* note 15, at 270-80 (elaborating on his observation that "[t]he meaning of 'professionalism' in the current crusade is woefully—one is tempted to say 'unprofessionally'—confusing").

Other legal scholars find that a unified standard or definition would not serve the legal community well due to the wide and varied occupational subsets within the profession. See, e.g., Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 317 (1998). As Professor Rhode states:

[T]his is in an era of postmodern professionalism, with identities fractured along lines of personal background, substantive specialty, and practice setting. As applied to law, the term "profession" has become a kind of folk concept. In common usage, it conveys a unity that is out of step with social realities.

*Id.* (footnote omitted).

Nevertheless, a number of scholars have identified certain qualities of "professionalism" in an attempt to arrive at a working definition. For example, in an attempt to define professionalism, one scholar found that: "Professionalism . . . transcends the limited sense

his status as dean of one of the most prestigious and influential law schools in the world, Kronman's espousal of professionalism is particularly significant in light of his past pronouncements bemoaning the current and future state of the legal profession. Specifically, Kronman's 1993 book, *The Lost Lawyer*,<sup>20</sup> has been acknowledged by countless scholars as part of a trilogy of works<sup>21</sup> by "the best and the brightest of the legal world . . . chronicle[ing] the decline of professionalism."<sup>22</sup> According to one scholar, amidst these three books and those with a similar theme, Kronman's stands out as the "most thorough and perhaps most well-known account of the decline in professionalism among today's lawyers."<sup>23</sup>

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of competence to include the more aspirational qualities traditionally associated with the ideals of the legal profession: broad vision and wisdom; integrity and deep commitment to values; compassionate regard for humanity; unselfishness and the genuine desire to serve others; self-confidence; individualism; and leadership." Lawrence S. Krieger, *What We're Not Telling Law Students—and Lawyers—that They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from Its Roots*, 13 J.L. & HEALTH 1, 16 (1998-99); see also Richard A. Matasar, *The Two Professionalisms of Legal Education*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 99, 115 n.3 (2001) (describing the author's "own professionalism mantra—the three C's of professionalism," consisting of competency, community involvement, and commitment "to those closest to us"); Pearce, *supra* note 6, at 1238 & n.39 (stating that "[c]ommentators do not agree on a single definition of professionalism" but identifying "esoteric knowledge, altruism, and autonomy" as "three conditions, perhaps under different labels and with different emphasis, [that] are common to most constructions of professionalism" (citations omitted)); Regan, *supra* note 10, at 33-43 (analyzing "values traditionally invoked in the name of professionalism," such as devotion to the client, commitment to quality, autonomy, and independence).

At least one legal scholar finds that "[t]he 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." Tomain, *supra* note 10, at 156. Professor Zacharias takes a more vague approach, noting that "from the vast literature on the subject of professionalism, one can identify several core normative themes concerning the term's meaning." Zacharias, *supra* note 1, at 1307. According to Professor Zacharias, "[v]irtually all of the themes encompass the notion that the lawyer's function includes a measure of objectivity in the implementation of legal skills, goals, or practices." *Id.*; see also Colin Croft, Note, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1263-71 (1992) (discussing the ideological and institutional attributes of professions generally).

20. ANTHONY KRONMAN, *THE LOST LAWYER* (1993).

21. These works include GLENDON, *supra* note 3; KRONMAN, *supra* note 20; SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994).

22. Pearce, *supra* note 6, at 1230; see also Robert W. Gordon, *The Radical Conservatism of the Practice of Justice*, 51 STAN. L. REV. 919, 930-31 (1999) (referring to these works as "the best known among many jeremiads" lamenting the decline of professionalism).

23. Maynard, *supra* note 2, at 895 n.2; see also Thomas S. Ulen, *The Prudence of Law and Economics: Why More Economics is Better*, 26 CUMB. L. REV. 773, 773 (1996) ("Dean Anthony Kronman is the most eloquent, thoughtful, and persuasive of the many recent critics of the legal profession.").

One of the most salient characteristics of Kronman's book, repeatedly emphasized by reviewers, is its pessimistic outlook.<sup>24</sup> For example, Professor David Wilkins refers to the book as a "deeply pessimistic meditation on the state of the American legal profession,"<sup>25</sup> and finds that "in Kronman's view, the current generation of academics, practitioners, and judges has so devalued and undermined th[e] professional ideal that its resurrection is now virtually impossible."<sup>26</sup>

Kronman's pessimism is based in large part on his observation that "[t]he law has become a business like any other . . . . [T]he only choice that lawyers now have is whether to struggle futilely against their fate or accept it with a measure of dignity and grace."<sup>27</sup> Indeed, Kronman put it more bluntly in his remarks at a 1994 Wayne State University Law School forum<sup>28</sup> dedicated to a discussion of his book:

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24. See Michael Livingston, *Confessions of an Economist Killer: A Reply to Kronman's "Lost Lawyer,"* 89 NW. U. L. REV. 1592, 1618, 1620 (1995) (book review) (finding that "the greatest flaw in *The Lost Lawyer*" may be Kronman's "pessimism[, which] may yet prove to be unjustified"); Thomas L. Shaffer, *The Lost Lawyer: Failing Ideals of the Legal Profession*, 41 LOY. L. REV. 387, 398 (1995) (book review) (stating that "Kronman's assessment of our situation . . . lacks hope"); Barry Sullivan, *Professions of Law*, 9 GEO. J. LEGAL ETHICS 1235, 1286, 1287 (1996) (finding that "Kronman's conclusions are gloomy" and describing Kronman's prognosis as "bleak").

The following passage from *The Lost Lawyer* exemplifies the type of pessimism referred to by reviewers:

[T]he likelihood that the profession as a whole will awaken to the emptiness of its condition and that there will be a great resurgence of support, at an institutional level, for the vanishing ideal of the lawyer-statesman seems to me quite low.

For the most part, I suspect, things will go on much as before, and the profession will drift more and more in the direction it has been moving this past quarter-century. Of course, each generation of lawyers makes its own contribution to the architecture of the law. The contribution mine has made has been to tear down the old system of ideas and institutions that gave the lawyer-statesman ideal its authority and power. The next, perhaps, will begin the work of rebuilding that we have torn apart. That may happen, and I hope it does, though I doubt in fact it will.

KRONMAN, *supra* note 20, at 380-81.

25. David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals From Ideology in Legal Ethics*, 108 HARV. L. REV. 458, 458 (1994) (reviewing KRONMAN, *supra* note 20); see also Laurel Terry, *Taking Kronman and Glendon One Step Further: In Celebration of "Professional Schools,"* 100 DICK. L. REV. 647, 661 (1996) (exclaiming that "Kronman is downright pessimistic about the state of the legal profession").

26. Wilkins, *supra* note 25, at 458-59. However, one commentator suggests that "[m]uch of the pessimism of contemporary law professors (and students) may actually be a sort of repressed 1960s-era idealism, as if the pessimists have despaired of realizing their dreams and are embarrassed to admit they still have them," and that "Kronman, in this view, deserves credit that he still dares to dream." Livingston, *supra* note 24, at 1621 n.81.

27. KRONMAN, *supra* note 20, at 370.

28. *The Second Driker Forum*, *supra* note 9.



America's large firms have become explicitly, candidly, without shame in the last twenty years unembarrassedly commercialistic in their outlook and practice. The bottom line has become the only line for them, and the older ethos of craftsmanship which was nourished and reinforced in a very deliberate and careful way by lawyers in these firms a half century ago has disappeared, and has been replaced by an ethos of moneymaking which puts the exclusive stress mark on the number of billable hours that you put in and the number of dollars those billable hours produce.

Well, once you have a culture like that, of course . . . there's little left in the mythology of the firm to underscore, to emphasize, to reinforce the value of craft as opposed to the extrinsic importance of moneymaking.<sup>29</sup>

After decrying the loss of "our collective professional ideals," Kronman asked rhetorically, "What's to replace it?"<sup>30</sup> His response was consistent with the pessimism present in his book:

There are no compelling candidates on the horizon, so what we're left with is a void in our own self-understanding, in our professional identity. Once we had a secure self-conception and I think an attractive and indeed I would even say noble self-conception, but that has been shattered, and nothing has yet emerged to replace it in a satisfying way. It is that sense of having lost our traditional moorings and not having the confidence that there is a successor ideal or mythology in view.<sup>31</sup>

In the course of a few short years, however, Kronman seems to have emerged with a new sense of optimism in the professionalism model. In a number of recent addresses, Kronman appears to have overcome the sense of despair that permeated his earlier book, allowing him to embrace the future of the legal profession.<sup>32</sup> Thus, although he still acknowledges that "the roots of legal professionalism

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29. *Id.* at 121-22.

30. *Id.* at 125.

31. *Id.* at 125-26.

32. These addresses include presentations at: Chapman University School of Law Groundbreaking Ceremony, November 21, 1997, published as Kronman, *supra* note 11; Conference on Legal Ethics: Access to Justice, held at Hofstra University School of Law, March 10-12, 1996, published as Kronman, *supra* note 6, and as Kronman, *The Fault in Legal Ethics*, 100 DICK. L. REV. 489 (1996) [hereinafter Kronman, *The Fault in Legal Ethics*]; and the Keynote address at Florida State University College of Law Symposium, Defining and Refining Professionalism: Assessing the Roles and Regulation of Lawyers in the Twenty-First Century, February 12, 1999, published as Kronman, *Legal Professionalism*, 27 FLA. ST. U. L. REV. 1 (1999) [hereinafter Kronman, *Legal Professionalism*].

are challenged as never before[.]”<sup>33</sup> he calls for the “survival of the profession”<sup>34</sup> through “the clearest possible reaffirmation of the . . . features that make it such, and a heroic commitment to their protection.”<sup>35</sup>

It is striking that Kronman, until recently one of the leading witnesses to the apparently irreversible demise of professionalism, now speaks of the ability and obligation of law schools and lawyers to reaffirm and protect the professional character of lawyering.<sup>36</sup> In the face of mounting evidence and commentary suggesting that the pessimism he expressed in *The Lost Lawyer* has been borne out in the years since he issued his negative prognosis,<sup>37</sup> Kronman now refuses to admit to the defeat of the profession. His willingness, instead, to embark upon an attempt to revive professionalism, evinces what may amount to adherence to a distinctive faith in the professionalism model that requires its followers to proclaim its vitality despite strong indications to the contrary.<sup>38</sup>

Professor Atkinson has similarly described a “professionalism crusade” characterized by “an implicit assumption of one true professional faith and its tendency to condemn categorically certain modes

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33. Kronman, *supra* note 11, at 12.

34. *Id.*

35. *Id.*

36. At the outset of his review of *The Lost Lawyer*, Professor Wilkins notes that, in the introduction to the book, Kronman traces the origins of his thinking that ultimately culminated in the book to a speech he delivered in 1981 at Yale Law School regarding the legal profession and the challenging reaction he received from two of his colleagues. Wilkins, *supra* note 25, at 458 (citing KRONMAN, *supra* note 20, at vii). Professor Wilkins then proceeds with an analysis comparing Kronman’s views from 1981 with the conclusions he reached in 1993 in *The Lost Lawyer*. See *id.* at 459 (finding that “Kronman’s prognosis for those entering the profession today remains the same as it was in 1981; they cannot expect to find moral fulfillment in their work as lawyers”).

In a similar vein, this Essay is intended, in part, as an attempt to update and continue Professor Wilkins’s project along the next segment of Kronman’s career, using *The Lost Lawyer* as a starting point. Unlike Professor Wilkins’s earlier study, however, this Essay finds a fundamental change in Kronman’s thinking, from the pessimism found in *The Lost Lawyer* to the more optimistic support of professionalism that Kronman currently proclaims.

37. See Pearce, *supra* note 6, *passim*; Schiltz, *supra* note 5, at 729-30 (noting that “[m]any commentators have lamented the increasing commercialization of the legal profession, but few have captured the extent of this affliction . . . because it almost defies description” (footnote omitted)); Tomain, *supra* note 10, at 168 (observing that “[t]he slogan that ‘law has become more of a business and less of a profession’ is not without some basis in fact”); Transcript, *Defining and Refining Professionalism: Assessing the Roles and Regulations of Lawyers in the Twenty-First Century*, 27 FLA. ST. U. L. REV. 205, 210 (1999) (remarks of Hon. Harry Lee Anstead) (stating “the business paradigm has already come in and been in place in a lot of the legal profession with the larger firms”).

38. See *supra* note 37 (citing sources discussing the commercialization of the legal profession).

of conduct as cardinal sins.”<sup>39</sup> Professor Atkinson notes that the professionalism movement is rife with religious metaphors. “Its formal proposals tend to call for a return to a common professional faith—the supposedly shared beliefs and commitments that are enshrined in documents described as ‘Creeds,’ ‘Oaths,’ and ‘Pledges’ of professionalism.”<sup>40</sup> Although these documents may be termed “codes,” “they read more like the Decalogue than the Uniform Commercial Code or, for that matter, the Model Code of Professional Responsibility.”<sup>41</sup> These titles imply, “with perhaps a more profound accuracy than their authors intended, that the documents they describe are articles of faith.”<sup>42</sup>

Indeed, the language that Kronman uses in his speeches advocating professionalism is more akin to the language of the religious believer than that of the academic legal scholar. In his address at the 1997 groundbreaking ceremony of Chapman University School of Law, Kronman repeatedly uses religious imagery to describe the law and legal education. Kronman announces that those participating in the groundbreaking serve to “solemnize as witnesses”<sup>43</sup> the law school’s act of becoming “heir to the traditions of the legal profession.”<sup>44</sup> Kronman then cites the Roman tradition to “consecrate” the site of a building and “solemnize the occasion,” in the belief that such an action, undertaken by the “priests,” followed “the paths of the gods.”<sup>45</sup> According to Kronman, these dedications linked the past with the future, shaping the “history and morality and religion of the Roman republic.”<sup>46</sup>

Of course, Kronman is far from the first American legal scholar to cast the law in religious terms or to draw a parallel between the American legal system and religion. Professors Robert Cover,<sup>47</sup> Thomas Grey,<sup>48</sup> and Ronald Garet,<sup>49</sup> along with numerous others who

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39. Atkinson, *supra* note 15, at 263.

40. *Id.*

41. *Id.*

42. *Id.*

43. Kronman, *supra* note 11, at 1.

44. *Id.*

45. *Id.* at 2.

46. *Id.*

47. Robert M. Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

48. Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

49. Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. CAL. L. REV. 35 (1985).

followed in their path,<sup>50</sup> have documented and demonstrated similarities in the interpretive methodologies employed in biblical hermeneutics and constitutional interpretation. As other scholars such as Professors Sanford Levinson<sup>51</sup> and Steven Smith<sup>52</sup> have demonstrated, these similarities form but a piece of a broader notion of American faith or belief in the law.<sup>53</sup>

Kronman, however, appears to have taken a significant step forward in his comparison of law to religion. For Kronman, it is not enough to recognize that, on an intellectual level, parallels exist between the disciplines of law and religion, or even that, on a more practical level, law in the United States enjoys an acceptance and adherence in much the same way as does religion for its believers. According to Kronman, legal practice and its professional nature comprise a belief system and a way of life for the lawyer, analogous to that of religious commitment.<sup>54</sup>

## II. THE EVOLUTION OF KRONMAN'S FAITH: A CLOSER LOOK

The genesis of this concept in Kronman's thinking can be traced back at least to 1987, when, in an article with the telling title, *Living in the Law*,<sup>55</sup> Kronman explained that he was not interested merely in the question of "the moral justifiability of what lawyers do."<sup>56</sup> Rather, Kronman set out to answer the more fundamental question of "[w]hat is it about the life of a lawyer that justifies the very large commitment which the decision to pursue it entails?"<sup>57</sup> As Kronman put it, "though my immediate concern is with lawyers and the lives they lead, it is my hope that what I say will contribute to the current revival of interest in the question of what it means, more generally, to live the life of a person."<sup>58</sup> Thus, as early as 1987, Kronman equated an indi-

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50. E.g., Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 CONST. COMMENT. 511 (1998); Steven D. Smith, *Believing Like a Lawyer*, 40 B.C. L. REV. 1041 (1999).

51. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

52. Smith, *supra* note 50.

53. According to Professor Smith, for example, "[c]entral features of legal practice that seem inexplicable from a rationalist perspective—and hence that rationalist theorists have criticized throughout the past century—come to seem entirely natural and appropriate from the standpoint of a certain kind of faith, or from what we might call 'legal faith.'" *Id.* at 1113; see also Brian C. Murchison, *Law, Belief, and Bildung: The Education of Harry Edwards*, 29 HOFSTRA L. REV. 127 (2000) (comparing Judge Harry Edwards's faith in the law to the religious faith of Paul Scott's fictional character Barbie Batchelor).

54. See KRONMAN, *supra* note 20, at 3 (discussing the intrinsic value of practicing law).

55. Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987).

56. *Id.* at 836.

57. *Id.*

58. *Id.* at 838.

vidual's professional life as a lawyer with the way that individual lives his or her life.<sup>59</sup>

Six years later, in *The Lost Lawyer*, Kronman's view of the centrality—or even primacy—of the lawyer's professional life developed an explicitly theological component. Kronman repeatedly used religious imagery to express his dissatisfaction with the state of the legal profession.<sup>60</sup> For example, Kronman expressed admiration for the courtroom setting, in which “the well-being of the law is not only a subject of explicit concern; it is a value superior to all others.”<sup>61</sup> He wrote, however, of a profession struggling “against the forces of disorder that threaten all our fragile human works.”<sup>62</sup> He lamented that we can no longer look to the ideals of lawyering for an answer to “the question, why is the life of a lawyer worth living.”<sup>63</sup> Only someone who had such a strong sense of faith in the legal profession as a religion would mourn the realization that lawyers “have been forced to look for their salvation outside the realm of work, after hours, in the intimacies of private life.”<sup>64</sup>

Kronman was not the first to suggest that the practice of law plays a central role within the broader context of an individual's life, or even to proceed with such a discussion by reference to religious be-

59. Notably, despite Kronman's optimistic conclusion that, “[a] life lived in the law . . . has intrinsic worth for the person living it,” *id.* at 874, the article also includes a haunting prelude to the book that would follow six years later. Its closing lines state: “Will it be possible, in the world of law that I fear is growing up around us, to answer someone who asks why he should choose a living in the law or think of it as anything more than a way of passing time and making money?” *Id.* at 876.

60. See Shaffer, *supra* note 24, at 395 (discussing Kronman's use of religious rhetoric to describe the commercialization of the legal profession).

61. KRONMAN, *supra* note 20, at 151.

62. *Id.* at 108.

63. *Id.* at 165.

64. *Id.* at 370. Professor Schiltz noted that *The Lost Lawyer* is a prominent book about the “spiritual crisis” of American lawyers written by a leading academic [which] barely mentions religion. Instead, the book asserts that the “only” place that we . . . can meet our “need to believe that [our] lives are worth living”—now that it is “unthinkable that one can find even the smallest part of an answer [to the ultimate question of life's meaning] by choosing a legal career”—is “in the realm of personal relations, of brotherly and erotic love, in the sphere of private life.”

Schiltz, *supra* note 5, at 753 n.181 (quoting KRONMAN, *supra* note 20, at 369-70) (citations omitted). Professor Schiltz responds that “[t]his no doubt would come as a surprise to many people of faith.” *Id.*

Indeed, the notion that the practice of law can serve as a primary source of meaning in life appears central to Kronman's abiding faith in the profession. See, e.g., Kronman, *Legal Professionalism*, *supra* note 32, at 3 (stating that “[m]any people today look for meaning in their lives outside the world of work[,] [b]ut we professionals hang on to the idea that we can find fulfillment in the work we do”).

liefs.<sup>65</sup> Before Kronman, Professor Shaffer regularly looked to personal and religious values to help understand the individual's relationship to legal practice.<sup>66</sup> Professor Pearce has concluded that Shaffer, and those who followed his example,<sup>67</sup> have produced a "religious lawyering movement"<sup>68</sup>—a movement which recognized that a person "might want to live in the office as he lives at home."<sup>69</sup>

Kronman's ideas differed, however, both in degree and kind, with respect to the religious significance of the practice of law. From Kronman's perspective, living the life of a lawyer did not merely reflect a noble or moral choice that could be reconciled or even integrated with other religious and personal values. Rather, he believed that participating in the legal profession carries intrinsic value and represents an independent and seemingly religious commitment to the legal faith.<sup>70</sup> As Professor Shaffer saw it, Kronman put "all his

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65. Kronman traces the idea that "one's work" can be "intrinsically satisfying" to the Judeo-Christian tradition and the story of "The Fall." Kronman, *Legal Professionalism*, *supra* note 32, at 2-3. He suggests that the expulsion from Eden and attendant need to "work in order to live" were originally perceived as "badge[s] of our spiritual condition as fallen creatures." *Id.* Against this background, Kronman notes, it is understandable that work was eventually viewed "as an arena for spiritual progress," and "redemption." *Id.* at 3.

66. *E.g.*, THOMAS L. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981); Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231 (1979).

67. *See, e.g.*, Russell G. Pearce, *Foreword: The Religious Lawyering Movement: An Emerging Force in Legal Ethics and Professionalism*, 66 FORDHAM L. REV. 1075 (1998) (tracing the course of scholarship in this area).

68. *Id.* at 1075. For examples of the scholarship that has contributed to the emergence of this movement, see Samuel J. Levine, *Introductory Note: Responding to the Problems of Ethical Schizophrenia*, 38 CATH. LAW. 145 (1998); Symposium, *Faith and the Law*, 27 TEX. TECH L. REV. 911 (1996); Symposium, *Lawyering and Personal Values*, 38 CATH. LAW. 145 (1998); Symposium, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 FORDHAM URB. L.J. 821 (1999); Symposium, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1998).

69. Thomas L. Shaffer, *On Living One Way in Town and Another Way at Home*, 31 VAL. U. L. REV. 879, 883 (1997). Professor Shaffer and others have acknowledged—and advocated—the possibility that the practice of law can serve as a virtuous endeavor when integrated into a broader ethical framework and lifestyle. *See, e.g., id.* at 889-92 (discussing how feminist and religious ethical principles could help lawyers live a better lifestyle at work and at home); Samuel J. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH L. REV. 1199 (1996) (explaining how the author has been able to integrate his work as a prosecutor with his spirituality as an Orthodox Jewish individual).

70. *See* Kronman, *Legal Professionalism*, *supra* note 32, at 1-3 (discussing how the debate over the meaning of legal professionalism implicates internal and external questions, and explaining how viewing work as a way to gain spiritual value remains strong for some in the legal community); Kronman, *supra* note 55, at 845-74 (arguing that the skill of good judgment, developed by practicing law, should give lawyers a basis for believing in the intrinsic value of the work they do); *cf.* Croft, *supra* note 19, at 1270 & n.76 (noting Kronman's intrinsic-extrinsic distinction and finding that "[t]he intrinsic value of working within a

hope”<sup>71</sup> in the role professional life played in “the life of a good lawyer,” rather than recognizing the importance of “ethnic, religious, and familial associations.”<sup>72</sup> Similarly, Professor Anthony Alfieri observed that Kronman was “deeply wedded to the secular ‘idea of a calling, of salvation through work.’”<sup>73</sup> According to Professor Alfieri, Kronman viewed work as “exert[ing] a ‘transformative effect’ on the human personality,” and found that “[p]ersonal fulfillment . . . depends in substantial part on the ‘meaning-giving power’ of . . . professional work.”<sup>74</sup>

The deep pessimism prevalent in *The Lost Lawyer* represented an expression of Kronman’s loss of faith in the profession and the professionalism model, due in part to his acknowledgment of—and apparent surrender to—the increasing commercialization of the lawyer’s work.<sup>75</sup> Having had his faith shattered, Kronman found himself, like the lawyers he observed, disillusioned and in need of affirmation of his beliefs.<sup>76</sup> In *The Lost Lawyer*, Kronman was unsuccessful in his

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profession derives from the occupation’s inherent value as a worthy calling, rather than from its status as a means to wealth, power, or prestige”).

A number of scholars have argued that the substitution of the “religion” of professionalism for actual religion is misplaced. See, e.g., Kenneth Anderson, *A New Class of Lawyers: The Therapeutic as Rights Talk*, 96 COLUM. L. REV. 1062, 1071 (1996) (reviewing KRONMAN, *supra* note 20). Professor Anderson criticizes the legal community’s emphasis on professional ethics over personal ethics because “expansion of the professional ethical guidelines assumes that their adherents have no life apart from the profession that would provide another, broader basis for an ethical life.” *Id.* Professor Anderson adds, “[a]ttempts by lawyers, lacking other sources of identity, to expand the empire of professionalism to cover life at large because nothing else covers their own lives ought to give lawyers pause.” *Id.* at 1072; see also Susan G. Kupfer, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33, 44 (1996) (finding that “[t]here are dangers to this ideal professional self, not the least being that a process of social construction tends to leave one interested more in conformity to professional norms (by which success is measured) than in the pursuit of ideals generated by other, more personal systems of belief”); Thomas L. Shaffer, *Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393, 400, 405 (1990-91) (warning of “the tragic dimensions of turning professionalism into a moral argument,” which include the argument “that being in the profession will make you a better person”).

71. Shaffer, *supra* note 24, at 395.

72. *Id.* at 396.

73. Anthony V. Alfieri, *Denaturalizing the Lawyer-Statesman*, 93 MICH. L. REV. 1204, 1224-25 (1995) (reviewing and quoting KRONMAN, *supra* note 20, at 368-71).

74. *Id.*

75. See *supra* notes 24-31 and accompanying text (explaining the source of Kronman’s pessimism in *The Lost Lawyer*).

76. See Smith, *supra* note 50, at 1117 (criticizing Kronman for “adher[ing,] . . . quite aggressively, . . . to traditional legal methods that upon examination can be seen to reflect . . . an orientation of faith, and indeed of ‘legal faith’—that scholars and legal practitioners are likely to disavow”).

search, “find[ing] nothing for us to follow.”<sup>77</sup> His conclusions “lack[ed] hope . . . a necessary virtue for a believer.”<sup>78</sup>

Thus, following *The Lost Lawyer*, Kronman had to retreat from the optimistic goals he pursued in his 1987 article and reassess some of the fundamentals of his faith. With the realities he encountered in *The Lost Lawyer* framing his perspective on the legal profession, Kronman was required to rethink some of the most basic assumptions about the professionalism model and the nature of the legal profession before he could consider any more attempts to explore further the virtues of the life of a lawyer.<sup>79</sup>

Kronman has found answers to these troubling issues. However, he has cast his response not in empirical terms or even through impressionistic or experiential observations, but instead through expressions of faith in the legal profession replete with religious imagery, demonstrating his apparent emergence from his religious crisis with a new faith in the professionalism model.

Indeed, Kronman now articulates four articles of faith<sup>80</sup> that form the basis of his belief that “the practice of law” is “a profession . . . that entitle[s] those engaged in it to the special respect this word implies.”<sup>81</sup> According to Kronman, these characteristics of the legal profession contribute to its status as not merely a “job,” like that of the butcher, the brewer, or the baker,<sup>82</sup> but—using a phrase that might ordinarily be associated more closely with religion—a “way of life.”<sup>83</sup>

The first article of faith, which Kronman calls the “most familiar,”<sup>84</sup> and which appears to be the most important to him, is that “the law is a public calling which entails a duty to serve the good of the

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77. Shaffer, *supra* note 24, at 393.

78. *Id.* at 398 (footnote omitted).

79. See Alfieri, *supra* note 73, at 1225 (stating that “Kronman bemoans the ‘dramatic narrowing of the possibilities of salvation within the realm of work’ sparked by the dissolution of traditional institutions and professional ideals”).

80. The term “articles of faith” borrows from Professor Atkinson’s observation that the titles of works proposing a return to the professionalism model “imply, with perhaps a more profound accuracy than their authors intended, that the documents they describe are articles of faith.” Atkinson, *supra* note 15, at 263.

81. Kronman, *supra* note 11, at 3.

82. In his work, Kronman repeatedly discusses work in terms of the butcher, the brewer, and the baker as borrowed from Adam Smith’s *The Wealth of Nations*. See, e.g., Kronman, *supra* note 6, at 90-91. Kronman discusses Smith’s contention that “the butcher, the brewer, [and] the baker” contribute to “the public good” but “with an eye solely to [their] own advantage.” Kronman, *supra* note 11, at 3. Kronman argues that the lawyer is different in that he or she “is charged with a conscious trusteeship of the public good that cannot be discharged by any mechanism other than his own direct intervention.” *Id.* at 4.

83. Kronman, *supra* note 11, at 2-3.

84. Kronman, *Legal Professionalism*, *supra* note 32, at 4.



community as a whole, and not just one's own good or that of one's clients."<sup>85</sup> Kronman explains this concept largely in negative terms, contrasting the lawyer with the baker and the brewer who "contribute to the good of society not out of concern for the well being of society itself, but solely through the pursuit of their own advantage, each looking only to the profit he hopes to make from the patronage of his customers or clients."<sup>86</sup>

The lawyer is different, according to Kronman, because "the moral experience of law practice" is characterized by a "division of allegiances"<sup>87</sup> between "a particular client" and "the well being of the law as a whole."<sup>88</sup> Like many forms of religion, this duty to the public good is all-encompassing, requiring lawyers to uphold this duty "not just occasionally, not just in the fraction of time [they] devote[ ] to *pro bono* activities, but constantly and consistently,"<sup>89</sup> "in every bit of advice they give and every litigation they conduct."<sup>90</sup> In short, the lawyer's obligation to contribute to the public good attaches "in every moment he is practicing law."<sup>91</sup> Kronman emphasizes that this obligation is solemnized "by the oaths [lawyers] swear upon admission to the bar"—a procedure that echoes a religious ceremony.<sup>92</sup>

The second article of faith is the "nonspecialized nature of the practice of law," which allows the legal profession to remain "a generalist's craft, whose possessor can move from one field to another."<sup>93</sup> Again relying on a contrast to another type of job, Kronman asserts that unlike "activities like pin-making, which are characterized . . . by the division of labor into ever finer parts, each the province of a specialist with a tremendously developed but excruciatingly narrow expertise[,] [l]awyers . . . perform a range of different tasks . . . touching, in the process, on a dozen different areas of law," developing "a loose ensemble of methods and habits easily transported across doctrinal lines."<sup>94</sup>

Kronman acknowledges that this contrast does not necessarily paint lawyers in the most favorable light. Specifically,

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85. Kronman, *supra* note 11, at 3.

86. Kronman, *Legal Professionalism*, *supra* note 32, at 4-5.

87. *Id.* at 5.

88. *Id.*

89. Kronman, *supra* note 11, at 3.

90. Kronman, *Legal Professionalism*, *supra* note 32, at 4.

91. Kronman, *supra* note 11, at 3-4.

92. Kronman, *Legal Professionalism*, *supra* note 32, at 4.

93. Kronman, *supra* note 11, at 4.

94. *Id.*

[f]rom the standpoint of the pin factory and all the other modern forms of enterprise whose success depends upon the division of labor and the cultivation of a deep but narrow expertise, the fact that the law remains a generalist's craft can only be interpreted as a sign of its dilettantism and amateurish backwardness.<sup>95</sup>

Kronman does not explain why he rejects this perspective. Nevertheless, he counters that, "viewed in another light, with pride and not embarrassment, the nontechnical nature of his work constitutes a second enduring source of the lawyer's claim to be a professional with a freedom and range of activity that specialization destroys."<sup>96</sup> Thus, as a believer, Kronman emerges unscathed from the mocking criticism of others, instead wearing such criticism as a badge of honor, without responding directly to the substance of their attacks.

The third article of faith states that the legal profession "requires more than intellectual skill."<sup>97</sup> Again like many forms of religion, "[i]t also requires the development of perceptual and emotional powers, and hence necessarily engages parts of one's personality other than the cognitive or thinking part. A good legal education is a process of general maturation in which the seeing, thinking, and feeling parts of the soul are reciprocally engaged."<sup>98</sup> This principle, expressed in explicitly spiritual terms, powerfully articulates Kronman's belief in the practice of law as a way of life.<sup>99</sup>

The fourth and final article of faith is the law's almost mystical connection to the past.<sup>100</sup> Kronman sees precedent as a "value" in the law, because "[t]he law is internally connected to its past—connected by its own defining norms and values—and not just externally connected, as every enterprise is, through the story an observer might tell about its development over time."<sup>101</sup> Like accepting a religious tradition, "[t]o enter the legal profession is therefore to come into an activity with self-conscious historical depth, to feel that one is entering an

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95. *Id.* at 5.

96. *Id.*

97. *Id.*

98. *Id.*

99. As Kronman explains:

The process of training to become a lawyer, and the subsequent experience of being one, gather the soul's powers in a way that confirms one's sense of wholeness as a person and sense of being wholly engaged by one's work in contrast to all activities that can be mastered by the mind alone, which often produce, among the technicians who perform them, a sense of partial engagement only.

*Id.*

100. *Id.* at 5-6; Kronman, *Legal Professionalism*, *supra* note 32, at 6.

101. Kronman, *supra* note 11, at 6.

activity that has long been underway, and whose fulfillment requires a collaboration among many generations."<sup>102</sup> Indeed, "[i]t is to know that one *belongs to a tradition*."<sup>103</sup>

Like many other forms of religion, Kronman's professionalism is legitimized in part by its widely held traditions that connect it to the past.<sup>104</sup> For example, in support of "the idea that work itself might be intrinsically meaningful," Kronman harkens back to "the Judeo-Christian tradition" that views work "as an arena for spiritual progress, for fulfillment, and perhaps even for redemption."<sup>105</sup>

Moreover, Kronman's professionalism looks to "ancient assumptions," accepted "both by lawyers and laypeople," that the practice of law is a profession and that legal education is "a form of professional, and not merely vocational, training."<sup>106</sup> Indeed, Kronman asserts, the idea that the practice of law is a profession lies "at the core of our tradition [as] one idea that no one will dispute."<sup>107</sup> According to Kronman, then, belief in professionalism relies heavily on acceptance of past assumptions, together with the repeated declaration that adherence to the faith is not disputed by others.

Thus, Kronman has become a powerful preacher to the believers, exhorting law schools to take their rightful place as "heir to the traditions of the legal profession . . . [and] declar[e] [their] commitment to sustain these traditions, whose survival is now in [their] hands."<sup>108</sup> Responding to challenges to the professionalism model, Kronman uses religious imagery, rallying the adherents of professionalism to

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102. *Id.*

103. *Id.* (emphasis added).

104. Kronman has discussed elsewhere, on a broader level, the unique connection he sees between law and tradition. See Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1034 (1990) (stating that "[t]he law accords the past an authority that philosophy does not—an authority which indeed is incompatible with the independent spirit of all philosophical reflection"). Cf. Alfieri, *supra* note 73, at 1205 (critiquing Kronman's approach, which "accords tradition an authority that holds 'inherent and direct' sway over the practice of law").

105. Kronman, *Legal Professionalism*, *supra* note 32, at 2-3. Kronman observes that "[t]he notion that work has spiritual value is with us still, although the scaffolding of religious ideas that accompanied its invention has largely fallen away. Today, the notion of meaningful work survives mainly in a secularized form." *Id.* at 3. For Kronman, this observation may lend further support to his belief in professionalism, which can serve to fill the gap left by what he sees as religion's loss of prominence in lending spiritual meaning to work. See *id.*; cf. Cochran, *supra* note 14, at 306-07 (noting that "[t]he concept of professionalism emerged from the religious orders of the Middle Ages," but that "[a]s the legal profession evolved in England and the United States, it lost its religious character").

106. Kronman, *supra* note 11, at 3.

107. *Id.* at 2.

108. *Id.* at 1.

fight against the infidels, urging them to engage in “battle” in the “great struggle . . . for the soul of the profession.”<sup>109</sup>

Kronman’s reaffirmed faith is seemingly unquestioning, not susceptible to the doubts in the professionalism model that he experienced with *The Lost Lawyer*. The language Kronman employs within his declarations of faith in the legal profession reveals an approach that does not seem to tolerate—or even acknowledge the existence of—the claims of others. As Kronman exclaims, “[i]t is a cliché that ours is a profession and not a trade. We *all* believe this. We *all* badly want to believe it. It is an important thought for us to hold onto.”<sup>110</sup> No dissenting views are recognized; if they exist, they reflect the teachings of the heretics, those unfaithful to the religion of professionalism.<sup>111</sup> The believers must cling to their faith, regardless of the arguments and evidence offered by the heretics, arguments that just a few years ago succeeded in leading Kronman astray.

### III. BUSINESS MODEL HERESIES AND THE REACTIONS OF THE BELIEVERS

But of course there are heretics. There are those who do not adhere to the religion of professionalism, and who have lost—and have not regained—any faith they may have once had in the intrinsic virtue of living the life of a lawyer. The heretics take various forms, attacking the professionalism model with different arguments. Perhaps the argument most dangerous to the continued success of the religion of professionalism is that which nearly claimed one of its most coveted proponents: the argument that law is not a profession but a business.<sup>112</sup>

Many scholars assert that the practice of law now resembles more a business than a profession, observing that “lawyers aggressively seek out new clients” by advertising “in the various public media,” and placing greater emphasis on public relations.<sup>113</sup> The modern practice of law is a business in which “rainmakers are viewed as valued firm assets,” and “[t]he financial pressures to obtain and keep clients are so great that lawyers’ ethics codes are, in fact, geared toward restraining

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109. *Id.* at 12.

110. Kronman, *Legal Professionalism*, *supra* note 32, at 1 (emphasis added).

111. *See, e.g.*, Atkinson, *supra* note 15, at 266 (stating that one danger of advocating for one true professional faith “is that those who object to the present professionalism crusade will be denounced as heretics, enemies of a shared professional faith”).

112. *E.g.*, Pearce, *supra* note 6, at 1230.

113. Robert T. Begg, *The Lawyer’s License to Discriminate Revoked: How a Dentist Put Teeth in New York’s Anti-Discrimination Disciplinary Rule*, 64 ALB. L. REV. 153, 169-70 (2000).

excessive solicitation of clients.”<sup>114</sup> One scholar has characterized “the *modus operandi*” of law practice as “the relentless, cynical pursuit of clients and profits.”<sup>115</sup>

Professor Schiltz has attacked a number of beliefs that the professionalism model espouses, specifically as manifested in large law firms.<sup>116</sup> Though he does not expressly refer to the professionalism or business model, Schiltz observes that lawyers “complain about the commercialization of the legal profession—about the fact that practicing law has become less of a profession and more of a business,”<sup>117</sup> and he emphasizes the central role that money takes in legal practice.<sup>118</sup> Employing characteristically blunt terms, Schiltz declares that

[the legal profession] is absolutely obsessed with money. . . . Money is at the root of virtually everything that lawyers don’t like about their profession: the long hours, the commercialization, the tremendous pressure to attract and retain clients, the fiercely competitive marketplace, the lack of collegiality and loyalty among partners, the poor public image of the profession, and even the lack of civility.<sup>119</sup>

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114. *Id.* at 170.

115. Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1328 (1998). It is interesting that the concern, expressed by many of these scholars, over the increasingly commercial nature of legal practice, appears to be somewhat of a global phenomenon, and is certainly not unique to the United States. One scholar describing the phenomenon in Nigeria uses language that could just as easily be used to describe the views of many scholars regarding American lawyers. See Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VAND. J. TRANSNAT’L L. 573, 640 (2000) (“The notion of materialism celebrated by Nigerian lawyers has resulted in a decline in professionalism and has engendered public contempt for the legal profession. . . . The public will never support or appreciate a legal profession that is more interested in making money than serving the public.” (footnote omitted)).

116. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

117. *Id.* at 888.

118. *Id.* at 895-906, 912-15.

119. *Id.* at 903; see also AT THE BREAKING POINT, 1991 A.B.A. NAT’L CONF. REP. 12 (“[M]oney is not just incidental to the practice, but at its core.”); REPORT AND RECOMMENDATIONS OF THE QUALITY OF LIFE TASK FORCE, 1991 N.C. B. ASS’N SEC. REP. 9 (“[T]he misguided view of money as the sole goal of practice, sole measure of success and sole measure of self-worth is directly and indirectly responsible for many of the problems in practice today . . .”).

Professor Schiltz’s article prompted a symposium issue of the *Vanderbilt Law Review*, which included a number of responses by leading scholars and practitioners, including Marc S. Galanter & Thomas M. Palay, Kathleen E. Hull, Michael J. Kelly, Howard Lesnick, Mary A. McLaughlin, Stephen L. Pepper, and Michael Traynor. See Symposium, *Attorney Well-Being in Large Firms: Choices Facing Young Lawyers*, 52 VAND. L. REV. 869 (1999). Schiltz, in turn, offered a rejoinder to these responses. Patrick J. Schiltz, *Provoking Introspection: A*

Professor Pearce, a leading heretic to the belief in the professionalism model, has “chronicled the decline of professionalism” by documenting “the loss of faith in the distinction between a business and a profession.”<sup>120</sup> Pearce’s critique of the professionalism model is effective—and, to believers, threatening—because it relies on empirical evidence to contradict one of the central articles of faith in professionalism: the belief that a lawyer’s primary concern is to serve the good of the community and not the pursuit of profit.<sup>121</sup>

Professor Pearce cites many examples of trends in legal practice that belie the belief that lawyers maintain a more noble approach to their jobs than those whose primary goal is their own business interests.<sup>122</sup> Specifically, he notes the “common perception among legal commentators . . . that lawyers are primarily motivated by self-interest and the desire to make money.”<sup>123</sup> The very nature of practicing law encourages such a culture. For example, “[i]n large law firms, the profits a lawyer generate[s] by procuring business or producing billable hours, and not professional excellence, determine[s] that lawyer’s rewards. Fewer lawyers appear[ ] to engage in public service, and those who d[o] f[i]nd that it br[ings] them little favor at their firms.”<sup>124</sup> Pearce cites a number of scholars and studies to support the observation that “[s]ome lawyers t[ake] advantage of this atmosphere to ‘generat[e] the highest possible fee,’ rather than provide the best possible service.”<sup>125</sup> According to Pearce, “[t]his pursuit of fees . . . [is] the catalyst for law firms to take on the forms of businesses.”<sup>126</sup> In adopting a business approach, firms “add[ ] managers, business plans, marketing directors, and financially driven strategies to maximize efficiency in making profits.”<sup>127</sup> In short, based on the evidence he has collected and presented, Pearce considers the continued belief in the

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*Reply to Galanter & Palay, Hull, Kelly, Lesnick, McLaughlin, Pepper, and Traynor*, 52 VAND. L. REV. 1033 (1999).

120. Pearce, *supra* note 6, at 1230.

121. *See id.* at 1263-76 (concluding that a business paradigm will replace the professionalism paradigm and that the business paradigm is good for the legal community).

122. *See id.* at 1249-50 (discussing increasing competition among lawyers through advertising); 1251-56 (noting that law practice is a larger industry than the steel or textile industries, and discussing the impact of increased marketing on law practice); 1257-62 (discussing the increased commercialism of the practice of law).

123. *Id.* at 1251 (quoting Elizabeth A. Kovachevich & Geri L. Waksler, *The Legal Profession: Edging Closer to Death with Each Passing Hour*, 20 STETSON L. REV. 419, 423 (1991)) (alteration in original).

124. *Id.* at 1251-52 (footnotes omitted).

125. *Id.* at 1252 (alteration in original).

126. *Id.*

127. *Id.*

professionalism paradigm to be outdated, an “anachronism” that “is almost impossible to sustain.”<sup>128</sup>

Though Pearce is far from alone in his heresy against the belief in the professionalism model,<sup>129</sup> it appears that believers—as defenders of the faith—are particularly troubled by his observations and arguments, deeming his views so dangerous that they warrant a public response.<sup>130</sup>

Two of the most powerful responses were published in a symposium in the *Florida State University Law Review*.<sup>131</sup> The responses are sharply critical of Pearce’s thesis that the business model is a more accurate and more useful framework for understanding the work of lawyers than is the professionalism model.<sup>132</sup> Both responses, however, appear to reflect the unwillingness or inability of believers in professionalism to consider the possibility that their faith is misguided. While the heretics attack the professionalism model with empirical evidence, defenders of that model respond largely with preaching and exhortations to remain faithful.

In his published keynote address to the symposium, Kronman reiterates the articles of his faith, articulating his belief that lawyers are interested in the public good rather than their own profit.<sup>133</sup> Responding implicitly to Pearce’s heretical arguments, Kronman states, “I don’t mean to suggest—what of course is not true—that lawyers are exclusively concerned with the public good.”<sup>134</sup> Nevertheless, Kronman remains unwilling to impute to lawyers a commercial mo-

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128. *Id.* at 1264. Pearce borrows the term “anachronism” from a United States Supreme Court opinion. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371-72 (1977) (stating that “the belief that lawyers are somehow ‘above’ trade has become an anachronism”). Pearce cites *Bates* as “confirming that the perspective of law as a business ha[s] moved from the margin to the center of the legal community’s discourse.” Pearce, *supra* note 6, at 1250.

129. See *supra* notes 112-119 and accompanying text (discussing various criticisms of the professionalism model).

130. It is worth noting that two of the leading heretics to the “religion” of professionalism, Pearce and Schiltz, are themselves leading proponents of the importance of actual religion in the life of a lawyer. Pearce is widely recognized as one of the current leaders of the “religious lawyering movement,” see *supra* notes 39-42 and accompanying text (discussing this “movement”), having organized major symposia at Fordham Law School addressing the relationship between religion and the practice of law. *The Relevance of Religion to a Lawyer’s Work*, *supra* note 68. Schiltz is now Associate Dean at the University of St. Thomas School of Law, a school he helped establish with the express goal of encouraging law students to incorporate ethics, as well as religious and personal values, into their professional goals and perspectives. See <http://www.stthomas.edu/lawschool/mad/mad.htm>.

131. Symposium, *Defining and Refining Professionalism: Assessing the Roles and Regulation of Lawyers in the Twenty-First Century*, 27 FLA. ST. U. L. REV. 1 (1999).

132. See Kronman, *Legal Professionalism*, *supra* note 32; Stempel, *supra* note 4.

133. Kronman, *Legal Professionalism*, *supra* note 32, at 4-7.

134. *Id.* at 5.

tive. Instead, he speaks of a “division of allegiances” resulting from the fact that “[e]very lawyer is at one and at the same time the representative of a particular interest, a particular client, a particular claim, and also an officer of the court, concerned for the well being of the law as a whole.”<sup>135</sup> When Kronman does refer to the relationship between the practice of law and the market, it is in the sense that “[t]hrough their public-spirited devotion to the integrity of the legal system that enframes the market-based and market-driven world in which we live, lawyers make a crucial contribution to the good of society as a whole.”<sup>136</sup>

Only at the end of the speech does Kronman address Pearce’s arguments more directly, acknowledging that “[o]ur profession is now being remade in the image of the market system, a system that itself needs the integrating professionalism of lawyers.”<sup>137</sup> In fact, he warns that “the legal profession is . . . becom[ing] just a business like any other.”<sup>138</sup> His response, though, is to express an unqualified reaffirmation of his faith, and a call to others to work against the potential dangers that may result from heretical ideas such as those Pearce espouses.<sup>139</sup> Though he does not refer to Professor Pearce by name, Kronman concludes the address by insisting on how “urgently we appreciate the value of the very qualities this ‘paradigm shift’ seeks to expunge” and calling on all believers to join him in “resolv[ing] to hold on to these qualities as long and as best we can.”<sup>140</sup>

The most extensive—and most pointed—defense against Pearce’s heretical teachings was put forth by Professor Stempel, who organized the symposium.<sup>141</sup> Like Kronman, Stempel employs lan-

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135. *Id.*

136. *Id.* at 6.

137. *Id.* at 7.

138. *Id.*

139. *See id.*

140. *Id.*

141. *See* Stempel, *supra* note 4. It is perhaps telling that Professor Stempel concedes that his focus on Pearce’s approach entails “some risk of oversimplification and overpersonalization.” *Id.* at 33. Reactions by the faithful to the apparently dangerous teachings of a heretic may often be characterized by a simplistic depiction of the heretical argument, combined with a “blame the messenger” mentality that substitutes an attack on the heretic for a more nuanced and substantive response.

Indeed, Pearce may have anticipated such a reaction from the establishment of believers in professional faith. Pearce cites the example of Karl Llewellyn to illustrate the “function of normal discourse . . . to marginalize perspectives outside of the Professionalism Paradigm.” Pearce, *supra* note 6, at 1245. Referring to Llewellyn as “one of the leading, though sometimes iconoclastic, voices of twentieth-century legal scholarship,” Pearce suggests that “[a]s an iconoclast, Llewellyn brought to his analysis of the profession . . . an outsider perspective open to new ideas challenging the Business-Profession dichotomy.”



guage of faith in his criticism of the business model, writing that Pearce has “forsaken the basic core of the professionalism paradigm,”<sup>142</sup> and that “a business-based construct of lawyering holds inherent evils.”<sup>143</sup>

Moreover, despite the attacks of the nonbelievers, Stempel’s methodological framework is premised on a strong presumption that favors faith in the professionalism model. He posits that “the burden of persuasion rests with [Pearce] and other advocates of the business paradigm.”<sup>144</sup> Stempel acknowledges that “[t]o an extent, . . . by placing the burden of persuasion for change on Pearce I am being a bit unfair,” in part because, he admits, “it would . . . be hard [for Pearce] to convince me and other defenders of the professionalism paradigm” of the validity of his approach.<sup>145</sup> Despite these concessions, Stempel abides by the presumption.

Likewise, Stempel’s reaction to Pearce’s criticism of the rationale behind professionalism seems to suggest that Stempel’s conclusions are based more in an unswerving faith in the professionalism model than in an intellectually honest inquiry.<sup>146</sup> Again, Stempel offers a concession, noting that “there may have been some flaws in previous formulations of the rationale.”<sup>147</sup> According to Stempel, however, it is possible that only “our dominant explanations for why law must be viewed as a profession [are] flawed.”<sup>148</sup> Thus, he argues, “[p]reviously persuasive rationales for a professionalism paradigm may be outdated, but the system of professionalism remains well justified by more modern policy goals.”<sup>149</sup> Stempel draws a parallel to “a precept or doctrine [that] may emerge based on one rationale but may maintain its value under a different rationale after the original justification becomes outdated.”<sup>150</sup> The reference to a “precept” or “doctrine” that transcends time in remaining dominant despite apparent flaws seems to evoke a received religious tenet taken on faith rather than a rea-

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*Id.* at 1245-46. Perhaps foreseeing the response of believers to his own ideas as much as describing those to Llewellyn’s, Pearce concludes that “[i]n normal discourse, outsider perspectives have little influence.” *Id.* at 1246.

142. Stempel, *supra* note 4, at 33.

143. *Id.* at 34.

144. *Id.* at 41.

145. *Id.* at 42 n.66.

146. *See id.* (admitting that “much of [his own] belief is premised on intuition and personal experience rather than systematic study and measurement”).

147. *Id.* at 37.

148. *Id.*

149. *Id.*

150. *Id.*

soned conclusion derived through an analysis of current circumstances.

Perhaps the most revealing aspect of Stempel's response to Pearce is his reliance on the assertion that "there is no doubt that the professionalism paradigm enjoys the status of a dominant paradigm."<sup>151</sup> Specifically, he notes that

[a]lthough there are many like Pearce who have criticized the professionalism regime and have argued for more practice of law as a business, there is not even a separate school of law-as-business thought to which these lawyers can retire to study the new gospel. There is not even a law school espousing the law-as-business paradigm that prospective students can attend. If students want to join the community, they must attend a conventional law school which is structured around the traditional paradigm of lawyer identity.<sup>152</sup>

In short, Stempel finds it "obvious [that] Pearce's or other scholars' disagreement with this state of affairs does not displace the paradigm."<sup>153</sup>

Thus, simply by invoking his own membership in the dominant faith, Stempel rejects any empirical basis for Pearce's heretical ideas. Rather than offering a response to Pearce's empirical evidence, such reliance on the hegemony of the believers in the professionalism model appears to deny—or at least ignore—reality in favor of perpetuating the faith of those in power. Indeed, Kronman's position as a leader of the faith only reinforces an impression of members of the legal establishment, so extensively documented by Stempel, who are unwilling to consider the possibility that a heretic among them has demonstrated that their faith is not the only true faith and, in fact, may well be unfounded.

### CONCLUSION

In 1995, in advocating a recognition that a business model was replacing the professionalism model for the practice of law, Professor Pearce anticipated the negative reaction his heretical ideas would receive from the establishment of believers in professionalism.<sup>154</sup> Indeed, he carefully chose the concept of a "paradigm" as a framework through which to express his views, noting how difficult it would be

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151. *Id.* at 54.

152. *Id.* at 54-55.

153. *Id.* at 56.

154. *See supra* note 141.

for either the believers or the heretics to persuade the other side.<sup>155</sup> Implicitly acknowledging the nearly religious divide between the believers and the heretics, Pearce explained that “[w]hether the new paradigm succeeds in a revolution depends more on the power of conversion than logical argument. No ‘logical’ choice is available between competing paradigms that ‘disagree about what is a problem and what a solution.’”<sup>156</sup>

In the same year, Professor Atkinson constructed a more explicit comparison to religious argument, referring to a professionalism “crusade” and to himself as a dissenter.<sup>157</sup> Relying on this analogy, Atkinson insisted that, “[a]s in matters of religion, so in matters of professional aspiration, we are unlikely to come to full agreement, and we are almost certainly not going to be able to bring other conscientious people to our belief by force of either argument or arms.”<sup>158</sup>

Six years later, the professionalism crusade continues, with believers in the professionalism model confident in their reaffirmed faith and strong in their defense against the heretical ideas they encounter. With such luminaries as Anthony Kronman leading the crusade, it appears that the legal establishment may successfully quell the dissent within its ranks and maintain the professionalism model as the one true faith. Regrettably, however, such success, premised not on persuasion and reason but on the exercise of hegemonic power, while perhaps satisfactory to the believers, may ultimately prove illusory.<sup>159</sup>

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155. Pearce, *supra* note 6, at 1232-33, 1236.

156. *Id.* at 1236 (footnote omitted) (quoting THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 109 (2d ed. 1970)).

157. See Atkinson, *supra* note 15, at 261-70.

158. *Id.* at 269.

159. See Pearce, *supra* note 6, at 1231 (arguing that “the Professionalism Paradigm is socially constructed. Its authority rests not on its truth in any abstract sense, but in its acceptance by the relevant community.”).