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Judith A. McMorrow

Boston College Law School, judith.mcmorrow@bc.edu

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MOVING FROM A BRANDEIS BRIEF TO A BRANDEIS LAW FIRM: CHALLENGES AND OPPORTUNITIES FOR HOLISTIC LEGAL SERVICES IN THE UNITED STATES

*Judith A. McMorrow**

I. INTRODUCTION

As law has become infused ever more deeply into the fabric of the American experience, and as technology has broken down both geographic and professional barriers, the line between legal and non-legal services is increasingly difficult to discern outside litigation.¹ In some settings this is driven by the need for an interdisciplinary approach to social issues. Non-profit organizations have long put together interdisciplinary strategies, such as public relations, community mobilization, lobbying and litigation, to move forward a social and legal strategy for change. Both civil rights organizations and the National Rifle Association use this team approach.² Poverty organizations have provided both legal and social work services in an integrated fashion.³ Medical-legal partnerships address health issues in

* Professor of Law, Boston College Law School. My deep appreciation to Professor Sam Levine and Touro College Jacob D. Fuchsburg Law Center for gathering an amazing group of scholars and commentators, to Paul Tremblay, Michael Cassidy and David Olson for helpful comments on this essay, the Boston College Law School Fund for support of this research, and Anna Snook and Michael Victor for their very able research assistance.

¹ See Benjamin H. Barton, *The Lawyer's Monopoly -- What Goes and What Stays*, 82 *FORDHAM L. REV.* 3067, 3067 (2014); Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders are Reshaping the Law Marketplace and What We Should Do About It*, 63 *HASTINGS L.J.* 953, 953 (2012); Thomas D. Morgan, *Inverting Our Thinking About Law as a Profession or Business* 1, 9 (unpublished manuscript) (on file with author).

² See CHARLES H. HOUSTON, *AN INTERDISCIPLINARY STUDY OF CIVIL RIGHTS LEADERSHIP* (James L. Conyers, Jr. eds., 2012); BRIAN ANSE PATRICK, *THE NATIONAL RIFLE ASSOCIATION AND THE MEDIA: THE MOTIVATING FORCE OF NEGATIVE COVERAGE* 117-19, 122 (2013) (exploring mobilization and media relations of the National Rifle Association ("NRA")).

³ See Willem van Genugten et al., *Protecting the Victims of the Privatization of War*, in *THE NEW FACES OF VICTIMHOOD: GLOBALIZATION, TRANSNATIONAL CRIMES AND VICTIM RIGHTS*

low-income communities.⁴

The business setting has increasingly seen an integration of law into the fabric of business. Corporation in-house counsel often practice in what has been described a “quasi-legal zone” in which corporate legal problems may require a blend of legal, management structure, human psychology, and technology expertise.⁵ Consultancy services offer assistance in compliance, in-house investigations and a host of other law-related topics.⁶ In particular, the Big Four accounting firms offer compliance, financial management, human resources, forensic, and merger and acquisition services, along with their traditional tax advising.⁷ Outside the United States, this type of multidisciplinary practice, with an express focus on law, has thrived.⁸ The creation of a new category of “JD Advantage” jobs is a reflection of the porousness of legal practice.⁹ The result is that despite the comparatively strong monopoly status of U.S. lawyers, there are now many areas of law and law-related services shared by lawyers and others.¹⁰ Some sectors, such as in tax, patent, and immigration, actively share the delivery of legal services, with a regulatory structure that has adapted to the sharing.¹¹

253-56 (Rianne Letschert & Jan van Dijk eds., 2011).

⁴ See generally Robert Pettignano et al., *Can Access to a Medical-Legal Partnership Benefit Patients with Asthma who Live in an Urban Community?*, 24 J. HEALTH CARE FOR POOR & UNDERSERVED 706 (2013) (describing medical-legal partnership).

⁵ Dana A. Remus, *Out of Practice: The Twenty-First-Century Legal Profession*, 63 DUKE L.J. 1243, 1248 (2014).

⁶ See *Corporate Investigative Solutions*, AON, <http://www.aon.com/risk-services/corporate-investigative-solutions.jsp> (last visited Oct. 16, 2016); *Global Risk & Investigations Practice*, FTI CONSULTING, <http://www.fticonsulting.com/services/forensic-litigation-consulting/global-risk--investigations-practice> (last visited Oct. 16, 2016); *Meeting China's Productivity Challenge*, MCKINSEY & COMPANY, <http://www.mckinsey.com/global-themes/china/meeting-chinas-productivity-challenge> (last visited Oct. 16, 2016).

⁷ David B. Wilkins & Maria Jose Esteban, *The Reemergence of the Big Four in Law: Their Rise, Transformation, and Potential Triumph*, THE PRACTICE (Jan. 2016), <https://thepractice.law.harvard.edu/article/the-reemergence-of-the-big-four-in-law>; *Building a Better World for our Clients*, EY, <http://www.ey.com/GL/en/Services> (last visited Oct. 16, 2016); DELOITTE, <http://www2.deloitte.com/us/en.html> (last visited Oct. 16, 2016); PwC: *Services*, PWC, <http://www.pwc.com/us/en/services.html> (last visited Oct. 16, 2016).

⁸ Wilkins & Esteban, *supra* note 7.

⁹ *Detailed Analysis of JD Advantage Jobs*, NALP (May 2013), http://www.nalp.org/jd_advantage_jobs_detail_may2013.

¹⁰ Andrew M. Perlman, *Towards the Law of Legal Services*, 37 CARDOZO L. REV. 49, 76 (2015) (stating that even the language of “lawyers and other[s]” or “lawyers” and “nonlawyers” reflects a very lawyer-centric approach to this issue). I am using these phrases, however, because the focus of this essay is on the line between lawyer and other.

¹¹ See Daniel R. Coquillette & Judith A. McMorro, *Zacharias's Prophecy: The Federal-*

The flourishing of creative service delivery models is a natural outgrowth of three important ideas that Louis Brandeis developed. First, his work gave rise to the concept of the Brandeis Brief, which draws on social science research, usually to justify the rationality of a legislative action. More broadly, it is used as a metaphor for the relevance of such social science insights to legal problem-solving.¹² Second, Brandeis introduced the concept of “counsel for the situation” to capture a vision of lawyering that provided a broader identification of the interests involved, again with an orientation on problem-solving.¹³ A third idea championed by Brandeis was to boldly proclaim that business can be a force for good.¹⁴ These ideas, brought together, suggest that clients and users of legal services can benefit not just from a narrow Brandeis brief, but a true Brandeis law firm that unleashes the insights from other professional perspectives, allows for creative problem-solving, and sees the potential of business as a force for good.¹⁵ This essay explores the challenges and opportunities to U.S. law firms that wish to move from using the spirit of a Brandeis brief to become a more fully holistic Brandeis law firm.

ization of Legal Ethics Through Legislative, Court, and Agency Regulation, 48 SAN DIEGO L. REV. 123, 124-25 (2011) (examining how federal practice, which includes several settings where lawyers and non-lawyers practice together, has pushed toward federalization of ethics in these contexts). Tax work is shared by accountants and lawyers, a historical accommodation. *Id.* at 132. Patent is shared because of the policy of the US Patent and Trademark office that allows for non-lawyer patent experts to become a member of the patent bar. *Id.* at 139.

¹² *Muller v. Oregon*, 208 U.S. 412, 419 (1908) (“In the brief filed by Mr. Louis D. Brandeis, for the defendant in error, is a very copious collection of all these matters, an epitome of which is found in the margin.”); MELVIN I. UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 214-16 (2009).

¹³ Jeffrey Rosen, *Why Brandeis Matters*, NEW REPUBLIC, (June 29, 2010), <https://newrepublic.com/article/75902/why-brandeis-matters>.

¹⁴ Louis D. Brandeis, *Business – A Profession*, in *BUSINESS – A PROFESSION* 1-12 (1914) (compilation of public talks by Louis Brandeis) (reprinted 1996). See also Morgan, *supra* note 1, at 4. Brandeis, of course, had a well-known skepticism of *bigness* but not of business itself. Morgan, *supra* note 1, at 15-16. See also, *Mr. Justice Brandeis, Competition and Smallness; A Dilemma Re-Examined*, 66 YALE L.J. 69, 70-71 (1956); Rosen, *supra* note 13.

¹⁵ My apologies to Nutter, McClenon and Fish, LLP, the modern successor to the Boston-based law firm that Louis Brandeis founded in 1879. Still in existence, Nutter emphasizes a client-centered approach, aiming to “harness the firm’s expertise to find efficient, interdisciplinary solutions that achieve the best results for the client.” *Our Approach*, NUTTER UNCOMMON LAW, <http://www.nutter.com/Community> (last visited Oct. 16, 2016). See also *Meet Nutter*, NUTTER UNCOMMON LAW, <http://www.nutter.com/firm/uniGC.aspx?xpST=AboutUs> (last visited Oct. 16, 2016) (stating that “[t]he legacy of Brandeis – his deep commitment to clients, to pro bono service and the creation of a just society – continues as a source of pride and inspiration for us today.”).

II. THE BRANDEIS BRIEF

The Brandeis brief has a complicated and nuanced history.¹⁶ The most technical use of the term Brandeis brief focuses on asking courts to take judicial notice of social facts, primarily to provide justification for challenges to legislation.¹⁷ Whether the brief, originally submitted by Brandeis in *Muller v. Oregon*, was unique or bold or scientifically accurate (or sexist) is beside the point.¹⁸ The federal courts acknowledge the continued importance of Brandeis briefs for bringing social science and statistics to the attention of courts, even as the courts recognize that the modern rules of evidence constrain how the information is used in litigation settings.¹⁹ The Brandeis brief more broadly is a metaphor of the importance of placing the legal problems in a social context.²⁰ In the modern era it is almost mundane to note that social science insights – probed and vetted – can be extraordinarily helpful in crafting solutions to real-life problems. It may be as simple as recognizing the root causes of the legal problems that confront the client, such as housing, unemployment and mental health issues.²¹ Thus, understanding patterns and conse-

¹⁶ See Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107) (demonstrating that Brandeis' work as defense counsel in *Muller* gave rise to the term Brandeis Brief). Josephine Goldmark (Brandeis' sister-in-law) and Florence Kelly, who asked Brandeis to join the appeal, had only two weeks to compile all the data available, which ranged from foreign law to different studies, in order to support the legislation that limited women's working hours. UROFSKY, *supra* note 12, at 214-16. The resulting 113 page brief had "only two pages devoted to law," with the remainder providing laws, factory reports and medical evidence, to support the rationality of the state legislation. UROFSKY, *supra* note 12, at 214-16.

¹⁷ *McCleskey v. Kemp*, 753 F.2d 877, 888 (11th Cir. 1985), *aff'd*, 481 U.S. 279, 282 (1987); *United States v. Williams*, 788 F. Supp. 2d 847, 851 (N.D. Iowa 2011).

¹⁸ David E. Bernstein, *Brandeis Brief Myths*, 15 GREEN BAG 2D 9 (2011).

¹⁹ See *McCleskey*, 753 F.2d at 888; *Williams*, 788 F. Supp. 2d at 851. See also *Ctr. for Biological Diversity v. Morgenweck*, 351 F. Supp. 2d 1137, 1144 (D. Colo. 2004) (stating that newspaper articles could not be offered for the truth of the facts but can be used for a more limited purpose to establish that there were differing views in the scientific and environmental communities).

²⁰ See, e.g., Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859, 864 (2001) ("Civil rights lawyers also . . . adopt[ed] Brandeis' signature style of brief writing (the so-called "Brandeis Brief"), which made generous use of sociological data to support legal arguments."); Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. ILL. L. REV. 59, 60-61 (2013) (appreciating that the historical origins and original use of the Brandeis brief has been subject to fascinating analysis); Anita Bernstein, Professor of Law, Brooklyn Sch. of Law, *Good Enough for a Brandeis Brief*, Lecture before Touro College Jacob D. Fuchsberg Law Center Symposium: Louis D. Brandeis: An Interdisciplinary Retrospective (Mar. 31, 2016).

²¹ Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal*

quences allows both lawyers and courts to craft better legal solutions.

The world of Big Data is one modern manifestation of this idea. Knowing more deeply how people behave and how systems interact is opening new opportunities to reduce legal problems. Lawyers who see and use the power of data have “a clear advantage over their counterparts”²² This is more than just a new tool: “Big data . . . invites lawyers to make a fundamental change in their approach to the law itself by looking to statistical patterns, predictors, and correlations, in addition to the legal rules that purportedly control outcomes—case law, statutory law, procedural rules, and administrative regulations.”²³ Bringing these ideas into litigation is more complicated because of evidentiary issues. But lawyers have much greater freedom to integrate patterns and consequences as an integral part of advising one’s client.

A good example supporting the idea that the legal profession should examine legal problems in a context is Riverview Law, a UK alternative business structure law firm with non-lawyer owners and investors.²⁴ Riverview Law offers big data analytics as part of their flat-fee legal contracts.²⁵ In addition to providing standard legal work to large corporate clients, they can monitor legal issues that arise, identify patterns (such as a rise in contract claims in a particular region), and work on solutions, such as improved training to reduce the occurrence of legal issues in the future.²⁶ Riverview uses flat fees, and measures success in delivering quality services by contract renewal, so that both the law firm and the client have a strong aligned interest in reducing the legal problems confronting the client.²⁷ Data

Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals, 86 B.U. L. REV. 623, 677 (2006).

²² See, e.g., Dru Stevenson & Nicholas J. Wagoner, *Bargaining in the Shadow of Big Data*, 67 FLA. L. REV. 1337, 1340-42 (2015) (using “super crunching improves decision making”).

²³ *Id.* at 1342.

²⁴ Judith A. McMorrow, *UK Alternative Business Structures for Legal Practice: Emerging Models and Early Lessons for the US*, 47 GEO J. INT’L. L. 665, 667-68 (2016) [hereinafter McMorrow, *UK Alternative Business Structures*].

²⁵ *Id.* at 668.

²⁶ *Id.* at 686-87; Heidi K. Gardner & Silvia Hodges Silverstein, *Riverview Law: Applying Business Sense to the Legal Market*, 9-414-079 HARV. BUS. REV. 1, 5 (2014); Stanford Law School, *Keep Calm and Carry On?: Disruption in the UK Legal Market and What it Could Mean for the US*, YOUTUBE (May 5, 2014) https://www.youtube.com/watch?v=eJHbahKw_ws.

²⁷ *But cf.* Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171, 178 (2005) (noting how the billable

analysis reveals on-the-ground variables that affect the legal issues and consequently become an important part of the legal practice.²⁸

Big data is also relevant to shaping internal management systems to reduce legal problems. The field of compliance has increasingly drawn on behavioral economics and behavioral ethics to craft effective compliance systems for corporations.²⁹ Legal regulators also draw on this information to craft legal obligations.³⁰ One might say that all this information is available for lawyers in traditional law firms to access via hiring their own consultants or creating ancillary businesses. But such systems require deep investment of capital, business expertise often held by talented individuals who seek an equity interest in the enterprise, and a team mindset.³¹ It is difficult for U.S. law firms to obtain access to the capital and talent, and the partnership model, which is dominant in U.S. law firms, makes it difficult to embrace the risk-taking inherent in this expanded vision of service-delivery. The U.S. approach insists that the lawyer be the dominant actor.³² As discussed below, it is much harder in the U.S. for professionals in private law firms to come together as equals and partners.

III. COUNSEL FOR THE SITUATION AND ITS MODERN PROGENY – COLLABORATIVE LAW, CONSULTANCIES AND MULTIDISCIPLINARY PRACTICES

The idea of “counsel for the situation” is a very elastic term. Initially used by Brandeis to explain why his representation of a trustee in bankruptcy was proper, the modern understanding characterizes the lawyer as a problem-solver who considers the public good and recognizes the lawyer as counselor, not just as an advocate and litiga-

hour creates ethical issues for lawyers because of the pressure to inflate hours).

²⁸ See McMorrow, *UK Alternative Business Structures*, *supra* note 24, at 687, 698.

²⁹ DONALD C. LANGEVOORT, *Behavioral Ethics, Behavioral Compliance*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING (Jennifer Arlen ed., Edward Elgar Press) (forthcoming 2016) (manuscript at 2, 12, 18) (<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2519&context=facpub>).

³⁰ David A. Skeel, Jr., *Behaviorism in Finance and Securities Law*, 21 SUP. CT. ECON. REV. 77, 81-82 (2013).

³¹ *Id.* at 688-89.

³² See, e.g., Stephanie Francis Ward, *Diversify or Die: How Adding Ancillary Businesses Can Get Your Firm Through Tough Times*, ABA JOURNAL PODCAST (June 4, 2012), http://www.abajournal.com/news/article/podcast_monthly_episode_27.

tor.³³ Brandeis led this shift in perspective.

As Melvin Urofsky notes in his Brandeis biography,³⁴ massive changes at the turn of the last century caused by the industrial revolution and immigration affected “how lawyers served their clients,” shifting the lawyer’s role “from advocate to counsel.”³⁵ These changes also accelerated the move of lawyers into larger law firms “marked by specialization and commercialization.”³⁶ Brandeis responded to these forces by avoiding “a narrow and limited view of the legal profession”³⁷ Counsel for the situation captures this by rejecting a single, rigid model of lawyering – the zealous representative who will embark on scorched earth tactics (within the bounds of the law, of course). Brandeis rejected this hired gun model and replaced it with a vision of lawyer as counselor who considers the public good along with the interests of his client.³⁸ To provide this perspective, in Brandeis’ view lawyers needed to embrace a “broader education—by study undertaken preparatory to practice—and continued by lawyer and judge throughout life: study of economics and sociology and politics which embody the facts and present the problems of today.”³⁹

A rapidly changing economic and social landscape is familiar to modern observers, with technology and porous borders as significant forces for change.⁴⁰ Not surprisingly, the need for at least an *option* to hire a counsel for the situation has significant modern traction. Movements such as collaborative law in family practice are a move toward a richer model of lawyering in which the lawyer – with client embracing the goal – serves to protect the relational interests of the

³³ Gerald K. Smith, *Conflicts of Interest in Workouts and Bankruptcy Reorganization Cases*, 48 S.C. L. REV. 793, 824-26 (1997); Clyde Spillenger, *Evasive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 1445, 1502-11 (1996).

³⁴ See generally UROFSKY, *supra* note 12.

³⁵ See UROFSKY, *supra* note 12, at 59 (“Advocacy did not disappear, but lawyers tried to steer their clients along paths that would avoid litigation.”).

³⁶ See UROFSKY, *supra* note 12, at 59.

³⁷ See UROFSKY, *supra* note 12, at 59.

³⁸ Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 172 (1995) (“[H]e had the odd notion that the lawyer’s duty is not to act as a hired gun but to advance the public interest as well as that of his client.”).

³⁹ LOUIS D. BRANDEIS, *The Living Law, in BUSINESS – A PROFESSION* 362 (1933) [hereinafter *BUSINESS – A PROFESSION*].

⁴⁰ See Samuel J. Levine, *Conference the Law: Business or Profession? The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century*, 40 FORDHAM URB. L.J. 1, 3, 22 (2012).

whole family in divorce and family law.⁴¹ Collaborative law is an example where there are ethical risks, such as concerns about conflicts of interest, but such risks are managed through careful client consent.⁴² This gives clients more opportunity to choose a model of lawyering that more closely reflects their goals.

Collaborative law looks at counsel for the situation in a traditional adversarial context. Expanding outward, the attitude of problem-solving and collaboration to achieve a shared goal obviously exists in many other contexts. As Susan R. Jones argues, small business clients and promoters of community economic development need interdisciplinary collaboration on “business planning, marketing, financing, advertising, and exploitation of the business’ intellectual property.”⁴³ Intellectual property lawyers also need strong interdisciplinary skills.⁴⁴ Additionally, for in-house lawyers, “companies increasingly rely on models of integrated product development, which in turn depend on the successful collaboration of cross-disciplinary teams.”⁴⁵

Counsel for the situation also reflects an idea of empathy. In a legal system in which well over half of all cases are settled, negotiation and navigating interests of both sides are extremely helpful for a

⁴¹ Barbara A. Babb & Gloria Danziger, *Families Matter: Recommendations to Improve Outcomes for Children and Families in Court*, UNIV. BALT. SCH. L. SAYRA & NEIL MEYERHOFF CTR. FOR FAMILIES, CHILD. & CTS. 1, 11-12 (2014), http://jpo.wrlc.org/bitstream/handle/11204/3760/Families%20Matter_Recommendations%20to%20Improve%20Outcomes%20for%20Children%20and%20Families%20in%20Court.pdf?sequence=3; Robert F. Cochran, Jr., *Collaborative Practice’s Radical Possibilities for the Legal Profession: “[Two Lawyers and Two Clients] For the Situation,”* 11 PEPP. DISP. RESOL. L.J. 229, 230, 247-48 (2011); John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1336 n.70, 1360-61 (2003); Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law--An Emerging Practice*, 45 BOS. B.J. 1, 3-4 (2001).

⁴² John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 748, 757-58, 764 (1992) (Brandeis’ “concept of counsel for the situation is no longer viable in the modern legal profession.”).

⁴³ Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J. L. & POL’Y 249, 249 (2004) (describing interdisciplinary work in a transactional clinic). See also Anthony J. Luppino, *Multidisciplinary Business Planning Firms: Expanding the Regulatory Tent Without Creating a Circus*, 35 SETON HALL L. REV. 109, 111, 116, 163 (2004).

⁴⁴ Cynthia L. Dahl, *Teaching Would-Be IP Lawyers to ‘Speak Engineer:’ An Interdisciplinary Module to Teach New Intellectual Property Attorneys to Work Across Disciplines*, 19 LEWIS & CLARK L. REV. 361, 362-65 (2015) (teaching cooperation and communication between students from different disciplines).

⁴⁵ *Id.* at 365.

successful outcome.⁴⁶ As Professor Robert Cochran argues, “there is a place for ‘situation treatment’ in almost any representation.”⁴⁷ But there are lawyers who make clear at the outset that they are the best choice for clients who wish to maintain an ongoing working relationship and open communication with the person or business on the other side of the table. Embracing this problem-solving approach allows clients to elect a service provider who moves beyond a narrow and adversarial model of lawyering.

Sometimes the spirit of counsel for the situation occurs through consultancy services. Consultancy services are ubiquitous in the modern economy and culture, offering services in widely disparate topics such as war, poverty, and legal services.⁴⁸ Lawyers are regularly part of consulting practices. When the services are offered outside of traditional law firms, however, the service providers “position themselves outside the regulatory framework that governs attorney-client relationships, [so that] clients can use them in ways that they cannot use traditional counsel.”⁴⁹ Lawyers and other professionals in consultancies can work in teams, be partners and share profits.

Legal consultancies have thrived around the world.⁵⁰ Working in a consultancy environment is attractive to lawyers who wish to move away from the big firm, billable hour model and who want to

⁴⁶ For an analysis of settlement rates see Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 111 (2009).

⁴⁷ Robert F. Cochran, Jr., *Louis D. Brandeis and the Lawyer Advocacy System*, 40 PEPP. L. REV. 351, 363 (2013); see also John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965); Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377, 377 (2004); John T. Noonan, Jr., *The Lawyer Who Overidentifies with His Client*, 76 NOTRE DAME L. REV. 827, 828, 832-33 (2001); Spillenger, *supra* note 33, at 1502-04, 1509.

⁴⁸ See van Genugten, *supra* note 3, at 253-54.

⁴⁹ Tanina Rostain, *The Emergence of “Law Consultants,”* 75 FORDHAM L. REV. 1397, 1399 (2006) (describing how consultants can avoid rules intended to protect employees and other third parties). See also Louise Lark Hill, *The Preclusion of Nonlawyer Ownership of Law Firms: Protecting the Interest of Clients or Protecting the Interests of Lawyers?*, 42 CAP. U. L. REV. 907, 914 (2014) (“During the 1990s, members of the legal profession noticed that consulting firms were soliciting clients and offering services quite similar to those traditionally offered by law firms.”).

⁵⁰ See, e.g., Evan Pickworth, *Consultancy Model is ‘Changing Legal Sector’*, INVESTORS MONTHLY (May 27, 2013) (describing how legal consultancy “is a ‘game-changer’ for the South African legal profession.”), <http://www.bdlive.co.za/national/law/2013/05/27/consultancy-model-is-changing-legal-sector>.

work in more of a team-based, problem-solving environment.⁵¹ Consultancies are attractive to some clients, particularly for law-related work, because of the ability to offer fine-tuned and efficient services.⁵²

Multidisciplinary practice, discussed above in the Brandeis Brief, can often overlap with consultancy service. Multidisciplinary practice (“MDP”) is a business form that “envisions an integrated entity that provides legal services as one of several professional services offered through a single provider.”⁵³ Poverty law lawyers have worked in multidisciplinary practices for decades, often through collaboration with social workers.⁵⁴ Legal and counseling services for low-income clients have been provided by a single organization.⁵⁵ In both circumstances the service provider needed to carefully craft the relationship to assure that the professional obligations of both groups were met.⁵⁶ In other words, ethical risks need to be identified and managed, but the underlying concept is not very controversial in non-profit settings.

It appears that multidisciplinary practice becomes an issue within the legal profession when money is involved. The long and tortured history of promoting multidisciplinary practice in the U.S. is well-documented.⁵⁷ Providing equal seats at the table has been

⁵¹ *Id.*

⁵² See *FYI: Hiring a Freelancer or Consultant*, AM. BAR ASS'N, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/consultants.html (last visited Oct. 17, 2016).

⁵³ Lark Hill, *supra* note 49, at 915.

⁵⁴ See Alexis Anderson, Lynn Barenberg & Paul R. Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 661-62 (2007).

⁵⁵ See COMMUNITY LEGAL SERVICES AND COUNSELING CENTER, <http://www.clsacc.org/> (last visited Oct. 17, 2016). As their website describes:

CLSACC provides free civil legal assistance and affordable psychological counseling for people with low incomes. Since our inception, we have been sustained by the commitment and dedication of volunteer lawyers and mental health professionals. Our services combat the effects of poverty and violence by helping clients and their children meet basic human needs for safety, income, health and housing. CLSACC's unique interdisciplinary approach has enabled us to keep pace with the ever-changing and interrelated needs of our clients.

Id.

⁵⁶ Anderson, Barenberg & Tremblay, *supra* note 54, at 663-64, 666, 668.

⁵⁷ For an earlier history of the MDP debate see 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,

staunchly resisted in the U.S., usually on a concern that the core values of the legal profession will be compromised.⁵⁸

Much of the pressure to change legal practice is driven by client needs. Many corporations have moved to project and team-based functioning in which lawyers are one member of the team.⁵⁹ The teams often function in a multidisciplinary manner, with legal perspective as one perspective on the team.⁶⁰ The team, not the outside counsel, determines “the problem, objectives, and scope of the legal work to be performed.”⁶¹ In working with transnational projects, the landscape has also pushed toward collaboration:

[G]lobalization of business and a parallel consolidation of marketplaces create a business environment in which today’s competitor may be tomorrow’s joint venturer, partner, or merged entity Business venturers in the interconnected global marketplace of the twenty-first century will increasingly emphasize dispute avoidance strategies, cooperative business solutions, sophisticated models for cost-shared dispute resolution, and systems for creating competitive advantage through collaborative conflict management.⁶²

As Professor Tanina Rostain notes, many “corporations do not care how their service providers characterize the relationship, so long as they provide the services that are needed.”⁶³ But if given a choice between a regulated or unregulated provider, it would seem logical that corporation would gravitate to the regulated actor, if the

85-87 (2000).

⁵⁸ Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know it?*, 84 MINN. L. REV. 1315, 1315-17 (2000); Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV. 2193, 2193-94 (2010); Susan Poser, *Main Street Multidisciplinary Practice Firms: Laboratories for the Future*, 37 U. MICH. J. L. REFORM 95, 96-98 (2003); W. Bradley Wendel, *In Search of Core Values*, 16 LEGAL ETHICS 350, 350 (2013); Luppino, *supra* note 43, at 113-14.

⁵⁹ Robert Eli Rosen, “*We’re All Consultants Now: How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*,” 44 ARIZ. L. REV. 637, 642-43, 650 (2002) (“[H]ow the company is organized affects how lawyers act.”).

⁶⁰ *Id.* at 644, 646, 650, 663.

⁶¹ *Id.* at 656.

⁶² Ann L. MacNaughton & Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 LOY. L. REV. 665, 667 (2001).

⁶³ Rostain, *supra* note 49, at 1409.

quality and price is comparable.

IV. BUSINESS AS A FORCE FOR GOOD

The third idea that Brandeis boldly proclaimed is that business itself can be a profession and a force for good.⁶⁴ Throughout both his legal and judicial career, Brandeis was wary of businesses that were too big and exerted monopoly power. This, however, did not make him anti-business.⁶⁵ He was a strong voice for the power of business to address social needs, even as he acknowledged that businesses could run rough-shod over the interests of the general citizenry.⁶⁶ Brandeis was emphatic that “every legitimate occupation, be it profession or business or trade, furnishes abundant opportunities for usefulness, if pursued in what Matthew Arnold called ‘the grand manner.’”⁶⁷ In addressing the question of whether the bar has become too commercialized, Brandeis challenged this conceptualization: “Probably business has become professionalized as much as the Bar has become commercialized.”⁶⁸

Functioning as a business is simply an organizational form. Founders can choose to put certain values into action via the corporate structure. With large businesses, corporate social responsibility has given a vocabulary to the idea that corporations and businesses can both do good and do well.⁶⁹

The counterpoise in this debate is situating law practice as a *profession*. I join Brandeis in the belief that “the legal profession

⁶⁴ BUSINESS – A PROFESSION, *supra* note 6; *The New Haven: An Unregulated Monopoly*, in BUSINESS – A PROFESSION, *supra* note 39, at 282-83.

⁶⁵ See BRANDEIS, *The New Haven: An Unregulated Monopoly*, in BUSINESS – A PROFESSION, *supra* note 39, at 279-80; Barak Orbach & Grace Campbell Rebling, *The Anti-trust Curse of Bigness*, 85 S. CAL. L. REV. 605, 624-30 (2012) (analyzing Brandeis’ attitude toward bigness).

⁶⁶ BRANDEIS, *The New Haven: An Unregulated Monopoly*, in BUSINESS – A PROFESSION, *supra* note 39, at 282-83.

⁶⁷ BRANDEIS, *The Opportunity in the Law*, in BUSINESS – A PROFESSION, *supra* note 39, at 313.

⁶⁸ BRANDEIS, *The Opportunity in the Law*, in BUSINESS – A PROFESSION, *supra* note 37, at 318.

⁶⁹ There is more to cite on corporate social responsibility (CSR) than a footnote can allow. For some interesting discussions, see Wayne Visser, *The Age of Responsibility: CSR 2.0 and the New DNA of Business*, 5 J. BUS. SYSTEMS, GOVERNANCE & ETHICS 7, 7 (2010) http://www.waynevisser.com/wpcontent/uploads/2012/06/paper_age_responsibility_wvisser.pdf; but see KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW* (2006); C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 77 (2002).

does afford in America unusual opportunities for usefulness.”⁷⁰ Brandeis envisioned that the value-added of lawyers comes from training and judgment and careful reasoning.⁷¹ He challenged lawyers to move away from a pure advocacy model in non-litigation settings, urging that lawyers must take a broader vision when representing clients before legislatures and city councils.⁷²

This leads to the question of law firms not just advising businesses, but being businesses as well. Brandeis challenged us to recognize that business could be a profession.⁷³ It is axiomatic that the legal profession is also a business. The professional values of law firms do not shield it from business failures.⁷⁴ Law firms can make poor business decisions, such as poor practice infrastructure (weak internal accounting systems, notifications, etc.), expanding too rapidly, committing to payouts that are not sustainable, and the like.⁷⁵ The limited liability partnership organizational structure encourages partnership runs.⁷⁶ There is absolutely nothing in the concept of “law firm” that increases the chances that the law firm will make beneficial business decisions.

Similarly, a business is capable of making good or bad decisions. Brandeis long warned of the dangers of big business but also promoted the idea that business can be a force for good.⁷⁷ It is not inexorably evil, any more than law firms are inexorably a source of good. Instead the question is what opportunities and risks come from collaborations.

⁷⁰ BRANDEIS, *The Opportunity in the Law*, in BUSINESS – A PROFESSION, *supra* note 39, at 330.

⁷¹ BRANDEIS, *The Opportunity in the Law*, in BUSINESS – A PROFESSION, *supra* note 37, at 331-32.

⁷² BRANDEIS, *The Opportunity in the Law*, in BUSINESS – A PROFESSION, *supra* note 37, at 340-41.

⁷³ Rosen, *supra* note 13.

⁷⁴ Erin Fuchs, *The Eight Most Crushing Law Firm Implosions in the Nation's History*, BUSINESS INSIDER (June 24, 2012), <http://www.businessinsider.com/the-eight-most-spectacular-law-firm-collapses-in-history-2012-6>.

⁷⁵ See Gillian D. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2014); Judith A. McMorrow, *In Defense of the Business of Law*, 40 FORD. URBAN L. J. 459, 460-61 (2012).

⁷⁶ John Morley, *Why Law Firms Collapse 1*, (Yale Law & Econ., Working Paper No. 521, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2580616.

⁷⁷ See *Meet Nutter*, *supra* note 15.

V. MOVING TOWARD A BRANDEIS LAW FIRM IN THE UNITED STATES: CHALLENGES AND OPPORTUNITIES

The discussion above demonstrates that many clients desire more holistic lawyering. The current regulatory structure in the U.S. makes this difficult by prohibiting non-lawyer owners and investors in law firms.⁷⁸ Lawyers can hire non-lawyer professionals, but those professionals cannot share in fees, functionally pushing them outside the leadership structure of the law firm.⁷⁹ Other professionals, including economists, social workers, and technology experts, cannot have an equal seat at the table.⁸⁰

This is not inevitable. It is now well-known that Australia, England and Wales (UK), and several European countries allow non-lawyer owners and investors.⁸¹ The most expansive development has occurred in the UK, which began to license Alternative Business Structure (“ABS”) law firms in 2012.⁸² The Solicitor’s Regulation Authority, the largest regulator, has issued over 500 ABS licenses.⁸³ While many of those ABS firms look like traditional law firms, many others are forming more creative business structures than would be allowed in the U.S.⁸⁴ Law firms can raise capital for investment in technology and provide non-lawyer professionals a true seat at the table, drawing in the best talent to legal services.⁸⁵ Allowing for an ABS structure can reduce the short-termism inherent in many LLP law firm structures.⁸⁶ The UK has a fairly narrow definition of what constitutes reserved activities (unauthorized practice of law), so some of these legal service providers could have operated without becoming a law firm.⁸⁷ But they chose to become a firm because they pre-

⁷⁸ MODEL RULES OF PROF’L CONDUCT r. 5.4(b) (AM. BAR ASS’N 1983).

⁷⁹ MODEL RULES OF PROF’L CONDUCT r. 5.4(a) (AM. BAR ASS’N 1983).

⁸⁰ Nick Robinson, *When Lawyers Don’t Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1 (2016).

⁸¹ McMorrow, *UK Alternative Business Structures*, *supra* note 24, at 669-70.

⁸² McMorrow, *UK Alternative Business Structures*, *supra* note 24, at 667-68.

⁸³ *Search for a licensed body (ABS)*, SOLICITORS REGULATION AUTHORITY, <http://www.sra.org.uk/solicitors/firm-based-authorisation/abs/abs-search.page> (last visited Oct. 17, 2016).

⁸⁴ McMorrow, *UK Alternative Business Structures*, *supra* note 24, at 670.

⁸⁵ Robinson, *supra* note 80, at 4.

⁸⁶ Jonathan T. Molot, *What’s Wrong with Law Firms? A Corporate Finance Solution to Law Firm Short-Termism*, 88 S. CAL. L. REV. 1, 13 (2014).

⁸⁷ See Prof. Stephen Mayson & Olivia Marley, *The Regulation of Legal Services: Reserved Legal Activities --History and Rationale*, LEGAL SERVICES INST. (2010), 1, 1 <https://stephenmayson.files.wordpress.com/2013/08/mayson-marley-2010-reserved-legal->

sumably see value-added in becoming a regulated business.⁸⁸ Prestige and the ability to charge for the services provided is one value added.⁸⁹ But cultures, mindset and client desires also play a role.⁹⁰

The biggest risk of allowing non-lawyer owners and investors in a law firm is a legitimate concern about erosion of core professional values. For our purposes, I am using the core values that Professor Geoffrey Hazard and Angelo Dondi identified as common core values in legal professions throughout the world: “competence; independence; loyalty to [one’s] client; maintaining the confidentiality of client . . . [communications]; responsibility to the courts and to colleagues; and honorable conduct in professional and personal matters.”⁹¹ But identifying the risk to core values helps establish the appropriate regulation needed to address the risk. In the UK, the law firm itself is regulated, and must have a head of Legal Practice that assures that professional obligations are met, as well as a head of Finance and Administration to promote a good business infrastructure.⁹²

It is time for a paradigm shift in the U.S.. The current discussion of non-lawyer owners and investors, and of multidisciplinary practice, has largely been framed as *excluding* the others from the practice of law. But legal services have become so embedded in daily life of both individuals and businesses that this framing has limited utility. Instead of building a wall between legal and non-legal services, the legal profession should envision a tent into which they invite others. Non-regulated legal services providers, such as consultancies, can become law firms if they agree to be regulated. This will

activities-history-and-rationale.pdf.

⁸⁸ Nick Hilborne, *Property Management Firm Turns Itself Into ABS*, LEGALFUTURES, (Mar. 15, 2016), <http://www.legalfutures.co.uk/latest-news/property-management-firm-turns-itself-into-abs#>.

⁸⁹ *Id.*

⁹⁰ Nick Hilborne, *Taking Separation Seriously: Surveyors in Country Mansion Set Up ABS in Coach House*, LEGALFUTURES, (Nov. 16, 2015 12:05 AM), <http://www.legalfutures.co.uk/latest-news/taking-separation-seriously-surveyors-in-country-mansion-set-up-abs-in-coach-house/print>; Nick Hilborne, *Top 20 Accountants Expands Commercial Law Services as City Practice Evolves with Accountancy Arm*, LEGALFUTURES, (Nov. 18, 2015 10:36 AM), <http://www.legalfutures.co.uk/latest-news/top-20-accountants-expand-commercial-law-services-as-city-practice-evolves-with-accountancy-arm>

⁹¹ GEOFFREY C. HAZARD JR. & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 109 (2004).

⁹² *Responsibilities of COLPs and COFAs*, SOLICITORS REGULATION AUTHORITY <http://www.sra.org.uk/solicitors/colp-cofa/responsibilities-record-report.page> (last updated Sept. 10, 2014).

increase client protection by allowing services to be provided in a regulated environment that makes clear the obligations to avoid conflicts, maintain confidences, provide competent services, have proper financial practices to protect client funds, and the like.

The UK experience offers multiple examples. PriceWaterhouseCoopers was recently authorized as an ABS firm.⁹³ By submitting itself to regulation, it now must comply with the regulatory requirements of the Solicitors Regulation Authority.⁹⁴ Their head of legal practice must assure that they have systems in place to avoid conflicts, protect confidences, and comply with other professional values of solicitors.⁹⁵ They are required to maintain malpractice insurance.⁹⁶ They chose to submit themselves to regulation presumably because they see a value-added of being called a law firm. And their clients will now have enhanced protection.

Riverview Law, described above, is a second example.⁹⁷ Outside investors provided Riverview with capital necessary to build the technology infrastructure to provide the data analysis.⁹⁸ Under the UK definition of reserve activities, much of what Riverview Law does could have been provided outside of regulation.⁹⁹ But being a law firm is a more accurate description of the center of gravity of their work.¹⁰⁰ And their clients will now have enhanced protection.

A third emerging example is LegalZoom, the online document provider with a strong presence in the U.S. legal market.¹⁰¹ In

⁹³ Joanne Harris, *PwC Legal Gains ABS Licence*, THE LAWYER (Jan. 31 2014), <https://www.thelawyer.com/issues/online-january-2014/pwc-legal-gains-abs-licence/>.

⁹⁴ Neil Rose, *Here Come the Big Boys – PwC Gains ABS Licence*, LEGALFUTURES (Jan. 31, 2014 2:42 PM), <http://www.legalfutures.co.uk/latest-news/here-come-big-boys-pwc-gains-abs-licence>.

⁹⁵ Julia Irvine, *PwC Legal Gets ABS Licence*, ECONOMIA (Jan. 31, 2014), <http://economia.icaew.com/news/january-2014/pwc-legal-gets-abs-licence>.

⁹⁶ SRA INDEM. INS. R. 1.3 (SOLICITORS REGULATION AUTH. 2013).

⁹⁷ Caroline Hill, *Technology is Relevant to Everything - Riverview Law's CEO Karl Chapman Discusses the New Law Disruptor's Rapid Growth*, LEGALIT INSIDER (Mar. 12 2015, 7:26 AM), <http://www.legaltechnology.com/latest-news/technology-is-relevant-to-everything-riverview-laws-ceo-karl-chapman-discusses-the-new-law-disruptors-rapid-growth/>.

⁹⁸ *Id.*

⁹⁹ *Id.*; *Study to Provide an Inventory of Reserves of Activities Linked to Professional Qualifications Requirements in 13 EU Member States & Assessing Their Economic Impact*, CENTRE STRATEGY & EVALUATION SERVICES, 1, 1 (2012), http://ec.europa.eu/internal_market/qualifications/docs/news/20120214-summary_en.pdf.

¹⁰⁰ Hill, *supra* note 97.

¹⁰¹ *About Us*, LEGALZOOM, <https://www.legalzoom.com/about-us> (last visited Oct. 17, 2016).

the U.S., LegalZoom users are warned repeatedly in small print at the bottom of the website that “communications between you and LegalZoom are protected by our Privacy Policy but not by the attorney-client privilege or as work product. . . . We are not a law firm.”¹⁰² But users in the UK going to a law firm will be called clients (not just customers) and will receive greater protection than their U.S. counterparts.¹⁰³

Perhaps the biggest barrier to a true Brandeis Law Firm, and the greatest opportunity, is attitude. U.S. lawyers generally talk about the world of legal service providers in binary terms: lawyers and everyone else. Lawyers are crafted as providing the primary value-added, with an implicit disrespect for the contribution of others.¹⁰⁴ No matter how hard we try to get lawyers to not craft their world with the lawyer at the center, it always seems to revert back to that model. For example, the 1983 Model Rules of Professional Conduct rephrased the relationship when providing legal services and called it the “client-lawyer relationship.”¹⁰⁵ But the phrase is rarely used in the legal profession and sounds jarring to lawyers’ ears. Lawyers often speak as if they have an ownership vision of law. Having this ownership attitude is a poor fit for our more complex, thick law world where law is everywhere. Instead, lawyers should have a stewardship relationship to law in which we are servants, not owners and masters.¹⁰⁶

Some continue to urge that non-lawyer owners and investors will erode even that stewardship by throwing open legal services to the harsh and unfettered forces of the market. But legal services would be a regulated market in which those who want to call themselves a law firm must abide by those professional values that we hold dear. If they fail to, the firm risks losing its license, and the director of legal practice would be at risk as well. In return, non-lawyer interdisciplinary perspectives would have a structural place within legal services and access to capital would allow for investment

¹⁰² *Id.*

¹⁰³ McMorrow, *UK Alternative Business Structure Law Firms*, *supra* note 24, at 694-700.

¹⁰⁴ Stephen Mayson, *Restoring a Future for Law*, STEPHEN MAYSON: AN INDEPENDENT MIND 1, 5 (Oct. 2013), <http://stephenmayson.files.wordpress.com/2013/10/mayson-2013-restoring-a-future-for-law.pdf>.

¹⁰⁵ MODEL RULES OF PROF'L CONDUCT r. 1.0 (AM. BAR ASS'N 1983).

¹⁰⁶ *Cf.* Keith R. Fisher, *Repudiating the Holmesian “Bad Man” through Contextual Ethical Reasoning: The Lawyer as Steward*, 2008 J. PROF'L LAW 13 (2007); Kristen A. Carpenter, Sonia K. Katyal, & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022 (2009).

in technology and stream-lined services.

VI. CONCLUSION

One wonders what Brandeis might think of non-lawyers owning and investing in law firms. He lived out a practice philosophy that saw the lawyer as a force for public good.¹⁰⁷ He saw non-monopoly businesses as a force for good. Brandeis also fully appreciated that aggregation of capital was indispensable to expansion of capital-intensive activities.¹⁰⁸ While in the past the practice of law was not seen as a capital-intensive activity, if a modern law firm wants to make a significant investment in technology, it needs significant access to both capital and talent. Brandeis was ever and always a pragmatist.¹⁰⁹ One suspects he would keep an open mind to the possibility that we can create a modern Brandeis law firm that gathers together professionals to work on shared goals.

¹⁰⁷ UROFSKY, *supra* note 12, at 205-06.

¹⁰⁸ UROFSKY, *supra* note 12, at 94.

¹⁰⁹ Farber, *supra* note 38, at 164.