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IT IS TIME TO BURN THE BOATS: “TWIN CRISES IN THE LAW” KEYNOTE ADDRESS

Michael D. Zimmerman*

Abstract

Two crises exist in modern day law: first, the many people with legal needs who are underserved, and second, the many lawyers who are underemployed. Both are changing law practice as we know it. This address discusses each of these problems and identifies topics to consider when generating solutions.

I. INTRODUCTION

As you know, the day’s topic is the twin crises in the law—the large number of people in the middle class who cannot afford lawyers and the large number of underemployed new lawyers.

We will consider the nature of these “crises” and their interrelationship. Because the two seem so symmetrical, there is hope that each can serve to help resolve the other. I look forward to the discussions and to hearing both from those on the panels and those in the audience as to how we can rise to the challenge of underserved potential clients and underutilized legal talent.

While the topic is these “twin crises,” I expect you will hear much about deeper, almost tectonic shifts in the world of law and lawyers, shifts that will challenge all of us, not just the new underemployed lawyers. These shifts are in significant part responsible for the surplus of new lawyers. I will attempt to canvas some of these changes but will only brush the surface. Yet I think it is important that we all educate ourselves about these changes and begin to consider fundamental alterations in the structures through which lawyers are educated, admitted to practice, trained, governed, and marketed. We must open ourselves to new perspectives, even take a metaperspective, on the profession and those it serves and those it does not, which in many cases includes lawyers.

Returning to the topic for today, first, I will discuss the underserved middle class;¹ second, the underemployed new graduates;² and finally, possible solutions to these twin crises.³

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¹ *Infra* Part II.

² *Infra* Part III.

³ *Infra* Part IV.

II. UNDERSERVED MIDDLE CLASS

Let me address the oldest of these crises first. That a large percentage of the middle class in this country cannot afford lawyers is not news.⁴ It has likely been a problem for generations.⁵ I suspect, however, it is aggravated in recent years by the flattening of the growth in real incomes of the middle- and lower-middle class, as well as the rapidly growing disparity between the incomes of the wealthiest segment of the population and the rest.⁶ Lawyers understandably have increasingly sought the patronage of the wealthiest and priced their services to reflect that fact, only aggravating the inability of the rest to pay for legal services.

The profession has made several attempts to address the problem. Let me canvass them, both nationally and in Utah.

A. *Pro Bono and Low Bono*

The traditional approach has been to encourage attorneys to do more voluntary pro bono or low bono. This is a long-standing commitment of the profession, and many feel this ethical obligation deeply. But the need is so great that relying on volunteerism alone is not enough. Nor does mandating pro bono seem likely to solve the problem, in part because there is resistance in the profession to being required to volunteer. In fact, in the mid-1990s, when I was on the supreme court, members of the bar actively resisted a proposal from the court that they be required to simply report the number of hours they devoted to pro-bono legal services. Lawyers vocally raised fears that reporting was the first step towards the court requiring pro bono. Other lawyers urged that the essence of pro bono was its voluntariness and argued that reporting was incompatible with pro bono's noble motive. The court did not enact the proposal. Today, with the intense pressure for billable hours in larger firms, and minimal credit given to lawyers for time spent on pro bono, the obstacles to increased pro bono are even greater.

⁴ Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785 (2001) (estimating, in 2001, that the legal needs of “two- to three-fifths of middle-income individuals, remain unmet”).

⁵ *Id.* at 1819; *see also* SUPREME COURT STUDY COMM., REPORT TO THE UTAH SUPREME COURT OF THE SUPREME COURT STUDY COMMITTEE ON THE DELIVERY OF LEGAL SERVICES 14–15 (2002) *available at* <http://utah.ptfs.com/awweb/main.jsp?flag=browse&smd=1&awdid=1>, *archived at* <http://perma.cc/ZC8T-L2D8> (noting, in 2002, that while there is “little doubt that there does exist an unmet need for legal services,” the need was “not yet well defined by reliable data”).

⁶ Brett G. Scharffs, *The Way Forward: Underserved Clients, Underemployed Lawyers—What Can Law Schools Do?*, 2014 UTAH L. REV. ONLAW 79, 87–88.

B. Volunteer Lawyers Partnered with Legal Services Organizations

Another option that has been tried is to use volunteer lawyers to supplement other public legal service providers in a way that creates synergy between the two. Some seventeen years ago, I co-chaired a bar task force that looked at some then-current research which suggested that a very high percentage of the public could not obtain even the most basic legal services, such as in the areas of landlord-tenant disputes, divorces, and wills. We envisioned using the new technology of computers and the fledgling Internet to make it easier to match volunteer lawyers with clients so the volunteer lawyers could supplement the overworked staff of agencies like Legal Aid Society and Utah Legal Services. As I recall, that effort foundered on the expense of the solution proposed—the need for someone to administer the matching of clients and lawyers, and on the difficulty of getting lawyers to accept pro bono assignments in areas where they felt less than comfortable. An informal, volunteer, not-for-profit approach did not seem capable of meeting the challenge then. In my view, it cannot meet the challenge today.

C. Paralegals

Yet another move to address the legally underserved, which took off in the 1970s, was the formal training of paralegals.⁷ Paralegals were touted as persons who could relieve lawyers from some of their more routine and mundane jobs.⁸ Their use was to have the potential to reduce the cost of legal services.⁹ To date, that promise has not been fulfilled, largely because lawyers and courts, through the regulation of the practice, have cabined paralegals in ways that prevent them from assisting the public with routine matters. Instead, they have been brought into the system to be adjuncts of lawyers, doing ministerial tasks and being charged out at rates that make their use by lawyers highly profitable. They have not served as a spur to reform the system or to make services more available.

D. Mediation

Then there is mediation. It flowered in the 1980s.¹⁰ It was originally promoted as bringing more holistic, simplified, and economical dispute resolution to the

⁷ Susan Mae McCabe, *A Brief History of the Paralegal Profession*, MICH. BAR J., July 2007, at 18, 18–19.

⁸ Sally Kane, *The 8 Worst Things About Being a Paralegal*, ABOUT.COM, <http://legalcareers.about.com/od/legalcareerbasics/tp/The-8-Worst-Things-About-Being-A-Paralegal.htm>, archived at <http://perma.cc/4DZF-SE52>.

⁹ McCabe, *supra* note 7, at 18–19.

¹⁰ See James R. Holbrook, *The Effects of Alternative Dispute Resolution on Access to Justice in Utah*, 2006 UTAH L. REV. 1017, 1017–18 (noting ABA support for greater use of alternative dispute resolution in a 1986 report).

public.¹¹ Mediation services would be offered in many contexts by nonlawyers and would result in better, more enduring, and less expensive resolution of disputes. Mediation has achieved some of this, particularly in the areas of domestic relations and child-custody disputes, where parties must navigate long-term relationships, lawyers have little interest in handling the ongoing disputes between the parties, and the cost of continuing lawyer's fees is prohibitive. When we introduced court-annexed mediation services in Utah in the mid-1990s,¹² lawyers were originally very resistant, concerned that they would lose litigation business to mediation. As I said, that may have occurred in some areas, such as domestic relations and small claims. But in mainstream civil litigation, lawyers have learned to do with mediation what they did with paralegals—bring mediation services into the category of litigation services offered by lawyers. Mediators are used as settlement service providers. Still, mediation has improved matters somewhat. Most attribute some of the decrease in trials to the use of mediation to settle cases.

Yet while I think mediation has added something of value to the legal system by helping to resolve cases that would have gone to trial, I doubt that this has sharply reduced the cost of legal services. This is in part because litigators have not changed how they address disputes. They do not bring in a mediator when a matter is just ripening, before positions have hardened, but wait until after the pleadings are filed, the motions for summary judgment denied, the discovery is done, and the matter is approaching trial. Mediators are used as settlers, not as agents for early and amicable dispute resolution. Mediation outside the lawyers' domain is also limited by restrictions on the practice of law.

E. Self-Help Resources for Pro Se Litigants

A final aspect of the movement in the 1970s and 1980s to make legal services more available to the public and to break the lawyers' monopoly that restricts the availability of affordable services was a public call that lay persons be permitted to handle their own matters. Books were published encouraging people to prepare their own legal documents and be their own lawyers in areas that intimately affect them, such as probate and divorce.¹³ The movement caught on and it seems to have gained some traction in areas such as basic wills and "avoiding probate,"¹⁴ but

¹¹ See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1359–61.

¹² Holbrook, *supra* note 10, at 1019.

¹³ E.g., JOHN COTTON HOWELL, *PROBATE: THE CITIZEN'S LEGAL GUIDE* (1981) (offering individuals guidance on preparing wills and other legal documents); WALTER L. KANTROWITZ, *HOW TO BE YOUR OWN LAWYER—SOMETIMES* (1979) (providing pro se litigants a self-help lawyering guide).

¹⁴ E.g., *Last Will & Testament*, LEGAL ZOOM, <http://www.legalzoom.com/legal-wills/wills-overview.html>, archived at <http://perma.cc/WA2Y-EM5D>; *Your Last Will and Testament*, LAW DEPOT, http://www.lawdepot.com/contracts/last-will-and-testament-usa/?loc=US&pid=googleppc-will_us-mainbroad_f1-s-ggkey_creating%20a%20will&s_kwcid=

when it came to litigation, having lay persons put together legal forms and court filings from books proved to be problematic. The peculiarities of different jurisdictions and different causes of action are challenging enough for lawyers.

By the 1990s in Utah, the courts were beginning to experience a flood of pro se litigants, particularly in the area of divorce and small claims.¹⁵ Their filings were often inadequate, and their self-representation far from competent. In response, the administrative office of the courts began to make forms available to the public through automated kiosks in courthouses, and now online, to help them prepare adequate filings in domestic relations and small claims matters.¹⁶

But forms were not enough. The entire court system is premised on the assumption that lawyers, who know how the process works, will guide their clients through its intricacies. In essence, lawyers do much of the administrative work of the system. The court relies upon them to keep the system running smoothly. To such a system, pro se litigants are indigestible. They slow things down and require extra attention by judges and clerks, and they often lose their cases not on the merits but because of procedural errors. No amount of hand-holding by staff will address the fundamental problems of parties, who are not legally trained, handling their own often-complex matters. Yet the pro se boom continues.¹⁷

So we now arrive at the present moment. Volunteerism has not and never will address the affordability problem of legal services. Paralegals, so long as they are constrained by regulatory limitations, are not allowed to meet these needs. Mediation and self-help address some of the problems but not all. Even combined, these measures have not and will not solve the problem of affordability. And some of them, such as self-help, have no hope of bringing any particularized legal expertise to the public. This is where the second of the crises we are here to talk about comes into play—a crisis that opens the door to more systematic changes.

III. UNDEREMPLOYED LAW GRADUATES

That there is a crisis in the job market for young lawyers is indisputable. According to various sources, recent law graduates are having an extraordinarily

creating%20a%20will|35089891145&gclid=CKONqcS9tbwCFdHm7AodcC4AOA#.VB337vldWNg, archived at <http://perma.cc/PWC-9LRB>.

¹⁵ Michael D. Zimmerman, Chief Justice, Utah Supreme Court, State of the Judiciary Address (Jan. 19, 1998), available at <http://utah.ptfs.com/awweb/main.jsp?flag=browse&smd=1&awdid=1>, archived at <http://perma.cc/4Y86-TKC5>; see also Christine M. Durham, Chief Justice, Utah Supreme Court, State of the Judiciary Address (Jan. 19, 2004), available at <http://utah.ptfs.com/awweb/main.jsp?flag=browse&smd=1&awdid=1>, archived at <http://perma.cc/P8PR-8FTS> (noting similar concerns).

¹⁶ E.g., *Court Forms and Instructions*, UTAH STATE COURTS, <http://www.utcourts.gov/resources/forms/>, archived at <http://perma.cc/3UZU-UCUW>.

¹⁷ See Linda F. Smith, *Access to Justice in Utah: Time For a Comprehensive Plan*, 2006 UTAH L. REV. 1117, 1131.

difficult time getting good law jobs.¹⁸ Nationally, something like 85% of 2012 graduates were employed nine months after graduation, but only 58% of that 85% were working full-time in long-term jobs that required bar passage.¹⁹

My law school sources tell me that the job market in Utah is not that dismal unless you are looking for a job in a large market outside the state. But there are plenty of underemployed young lawyers remaining in Utah. And the predictions are that the problem of too many graduates for too few jobs will not go away soon. One observer states that in the next ten years, it is likely American law schools will produce more than twice the number of lawyers than the legal market will need.²⁰

A. Commoditization of Legal Services

This problem is not limited to new graduates. The market is shifting beneath all of us. In established national law firms, associates have been the subject of successive waves of layoffs, and even partners are being ruffed if they are not productive enough.²¹ All the while, clients are becoming increasingly critical consumers, seeing legal services as a commodity market where lower price is not inconsistent with quality service. A study by Georgetown Law's Center for the Study of the Legal Profession in conjunction with Thompson Reuters Peer Monitor, entitled *2013 Report on the State of the Legal Market*, suggests that the changes in the legal market are thoroughgoing and that things will not return to the way they were before the great recession.²² The report states that "the market for legal services in the United States and throughout the world has changed in fundamental ways," and "even as we work our way out of the economic doldrums, the practice of law going forward is likely to be starkly different than in the pre-2008 period."²³

The report notes that the rate in growth in the demand for legal services has been in decline for some years, even before the great recession.²⁴ Clients are

¹⁸ James R. Holbrook & Jonathan R. Hornok, *Addressing Twin Crises in the Law: Underserved Clients and Underemployed Lawyers*, UTAH B. J., Sept./Oct. 2013, at 29, 29–30; Jess Hofberger, *Law Graduate Employment in Utah by the Numbers*, 2014 UTAH L. REV. ONLAW 43, 46–47.

¹⁹ Holbrook & Hornok, *supra* note 18, at 30.

²⁰ GEORGETOWN UNIV. LAW CTR., 2013 REPORT ON THE STATE OF THE LEGAL MARKET 17 (2013) available at <http://perma.cc/6SP4-KPW4> [hereinafter GEORGETOWN].

²¹ See Peter Lattman, *Mass Layoffs at a Top-Flight Law Firm*, N.Y. TIMES DEALBOOK (June 24, 2013, 9:39 AM), http://dealbook.nytimes.com/2013/06/24/big-law-firm-to-cut-lawyers-and-some-partner-pay/?_php=true&_type=blogs&_r=1, archived at <http://perma.cc/ZG25-JCYH>; Petra Pasternak, *Slump Brings Associate Layoffs at Gunderson, LAW.COM* (Dec. 19, 2008), <http://www.law.com/jsp/law/careercenter/CareerCenterArticleFriendly.jsp?id=1202426877118>, archived at <http://perma.cc/S624-3Q95>.

²² See generally GEORGETOWN, *supra* note 20 (noting that changing dynamics in the legal market will alter the future of legal employment).

²³ *Id.* at 1.

²⁴ *Id.* at 20.

increasingly resistant to rate increases—the principal route for increased incomes for partners. They are far more ready to shop around for legal talent based on cost and specialization than in the past. Simply hiring one firm for all your needs, and not looking back, appears to be a way of doing business that is fading. It is a buyer's market, and the buyers demand more efficiency and are less willing to simply pay what is asked.

At an institutional level, these competitive forces influence law firms, which in turn explains the surplus of young lawyers. As competition increases for the high-dollar clients, and as clients become critical consumers, law firms seek to keep their rainmakers happy by looking for ways to increase profits. They know that partners have become as mobile as clients, freely switching firms when they think they can increase earnings or sell their book of business. Since there is no economy of scale in law—large firms are not more efficient than small firms in providing legal services²⁵—the route to more profits is to raise rates when possible, push lawyers harder to bill hours and to make rain, and reward those who do and punish those who do not. As a result, law firms are increasingly not places where one settles collegially to practice for the rest of one's career, but store fronts, even franchises, behind which lawyers gather for the purpose of selling their wares, and then moving on when some other operation offers higher rewards. A natural consequence of these profit pressures is that law firms are increasingly less loyal to their lawyers.

In 2009, many large firms nationally, including some in Salt Lake City, cut their legal staffs or postponed the arrival of new lawyers to preserve their profitability in the face of the economic decline.²⁶ The economic ripples moved through the whole legal market, sending highly qualified graduates scrambling for jobs and displacing others in the cascade. Most thought this was a onetime, extraordinary phenomenon. But in 2013, as the economy regained its footing, there were yet more announcements of rifts in large law firms, some including partners, as firms seek to maintain their profitability in the face of a profound shift in the market for legal services.²⁷

²⁵ See Patrick J. Lamb, *Is Small the New Big?*, LAW PRACTICE MAGAZINE, Jan./Feb. 2013, available at http://www.americanbar.org/publications/law_practice_magazine/2013/january-february/is-small-the-new-big.html, archived at <http://perma.cc/A9BR-9ZE3>.

²⁶ Mike Gorrell, *Law Firm Staffs Start to Feel Recession Pain*, SALT LAKE TRIB., (May 6, 2009, 5:23 PM), <http://archive.sltrib.com/printfriendly.php?id=12310150&itype=ngpsid>, archive at <http://perma.cc/7WN6-WHTR>; Sarah Karush, *Pro Bono Pros: Law Firms Pay New Hires to Work for Public Good*, DAILY HERALD (Oct. 25, 2009, 12:00 AM), http://www.heraldextra.com/business/pro-bono-pros-law-firms-pay-new-hires-to-work/article_eab6a3bb-c18c-56b1-b7ca-0fd1d0618e83.html, archived at <http://perma.cc/X2ZW-4B2E>.

²⁷ See, e.g., Jennifer Smith, *Law-Firm Partners Face Layoffs*, WALL ST. J. (Jan. 6, 2013, 7:41 PM), <http://online.wsj.com/news/articles/SB10001424127887323689604578221891691032424>, archived at <http://perma.cc/8Z2K-Y6CE>.

These market shifts have put pressure on new lawyers to find jobs and to keep them. In urban areas, clients are increasingly refusing to pay for first year associates, who are seen as simply lawyers-in-training.²⁸ Yet these are the people large law firms have traditionally leveraged to earn much of their profits. The Georgetown report notes that the market for new lawyers is increasingly mid- and small-sized firms, as large firms cut back on their hiring.²⁹ Finally, the report notes that in part because of decreased hiring by large firms, the median starting salary for 2011 graduates was 35% below that of 2009 grads nationally.³⁰

This more competitive market is predicted to bring about fundamental changes in law firm organization and management.³¹ Traditional law firm organization—supposedly collegial partnerships with lawyers as the consensus leaders—is showing the stress of size and competition. The failure or economically forced consolidation of a number of large firms recently demonstrates that there are challenges in using an old model for a modern market.³² Many partnerships have become partnerships in name only, but the expectations of those joining them have not adjusted. Ask a law firm partner what it means to be a partner, and I suspect relatively few would say that they are an employee of an impersonal money-maximizing entity. But that is often the reality of their situation. As a result, alienation and dissatisfaction are rampant.

B. Too Many Underprepared Law School Graduates

In the interest of completeness, there is another reason that we have so many underemployed young lawyers. The popularity of law school and its high cost, a cost financed largely with easy to obtain but hard to pay off student loans, has run into the wall of a decreasing market for graduates. I will not undertake a detailed discussion of the role law schools will need to take in addressing the restructuring that is occurring in the legal profession. Others here are much better suited than I to address that topic. I will say that the current situation, where opportunities for training in law firms are becoming harder to get, is heightening a long-standing

²⁸ Joe Palazzolo, *First-Year Associates: Are They Worth It?*, WALL ST. J. LAW BLOG (Oct. 17, 2011, 9:59 AM), <http://blogs.wsj.com/law/2011/10/17/first-year-associates-are-they-worth-it/>, archived at <http://perma.cc/5RS7-XC5K>.

²⁹ GEORGETOWN, *supra* note 20, at 10–11.

³⁰ *Id.* at 9.

³¹ Edwin B. Reeser, *Is Your Firm Changing Its Business Model, Or Is It in a Stage of Failure?*, ABA (Oct. 24, 2013, 8:30 AM), http://www.abajournal.com/legalrebels/article/is_your_firm_changing_its_business_model_or_is_it_in_a_stage_of_failure/, archived at <http://perma.cc/ADX6-9Z55>.

³² See, e.g., Mark Harris, *Why More Law Firms Will Go the Way of Dewey & LeBoeuf*, FORBES (May 8, 2012, 10:32 AM), <http://www.forbes.com/sites/forbesleadershipforum/2012/05/08/why-more-law-firms-will-go-the-way-of-dewey-leboeuf/>, archived at <http://perma.cc/84Y-9PNC> (noting the recent collapse of a major law firm and anticipating further trouble for large firms).

concern that law schools do not produce people who are able to actually practice law. They may be able to pass a bar exam, but passing a bar exam does not a competent practitioner make.

A recent excellent article in the *Denver Law Review*, coauthored by Professor James Holbrook and others, addresses the state of legal education and its ability to prepare people to actually practice law.³³ That article does a nice job of bringing together materials showing that while law school is good at training people in the law's analytical method, it does a poor job in training people in the many more skills that are needed to succeed in the real world of law practice. Practical problem solving, client counseling, negotiation, leadership, and a capacity to make nuanced and complex ethical decisions daily are all among the many practical business and people skills that are required to succeed in the practice. Law school leaves the student to learn at the feet of postgraduation employers. But if the employer does not provide that training, the young practitioner is at sea in a very leaky boat. In addition, in a down market, these graduates are left with few good choices in terms of job opportunities. Low paying legal jobs serving the underserved are not appealing to a graduate with a large debt load, even if they have the business skills to hang out a shingle.

The dynamics of the market and the response of law firms to the increasingly competitive environment have highlighted the rather clunky way that law school and law practice coexist. Far from being smoothly integrated elements of a machine, the two have tended to go their own way: one teaching students to “think like a lawyer” and the other demanding actual lawyers, not just people who can think like them. In an up market, the disconnect between law school training and law practice was obscured to a degree, at least for the bulk of the users of legal services. In the aftermath of what can only be described as the bursting of a long-expanding legal-business and legal-education bubble, those disconnects begin to look like major dysfunction. And if a consequence of this burst bubble is an increase in the number of graduates hanging out their own shingle, the consequences of that dysfunction will be visited on the public. This is not something law schools, or those who regulate the practice, can long ignore.

This survey of the past and present may seem far more than you wanted to hear. But I think these structural challenges are necessary background, and they make it quite likely that our twin crises will persist—an underserved middle class priced out of the market and a surplus of law-trained people without an opportunity to be either fully trained or employed as lawyers, at least not in our traditional business model.

The second half of this crisis—the underutilized lawyers—sets the stage for making service to the middle class a real and continuing priority for the bench and

³³ Jess M. Krannich, James R. Holbrook & Julie J. McAdams, *Beyond “Thinking Like A Lawyer” and the Traditional Legal Paradigm: Toward A Comprehensive View of Legal Education*, 86 DENV. U. L. REV. 381, 381–82 (2009).

bar. Not just because the middle class needs legal services, but also because the bar needs the customers.

IV. POSSIBLE SOLUTIONS

In suggesting some thoughts about solutions to these twin problems, I stress that my role here is only to throw out ideas. I have been encouraged to open up questions, not to close them down. I have no desire to be incendiary, but I do want to question premises. I think that it is essential.

The small turnout here today suggests that we lawyers are like frogs in a pot with the water gradually being heated. We do not yet realize we are being cooked. I think someone needs to yell “fire.” The Georgetown Report, when addressing the law business, suggests something similar. It states that “to an unfortunate extent . . . many lawyers and law firms seem stuck in old models—traditional ways of thinking about law firm economics and structure, legal work processes, talent management, and client relationships—that are no longer well suited to the market environment in which they compete.”³⁴

Citing the example of Cortez, who in 1519 put spine in his small force of men who were about to leave the coast of Mexico to confront the entire Aztec Empire by ordering them to burn their ships, the report suggests that “perhaps it’s time for us, like Cortez, to burn the ships—to force ourselves to think outside our traditional models and, however uncomfortable it might be, to imagine new and creative ways to deliver legal services more efficiently and build more sustainable models of law firm practice.”³⁵ I would address this question not only to law firms, but also to law schools and the courts that regulate the practice of law.

A. The Utah Supreme Court Has Plenary Power to Regulate the Practice of Law

Let me start with what I think is the most global suggestion. The Utah Supreme Court should lead the way forward. Under Article VIII, section 4 of the Utah Constitution, adopted in 1984, the supreme court has plenary power to govern the practice of law.³⁶ That authority appears complete. The constitutional provision states: “The Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law.” In the case of *Utah State Bar v. Summerhayes & Hayden*,³⁷ the Utah Supreme Court emphasized the scope of the provision when it held that it had the “exclusive authority . . . to determine what constitutes the practice of law.”³⁸

³⁴ GEORGETOWN, *supra* note 20, at 1.

³⁵ *Id.*

³⁶ UTAH CONST. art. VIII, § 4.

³⁷ 905 P.2d 867 (Utah 1995).

³⁸ *Id.* at 870.

Given the breadth and exclusivity of this power, the Utah Supreme Court is the only entity in the state that has the comprehensive capacity to determine what training is required to be admitted to practice, what constitutes the practice of law, and what other requirements there are for the practice. And the court has sole constitutional power to regulate this by rule. This makes the court the only agency with power to light the torch used to burn the boats, to force us all to turn and face the future, no matter how challenging it may be. It should initiate the process of comprehensively addressing the various issues that confront us, of which the twin crises are a symptom.

B. The Bar Commission Lacks the Scope and Power to Make Needed Changes

I recognize that the court has largely left the day-to-day issues concerning the practice to the Bar Commission. But with all due deference, I think that the Bar Commission is by nature concerned with more parochial issues. And structurally, it is certainly not up to the task before us. It is weak and, inevitably, status quo oriented, given the way its members are selected, the shortness of its president's term, and its elective constituency. It certainly is not representative of law students, prospective law students, those with law degrees but not members of the bar, or, perhaps most importantly, nonlawyers who may contribute to the formulation of responses to the current crises. This includes both consumers of legal services and nonlawyers who may be interested in putting together business combinations that may serve the unserved. Finally, it lacks the necessary power to make changes.

C. A Supreme Court Committee and Topics for Further Study

I submit that the court should consider putting in place some broadly constituted group to make a long range study of the issues confronting the education and training of lawyers, the practice of law, and the service needs of the public. This would open a discussion of issues such as those I have raised, issues that may fundamentally challenge what we think are our self-interests as lawyers, but which may be of real importance to the public, and ultimately enlivening for all of us. Change is inevitable, and we need a push.

What are the possible issues I would suggest be studied? Here are a few.

1. Define the Unmet Need for Legal Services

We assume that the middle class needs more of what we currently provide—more services from licensed lawyers. But have we looked more broadly at what the public wants from a perspective other than our own, the perspective of members of a licensed monopoly? Abraham Maslow famously said, “I suppose it is tempting,

if the only tool you have is a hammer, to treat everything as if it were a nail.”³⁹ What if we did not just have a hammer, a fixed definition of the “practice of law,” but an open vision that asked consumers what they needed from providers?

As a middle-class person, I live in a very law-regulated world, one much more regulated than it was forty or fifty years ago. There are consumer protection laws, the new health care law, pension laws, fair credit reporting laws, and lender disclosure laws; not to mention laws relating to contracts that I sign every day—student loan agreements, mortgage loan agreements, and leases for houses and cars. And then there is the need for simple wills, simple probate services, and simple divorces. I could use assistance understanding my obligations, my rights, and my options under all of these laws, often in advance of incurring obligations or taking legal actions.

At present, I could go to a lawyer for counseling in advance of a particular transaction or of a need arising, but even the least expensive lawyer is likely to cost me so much that I would not be tempted, particularly if I knew he or she charged by the hour. Moreover, most lawyers are generalists. They could not efficiently handle such routine requests. They tend to be crisis- and action-oriented, not vendors of information.

So do I need a person who fits into the definition of one who is engaged in the “practice of law”? Perhaps not. Perhaps I could consult a paralegal, someone working under the general supervision of a lawyer, or even someone working for a nonlawyer who has determined that they can construct a business model that makes sense and through which they can offer a very narrow range of consulting services to consumers that are beyond what lawyers now regularly offer. This person might help me avoid costly legal problems, at a fixed fee I could afford. Why should the “regulation of the practice of law” preclude such a service? As I will suggest, we should push the use of unbundled legal services. Why not consider “delegalizing” some forms of what we might classify today as legal services? Lawyers do not write title opinions anymore because they could not do them economically and lost the market to title companies. Title opinions are no longer the exclusive province of licensed lawyers. Why should lawyers’ monopoly on the “practice of law” bar the public from obtaining other routine affordable advice from nonlawyers before a crisis hits? As a middle-class person, I probably do not need a cheaper litigator; I need advice as to how to avoid litigation.

2. Involvement of Nonlawyers

Why not permit nonlawyers to manage law firms, and to bring equity capital into firms providing legal services? The free movement of capital and management talent has figured out how to sell virtually everything and to find ways of servicing all market niches at affordable prices. The new economic libertarianism argues the

³⁹ ABRAHAM H. MASLOW, *THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE* 15–16 (1966).

market should be freed to provide goods and services efficiently and cheaply. Why should the law business not tap into that same capitalistic machinery to see if we cannot do a more efficient job of delivering a less expensive commodity to a much larger market?

Recently, “incubator” law firms have begun to grow, nourished in many cases by law schools that are trying to provide some training for future lawyers and at the same time serve those of modest income.⁴⁰ They “incubate” lawyers by gathering together young graduates or near graduates to offer services to the public. They charge low rates and usually employ a senior lawyer to act as a supervisor and mentor for the young lawyers in training. This might not be a model many lawyers would want to emulate in the private sector, since law firms have to be financed by the lawyers working in them, and the return on investment would not seem high. But who is to say that clever, well-funded entrepreneurs with technical savvy could not figure out a way to emulate this model for narrow areas of specialization and do it in a way that both makes money and serves a heretofore unserved market? Why not let them try?

I can imagine a group of newly minted lawyers going to an entrepreneur and seeking capital to start a specialized law firm addressing a relatively narrow service area that is widely needed, perhaps including Internet-based services. The firm hires a senior lawyer to do the supervision and training, but the younger lawyers may be the owners. With the flexibility to bring capital into the business, there might be much innovation in the delivery of legal (or nonlegal) services.

At present, all of this is foreclosed by various ethical rules,⁴¹ making the new lawyers who might look for a way to employ themselves and serve a middle-class niche market financially impotent. Permitting this infusion of nonlawyer controlled capital into new ideas would also go a long way to put competitive and innovative pressures on the ossified structure of the law firm business as it exists, driving existing firms to think of new ways to meet the competitive challenges of these newly incubated firms.

Some will say that the explicit drive to make money for investors will taint the noble practice of law. Anyone thinking that there is no taint of avarice in the practice of law has not been reading the *American Lawyer*. Or it might be suggested that nonlawyers would not understand the subtleties of the provision of legal services. I doubt that legal services are so unique that only lawyers can understand their efficient delivery.

As for the brilliance of lawyers as managers, the recent very public collapse of several mega law firms, and the much less visible but equally troubling economically motivated dissolution or consolidation of many other law firms,

⁴⁰ See, e.g., G.M. Filisko, *Law Firm Incubators Help Both Grads and Needy Clients*, *Fred Rooney Says*, ABA (Sept. 18, 2013, 8:30 AM), http://www.abajournal.com/legalrebel/s/article/2013_legal_rebel_profile_fred_rooney/, archived at <http://perma.cc/N9JR-MBMX>.

⁴¹ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013) (prohibiting fee sharing with nonlawyers and forming partnerships with nonlawyers—among other prohibitions).

suggests that lawyers are not necessarily great managers in this new market reality.⁴² The Georgetown report suggests that the traditional law firm organization—a partnership with some measure of shared control among members that hangs out a sign and is open for business and seeks that business from the same wealthy clientele as all other traditional law firms—is not up to the challenges of the much more competitive environment on the horizon.⁴³ It also suggests that the partnership model breeds discontent because it holds out a false promise of true partnership to people who are really just well paid employees.⁴⁴

Finally, law firms, as well as new forms of business organizations providing legal services or even legal services that are not defined as “the practice of law,” could benefit from being managed by nonlawyers. As Jim Holbrook notes, studies have shown that law school graduates are a distinct personality type.⁴⁵ They have a tendency to be “less sociable and more skeptical, urgent, analytical, autonomous, and more defensive and thin-skinned than the general public—by a wide margin.”⁴⁶ Lawyers are not high in leadership skills, which are “people-focused, inspirational, emotional, nonlinear and visceral”⁴⁷—all qualities deemphasized in law school. Why not seek firm leaders in the broader field of business management? Why be prohibited from doing so?

The advantages of allowing nonlawyer capital and nonlawyer owners or managers into the practice of law might well produce whole new enterprises to serve the unserved, to even serve those who lawyers do not recognize as unserved. It is worth considering.

3. *Unbundling*

The unbundling of legal services is another step that if widely adopted and countenanced by the rules of ethics,⁴⁸ and promoted by the bar, could reduce legal costs and make services more available. Permitting lawyers to do part of a larger job, with adequate disclosure, fits with the increasing commoditization of the market for legal services. Clients should be free to choose good-enough legal services, and not be required to have only the best.

⁴² See Harris, *supra* note 32.

⁴³ GEORGETOWN, *supra* note 20, at 10–12.

⁴⁴ See *id.* at 11.

⁴⁵ Krannich, Holbrook & McAdams, *supra* note 33, at 392.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Cf. David L. Hudson Jr., *What Ethics Issues to Consider When Offering Unbundled Legal Services*, ABA (June 1, 2013, 3:20 AM), http://www.abajournal.com/magazine/article/lawyers_offering_unbundled_legal_services_must_consider_the_ethics_issues/, archived at <http://perma.cc/YYU8-KUUA> (announcing greater ABA support for the concept of unbundling, but acknowledging remaining ethics challenges of unbundled services).

4. *Law schools*

Should law school be training nonlawyers to deliver legal services, or what the Utah Supreme Court might at some date redefine as “not the practice of law” services? Why should law school be devoted to training people to pass the bar? The law schools often reject the idea that they are trade schools, existing just to train lawyers for practice. They argue that a major part of their task is to educate citizens. So why not expressly expand their mission to train both those who will not practice, and perhaps on a separate track, those who do intend to deliver services, either as members of the bar or as nonlawyers? Then instead of seeking just one pool of applicants, the schools could seek discrete pools for the discrete law-oriented tasks that the community and the market need.

I have suggested the need to envision the legal service needs of the unserved middle class, and that we should not assume it needs from the members of the bar what we already provide to the wealthy at a higher price. Instead, the unserved middle class might need services that could be provided by nonlawyers. So why should we assume that law schools are training only lawyers? Why should the educational institution of the law school not look at training a broader cadre of people?

These are a few topics for consideration. I am sure others will have more and better ideas of issues to be explored.

V. CONCLUSION

My final word is that it is time to consider burning the boats. We must stop gazing fondly at where we have been and turn to confront the emerging future. There I think we will find large challenges in addressing the deep structural flaws that are being revealed in the world of the law—a world that is increasingly serving neither the lawyers nor the public.