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# EMBRACING DESCENT: THE BANKRUPTCY OF A BUSINESS PARADIGM FOR CONCEPTUALIZING AND REGULATING THE LEGAL PROFESSION

JEFFREY W. STEMPEL\*

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*There was one other game that Julian did not like, because he was afraid of the consequences. That was known simply as Five-Finger Grab. . . . [S]ometimes after a tour of the store the gang would meet, and two or three of the boys would . . . show what they had got in the Five-Finger Grab . . . . The other boys would be ashamed, and the next time they went to the store everyone would try to get something.*

*Julian at first would refuse to participate in the Five-Finger Grab, but when Carter Davis abandoned his side and went over to the grabbers, Julian had to do something. . . . And so he became a five-finger grabber.<sup>1</sup>*

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1. JOHN O'HARA, APPOINTMENT IN SAMARRA 151-52 (1934). This passage from O'Hara's novel about self-destructive behavior might equally bear upon the topic of lawyers' reactions to the changing practice of law. In the novel, Julian English, whose childhood mischief is described in the passage, expends considerable energy attempting to restore and solidify his social position in the mythical community, but his efforts only create more difficulties, which culminate in his suicide. Today, lawyer professionalism faces a similar battle. While many lawyers have reacted by advocating a reinvigoration of professionalism, some have elected to reject the professionalism construct. The potential futility of such flight is reflected in the parable with which O'Hara begins the novel:

DEATH SPEAKS:

There was a merchant in Baghdad who sent his servant to market to buy provisions and in a little while the servant came back, white and trembling, and said, Master, just now when I was in the market-place I was jostled by a woman in the crowd and when I turned I saw it was Death that jostled me. She looked at me and made a threatening gesture; now, lend me your horse, and I will ride away from this city and avoid my fate. I will go to Samarra and there Death will not find me. The merchant lent him his horse, and the servant mounted it, and he dug his spurs in its flanks and as fast as the horse could gallop he went. Then the merchant went down to the market-place and he saw me standing in the crowd and he came to me and said, Why did you make a threatening gesture to my servant when you saw him this morning? That was not a threatening gesture, I said, it was only a start of surprise. I was astonished to see him in Baghdad, for I had an appointment with him tonight in Samarra.

*Id.* at Epigraph (quoting W. SOMERSET MAUGHAM, SHEPPY (1933)).

I. INTRODUCTION: THE CONCEPT OF BEING A LAWYER—ROMANTICS, ROBBER BARONS AND A CALL FOR ABANDONING PROFESSIONALISM AS THE ORGANIZING PRINCIPLE

Lawyers are said to travel in packs, or at least pairs, and in the popular parlance are often compared to hords of locusts, herds of cattle, or unruly mobs. However, at least for purposes of assessing concerns with professionalism currently surrounding the bar and the public, whether attorneys are more or less social than other human animals does not matter. My point is simply that lawyers are social beings; like other human beings in social and occupational groups, lawyers behave largely in accordance with group norms, in much the same way peer pressure led Julian English toward juvenile delinquency in the passage quoted above from O'Hara's novel.<sup>2</sup>

My operating premise simply posits that lawyers will tend to act in accordance with their social or peer incentive structures. The resulting thesis holds that society will see better conduct by lawyers, in the legal profession and as a whole, if attorneys continue to be regarded and regulated as part of a profession rather than being primarily conceptualized as actors in a market.

Lawyers and the legal profession have probably never been particularly popular,<sup>3</sup> despite the fact that some early American lawyers today enjoy something of a posthumous honeymoon as the *founding fathers* or *framers*.<sup>4</sup> Even so, the reputation of counsel in general is at a particularly low ebb in the late twentieth century.<sup>5</sup> Some of the

2. *See id.*

3. *See* Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 810-16 (1998) (noting historical fluctuation of lawyer stature against a baseline of significant public dislike for attorneys) [hereinafter Galanter, *Faces of Mistrust*].

4. John Adams, Alexander Hamilton, John Jay, Thomas Jefferson, and John Marshall were all lawyers. *See* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 101, 303 (2d ed. 1985).

5. *See generally* MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994). Although each book displays the distinctive stamp of prominent authors, all three generally portray a profession in decline, in some significant way, as compared to the practice of law earlier in the 20th century. All three books could be termed nostalgic, not in the pejorative sense, but in the literal sense that they mourn past incarnations of the practice of law.

A wave of works has sounded a similar theme. *See, e.g.*, Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 872 (1990) (attributing the "devolution" of the legal profession to changing market conditions); Elizabeth A. Kovachevich & Geri L. Waksler, *The Legal Profession: Edging Closer to Death with Each Passing Hour*, 20 STETSON L. REV. 419, 423 (1991) (urging that the billable hour will be the death of the profession and that the legal profession has "degenerated into a 'mean and mercenary calling'"). The organized legal profession itself has seemingly adopted this nostalgia. *See* AMERICAN BAR ASS'N COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM" (1986),

antilawyer signposts are so familiar that they have become hackneyed and trite: the ubiquitous Shakespeare quotation, "first thing we do, let's kill all the lawyers";<sup>6</sup> the public opinion surveys putting attorneys a notch below the proverbial used car salesman in job and trustworthiness ratings;<sup>7</sup> and the perennial lawyer jokes.<sup>8</sup>

The image of the lawyer reflected in popular culture has always suffered derision,<sup>9</sup> but today's image seems more cynical. In the impeachment inquiry surrounding President Clinton, the favorite sound bite for attacking his position was to describe Clinton as relying on "legal technicalities."<sup>10</sup> Lawyers are frequently villains of mod-

reprinted in 112 F.R.D. 243, 262 (1987) (hoping for a "rebirth of respect and confidence in [lawyers], in the services they provide and in the legal system itself") [hereinafter AMERICAN BAR ASS'N, PUBLIC SERVICE]. Although the dissatisfaction with modern law has focused largely on the public's disenchantment, lawyers themselves seem to view the lawyer's life as worse today than in the past. See, e.g., Geoffrey C. Hazard, Jr., "Practice" in *Law and Other Professions*, 39 ARIZ. L. REV. 387, 391-92 (1997) (noting increased feelings of detachment among attorneys and widespread job dissatisfaction); Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 94 (1994) (describing how law practice has become a "war" for business).

6. WILLIAM SHAKESPEARE, HENRY VI, pt. 2, act 4, sc. 2.

7. See Randall Samborn, *Tracking Trends*, NAT'L L.J., Aug. 9, 1993, at 20 (reviewing public opinion poll reflecting decline in the public perception of lawyers); see also Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 663 (1994) (noting this trend in public opinion during 1980s and 1990s) [hereinafter Galanter, *Predators and Parasites*]. But see ELIOT FREIDSON, PROFESSIONALISM POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE 56 (1986) (noting that lawyers rank fifteenth out of ninety in prestige within the professional-technical category). Law is generally ranked high in prestige, at least in relation to other occupations. See *id.* at 112.

8. See Editorial, *These Lawyers Are No Joke*, SOUTH BEND TRIB., Dec. 21, 1998, at A8, available in LEXIS, News Library, Sbdtr File ("What do you call 5,000 lawyers at the bottom of the Atlantic Ocean?" the old joke asks. The answer: 'A good start.');

9. See also Galanter, *Predators and Parasites*, *supra* note 7, at 634-37 (setting forth a sample of untrue or misleading antilawyer "facts" in common circulation and antilawyer jokes and sayings).

10. See, e.g., CHARLES DICKENS, BLEAK HOUSE (Duane DeVries ed., Thomas Y. Cromwell Co. 1971) (1853) (depicting how lawyers and legal system combine with family greed to bleed an estate dry through two decades of litigation); see also CHARLES DICKENS, GREAT EXPECTATIONS (Heritage Press 1971) (1861) (offering a largely unflattering portrayal of Attorney Jaggers). Jaggers is described as "marginally scrupulous" by one lawyer-interpreter. Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 306 (1995) [hereinafter Atkinson, *Dissenter's Commentary*]. Atkinson also notes an example from Robert Traver's *Anatomy of a Murder* (1958), in which an attorney "presses the edge of subornation of perjury to suggest to his client a dubious but successful insanity defense to murder." *Id.* at 307; see also FREIDSON, *supra* note 7, at 28 (describing a more recent "antiprofessionalism" movement of the post-World War II era); ANTHONY TROLLOPE, THE WARDEN 54 (Robin Gilmour ed., Penguin Books 1984) (1855) (presenting character Sir Abraham Haphazard, an attorney who focuses on form rather than substance).

10. See, e.g., Harold W. Andersen, *Clinton Strategy Is Public Relations Fiasco*, OMAHA WORLD HERALD, Sept. 20, 1998, at 31a, available in LEXIS, News Library, Omwhld File (referring to "the hair-splitting legal technicalities behind which Clinton's strategists are attempting to protect their client"); *The End of Impeachment: Quotes from the Trial*, ATLANTA J. & CONST., Feb. 14, 1999, at 2F (quoting Republican Senator Chuck Hagel, who spoke of "stripping away the underbrush of legal technicalities and nuance");

ern fiction.<sup>11</sup> When lawyers are heroes, the burnout rate is high, and even lawyer-novelists like John Grisham and Scott Turow often have their protagonists exiting the system while the getting is still good to ride off into the sunset for a new life.<sup>12</sup> In real life, Presidents, Vice-Presidents, and other politicians apparently think lawyer-bashing, and judge-bashing as well, increases favorable votes.<sup>13</sup> Presumably, their private polling data confirm the effectiveness of lawyer-bashing, or it would not be done.

Not only does criticism and rejection seem the profession's lot, but there also appears to be relatively little positive image-building of the lawyer. Instead of Perry Mason,<sup>14</sup> we have Ally McBeal,<sup>15</sup> L.A. Law,<sup>16</sup> and The Practice.<sup>17</sup> McBeal is embarrassingly airheaded, and more focused on finding a good nightclub than practicing good law.

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William Schneider, *As the Trial Turns*, L.A. TIMES, Jan. 24, 1999, at M1 ("[Clinton] resorts to legal technicalities, infuriating his critics and irritating his supporters.").

11. See *THE USUAL SUSPECTS* (Gramercy Pictures 1996). In the film, a lawyer actively assists a surprisingly shadowy crime kingpin in a plan involving the murder of a government witness and the mass killing of those who could tie him to crime. See *id.* Several literary accounts also provide overt examples. See, e.g., JOHN GRISHAM, *THE FIRM* (1990) (depicting an entire law firm as a mob front); JOHN GRISHAM, *THE RAINMAKER* (1995) (implying that the lawyer for an insurer is complicit in or actively involved in fraudulent withholding of information and deception of policyholders).

12. See, e.g., JOHN GRISHAM, *THE PARTNER* (1997) (depicting an attorney who fakes death and absconds with the firm's ill-gotten gains); JOHN GRISHAM, *THE RAINMAKER* (1995) (ending with the protagonist leaving the practice of law to teach high school); SCOTT TUROW, *PLEADING GUILTY* (1993) (depicting an attorney who leaves a law practice for a country lacking an extradition treaty after essentially re-stealing the firm's ill-gotten funds).

13. See, e.g., Galanter, *Predators and Parasites*, *supra* note 7, at 645-47 (reviewing former Vice-President Dan Quayle's well-publicized attack on lawyers and the American legal system designed as part of the Bush-Quayle 1992 re-election effort). See also Karen O'Connor, *Civil Justice Reform and Prospects for Change*, 59 BROOK. L. REV. 917, 919 n.9 (1993) (noting Dan Quayle's remarks at the August 13, 1991, annual meeting of the American Bar Association's House of Delegates). During the 1992 presidential campaign, former President George Bush digressed to mock fancy lawyers in "tasseled loafer[s]." George Bush, *Acceptance Speech for the Republican Presidential Nomination* (August 20, 1992), in *Transcript of Bush Speech Accepting the Nomination for Another Four Years*, N.Y. TIMES, Aug. 21, 1992, at A14 ("After all, my opponent's campaign is being backed by practically every trial lawyer who ever wore a tasseled loafer."). Bush undoubtedly thought that casting his opponent as the lawyer's candidate was good political strategy, although this assumption may have been faulty. See *Lawyers Give Most to Presidential Campaigns*, TALLAHASSEE DEM., Apr. 30, 1999, at 5A (noting that lawyer donations to political campaigns are substantial across party lines).

Similarly, in Florida, State Senator Charlie Crist attacked the successful plaintiffs' lawyers over the large fees they collected in the tobacco litigation. See *Crist Wants Tobacco Suit Probe to Go on*, FLA. TIMES-UNION, June 4, 1998, at B-5; see also Margaret Taleve, *Tobacco Probe Lit Few Fires*, TAMPA TRIB., May 17, 1998, at 1. But see John H. Cushman, Jr., *The 1998 Elections: State by State-South*, N.Y. TIMES, Nov. 5, 1998, at B5 (suggesting that, while public opinion of lawyers may be somewhat low, it is not so low as to render scapegoating or lawyer bashing a fool-proof campaign tool).

14. See *Perry Mason* (CBS television broadcast, 1957-66).

15. See *Ally McBeal* (FOX television broadcast, 1997-99).

16. See *L.A. Law* (NBC television broadcast, 1986-94).

17. See *The Practice* (ABC television broadcast, 1997-99).

The gang in L.A. Law struck a number of blows for conspicuous consumption and moral decline but relatively few for justice. The crew in *The Practice* does somewhat better, but needs its share of material goods and torrid embraces as well. If popular culture is any indication, lawyer professionalism is not merely going through a low point—it has reached Death Valley.<sup>18</sup>

If a negative public image were the only problem, it would be relatively difficult to differentiate the 1990s from the rest of the century. To a large extent, what makes the 1990s different is the upsurge in scholarly works arguing that law and lawyers are in a serious slump and need professional revitalization. Works by notable authors such as Mary Ann Glendon, Tony Kronman, and Sol Linowitz all argue that lawyers and the legal profession have indeed lost their way, largely through becoming more elitist, selfish, separated from society, and greedy.<sup>19</sup> Similarly, an inordinate number of prominent attorneys and judges have made similar observations.<sup>20</sup> Abusive litiga-

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18. But alas, lawyers get it coming and going. It was not that long ago that Woody Allen, as Boris Dimitrovich Grushenko, opined that "some people never even think about sex . . . they become lawyers." See *LOVE AND DEATH* (Jack Rollins & Charles H. Joffe Productions 1975).

19. See GLENDON, *supra* note 5; KRONMAN, *supra* note 5; LINOWITZ & MAYER, *supra* note 5. However, an academic trend exists toward observing a decline of professionalism that predates the past decades and these works. See FREIDSON, *supra* note 7, at 110 (noting trend toward this observation and citing sources).

One might gauge the decline of the lawyer's image by comparing these writings to those of the 1960-1980 period that, although hardly promotional, generally portrayed the legal profession in a more positive light. See, e.g., JEROME E. CARLIN, *LAWYERS ON THEIR OWN* (1962); JOSEPH C. GOULDEN, *THE SUPERLAWYERS* (1971); PAUL HOFFMAN, *LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS* (1973); ERWIN O. SMIGEL, *THE WALL STREET LAWYER* (1964). Even a self-identified polemic is not as despondently critical and resigned as are the 1990s books cited above. See RALPH NADER & MARK GREEN, *VERDICTS ON LAWYERS* (1976).

It is also probably worth noting that a higher percentage of the pre-1990s criticism came from sources other than the legal academy.

20. See, e.g., Warren E. Burger, *The Decline Of Professionalism*, 61 TENN. L. REV. 1 (1993). For the late Chief Justice Burger, concerns about eroding professionalism predated the 1990s explosion of lawyer criticism. See Warren E. Burger, *The Necessity for Civility*, Address Before the American Law Institute (May 18, 1971), in 52 F.R.D. 211 (1971) (decrying lapses in civility but targeting liberal activist lawyers for claiming political overtones in trials when unhappy with outcomes); Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62 (calling for re-examination of lawyer professionalism and implying a precarious state). More recent critiques make similar observations. See, for example, Louis H. Pollak, *Professional Attitude*, A.B.A. J., Aug. 1998, at 66, in which the author, a prominent federal trial judge and former Dean of Yale and Pennsylvania law schools, defends the importance of civility, implicitly suggesting that the legal profession has slipped in this regard. See also Jerome J. Shestack, *Taking Professionalism Seriously*, A.B.A. J., Aug. 1998, at 70, in which the then-ABA President endorses civility and respect for others, implying some modern slippage and danger of further slippage, and William Reece Smith, Jr., *Professionalism? What's That?*, FLA. BAR J., May 1998, at 28, in which the former ABA President notes the widespread concerns about declining professionalism that led to the establishment of the Center for Professionalism, "a joint venture of the Supreme Court of Florida and The Florida Bar."

tion has become a particular target prompting procedural reform, a "civility" movement, and criticism.<sup>21</sup> Bench-Bar Committees or Commissions have developed with a mission of restoring or enhancing professionalism.<sup>22</sup>

Still, not all of the profession's actors and commentators have criticized or opposed the modern lawyering trends. A number of lawyers and commentators have refused to enlist in the developing "crusade" for greater professionalism.<sup>23</sup> Some entities have attempted to operate multi-state and multi-country law firms much like multinational corporations.<sup>24</sup> Prominent legal commentators and observers have made law firm operations and earnings front-page news, at least in their own publications authored *by lawyers for lawyers*. The message of this cadre of the legal press is the promotion of business aspects of the law, including the lionization of profitability and at least implicit criticism of law firms that do not perform like Intel, Microsoft, or Berkshire Hathaway.<sup>25</sup>

This business-forcing movement of the law is somewhat difficult to characterize as a school, but it is nonetheless a powerful theme

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21. See, e.g., FLORIDA BAR COMM. ON PROFESSIONALISM, THE RULES REGULATING THE FLORIDA BAR AND IDEALS AND GOALS OF PROFESSIONALISM (1991); AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATION ON DISRUPTION OF THE JUDICIAL PROCESS (1970) (expressing concern that growing use of "disruptive" litigation tactics may become permanent); Robert N. Saylor, *Rambo Litigation—Why Hardball Tactics Don't Work*, A.B.A. J., Mar. 1988, at 79 (criticizing overly aggressive litigation behavior as both improper and ineffective).

22. See Smith, *supra* note 20 (describing Florida Center for Professionalism); see also AMERICAN BAR ASS'N, *supra* note 5, at 265.

23. See, e.g., Atkinson, *Dissenter's Commentary*, *supra* note 9; Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657 (1994). Professor Atkinson's dissent includes an opposition to what most lawyers would regard as baseline courtroom decorum. For example, in his article in this Symposium, he cites a lawyer's purposeful spilling of a water pitcher in order to disrupt the examination of a witness and implicitly labels this behavior fair advocacy and permissible zealous client representation. See Rob Atkinson, *Br'er Rabbit Professionalism: A Homily on Moral Heroes and Lawyerly Mores*, 27 FLA. ST. U. L. REV. 137 (1999).

24. See, e.g., Paul M. Barrett, *A Once-Stodgy Firm Makes a Flashy Return, but at What Cost?*, WALL ST. J., Aug. 17, 1998, at A1 (describing revamping of Cadwalader, Wickersham & Taft into leaner, meaner, more profitable firm, which led to litigation by ousted partners). The article's subheadlines convey some of the flavor of the criticism of the new Cadwalader: "Putsch and Shove," "Cadwalader Ousted Partners And Ushered in Profits: A View of Law's New Face," and "The Maitre d' Gets the Ax." *Id.*

25. For example, *American Lawyer* compiles the *AmLaw 100*, a listing of the largest, most profitable law firms in the nation, and ranks them accordingly. See *By the Numbers: Firms A-Z*, AMERICAN LAW., July 1998, at Supp. The *National Law Journal* compiles the *NLJ 250*, a listing of the largest firms in rank order, with information about their income, profitability, and deployment. See Patrick Oster, *Index to Law Firms on the NLJ 250 Survey for 1998*, Nov. 16, 1998, at C5. Firms and their competitors follow these statistics closely. See, e.g., Barrett, *supra* note 24, at A1 (noting with prominence that the Cadwalader Firm had profits of *only* \$425,000 per partner prior to reorganization, but in 1997 each partner enjoyed profits of nearly \$800,000).



moving law in the direction of greater commercialism.<sup>26</sup> In general, however, these social forces could be characterized as arguing for a more business-like approach by the legal profession rather than the replacement of the professionalism paradigm.

In the academy, most of the commentary has been what might be termed "pro-professionalism" in that it takes exception to at least some of the monetary strains imposed on modern practice and promotes a return to a more socially responsible model of lawyering.<sup>27</sup> Although there have long been works criticizing lawyers for being insufficiently businesslike, most of these criticisms have come from outside the academy.

Professor Russell G. Pearce is one critic who stands apart from the pack in a number of ways.<sup>28</sup> Pearce's work evokes concern that the anti-lawyer movement is in full swing. He is not a senior fellow at an institute funded by polluters, economic imperialists, or vice-peddlers. He does not operate a mixed practice of law, accountancy, and consulting. He teaches Professional Responsibility at a mainstream law school.<sup>29</sup> He is not a drafter of Sam Adams-like broadsides but a serious legal scholar whose past writings have been sup-

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26. Representative figures are Steven Brill, the founder of *American Lawyer* magazine, and Howard Finkelstein, founder of the *National Law Journal*. See *supra* note 25. Although their editorial stances often invoke professionalism values by criticizing conflicts of interest and lawyer self-dealing, they have also spearheaded a move to a world where lawyers are more conscious than ever of firm size, profits, and projected growth. See William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 579-80 (1985). Simon compares *The American Lawyer* to "How to Put Pep in Salesmanship," a work recommended by the fictional Dr. Geake to a class of medical students with the admonition not to spend so much time thinking about ethics that they forget that they will be judged by their wealth. See *id.* at 570 (quoting SINCLAIR LEWIS, ARROWSMITH 85 (1925)). Similarly, government leaders such as the Clinton Administration's Assistant Attorney General Joel Klein can be seen as part of this movement for actions such as pursuing an antitrust claim against the American Bar Association accreditation process for law schools and obtaining a consent agreement backing the ABA away from collecting and sharing comparative law school salary data.

27. See, e.g., Symposium, *Conference on the Commercialization of the Legal Profession*, 45 S.C. L. REV. 883 (1994); Symposium, *The Future of the Legal Profession*, 44 CASE W. RES. L. REV. 333 (1994); Symposium, *Professionalism in the Practice of Law: A Symposium on Civility and Judicial Ethics in the 1990s*, 28 VAL. U. L. REV. 513 (1994). Although there are many trenchant commentaries criticizing a romanticized or doctrinaire version of professionalism, these works generally argue for a different vision of the profession rather than a rejection of professional self-identification altogether. See, e.g., Atkinson, *Dissenter's Commentary*, *supra* note 9, at 343 (characterizing professionalism movement as being "reductionist" and having an "intolerant tone"); Mashburn, *supra* note 23, at 662 (suggesting that the professionalism ideology and related codes are used to suppress dissent and marginalize outsiders); Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773, 775-77 (reviewing AMERICAN BAR ASS'N, PUBLIC SERVICE, *supra* note 5, and criticizing the ABA's Commission on Professionalism for inadequate exploration of the concept of professionalism).

28. Russell G. Pearce is a Professor of Law at Fordham University School of Law.

29. He takes it seriously. See Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719 (1998).

portive of the lawyer-statesman ideal and the application of law for the greater public good.<sup>30</sup> Consequently, when Pearce adopts as his mantra for the coming century the axiom that law should abandon the professionalism paradigm that has so long been its underpinning, it is hard not to take notice. Pearce argues that law should be characterized as a business rather than a profession and regulated accordingly under a business paradigm.<sup>31</sup> To be sure, others have suggested that law could profit from greater importation of economic and business principles, or at least the use of such principles to analyze the state of the practice of law.<sup>32</sup> In doing so, however, these commentators have not forsaken the basic core of the professionalism paradigm.<sup>33</sup> Pearce is the first to take the proverbial plunge and urge replacement of the professionalism organizing thesis with the business organizing thesis.

As a result (and with some risk of oversimplification and overpersonalization), this commentary focuses on Pearce's working thesis.<sup>34</sup> He deserves considerable credit not only for being a contrarian voice resisting to some degree the nostalgia and romance characterizing some modern writings defending professionalism, but also for refusing to rest upon mere criticism of the status quo. Instead, he articulates a clear, if incomplete, alternative vision that draws the entire *whither goest the practice of law* debate into sharper definition.

Pearce, however, sacrifices some clarity and contrarian quality of his vision by arguing for a "kinder, gentler" business paradigm for

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30. See, e.g., Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241 (1992).

31. See Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-as-Business Paradigm*, 27 FLA. ST. U. L. REV. 9 (1999) [hereinafter Pearce, *Law Day 2050*]; Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995) [hereinafter Pearce, *Paradigm Shift*].

32. See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* (1991); Gilson, *supra* note 5, at 871 ("By applying economic analysis to highlight the critical role of professionalism in the market for legal services, it is possible to demonstrate the importance of both professionalism as a concept and economics as a means to analyze it."); Ronald J. Gilson and Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985) (applying portfolio theory and the economic theory of agency to analysis of the corporate law firm).

33. For example, Gilson describes himself as in alliance with the more traditionalist writers William Simon and Robert Gordon in what he terms the "Stanford Neo-Radical Rehabilitation of the Professionalism Project." See Gilson, *supra* note 5, at 888 n.41. Although Gilson makes this comment with his tongue at least partially in his cheek, it is clear that Gilson, on economic grounds, supports retention of the basic edifice of the professionalism paradigm. See also Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES* 230 (Robert L. Nelson et al. eds., 1992); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U.L. REV. 1 (1988).

34. See Pearce, *Paradigm Shift*, *supra* note 31, at 1265-76; Pearce, *Law Day 2050*, *supra* note 31, at 18-19 (suggesting that the professionalism paradigm is contradictory and predicting its ultimate rejection by lawyers).

law.<sup>35</sup> Apparently, he is unwilling to embrace a complete laissez-fair business of law. Instead, he argues for a moderate way, or “Middle Range,” between a pure market regime for lawyering and what he characterizes as the haute professionalism ethos that has traditionally strangled the law but has decreased in force so greatly as to lose its descriptive power.<sup>36</sup> To some extent, this Article not only takes the liberty of focusing on one particular vision of law as a business, but it also paints the business thesis as a straw man, although Pearce’s actual business paradigm is a more nuanced figure.<sup>37</sup> In addition, the Pearce “Middle Range” business kingdom, if shaped to respond to my criticisms, would look remarkably like a professionalism paradigm. Consequently, it loses its identity, suggesting that law needs the professionalism paradigm, at least in fact if not in name.

Nonetheless, this Article argues that even if the law-as-business construct is molded into something less radical than a Spencerian nightmare of pure laissez-faire lawyering, Pearce’s project points American law and American lawyers toward a potentially disastrous fork in the road of sociopolitical development. No matter how refined the final product, a business-based construct of lawyering holds inherent evils. The mere act of adopting an organizing schema utilizing a business paradigm must be rejected—not because it removes lawyers from a pedestal, but because it fails to regulate lawyers in a manner that will bring out the best and suppress the worst in them, the law, and society. This Article argues that although the professionalism paradigm has its problems, it remains the organizing principle most likely to lead to a better practice of law across the many dimensions of lawyering. For lawyers to shun defining themselves as professionals and instead characterize their work as business is to embrace the descent of the modern lawyer rather than resist it.

In Part II, I will briefly set forth the propositions underlying Pearce’s thesis that a shift to the business paradigm in the regulation of lawyers is imminent and necessary. I will then explore the rationale underlying professionalism, including nontraditional justifications for the model; the nature of Kuhnian paradigm shifts, concluding that the evidence is insufficient to support the prediction of an imminent shift; and the nature of the proposed business paradigm, concluding that it is too incomplete to be functional and, due to

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35. Pearce states:

More appealing than the status quo and market alternatives is a Middle Range approach. It combines the advantages of a market system with a communitarian moral vision and retains a place, though a limited one, for the current institutions of the bar.

Pearce, *Paradigm Shift*, *supra* note 31, at 1269.

36. *See id.*

37. I do this not to be rhetorically unfair to Pearce or his thesis, but to draw in higher relief the pitfalls I fear should the law-as-business ethos take hold.

the impoverished nature of business ethics, would likely aggravate law's modern woes further.

Part III will discuss the sociology of the legal community today, providing a brief historical glance at legal regulation, an overview of the teachings of sociology regarding group norms, and a discussion of the importance of these ideas in evaluating and selecting a paradigm for governing lawyers. Part IV will then analyze and compare the professionalism and business paradigms in the light of sociology's teachings, concluding that professionalism continues to offer a superior approach to influencing the behavior of attorneys in the way most beneficial to society. Part V then assesses the inevitable shortcomings of the business paradigm, using specific examples from the business world and from other professions such as medicine. I conclude that the consequences of departing from a professionalism model are quite dire and will result in further decline of lawyers and the practice of law rather than the renaissance suggested by Pearce.

## II. The Incomplete Case for a Paradigm Shift to Law-as-Business

### A. Pearce's Thesis

Pearce's thesis, first argued in 1995 and implicitly reiterated in this Symposium, can be reduced to the following propositions:

- (1) The underlying rationale for crafting law as a profession was always inherently flawed;<sup>38</sup>
- (2) The flaws of the professionalism paradigm have become more pronounced in the modern era.<sup>39</sup>
- (3) These modern pressures have so undermined the professionalism model as to place American law on the precipice of a Kuhnian paradigm shift.<sup>40</sup>

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38. See Pearce, *Paradigm Shift*, *supra* note 31, at 1230-32, 1237-40; Pearce, *Law Day 2050*, *supra* note 31, at 17.

39. See Pearce, *Paradigm Shift*, *supra* note 31, at 1237-50; Pearce, *Law Day 2050*, *supra* note 31, at 17.

40. See Pearce, *Paradigm Shift*, *supra* note 31, at 1246-63; Pearce, *Law Day 2050*, *supra* note 31, at 17-19. Indeed, in *Law Day 2050*, Pearce predicts that the paradigm shift will take place and essentially be complete by the mid-twenty-first century, burying the professionalism paradigm. One can only hope that Pearce's prognosticative powers are no better than those of Soviet leader Nikita S. Khrushchev, who made a similar boast in the 1960s.

By "Kuhnian," I refer to the prominent work on the sociology of science and the manner in which change occurs in the prevailing theories governing a discipline. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970) [hereinafter Kuhn, *SCIENTIFIC REVOLUTIONS*], a book described by Richard Rorty as "the most influential English-language philosophy book of the last half-century." Richard Rorty, *Untruth and Consequences*, *NEW REPUBLIC*, July 31, 1995, at 32, 33 (reviewing *KILLING TIME: THE AUTOBIOGRAPHY OF PAUL FEYERABEND* (1995)).

Kuhn argued that prevailing theory and doctrine within a scientific or scholarly community is to some degree socially constructed and does not flow ineludibly from empirical ob-

(4) We are in the midst of a "crisis" not only of political attack on lawyers but also "professional insecurity" because of the cognitive dissonance felt by lawyers whose real world challenges are inconsistent with the professionalism paradigm purportedly governing the practice of law.<sup>41</sup>

(5) Lawyers (I am trying not to talk about "the profession" in order to avoid loaded words) are divided over these issues in fundamental ways that cannot be resolved through the existing professionalism construct.<sup>42</sup>

(6) Efforts to "fix" the professionalism paradigm will not cure current problems.<sup>43</sup>

(7) A complete shift to a law-as-business organizing principle is necessary to resolve the modern woes befalling the law.<sup>44</sup>

(8) Aspects of law nonetheless distinguish it from an "ordinary" business, requiring that the law-as-business regulatory system (the "business paradigm") operate in the "Middle Range" between the status quo of professionalism and a pure market-based system.<sup>45</sup>

### B. *The Incomplete and Unconvincing Critique of the Status Quo*

My critique of Pearce's proposition begins with an examination of the traditional rationale underlying professionalism and Pearce's

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servation and consequent deductive conclusion. In times of "normal science," however, a prevailing paradigm that organizes the discipline dominates both the academy and the practice of the art. Practitioners of normal science give the discipline practical application or work for further discovery and to resolve outstanding questions or "anomalies" arising from differences between theoretical prediction and observed reality. However, when too many or too serious anomalies arise and cannot be adequately explained within the framework of the prevailing paradigm, pressure builds for a revision of the paradigm. Ultimately, a substantial alteration or shift in the paradigm takes place and the formerly dominant paradigm is either replaced or substantially altered. New theory ousts old, and this is reflected not only in daily operations of the discipline but also in the teaching and theorization of the academy.

For more expansive descriptions of Kuhn's analysis, see Pearce, *Paradigm Shift*, *supra* note 31, at 1230-37. See also Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 695-705 (1993) (comparing changes in civil litigation to scientific paradigm shifts discussed by Kuhn) [hereinafter Stempel, *New Paradigm*]; Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 647 n.44 (1990) (explaining that Kuhn used "paradigm" to mean "disciplinary matrix," "exemplar," and "model"); Thomas S. Kuhn, *Second Thoughts on Paradigms*, in THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE 293 (1977).

41. See Pearce, *Paradigm Shift*, *supra* note 31, at 1256-63; Pearce, *Law Day 2050*, *supra* note 31, at 18-19.

42. See Pearce, *Paradigm Shift*, *supra* note 31, at 1263-65; Pearce, *Law Day 2050*, *supra* note 31, at 18-19.

43. See Pearce, *Paradigm Shift*, *supra* note 31, at 1263-65; Pearce, *Law Day 2050*, *supra* note 31, at 22.

44. See Pearce, *Paradigm Shift*, *supra* note 31, at 1265-70; Pearce, *Law Day 2050*, *supra* note 31, at 20-22.

45. See Pearce, *Paradigm Shift*, *supra* note 31, at 1269-76; Pearce, *Law Day 2050*, *supra* note 31, at 20-22.

criticism of it. Pearce criticizes several aspects of the rationale underlying the professionalism paradigm in addition to criticizing the professionalism paradigm in action. He certainly thinks that the historical case for such a characterization, even if compelling a century ago, has become outmoded.<sup>46</sup> While there may have been some flaws in previous formulations of the rationale, any analysis must account for the important sociological works documenting the impact of social norms on behavior.<sup>47</sup>

However, the basis for crafting law as a profession may not be inherently flawed. Rather, our dominant explanations for why law must be viewed as a profession may be flawed. Previously persuasive rationales for a professionalism paradigm may be outdated, but the system of professionalism remains well justified by more modern policy goals. For example, a precept or doctrine may emerge based on one rationale but may maintain its value under a different rationale after the original justification becomes outdated.<sup>48</sup>

Pearce's analysis focuses on the traditional rationale offered for professionalism. As he articulates it, regulating an economic actor as a professional is justified where the activity in question:

- a) involves esoteric knowledge or great complexity;
- b) is thus beyond the capacity of lay regulation;
- c) thus requires professional self-regulation;
- d) and thus requires autonomy.<sup>49</sup>

As Pearce points out, proponents of this rationale consider the altruistic ideology accompanying professionalism to be derived from the potential for abuse occasioned by autonomy.<sup>50</sup> According to these theorists, this danger requires that the self-regulating professional reject financial self-interest and profit maximization in favor of a credo of altruism and client service in return for professional autonomy.<sup>51</sup>

The failure of the altruism rationale for professionalism hardly invalidates the professionalism paradigm in its entirety. As Pearce,

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46. See Pearce, *Paradigm Shift*, *supra* note 31, at 1238-56; Pearce, *Law Day 2050*, *supra* note 31, at 16.

47. See discussion *infra* Part III.

48. For example, the insurable interest doctrine, which requires a policyholder to have a legal or factual interest in the object of the insurance, was initially justified as a means of discouraging the purchase of insurance as a form of gambling. Over time, social aversion to gambling subsided; for example, the betting line is now a regular feature on the sports page. However, the doctrine is useful in discouraging moral hazard and insurance fraud. Policyholders with an insurable interest in the property or in the life-insured are less likely to engage in arson or murder to collect policy benefits. See JEFFREY W. STEMPEL, *LAW OF INSURANCE CONTRACT DISPUTES* §1.04[a] (1999); KENNETH S. ABRAHAM, *INSURANCE LAW AND REGULATION* 301 (2d ed. 1995).

49. See Pearce, *Paradigm Shift*, *supra* note 31, at 1238-40.

50. See *id.*

51. See *id.*

other scholars, and mass media have shown, the case for lawyer altruism is spotty and often more humorous than persuasive. Lawyers practice law primarily to earn a living. Becoming a professional does not negate the laws of nature or an individual's adherence to Maslow's hierarchy. Even the most professional lawyer wants to put food on the table before saving the world, but acknowledging this degree of lawyer self-interested motivation does not make lawyers unprofessional.<sup>52</sup> The professionalism paradigm can be vital in preventing a lawyer's perfectly understandable economic self-interest from metastasizing into socially undesirable behavior.

### 1. *Complexity and Specialized Knowledge*

Despite a century of development of the definitions of professionalism, Pearce's standard indicia of being a professional tend to miss the mark or understate the case for professionalism, at least for today's debate surrounding lawyers. Although lawyers have knowledge of complex matters, so do many workers. By this criterion, computer programmers, electricians, and auto mechanics are at least as professional as lawyers.<sup>53</sup> To a large degree, almost every aspect of modern life in a society governed by division of labor involves a considerable degree of specialized knowledge that is at least as esoteric as law. Use of the complexity criterion, at times, proves distinctly unhelpful for separating the professional from the nonprofessional. Whatever one's position on non-lawyer practice, it is hard to justify lawyer self-regulation and autonomy on complexity grounds, particularly when other complex fields are not as autonomous.

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52. Just as being compensated does not make one unprofessional, neither does being an employee. See FREIDSON, *supra* note 7, at 122 (noting that members of the five traditional professions of medicine, law, clergy, military, and university teaching have historically and frequently been salaried employees rather than independent contractors). However, lawyer professionalism may in some cases be significantly undermined by employee status, which may require revision of the *Rules of Professional Conduct* in order to give employee-attorneys greater autonomy. See discussion *infra* notes 278-318 and accompanying text.

53. At least, I do not fix my car, and I bet most mechanics do not draft their own wills or file lawsuits pro se. See FREIDSON, *supra* note 7, at 52-54 (noting that occupations such as architecture, dentistry, engineering, etc., are recognized as "professional, technical, and kindred workers," by the federal government).

Using only the complexity criterion, one can make a strong case that all of these workers really are "professionals." Common sense tells us that this cannot really be the case. At some point, a professionalism definition weighted too heavily toward complexity or specialized knowledge produces an awfully long list of professionals. Surely, when everybody is a professional, nobody is a professional, and the term has been drained of meaning. Consequently, additional criteria must be considered to categorize professionals today and to determine if a professionalism paradigm remains apt for application to law and the other traditional professions of medicine, the clergy, the military, and university teaching, as well as to relatively recent professional groups such as accountants and architects. See *id.* at 122 (listing five traditional professions).

At the same time, however, as Pearce points out, legal knowledge is accessible to the laity. Ironically, it may be easier to find out about the law than the proper method for trimming trees.<sup>54</sup> In fact, many nonlawyers have successfully mastered at least a corner of legal complexity, creating the current debate about the proper boundaries of non-lawyer practice.<sup>55</sup> Still, a failure of the complexity rationale for professionalism is hardly fatal to the professionalism paradigm so long as other, more persuasive rationales for professionalism hold force. As discussed below, there are alternative and more persuasive grounds for conceptualizing law as a profession. In addition, Pearce appears to undervalue the educational factor in professionalism. Professionalism scholars have traditionally stressed its educational component as well as the informational component in delineating the boundaries of "professionalism".<sup>56</sup> Although an intelligent layperson can find the law and obtain sufficient grasp of it to conduct legal activity, this does not give that layperson an appreciation of the full warp-and-woof of law that we believe is imparted by formal legal training.<sup>57</sup>

Perhaps the narrowness of Pearce's definition of "professional" can be gauged by comparing it with that of the National Labor Relations Act, which includes as criteria whether an individual's work is "predominantly intellectual and varied in character;" whether it involves a "consistent exercise of discretion and judgment;" whether it resists standardization; and whether it requires the kind of complex or specialized knowledge usually acquired after a prolonged period of formal study (rather than general education and apprenticeship).<sup>58</sup>

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54. And that is, on the whole, a good thing, even if it serves to fuel the misdirected business paradigm movement. A democratic citizenry should possess basic legal knowledge, and information about the law should be relatively accessible.

55. See Richard B. Schmitt, *Advocates Act as Lawyers, and States Cry 'Objection!'*, WALL ST. J., Jan. 14, 1999, at B1 (discussing a case against an advocate for disabled children and the debate over who is really protected by bans on unauthorized practice of law).

56. See FREIDSON, *supra* note 7 at 25, 59-60.

57. This is one major reason that America moved from informal legal education via apprenticeship to full-time law schools. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983) (describing the development of American law schools).

58. See 29 U.S.C. § 152(12)(a) (1994) (added in 1947 by the Taft-Harley Act, ch. 120, § 101, 61 Stat. 136, 137), *discussed in* FREIDSON, *supra* note 7, at 138-39. Similarly, the American Bar Association Commission on Professionalism found the elements of professionalism to be:

1. Receipt of special privileges from the state;
2. Substantial intellectual training;
3. Clients are required to trust the professional because their relative lack of training and knowledge prevents them from fully and accurately evaluating the professional's work;
4. The client's vulnerable position of trust is acceptable because the professional's self-interest is modulated by devotion to serving the client and the public interest;
5. Self-regulation by the professional.



In contrast to the NLRA, Pearce focuses relentlessly, but too narrowly, on the complexity and esoteric aspects of professionalism. As discussed further below,<sup>59</sup> discretion and judgment in the face of uncertainty surrounding important problems and life events, together, form a major part of lawyering, but this dimension of the practice is essentially unexamined in Pearce's critique. Although it remains to be seen whether wise discretionary judgment results more under a professionalism paradigm or a business paradigm,<sup>60</sup> any analysis and comparison must give sufficient appreciation to this aspect of professionalism, generally, and lawyering, in particular.

## 2. *Autonomy*

Another aspect of professionalism as traditionally defined is that professionals, to a large degree, manage their own time and activity.<sup>61</sup> Scheduling flexibility, as a component of professionalism, should not be confused with true autonomy. A lawyer may be completely non-autonomous yet intrinsically vested with a good deal of discretion over time management because of the nature of the enterprise. For example, a lawyer told to write an opinion letter confirming the legality of the employer's conduct is hardly autonomous.<sup>62</sup> Still, in constructing the required document, the lawyer, nonetheless, retains substantial control over the manner in which the document is created. For example, the lawyer might decide, for example, the order of research, the sources employed, the format of the letter, and the tone and argument, as well as the lawyer's own use of time—drafting the letter at midnight, for example, because she went to her child's school play in the afternoon. Nevertheless, it would be a mis-

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*See* AMERICAN BAR ASS'N, *supra* note 5, at 10, 11. Pearce addresses these elements more directly, largely in an attempt to debunk them; like the ABA, however, he pays insufficient attention to the underlying premises. The ABA does not ask hard questions about whether anything other than precatory language really prevents lawyers from taking advantage of comparatively less-informed clients. Similarly, Pearce does not ask whether the lawyer's potential to fleece clients is any greater than that of the auto mechanic, the plumber, or the electrician. My answer, elaborated in text, is that the lawyer's opportunity for self-dealing is only marginally greater than that of other vendors and that it is best controlled by stringent regulation and deterrent penalties rather than hoary platitudes about professionalism.

59. *See infra* notes 169-252 and accompanying text.

60. *See id.* (arguing that such judgment is more likely to be inculcated in lawyers under a professionalism paradigm and providing examples of business behavior arguably in conflict with this ideal).

61. *See* FREIDSON, *supra* note 7, at 149-55.

62. Furthermore, in a situation of such slavishness, this lawyer would cease to be a lawyer under my concept of the professionalism paradigm. *See infra* notes 169-252 and accompanying text. For purposes of discussion, however, one can concede the autonomy issue and continue to inquire whether a professionalism construct remains a better means of regulating lawyers than a business construct.

take to call this lawyer autonomous unless she is actually using independent, professional judgment in crafting the opinion letter.

Autonomy remains an important hallmark of professionalism—one indeed strained by modern developments. Historically, lawyers have had great autonomy. They get to decide for whom they will work and for whom they will continue to work.<sup>63</sup> Lawyers in traditional practice can fire clients, just as clients can fire lawyers. As discussed below,<sup>64</sup> the growth of in-house counsel and captive law firms has changed this landscape, generally making lawyers less autonomous, perhaps to a degree that violates the professionalism paradigm.

Nevertheless, lawyers as a group, without doubt, satisfy the autonomy criterion of professionalism. The problem is that, by this definition of being able to walk away, businesspersons are similarly autonomous. Intel and Microsoft are required to do something only by contract. They can pick and choose business partners and terminate contracts for material breach. Even without material breach, they can terminate contracts if they are willing to pay damages. Nonetheless, by the autonomy yardstick, lawyers as a group are still more professional than businesspersons, because lawyers, by virtue of their license to practice, hold an asset of value and can, in reality, earn a living without doing tasks they find wrong or distasteful. Although this is also a problem with the professionalism paradigm—that it insulates lawyers from pure market forces and thus may create more expense or inefficiency in the delivery of legal services—it also enhances autonomy and thereby makes lawyers less likely to be mere “business servants.”<sup>65</sup> Nonetheless, autonomy, alone, does not distinguish lawyers from businesspeople.

To the degree that it gives lawyers greater autonomy, I posit that the professionalism paradigm generally serves society, by encouraging attorneys to refuse to engage in frivolous or antisocial conduct merely to make a buck, more than it harms society through the protectionist licensing enjoyed by lawyers. Despite what Pearce identifies as the inevitable *Zeitgeist* leading us toward “Law Day 2050,” I believe the burden of persuasion rests with him and other advocates of the business paradigm. Unless they can show that society wastes so much on over-priced legal services as to far exceed the value of

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63. Thus, if the client in the example above tells the lawyer to author an opinion letter blessing the client's conduct by, for example, predicting for a prospective investor that there will be no adverse effects from pending litigation, even though the lawyer knows the client will be held responsible for millions of dollars in damages, the lawyer can refuse to write the letter.

64. See *infra* Part V.E.

65. Pearce and I would unite in criticizing this type of lawyer. See Pearce, *Paradigm Shift*, *supra* note 31, at 1237-50.

greater lawyer autonomy, we should not be rushing to tear down the professionalism paradigm.<sup>66</sup>

Ironically, the ravages of lawyering under a business paradigm are succinctly illustrated by Pearce himself in his contribution to this Symposium. Through the dramatic vehicle of a "Law Day" speech given during the mid-twenty-first century, Pearce, as the mythical speaker, reflects on law's move from a professionalism paradigm to a business paradigm. Extolling this change, he cites a few examples of law practice in the year 2050 that would not have been permitted during the professionalism era.

Pearce predicts that the use of "Legal Maintenance Organizations, or LMOs, [will become] common parts of employee benefit packages, as well as viable options for individual consumers who could afford them."<sup>67</sup> He further predicts that consumers will find that "LMOs, like HMOs . . . , make services more affordable . . . by limiting the consumer's control of the delivery of services."<sup>68</sup> As discussed below<sup>69</sup> in connection with the absence of professionalism in some HMOs, the predicted growth of the LMO may be no cause to celebrate.

The extension of the contingent fee to criminal and family law cases, will, according to Pearce, make "counsel of choice more affordable in these areas."<sup>70</sup> If this is the future under a business paradigm, I can only take comfort in knowing I will be safely retired (and probably buried) by 2050.

In Pearce's 2050, "most lawyers work for the 'Big 11,' LMOs, or legal service providers like H&R Block."<sup>71</sup> As discussed throughout this

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66. To an extent, of course, by placing the burden of persuasion for change on Pearce I am being a bit unfair. Not only would it be hard for him to "prove" the cost increase resulting from the restricted entry into the practice of law, it would also be hard to convince me and other defenders of the professionalism paradigm that the loss of lawyer autonomy would not carry a high price tag. Lawyer autonomy and its value are intrinsically hard to measure, however, because, so often, the benefits occur out of public view. We simply cannot know with certainty how many times a lawyer, because of her ability to say "no," requires clients to do the right thing.

I posit that this happens a great deal and creates substantial value for society, although much of my belief is premised on intuition and personal experience rather than systematic study and measurement. For example, as a litigator in practice I frequently saw that clients initially resistant to providing reasonable discovery material or accepting a reasonable settlement offer came around on the issue because they heeded counsel's advice. Neither I nor my former colleagues ever actually threatened to "fire" the client if the client was unreasonable or urged improper conduct. Nonetheless, the effects of lawyer autonomy were palpable in that we refused to accede to wishes for improper behavior; the nature of the professionalism paradigm made it implicit that we could cease working on the matter at any juncture. As noted previously, businesspersons can quit at any time as well. I simply argue that fewer businesspersons have the practical ability to quit—and the autonomy it brings—than lawyers.

67. Pearce, *Law Day 2050*, *supra* note 31, at 12.

68. *Id.* at 12 n.21.

69. See *infra* notes 277-94 and accompanying text.

70. Pearce, *Law Day 2050*, *supra* note 31, at 13.

71. *Id.* at 14.

article, lawyers working for nonlawyers in the course of performing legal services is highly problematic because it inevitably leads to pressures tending to compromise lawyers' independent judgment. Although it is probably too late to turn back the clock on in-house counsel, threats to lawyer independence engender concern and scrutiny rather than a rush to expand its reach. Similarly, the concentration of law into "megafirms" is considered by many a highly problematic trend. Two well-regarded experts on legal ethics have proposed that law firms be limited in size to fifty lawyers to reduce the tendency of economic expansion and profit maximization which cloud the attorney's commitment to the system of professional responsibility.<sup>72</sup>

Perhaps more disturbing is what Pearce's brave new world entails for conflicts of interest: The business paradigm will apparently make society so confident in lawyers' ability to resist temptation and avoid inadvertent intra-organizational leaks that we will permit lawyers *in the same office* to work both sides of the street *in the same matter*. He predicts that "the Federal Code [will] make all conflicts personal"<sup>73</sup> and end the current law of imputed disqualification,<sup>74</sup> although "requir[ing] strict screening procedures to ensure confidentiality and loyalty within a firm."<sup>75</sup>

If these examples of the future are indicative of life under the business paradigm, Pearce has hardly made much of a brief for change. Each of these "achievements" of the business paradigm is, at least arguably, a decline in the quality of law and society.

A fundamental weakness of Pearce's critique is its *de facto* focus on specialized knowledge, an element of professionalism most associ-

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72. See RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 238-40 (1999). *But see* Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 *FORDHAM L. REV.* 125 (1991) (espousing a contrary view by arguing that bigger institutions with more at stake make for prominent and cooperative targets of regulation).

In my own view, critics of large law firms and money, as a common denominator, have a compelling point, but it also appears true that large firms often are better at establishing systems for avoiding professional lapses such as undiscovered conflict checks, missed statutes of limitation, or failure to cover open cases of the vacationing partner. There may indeed be slouching toward greed in the large law firm, but the economically secure large law firm is also more likely to have the fortitude to say "no" to clients who seek to bend the rules. After all, Pearce's mythical Cravath & Wachtel firm does not need the money that badly. See Pearce, *Law Day 2050*, *supra* note 31, at 10. Many small firms or solo practitioners will be unable to say no and lose a large fee. Rather than focusing on size alone, it is more important to focus on firm culture, which shapes lawyers, and occupational culture, which shapes firms and lawyers.

73. Pearce, *Law Day 2050*, *supra* note 31, at 16.

74. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (providing that if lawyers practice in a firm, "none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so" by the conflict rules applicable to individual attorneys) [hereinafter RULE].

75. Pearce, *Law Day 2050*, *supra* note 31, at 16.

ated with a particular school of writings about professionalism.<sup>76</sup> Pearce uses this school of thought as his traditional definition of professionalism, finds it wanting, and then essentially adopts a "market control or collective project model" of professionalism espoused by one school of professionalism writers.<sup>77</sup> Finding market control a better explanation of the lawyer professionalism phenomenon leads Pearce to resolve the perceived hypocritical contradiction by embracing a market-based business paradigm.<sup>78</sup> Although the knowledge-based observations of professionalism are important, Pearce gives them insufficient appreciation in his relentless explanations of professionalism based on market-oriented protectionism. In doing so, he not only gives insufficient attention to the nuances of the knowledge-based views of professionalism but tends to overlook, almost entirely, the sociological school of professionalism associated with Talcott Parsons, Emile Durkheim, and others.<sup>79</sup> This soft-pedaling of the sociological perspective on professionalism, in favor of professionalism's focus on specialized knowledge, is a real Achilles' Heel in the Pearce thesis. Most defenders of the professionalism paradigm base their case much more on the sociological perspective than on the special expertise of lawyers.<sup>80</sup> A richer understanding of professional activities requires a greater appreciation not only of the professional's marketplace but also of the sociology of professionals as compared to other workers. Appreciating these factors leads to considerable trepidation regarding Pearce's proposed business paradigm and furthers greater appeal for the professionalism paradigm.

### 3. *Altruism*

As Pearce argues, the traditional rationale for treating some workers as professionals is flawed and, at times, unrealistic. For ex-

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76. See, e.g., Andrew Abbott, *The New Occupational Structure: What Are the Questions?* 16 WORK AND OCCUPATIONS 273-91 (1989); FREIDSON, *supra* note 7.

77. See, e.g., RICHARD L. ABEL, AMERICAN LAWYERS (1989); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM (1977).

78. See Pearce, *Paradigm Shift*, *supra* note 31, at 1267 ("The anomaly arising from the Professionalism Paradigm's failure to curtail the business conduct of lawyers disappears under the Business Paradigm. If law is a business, the business conduct of lawyers is expected, not problematic.")

79. See, e.g., EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS (Cornelia Brookfield trans., 1957); TALCOTT PARSONS, ESSAYS IN SOCIOLOGICAL THEORY (rev. ed. 1954); HARRISON M. TRICE, OCCUPATIONAL SUBCULTURES IN THE WORKPLACE (1993).

Although he did not focus on the professions per se, prominent sociologist Robert Merton's writings on social behavior buttress quite formidably the writings of Durkheim and Parsons. See ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (rev. ed. 1968) [hereinafter MERTON, SOCIAL THEORY]; ROBERT K. MERTON, ON THEORETICAL SOCIOLOGY: FIVE ESSAYS, OLD AND NEW (rev. ed. 1967) (including updated portions of material first published in 1949) [hereinafter MERTON, ON THEORETICAL SOCIOLOGY].

80. See, e.g., Simon, *supra* note 26, at 575 n.27 (citing writings of Adolph Berle and Lon Fuller).

ample, Pearce has considerable fun with Roscoe Pound's romanticized and flowery description of a profession as the "[p]ursuit of the learned art in the spirit of a public service" where "[g]aining a livelihood is incidental" to the lawyer.<sup>81</sup> Probably more accurate is the famous *New Yorker* cartoon in which several law firm partners chastise a young associate for expressing corny idealism at a firm cocktail party: "We practice law to make money, Hawkins. If you can think of a better reason to practice law, let's hear it."<sup>82</sup>

According to Pearce, the traditional rationale for defining professions and permitting them to self-regulate was always flawed, but these problems have become more pronounced in the modern era. He identifies two particularly dangerous types of problems emerging from the dysfunction of professionalism: the "profit-maximizer" attorney and a variant, the "business servant" attorney.<sup>83</sup> The former uses the professional perch to reap enhanced profits from clients and others without adding value.<sup>84</sup> The latter are so rabidly wrapped up

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81. Pearce, *Paradigm Shift*, *supra* note 31, at 1245 n.75 (quoting ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953)).

82. The quote is from memory; the cartoon appeared sometime in the 1970s in the *New Yorker*. Indeed, many attorneys were quite open about enhancing professional status through self-regulation. For example, in 1933, Second Circuit Judge Martin Manton urged the bar to regulate strongly in order to limit the number of lawyers and address a perceived danger of overcrowding. See Martin Manton, *A "New Deal" for Lawyers*, 19 A.B.A. J. 596 (1933). Perhaps, in retrospect, it was not altogether surprising that Judge Manton later was found to have taken bribes. See GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 141-43, 257-61, 503-10 (1994); Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, *LAWYERS' IDEALS/LAWYERS' PRACTICES*, *supra* note 33, at 157.

Manton's fall from grace remains well known; it is so provocative that it probably continues to serve as a deterrent to tempted judges, in addition to whatever criminal law deterrent exists. See *In re Levy*, 30 F. Supp. 317, 329 (S.D.N.Y. 1939) (disbarring attorney for, among other things, giving Manton \$50,000 unsecured "loan" that was never repaid while representing client before Manton). As discussed below, in the world of the business paradigm, criminal and other regulatory deterrents become the overriding bulwark against antisocial behavior; under the professionalism paradigm, however, there are additional important deterrents and incentives that arguably make for better conduct by lawyers. See *infra* Part IV; see also GUNTHER, *supra*, at 278, 503-13 (noting that, even prior to Manton's bribery coming to light, Learned Hand thought him a poor judge exhibiting unprofessional approach to deciding cases); Alfred S. Konefsky, *Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel*, 65 U. CIN. L. REV. 1169, 1192-3 (1997) (criticizing Manton's reasoning and decision in contract litigation).

83. See Pearce, *Paradigm Shift*, *supra* note 31, at 1231, 1237-50.

84. Arguably, he also undermines value. For example, the plaintiff's bar, particularly class action lawyers, has been subjected to substantial criticism for at least two decades. The standard allegation is that these lawyers abuse the professional prerogative by filing litigation that has settlement value for them but has a negative impact on society through disruption of useful enterprises. Another critique has been that plaintiffs' class action lawyers may settle a meritorious case too cheaply in order to pocket fees without incurring the substantial financial risk of a long time investment and a low damages award or loss. See generally John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995) (discussing, among other things, collusive settlements and proposing solutions); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Am-*

in the fiduciary-morality-of-lawyering-as-zealous-advocacy that they assist clients in antisocial endeavors.

To the extent that Pound's vision of the lawyer community suggests that professionals are saints,<sup>85</sup> it is of course wrong, and Pound's great contributions to law and society do not make the statement any less wrong. Nonetheless, pointing out that lawyers are not saints hardly deals a crushing blow to the professionalism paradigm. Because lawyers are not saints, the professionalism paradigm in fact takes on greater force. The choice is not between the professionalism model and Nirvana. The choice is between the professionalism paradigm and competing methods of regulating lawyers, such as the business paradigm. On this count, Pound's views retain a good deal of truth. He observed that "in a business or trade [gaining a livelihood] is the entire purpose."<sup>86</sup> Imperfect as it may be, the professionalism paradigm may be the best-known means of exacting socially useful behavior from lawyers.

#### *4. Additional Considerations in Characterizing Professions Favor Continuing to Consider Law as a Profession*

##### *(a) Judgment*

On one hand, Pearce observes that there is nothing particularly special about lawyers as human beings.<sup>87</sup> On the other hand, he ignores what sociologists and psychologists tell us about the impact of social organizational structures on human behavior.<sup>88</sup> Rather than focusing so intently on a few criteria for assessing classification of the professional and nonprofessional, a shift in perspective is required. Lawyers should continue to be regulated as professionals rather than businesspersons, not because of the traditional bases for professional self-regulation such as the complexity rationale, but because the professionalism paradigm does a better job of fostering

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*chem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995) (discussing ethical problems raised by case in which settlement was reached before the class was certified); Symposium, *The Institute of Judicial Administration Research Conference on Class Actions*, 71 N.Y.U. L. REV. 1 (1996) (devoting the conference to a discussion of the relative costs and benefits of class-action lawsuits).

85. See *supra* Part II.B.3 (discussing Pearce's critique of Pound's altruistic model).

86. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953), quoted in Pearce, *Paradigm Shift*, *supra* note 31, at 1245 n.75.

87. See *supra* text accompanying notes 50-60 (discussing Pearce's argument that professionalism cannot be adequately justified by traditional rationales because lawyers are no more altruistic than anyone else and because they cannot be distinguished from many "nonprofessionals" on the basis of the complexity of their work or their possession of esoteric knowledge).

88. See *infra* Part III for discussion of the impact of informal norms, such as those enforced by the professionalism paradigm, on human behavior.

judgment with regard for public as well as private interests among lawyers than does the business paradigm.<sup>89</sup>

One significant feature of legal practice is that it requires the application of reasoned and seasoned judgment in the face of uncertainty. Lawyers conduct implicit cost-benefit analyses on a rolling basis and venture predictions regarding the future and their ability to impact the future. While this aspect of lawyering is related to complexity,<sup>90</sup> nevertheless, it is the "judgment" required by the complexity that sets law apart from most other occupations. The workings of a modern automobile are at least as complex as many legal issues. When a car breaks down, however, the course of action is usually clear: Fix the car. Issues of the efficacy of action simply do not arise in the same manner as takes place in law. Putting in a new distributor cap has a more predictable impact than filing a summary judgment motion. Deciding whether to sue a long-time supplier is quite a bit more involved than deciding whether to change the oil at three thousand miles, even if the oil change and the complaint drafting are deemed equally complex.

This point is hardly novel. A number of commentators, most notably Dean Anthony Kronman, have made essentially this argument for professionalism by stressing the importance of judgment and wisdom in lawyering.<sup>91</sup> My additional comment is not only to restate the importance of these qualities in lawyers. Rather, it is to stress that these aspects of practicing law are what make it a profession rather than merely another complex or technical occupation. In Tony Kronman's contribution to this Symposium, he not only reiterates that values are at the core of legal professionalism but also notes the degree to which work satisfaction and pride relate to the social utility of work.<sup>92</sup> One aspect of law as traditionally practiced that makes it an attractive field for talented persons is its operation under a profes-

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89. As others have stated:

[E]ven private lawyers committed to unswerving loyalty to client interests still must assume a quasi-public responsibility for honest observance of the basic rules and procedures of the framework, even in the face of the many opportunities they have to ignore the rules with impunity. Once this is acknowledged, the free market liberal faces the problem of how such islands of civic virtue might be secured in a world of generalized self-seeking. It is unlikely that he will be able to come up with a better answer than the one offered by professionalism.

Gordon & Simon, *supra* note 33 at 235. See also, TALCOTT PARSONS, *A Sociologist Looks at the Legal Profession*, in *ESSAYS ON SOCIOLOGICAL THEORY*, *supra* note 79, at 370, 384 (noting that the lawyer acts "as a kind of buffer between the illegitimate desires of his clients and the social interest").

90. For example, it is harder to estimate an appellate court's ruling on a complex point of law than on a simple and long undisturbed legal doctrine.

91. See Anthony Kronman, *Legal Professionalism*, 27 FLA. ST. U. L. REV. 1, 5 (1999) [hereinafter Kronman, *Legal Professionalism*].

92. See *id.* at 4.



sionalism paradigm. Perhaps society should consider the potential impact of the proposed paradigm shift on this aspect of lawyering.

*(b) Social Harm and Incompetent Legal Representation*

As other commentators in the field of professional responsibility have pointed out, there are several unique hazards and difficulties posed by poor lawyering. First, consumers of legal services are particularly vulnerable to harm if services provided are incompetent or self-serving, since representation frequently deals with matters extremely important to the client. Second, improper or incompetent lawyering is difficult to detect in a timely fashion. Third, legal activity has potentially long-lasting and wide-ranging effects on society, requiring that its regulatory paradigm curb self-dealing by lawyers as much as possible.

For example, Stephen Pepper has noted that in a profession the services rendered are "frequently of the utmost personal concern" to a client,<sup>93</sup> and the quality of the services rendered "is untestable from the perspective of the layman."<sup>94</sup> Thus, the client is particularly vulnerable if the professional fails to perform adequately.<sup>95</sup> Moreover, the client normally "needs" the legal services or representation, and lawyer retention is not really discretionary.<sup>96</sup> Obvious examples for lay persons are divorce and will probate. For even small commercial entities, legal services are often needed for start-up, regular operation, compliance with the law, taxation, and reorganization com-

93. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 615 [hereinafter Pepper, *Amoral Ethical Role*]. Pepper recently reaffirmed his adherence to this indicium of professional activity and other traditional bases discussed in this article. See Stephen L. Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INS. L.J. 27, 43 n.42 (1997-98) (setting forth "definitional characteristics" of a profession, including among others the unique need for the services by individuals, the inability of laypersons to evaluate their worth, and the requirement of specialized training and education) [hereinafter Pepper, *Fundamentals*]. This important concept underlying the professionalism model has been set forth by a number of scholars. See, e.g., BURTON J. BLEDSSTEIN, *THE CULTURE OF PROFESSIONALISM* 87 (1976); ELIOT FREIDSON, *PROFESSIONALISM REBORN: THEORY PROPHECY, AND POLICY* 201 (1994); WILBERT MOORE, *THE PROFESSIONS: ROLES AND RULES* 4-22 (1970).

94. See Pepper, *Amoral Ethical Role*, *supra* note 93, at 615; see also Gilson, *supra* note 5, at 889 (discussing this and related traits of the delivery of legal services as matters of information asymmetry between lawyer and client).

95. As Freidson puts it:

In the vast majority of cases of professional work, however, clients are neither sophisticated nor powerful, so that the professional's position as gatekeeper of desired resources combines with a monopoly of organizationally relevant knowledge about how the system works to create a position of interpersonal power that few are in a position to challenge.

FREIDSON, *supra* note 7, at 174.

96. See Pepper, *Fundamentals*, *supra* note 93, at 43-44 n.42; Pepper, *Amoral Ethical Role*, *supra* note 93, at 615-17.

pelled by commercial forces. Litigation, particularly defense of criminal charges or a third party's civil suit, also tends to render legal representation indispensable.<sup>97</sup>

Lawyers' clients are more vulnerable than other consumers. One can be extremely dependent on a vendor but not particularly vulnerable.<sup>98</sup> By contrast, the client is far more vulnerable to the lawyer as well as more dependent.<sup>99</sup> For example, clients with counsel are normally forbidden, or at least strongly discouraged, from participating in certain aspects of adjudication such as sidebar conferences on evidentiary objections. The client depends on the lawyer to represent her or his interests. The client is extremely vulnerable to the lawyer's performance at sidebar, in chambers, in negotiation, and in discovery. If the lawyer concedes an important evidentiary point, waives privilege, or makes unduly revealing statements to opposing counsel, the vulnerable client is often stuck with the consequences.

Lawyers are agents with the power to bind clients,<sup>100</sup> which makes the client inherently vulnerable to lawyer error, especially if the matter is important to the client. Counsel's broad agency authority of counsel is quite distinct from that enjoyed by other service providers. In this way, lawyers are also different from other professionals such as doctors and accountants. Unless a patient is undergoing a procedure such as surgery, the doctor's authority is not self-executing. Unless the patient takes the pill, exercises more, loses weight, or gets more sleep, the doctor's prescription is not implemented. Similarly, a tax return must be signed by the client. By contrast, lawyers have a

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97. The consequences of litigation, however, are somewhat more readily apparent than other types of representation; for this reason, malpractice in this area is not as likely to create the "time bomb" problem discussed *infra*. See text accompanying note 101.

98. For example, I am dependent on the refrigeration system of the local grocer when I buy milk. I have no idea whether the milk has been kept sufficiently refrigerated, but, at home, I will discover instantly upon opening the product whether it has spoiled. I have the option to throw it out, avoiding whatever harm it may have posed.

99. I acknowledge the line is blurred where certain trade services have an element of danger. Even so, the provision of trade services, to the extent it has qualities of consumer importance, vulnerability, and undetectability, has aspects of a profession. There is specialized training and apprenticeship for these trades. In addition to external government regulation, there is often some form of professional self-regulation through trade associations and unions.

100. See, e.g., *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) (noting that a criminal defendant was precluded from calling a witness due to lawyer's oversight or, possibly, calculated decision not to include witness on pretrial witness list); *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (noting that a lawyer has authority to determine the content of briefs, pleadings, motions, and other papers until discharged by the client); *Cotto v. United States*, 993 F.2d 274, 281 (1st Cir. 1993) (finding that the client is bound by the court's determination to dismiss a claim for lack of prosecution due to a lawyer's inattentiveness). But see RULE 1.2 (providing that although an attorney generally controls the means of discharging representation, the client generally has control over the objectives of representation and has absolute authority over whether to accept a settlement in a civil matter and, in a criminal case, whether to plead guilty, waive a jury trial, or take the stand).

considerably larger realm of absolute binding power, triggered more readily by the nature of legal representation.

On the whole, legal representation is full of potential time bombs. Even in fast-track dispute resolution, clients may not be able to gauge the potential consequences of lawyer strategy and tactics until appeals or collateral attacks are exhausted.<sup>101</sup> For example, deficiencies in separation agreements may not be realized until years later. Tax returns may look correct but may ultimately lead to an IRS audit seven years after the initial filing. The adequacy of wills and trusts is often not tested until decades after legal services are rendered.

Thus, while it may be true that consumer dependence and complexity do not adequately distinguish lawyers and others traditionally viewed as "professional" from other vocations, legal services continue to be set apart from most daily commercial activity by the unique vulnerability of its consumers and the time bomb problem. These attributes call upon society for an organizing construct that will maximize the chances that such services will be rendered proficiently. "Ordinary," nonprofessional business activity, for the most part, either does not need the constraints of professionalism,<sup>102</sup> or is not conducive to self-regulation because of inappropriateness or impracticality.<sup>103</sup>

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101. This can happen, for example, in cases involving issues like whether the client should take the stand, which theory of damages is most persuasive, or whether to make a motion for a pretrial evidence ruling.

102. For example, most product failures do not pose the serious consequences that may ensue from legal malpractice or self-dealing. If a new suit rips, one returns it to the clothier. If bread is stale, one complains and asks for a refund or takes future business to another grocer. Some product failures are, of course, serious. The bread might be contaminated. In this instance, the danger is so life-threatening and immediate (neither of which is true with the majority of legal services) that self-regulation by grocers is not an option. Rather, tradition has established government safety regulations for food, including possible criminal prosecution, supplemented by private tort actions by victims.

103. For example, the consequences of using pharmaceutical or biomedical products may not surface for years. Thus, it is not surprising that the drug industry is subject to stringent regulation by the Food and Drug Administration (FDA), a fact criticized by business interests who frequently argue that new drug approval takes too long.

Self-regulation by the drug industry does not exist in an official sense but is, to some degree, present in a *de facto* sense. The FDA trusts drug companies to file truthful and complete applications for approval and continuously monitor reports of any adverse reactions and side effects. When this trust is violated, it makes headlines and engenders lawsuits.

However, drug development and manufacturing could not be self-regulated in the same manner as the practice of law precisely because this field is now mature and developed under the aegis of a business paradigm rather than a professionalism paradigm. To state the obvious, the pharmaceutical industry lacks the professional self-regulatory infrastructure of state supreme courts and the organized bar. In addition, years of development have given the world a pharmaceutical industry that is innovative and profitable—but dominated by business decision making that, if left unchecked, would almost certainly result in more drug-related injuries and deaths. For example, but for external regulatory prohibition, thalidomide and other harmful products would have been marketed in the United States by drug companies operating under a business paradigm. *See, e.g.,* Myron L. Mar-

(c) *The Gate-Keeping Mechanisms of Professionalism*

Although a business construct can encourage the delivery of high-quality products and services, there are fewer guarantees of a minimum level of quality than typically exist under a system deemed professional.<sup>104</sup> Law attempts to achieve, and probably succeeds in achieving, some minimum level of quality through its selective admissions policies; for the most part, only A and B students with minimally acceptable LSAT scores are accepted, even at non-prestigious law schools. Moreover, the bar examination prevents a significant number from practicing law without some measurable expertise. By comparison, the business paradigm provides almost no formal gatekeeping and informally restricts the activity only at the upper echelons of the field.<sup>105</sup>

In sum, a number of factors essentially unexamined by Pearce and other proponents of a business paradigm provide good reasons for continuing to configure law as a profession rather than a business. At the risk of sounding tautological, the professionalism paradigm is better able to prompt valuable lawyer behavior while constraining undesirable attorney actions; it is a regulatory program designed for regulating professionals. Many of the ethical rules for lawyers are designed to preclude or manage some of the negative possibilities that may ensue when the client is represented under typical circumstances.

For example, Model Rule of Professional Conduct 1.1 establishes a duty of competent representation.<sup>106</sup> Model Rule 1.2 establishes at least minimal client control over important matters of representation and establishes the basic framework for client control over objectives, while allowing the attorney a zone of professionalism in representing the client.<sup>107</sup> Other provisions of Model Rule 1 impose additional duties or prohibitions on counsel, largely to minimize the dangers presented by need, vulnerability, complexity, difficulty in evaluation, outside pressure, or financial self-interest. The lawyer's work for the

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lin, Comment, *Treatment INDS: A Faster Route to Drug Approval?*, 39 Am. U. L. Rev. 171, 177 & n.49 (1989) (noting that the FDA refused to approve thalidomide despite its use in Europe, but that application for its approval remained pending in the United States until it was discovered that the drug had caused over 1,000 defective births).

104. See FREIDSON, *supra* note 7, at 23-24 ("To characterize something as an amateurish job, or the work of an amateur, implies poor work, while to characterize something as a professional job implies good, reliable work of skill and quality.").

105. For example, you may need a Wharton M.B.A. to get in the door at a prestigious Wall Street investment bank. However, you can engage in a myriad of business activities with a bachelor's degree or less. By contrast, one may not enter even the lowest rung of the attorney pecking order without having been admitted to law school, passed law school, and passed the bar exam.

106. See RULE 1.1.

107. See RULE 1.2.

client must be diligent,<sup>108</sup> there must be adequate communication,<sup>109</sup> and fees must be reasonable.<sup>110</sup> The lawyer must observe strict duties of confidentiality<sup>111</sup> and avoid conflicts of interest between current or former clients<sup>112</sup> as well as avoiding activities that may cloud the lawyer's professional judgment and zealous representation of the client.<sup>113</sup> Lawyers also have stringent duties regarding the safekeeping of client property<sup>114</sup> and may be suspended or disbarred for merely commingling client and office funds.

I am not naive enough to suggest that the mere existence of these ethical rules makes every attorney always behave ethically. Nevertheless, the ethical regulation brought about under the professionalism paradigm is considerably more extensive than that governing ordinary business. Regulations also respond to the traits of the lawyer-client relationship generally associated with professionalism. To a large degree, the professionalism paradigm and the resulting legal rules run counter to the business considerations that would otherwise govern the activity of practicing law. The nature of legal services requires a regulatory regime that is unlikely to result under a business paradigm, including even the "Middle Range" hybrid proposed by Pearce.<sup>115</sup>

### *C. The Unpersuasive Empirical Case for a Paradigm Shift*

According to Pearce, the modern and growing businessification of law reveals the decay of the professionalism paradigm. Although the official ethos of lawyers is altruism and service, their actual activity is more attuned to obtaining clients, generating fees, and improving their financial fortunes through the sale of legal services. Pearce contends that today's "normal science" of lawyering is not well explained or regulated by the professionalism paradigm.<sup>116</sup> As a result, the professionalism paradigm is no longer doing what Thomas Kuhn said paradigms should do—organize and explain the phenomena of the world.

Thus, according to Pearce, lawyers are in the midst of a professional insecurity crisis because the professionalism paradigm in-

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108. See RULE 1.1.

109. See RULE 1.4.

110. See RULE 1.5.

111. See RULE 1.6.

112. See RULE 1.7, 1.9.

113. See RULE 1.8.

114. See RULE 1.15.

115. Pearce's "Middle Range" hybrid is discussed *supra* in text accompanying notes 35-37, 45 and *infra* in text accompanying note 135.

116. See *supra* note 40 (describing Thomas Kuhn's theory of paradigm shifts that take place when normal science under the prevailing paradigm does not adequately explain reality).

creasingly has less explanatory power for organizing their actual daily practice activity.<sup>117</sup> In short, the traditional professionalism paradigm has become far less relevant to their lives. This disjunction of the professionalism theory and the daily practice of law creates cognitive dissonance for lawyers. They are governed as professionals but their activity is that of businesspersons.

To Pearce, these fissures run so deep that they cannot be resolved by merely adjusting the traditional paradigm; something new is needed.<sup>118</sup> A new paradigm is in the offing, according to Pearce, as the professionalism paradigm threatens to collapse under the weight of its inadequacies and inconsistencies.<sup>119</sup> Lawyers attempting to resolve these problems through redoubled self-regulatory efforts are doomed to failure, because the problem cannot be solved by the existing paradigm. Furthermore, lawyers are divided over the best means to correct the situation. The infirmities and inconsistencies of the professionalism paradigm are so pronounced that attorneys attempting to work within it will be unsuccessful.<sup>120</sup>

Pearce asserts that the legal community's difficulties and professionalism's inability to resolve them indicate that American law is on the precipice of a Kuhnian paradigm shift. Thus, the time is ripe for a complete shift to a law-as-business model that will resolve the anomalies of the current model and better conceptualize modern legal practice for regulation.<sup>121</sup>

A commentator once observed that in law, "a little fact goes a long way."<sup>122</sup> I am at least as guilty as Pearce of applying "Kuhn Light" to legal issues;<sup>123</sup> still, it is an inferential leap of no small proportion to observe difficulties in the professionalism paradigm and immediately conclude that the paradigm is so useless that its displacement lies just around the corner.

As to Pearce's contention that modern lawyers are suffering cognitive dissonance from the discrepancy between the tenets of professionalism and the realities of the day-to-day world, it is true that there are real and important problems in the legal community today which remain unsolved by the professionalism paradigm. However, none of these problems equate to the paradigm paralysis Kuhn de-

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117. See Pearce, *Paradigm Shift*, *supra* note 31, at 1256-63.

118. See *id.* at 1263-65.

119. See *id.*

120. See *id.*

121. See *id.* at 1265-67.

122. David Cole, *Against Literalism*, 40 STAN. L. REV. 545, 545 (1988) (reviewing JAMES WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF LAW* (1985)). Cole states: "From the recognition that law is transmitted through words springs the school of law and 'literature.' From the fact that legal disputes involve the allocation of costs comes 'law and economics.'" *Id.*

123. See Stempel, *New Paradigm*, *supra* note 40, at 695-705 (applying Kuhn's theory of paradigm shifts to litigation reform and related issues).

scribed in his examples.<sup>124</sup> The inconsistency between a paradigm holding that the earth is flat and the fact that sailors are circumnavigating the planet is far greater than that created by the mere observation that lawyers occasionally act with avarice or dishonesty. The former is a clear failure of the paradigm, but the latter may simply be a failure of humans to adhere to the paradigm. While a lack of adherence may result because the paradigm's standards are too high, it may also result because more enforcement is needed.

Nor has Pearce set forth a persuasive case that a well-administered system of lawyer regulation based on professionalism cannot work, or even work well. Moreover, under Kuhn's criteria, Pearce's observation simply is not enough to suggest a crisis of normal science, let alone an impending paradigm shift. According to Kuhn, a dominant paradigm during a time of normal science attracts an "enduring group of adherents away from competing modes" of thought in the area; is sufficiently "open-ended to leave problems to solve"; and is studied by students of the discipline in order to join the community.<sup>125</sup>

Despite the ongoing debate over professionalism in law, there is no doubt that the professionalism paradigm enjoys the status of a dominant paradigm. Although there are many like Pearce who have criticized the professionalism regime and have argued for more practice of law as a business, there is not even a separate school of law-as-business thought to which these lawyers can retire to study the new gospel. There is not even a law school espousing the law-as-business paradigm that prospective students can attend.<sup>126</sup> If stu-

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124. See KUHN, *SCIENTIFIC REVOLUTIONS*, *supra* note 40, at 136-59 (providing as examples the Copernican Revolution, which first posited that the earth revolved around the sun; the replacement of the view that light was made of particles; and the shift from Newtonian physics to Einstein's theory of relativity and quantum physics).

125. See *id.* at 160-91; see also Stempel, *New Paradigm*, *supra* note 40, at 699-700.

126. One might argue that law schools stressing economic analysis such as those at the University of Chicago and George Mason University are closer to the business paradigm than to the professionalism paradigm. However, such an assessment seems incorrect. For example, the curriculum at the University of Chicago and the textbooks employed there are found at virtually every accredited American law school. George Mason's curriculum, which was designed to be different (for example, it has a required course in quantitative methods) is only marginally different. American law schools tend to be similar regarding professional education, which is not surprising since the organized bar plays a major role in the accreditation process. Hence, almost by definition, there cannot be a full paradigm shift in law unless legal education is extensively deregulated, which appears unlikely.

Even if one could staff a law school only with teachers and scholars adhering to the economic analysis school (and George Mason University may have done something close to that), these lawyers do not necessarily operate within a business paradigm. Students are taught to be lawyers sensitive to economic issues. They are not taught to be businesspersons with substantial knowledge of the law. For example, one does not see a large law of office management curriculum at the University of Chicago.

Similarly, faculty sensitive to market issues can hardly be said to have forsaken the professionalism paradigm. For example, Judge and University of Chicago Professor Richard Posner, a leading lawyer-economist, has rendered decisions quite consistent with the ethics

dents want to join the community, they must attend a conventional law school which is structured around the traditional paradigm of lawyer identity.

Law schools require students to take a course on professional responsibility, but do not require them to take a course on law office operations, marketing, total quality management, or searching for excellence. Legal scholarship has increasingly focused on the business of law; however, law schools do not include classic case studies such as the dissolution of the Finley, Kumble Firm,<sup>127</sup> or Kodak leaving Donovan, Leisure for Sullivan & Cromwell during its fabled anti-trust litigation.<sup>128</sup> Furthermore, even if law schools did not teach a vision of lawyering informed by the professionalism paradigm, the mere existence of a consistent, substantive legal curriculum itself tends to define the school as one that favors professionalism.<sup>129</sup>

As to this lack of activation energy for a paradigm shift, Pearce would undoubtedly respond that this is precisely the problem he attacks. Law is a considerably closed fraternity. Law schools must be accredited by the American Bar Association.<sup>130</sup> All of these schools

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rules propounded under the professionalism paradigm, implicitly finding much of that paradigm consistent with economic analysis. *See, e.g.*, *Greycas, Inc. v. Proud*, 826 F.2d 1560, 1565 (7th Cir. 1987) (holding an attorney liable for misstatements to a reasonably relying nonclient based on economic analysis of loan collateral that was consistent with professionalism norms); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266 (7th Cir. 1983) (disqualifying firm from subsequent representation based on its access to financial information during prior representation).

127. *See* KIM ISAAC EISLER, *SHARK TANK: GREED, POLITICS AND THE COLLAPSE OF FINLEY, KUMBLE, ONE OF AMERICA'S LARGEST LAW FIRMS* (1990); *see also* STEVEN J. KUMBLE & KEVIN J. LAHART, *CONDUCT UNBECOMING: THE RISE AND RUIN OF FINLEY, KUMBLE* (1990); MARK STEVENS, *POWER OF ATTORNEY: THE RISE OF THE GIANT LAW FIRMS* 38 (1987) (characterizing Finley, Kumble as the "P.T. Barnum of the legal profession"); Steven Brill, *Bye, Bye, Finley, Kumble*, *AM. LAW.*, Sept. 1987, at 3, 40.

128. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), in which Kodak, represented by Sullivan & Cromwell, obtained the reversal of an adverse antitrust decision; and *Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404 (S.D.N.Y. 1978), in which Kodak was represented by Donovan, Leisure, Newton & Irvine at trial. *See also* NANCY LISAGOR & FRANK LIPSUS, *A LAW UNTO ITSELF: THE UNTOLD STORY OF THE LAW FIRM OF SULLIVAN & CROMWELL* (1988).

129. *See* FREIDSON, *supra* note 7, at 215 (stating that "formal knowledge of any discipline can be characterized by a single, central paradigm, and one can employ its textbooks as the authoritative source for portraying it").

130. The ABA accreditation process calls for review of accredited schools every seven years. *See* George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 *CARDOZO L. REV.* 2091, 2132 (1998) (describing the "sabbatical site evaluations"). If schools are not in compliance with certain minimum standards, the school may be ordered to rectify the problem or face the loss of accreditation. The ABA Law School Rules are, however, quite general and are focused more on ensuring adequate resources such as enough building space, a law library, acceptable student/teacher ratio, and a sufficient number of course offerings, rather than particular curricular offerings. To the extent that the organized bar sets some curricular standards, most of this push during the past quarter-century has been in favor of more clinical and skills training offerings, a segment of the curriculum more commonly linked to law as a business than to law as a profession. Thus, although the bar's role in accreditation may bring some



teach the same essential professionalism paradigm. Every casebook on professional responsibility, published by a major law book publisher, appears to be premised on the professionalism paradigm.<sup>131</sup> Legal ethics treatises also remain organized around the professionalism paradigm.<sup>132</sup> The same can probably be said about nearly every law school text on any subject, in that these authorities implicitly work within the professionalism paradigm, even if legal education fails to inculcate sufficient professionalism values in our students.

To state the obvious, Pearce's or other scholars' disagreement with this state of affairs does not displace the paradigm. The paradigm shift will occur when textbooks are rewritten to adopt a competing theory, when criteria for licensing change, and when scholarly prestige varies according to the institution's allegiance with the winning paradigm. In short, there simply is no Kuhnian paradigm shift on the immediate horizon. As Judge Richard Posner once observed, "one can beat a theory only with a better theory."<sup>133</sup> Pearce recognizes this and has made efforts in that direction in his writings urging a paradigm shift.<sup>134</sup> His efforts, however, and those of any advocate of the law-as-business movement remain a long way from articulating a sufficiently comprehensive alternative system for lawyer regulation, let alone triggering a paradigm shift. For example, what will the statutes or guidelines look like under a business paradigm? Will the *Model Rules* be revised, replaced, or eliminated altogether? The legal world is unlikely to enlist under a business paradigm unless the marching orders are more firmly defined.

On one Kuhnian dimension, the continuing power of the professionalism paradigm seems obvious—it is sufficiently open-ended that there remain many problems to solve. Indeed, critics of the professionalism system have provided a lengthy list of problems for the paradigm to address. At this juncture, it seems premature to conclude that the professionalism paradigm has failed in the task.

To some extent, it is quibbling to suggest that Pearce's thesis be rejected merely because it does not perfectly fit the Kuhn topology. I

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uniformity to legal education, it hardly thwarts any momentum that might otherwise exist for a shift to the business paradigm for law schools.

131. See, e.g., NATHAN CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION (1996); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (5th ed. 1998); DAVID LUBAN & DEBORAH L. RHODE, LEGAL ETHICS (2d ed. 1995); THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY (6th ed. 1995); DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1994); RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW (1995).

132. See, e.g., GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING (2d ed. 1998); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986).

133. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 373 (1990).

134. See Pearce, *Paradigm Shift*, *supra* note 31, at 1232; see also Pearce, *Law Day 2050*, *supra* note 31, at 18-19.

make this point only to note that there is a substantial difference between intellectual controversy and intellectual crisis. We have, I think, the former but not the latter in law today. On the contrary, my fear is that crisis will ensue if too many lawyers and other opinion leaders adopt the view that lawyer professionalism must be jettisoned for the law-as-business system.

*D. The Proposed Shift Will Not Fix Current Problems*

*1. The Generality of the Proposed Solution*

While he savages the current system of lawyer regulation, Pearce is unwilling to move to an entirely market-based paradigm. According to Pearce, aspects of law continue to distinguish it from an ordinary business, requiring that the law-as-business regulatory system operate in the "Middle Range" between the status quo of professionalism and a pure market-based system.<sup>135</sup>

Perhaps the most difficult aspect of Pearce's proposal is understanding its operation and ultimate breadth and its application. He proposes to organize legal regulation under a business paradigm, but it is a paradigm without parameters. He offers no central organizing construct for the law as business and leaves many open questions unaddressed.

*(a) Is the Credo of the Law-as-Business Regulatory World "The Customer Is Always Right"?*

"The customer is always right" is a wonderful sound bite but a potentially disastrous marching order for the lawyer representing Marc Rich,<sup>136</sup> Charles Keating,<sup>137</sup> or a securities fraud manipulator. Even if this credo is accepted, it will have significant definitional and operational problems left unaddressed by Pearce. For example, what does the lawyer do when there is an entity customer? Or where the entity customer is a diffuse one? For example, the constitutional mini-crisis faced by the nation during late 1998 and early 1999 can be viewed not only as the result of the President's lapses of judgment or charac-

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135. See Pearce, *Paradigm Shift*, *supra* note 31, at 1267-75.

136. Rich is a Swiss financier who has been accused of engaging in a longstanding pattern of deceit and manipulation of both the financial markets and the legal system. See *Action S.A. v. Marc Rich & Co., Inc.*, 951 F.2d 504, 507 (2d Cir. 1991) (rejecting Rich's choreographed effort to divest U.S. courts of subject matter jurisdiction by acquiring Spanish citizenship in order to avoid creditors or prosecution of civil actions); see also *Marc Rich & Co., A.G. v. United States*, 739 F.2d 834 (2d Cir. 1984); *Marc Rich & Co. v. United States*, 736 F.2d 864 (2d Cir. 1984); Steven Brill, *The Marc Rich Puppet Show*, AM. LAW., Oct. 1983, at 1, 1 (recounting some of Rich's activities and implying that his lawyers were excessively cooperative).

137. See *infra* Part V.G.1. (regarding "Keating Five" scandal).

ter but also as the result of having a well-financed lawyer, Independent Counsel Kenneth Starr, who is effectively under little or no client control.<sup>138</sup>

*(b) Conversely, Should the Credo of the Business Paradigm Be "Caveat Emptor"?*

Although it grates on modern ears, the ancient maxim of "let the buyer beware" has, at least historically, been part and parcel of a market-based business paradigm. In modern post-industrial societies, the maxim has given way to calls for ethical business conduct and to the necessity for regulation, including the informal regulation flowing from the adjudication of lawsuits by victimized consumers.<sup>139</sup>

Pearce expressly rejects a *caveat emptor* version of his business paradigm, and other law-as-business proponents also seem to have something less harsh in mind.<sup>140</sup> This raises the question: If markets are so great, why has modern business theory moved away from *caveat emptor*? To answer this question in the context of lawyering is to reinvent the wheel of the business theory evolution—an evolution still far from comprehensive.<sup>141</sup>

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138. My own opinion is that the Starr investigation has wreaked detriment upon America largely because it lacks the hallmark of the professional: detached wisdom and reasoned judgment, rather than rabid prosecutorial zeal, in the face of a difficult and uncertain situation.

For example, in what may be a new low in prosecutorial discretion, the Independent Counsel obtained an obstruction of justice indictment against a single mother from Richmond whose apparent "crime" was having known presidential accuser Kathleen Willey and having given anti-Willey and pro-Clinton comments on the alleged incident, some of which appeared on Larry King Live rather than under oath). See Jeffrey Rosen, *Steele Trap: Kenneth Starr's Last Crusade*, NEW REPUBLIC, Apr. 26 & May 3, 1999, at 44.

The excesses of the Starr investigation result not merely from zealous representation by an officer of the court but also from a "win-at-all-costs, bottom line, the-end-justifies-the-means" approach—one more indicative of the business or political world. There are too many prosecutors who lose sight of other professional values in the pursuit of victory via convictions. See, e.g., *United States v. Kojayan*, 8 F.3d 1315, 1318 (9th Cir. 1993) (describing how prosecutor isolated a key witness from the defendant and then misrepresented the witness' arrangement with prosecutor). Under a business paradigm, where success is the venerated value, would this sort of lawyer misbehavior not likely increase?

139. The oldest informal regulation of bad business conduct is, of course, punishment by the market, where consumers choose not to patronize the offending business and also warn their acquaintances, leading to lost business and revenue for the business offender. However, these market mechanisms have inherent limits. For example, a truly fraudulent business operation may have placed its profits and its principals in a country without an extradition treaty, as did Robert Vesco of Fund of Funds fame. See *Fund of Funds v. Arthur Andersen Co.*, 567 F.2d 225 (2d Cir. 1977). Litigation is then required to assist the victimized consumer, and even it may be only moderately effective.

140. See Pearce, *Paradigm Shift*, *supra* note 31, at 1269 ("More appealing than the status quo and market alternatives is a Middle Range approach.").

141. Recent years have seen a comparative explosion in the literature of business ethics, a development that is helpful to the call for a business paradigm but insufficient to establish the infrastructure of enforceable standards required for regulation of lawyers. One publisher has an entire series of books on business ethics. See, e.g., NORMAN BOWIE AND

Thus, I fault Pearce on two counts in this portion of the inquiry. First, there is an inherent inconsistency in advocating a business/market solution to the problems of legal services and then refusing to embrace a pure market approach. Second, resolution of the problem requires modification of the market approach beyond that already taking place in the business arena. What results in Pearce's "Middle Range" approach could be described as simply an impoverished version of the professionalism paradigm, or wishful thinking about modern business ethics.

*(c) Should Legal Services Be Judged According to the Degree to Which They "Add Value"?*

It is true that the degree to which a product or service adds value to the client or customer can provide a more sophisticated measure of its utility. While this measurement smacks of market-based ideology, it is, nevertheless, not inconsistent with the professionalism paradigm. For example, Model Rule 1.5 and its commentary set guidelines for assessing the reasonableness of legal fees. In essence, the factors listed in Model Rule 1.5 and accepted by lawyers at large state that lawyer fees should reflect the utility of the legal services to the client.<sup>142</sup>

Today's lawyers, operating under the professionalism paradigm, do add value to clients, even if it comes at a higher price than might sometimes obtain in an unregulated market. A powerful modern example is the state-sponsored litigation against tobacco manufacturers. These suits have been successfully settled with states receiving billions of dollars in reimbursement of Medicare and Medicaid expenditures arising from smoking-related illnesses.<sup>143</sup> Florida is a good example; the state authorized the litigation but refused to fund it. The lawyers on Florida's trial team advanced the funds for the

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RONALD DUSKA, *BUSINESS ETHICS* (2d ed. 1990); ROBERT C. SOLOMAN, *ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS* (1992); *BUSINESS ETHICS: THE STATE OF THE ART* (R. Edward Freeman ed., 1991); *ETHICS AND AGENCY THEORY: AN INTRODUCTION* (Norman E. Bowie and R. Edward Freeman eds., 1992).

142. See RULE 1.5 (allowing lawyers to charge fees unrelated to the value conveyed, in that it approves hourly billing and allows enhancement if the matter takes the lawyer away from other work). Still, this is not a failure of professionalism. It is only a concession to economic reality and a reflection of risk allocation between vendor and buyer. In other words, Rule 1.5 perfectly reflects Pearce's business paradigm ethos. My point is that necessary elements of business reality have been or can be incorporated into the professionalism paradigm; it is not necessary to jettison professionalism to obtain useful aspects of business theory or to adjust to the inevitable market pressures of the day.

143. See, e.g., Christa Sarafa, Note, *Making Tobacco Companies Pay: The Florida Medicaid Third-Party Liability Act*, 2 DePaul J. Health Care L. 123, 138 (1997) (describing Florida's \$11.3 billion settlement).

costs.<sup>144</sup> When the case was successfully settled, these lawyers were paid well.<sup>145</sup> They were also the subject of considerable negative publicity because of internal squabbles regarding whether the proper compensation was the contingency fee of twenty-five percent, negotiated at the outset, or the "reasonable" fees, set by arbitration, arranged as part of the settlement. In the end, the fees came via arbitration and equaled or exceeded the twenty-five percent figure, resulting in billions of dollars for the state's independently contracted lawyers.<sup>146</sup> Billions is a lot of money, and it is a bit unsettling to have attorneys collect fees for one case that outstrip the average lifetime earnings of entire neighborhoods and towns. Nevertheless, these fees were separate from the more than thirteen billion dollars Florida gained from the tobacco settlement; the state's compensation was not reduced by the lawyers' fees.<sup>147</sup>

Without doubt, counsel's investment, risk-bearing, and services provided substantial value to the state. If additional economic value is considered a social value under the business paradigm and one can write a fees rule that embodies the concept, how does this suggest that today's professionalism paradigm must be displaced by a business paradigm in order to expand the services provided by lawyers to clients and the public?

Moreover, while on the subject of large fees, I cannot resist asking: How will the business paradigm, even the middle range business paradigm, deal with large fees? Judging from the real world of business compensation, compensation issues would exist under a business paradigm that are at least as vexing as any under the professionalism paradigm. Under the business paradigm, there would be no such thing as an unconscionable or obscene fee, judging from corporate America's track record on executive compensation.<sup>148</sup> In light

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144. See Symposium, *Transcript of the Florida Tobacco Litigation Symposium—Fact, Law, Policy and Significance*, 25 FLA. ST. U. L. REV. 737, 741 (1998) [hereinafter *Florida Tobacco Litigation Symposium*].

145. See Melissa J. Kozlowski, *Tobacco Arbitration Panel Awards \$8.2 Billion*, N.J. L.J., Dec. 14, 1998, at 14; *Tobacco Fee Arbitration Panel Awards \$8.16B to Florida, Mississippi, Texas Attorneys*, ANDREWS TOBACCO INDUSTRY LITIG. REP., Dec. 28, 1998, at 3, available in LEXIS, Legnew Library, Andtob File; Bob Van Voris, *Tobacco Road Not Gold for All*, NAT'L L.J., Dec. 28, 1998, at A4 (discussing award to Florida trial team to be paid out over years, which will likely exceed \$3 billion).

146. See *supra* note 144 and accompanying text. See also Charles W. Wolfram, *What Will the Tobacco Fees Set in Motion?*, NAT'L L.J., Dec. 28, 1998, at A25 (criticizing fees as excessive and creating a "new political class" of wealthy attorneys able to effect tort reform and other political issues and criticizing the value of fees in relation to the settlement, noting that the bulk of the settlement "represented the value of claims the states were giving up for future injury that the tobacco companies, in effect, are being licensed to continue to inflict"); Editorial, *Tobacco and Torts*, ST. PETE. TIMES, Dec. 19, 1998, at 18A (criticizing the fees as unreasonably high).

147. See *Florida Tobacco Litigation Symposium*, *supra* note 144, at 742.

148. See, e.g., Mark A. Clawson & Thomas C. Klein, *Indexed Stock Options: A Proposal for Compensation Commensurate with Performance*, 3 STAN. J.L. BUS. & FIN. 31, 32-33

of those business precedents perhaps the big bucks will come even where the lawyer has not added value. For example, business CEOs frequently are paid millions, even in years when their companies perform poorly.<sup>149</sup> Is the answer to this riddle that the company would have fared even worse without the intrepid CEO? Or is the more likely explanation that the business paradigm controls costs and metes out rational rewards no better than the professionalism paradigm?

In law, we see some highly skilled and capable attorneys toiling away for salaries hovering in the \$30,000-\$50,000 range, as, for example, do many government lawyers, legal aid attorneys, and judicial clerks, while others make millions from large class action settlements. Similarly, in business we see the CEO, and other executives, routinely making more than hundreds of times the annual pay of rank-and-file employees. Is worth and value adequately measured under either system? If that question is too philosophical, let me limit myself to asking: On what basis does anyone think business compensation operates more rationally and morally than lawyer compensation?<sup>150</sup>

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(1997) (arguing that surge in executive pay during bull market of 1980s and 1990s irrationally out of proportion, even for executives who have performed well); Gary Minda, *Opportunistic Downsizing of Aging Workers: The 1990s Version of Age and Pension Discrimination in Employment*, 48 HASTINGS L.J. 511, 525 n.61 (describing how AT&T Chair Robert Allen receives multimillions in compensation despite bad decision to acquire NCR for billions); Dana Canedy, *Nothing Toylike in Mattel Chief's Compensation*, N.Y. TIMES, Apr. 28, 1999, at C1 (explaining that Mattel CEO Jill E. Barad was paid \$4.75 million in 1998 even though the company's performance was considered mediocre or worse by Wall Street analysts); Louis Lavelle, *The \$11M Question: What's a CEO Worth?*, RECORD (Bergen Co., N.J.), May 2, 1979, at B1, available in LEXIS, News Library, Njrec File (noting that the current AT&T CEO was paid more than \$6 million in 1998 and American Standard CEO, Emanuel Kampouris, received a \$2 million bonus in 1998, constituting a raise even though the company's stock dropped six percent).

Apart from the compensation issue is the matter of reward for an increase in the equity value of an entity. In that arena, business thinking has historically been "the sky's the limit," on the theory that ownership and attendant risk deserve whatever rewards befall the enterprise. For example, no one criticizes the wealth of Warren Buffett or Bill Gates based on their respective ownership of the stock of Berkshire Hathaway or Microsoft and the growth in share value, although high executive pay is sometimes attacked where the executive is less lionized or company performance is substandard. See, e.g., Timothy D. Schellhardt, *To a Pile of CEO Perks, Add the 'Special' Bonus*, WALL ST. J., Apr. 29, 1999, at B1.

149. See GRAEF S. CRYSTAL, IN SEARCH OF EXCESS: THE OVERCOMPENSATION OF AMERICAN EXECUTIVES (1991) (criticizing many executive compensation packages as far too lucrative and unlinked to company results and executive performance); see also Canedy, *supra* note 148; Schellhardt, *supra* note 148.

150. For example, Prof. Lester Brickman, perhaps the best-known academic critic of high lawyers' fees, calculates that the tobacco fees were the equivalent of \$82,000 per hour. See Van Voris, *supra* note 145. Assuming the average law partner's billable hours of 2,200 per year, a hypothetical \$82,000/hour lawyer would earn gross receipts of \$18 million that year, assuming all clients paid. From this, overhead expenses would need to be deducted, making this hypothetical partner's net earnings something less (a paltry \$17 million or so). This is of course a great deal of money. But contrasted to the \$4.75 million given Mattel

Ultimately, multiple questions are unanswered by the proposed shift to a business paradigm: (1) What are the boundaries of the market's role under this regulatory system? (2) Is the market to be completely open or are there restrictions on market behavior? How many restrictions exist? What form do the restrictions take? (3) Who enforces restrictions on the market? (4) What are the penalties for violating a restriction? (5) How is entry into the field to take place? Will it be restrictive in any way?

It is, of course, more than a little unfair to criticize Pearce for failing in one article, or even two, to develop a system of lawyer regulation akin to the *Model Rules* and state bar enforcement. It is not unfair, however, to require at least some articulation from Pearce regarding the basic ground rules of his proposed brave new world. To date, however, the confines of the law-as-business theory are simply unestablished. To the extent Pearce has ventured a vision of the "Middle Range" professionalism paradigm, he appears to borrow heavily from what I thought was the ethos of professionalism. This again prompts the question of why any organizational shift is required. Why throw out professionalism merely to reinvent it?

## 2. *The Narrowness of the Inquiry*

Throughout his article, Pearce writes as though the only role of lawyers in modern society is private client representation.<sup>151</sup> This glaucomic focus permits him to build a case for the business paradigm based on a situation most receptive to a business approach: the rendering of legal services to persons or entities who require legal assistance, or stand to gain from it, and the compensation of counsel, directly.

Yet, a portion of the legal world lies beyond private practice. Legal professionals also work for the government as prosecutors, public defenders, agency attorneys, and other regulatory counsel. Moreover, many attorneys serve as judges. In addition, many lawyers serve private clients as in-house (inside) counsel,<sup>152</sup> for whom the tension be-

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CEO Jill Barad in 1998 and the functional equivalent of \$26.3 million she received in 1997, the tobacco fees seem reasonable, particularly in light of the breakthrough result obtained by the tobacco lawyers as compared to the mediocre 1997 and 1998 had by Mattel. See Canedy, *supra* note 148, at C1. As Babe Ruth unapologetically noted when asked if he was embarrassed to earn more than the President of the United States (then Herbert Hoover): "I had a better year." See David Rampe, *Contracts: In Another League*, N.Y. TIMES, July 21, 1996, at s.4, p.2.

151. See, e.g., Pearce, *Law Day 2050*, *supra* note 31, at 10 (discussing the market for legal services and mentioning only private practice); *id.* at 14 (discussing employment of lawyers, but mentioning only private practice).

152. In 1985, ten percent of the bar was employed as in-house counsel. See BARBARA A. CURRAN, KATHERINE ROSICH, CLARA CARSON, AND MARK PUCETTI, *LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S (1985)*. This percentage has undoubtedly increased during the last fifteen years.

tween business imperatives and the social good may be different from that of outside counsel.

(a) *Inside Counsel*

One could concede to Pearce that inside counsel should be analyzed by the same yardstick governing lawyers in firms. However, as discussed below in the context of insurance defense, there is a good deal of evidence to suggest that the business-ethics tension is more pronounced for in-house lawyers.<sup>153</sup> Still, even if inside and outside counsel must be treated alike, there remains a dramatically large segment of lawyers and legal services for which a business-*uber-alles* approach is simply inapt. If this is true, however, then it is all the more important to evaluate the effect of solutions designed to address problems encountered by Pearce's typical firm lawyer on this growing segment of the bar. I believe that the business-ethics tension is more pronounced today for in-house lawyers.

(b) *Judges*

Judges, like in-house lawyers, were unaddressed by the Pearce article; the business paradigm is particularly unsuitable for judicial regulation. There are intractable problems if the legal system instructs judges to behave as businesspersons first and professionals second, or not at all. Consider a judge presiding over a case in which the plaintiff is a spurned job applicant charging race discrimination; the defendant is a large, local employer with a large, in-house legal department and is represented by the locality's largest, most prestigious, most lucrative firm. Even working under the auspices of the professionalism paradigm, a judge with thoughts of returning to practice or becoming an Alternative Dispute Resolution specialist after retirement will have a subconscious desire to retain popularity with the large corporate defendant and its prestigious, lucrative firm.<sup>154</sup> Ideally, the judge is constrained by the norms of impartiality reflected in the *ABA Code of Judicial Conduct* and relevant statutes regarding recusal,<sup>155</sup> which not only theoretically shape the judge's self-concept and values but also threaten the judge with discipline

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153. See *infra* Part V.E.

154. Where the plaintiff's law firm is sufficiently prominent to be a source of repeat business or future employment, the judge's business instincts could, of course, run in that direction.

155. See, e.g., 28 U.S.C. § 455 (1994) (requiring disqualification of judges where a judge or close relative has even a slight financial interest in the case and requiring recusal where a judge's impartiality is subject to reasonable question). See also MODEL CODE OF JUDICIAL CONDUCT Canon 3(E) (1990) (requiring disqualification when a judge may be affected by personal bias, relationships to parties or counsel, or economic interests).



and disgrace should too much favoritism appear.<sup>156</sup> It remains difficult to conceptualize effective judicial ethics under a business paradigm. Normally, it is good business sense to ingratiate oneself with wealthy entities that can provide a stream of future business.

Similarly, the judge in the business of self-advancement is unlikely to render rulings that displease political authority. One does not rise from the trial bench to the court of appeals by ruling against the appointing executive. Human beings are seldom, if ever, textbook "profiles in courage," but the track record of judges operating under the professionalism paradigm has been rather impressive, on the whole.<sup>157</sup> One can hardly expect it to improve under a business paradigm—and it could get much worse.

(c) *Government Attorneys*

For federal, state, and local government attorneys, the temptations for self-advancement at the expense of the system are as strong or stronger than those affecting judges. The undesirable influences go beyond the revolving door between private- and public-sector employment or the hope for promotion. The typical government attorney has far less job security than the typical judge. Judges may worry that displaying courage will bring a career dead-end, but attorneys may worry about losing their jobs.

Government counsel are frequently given discretion in highly politicized matters or where the executive branch's political preferences are clear. In such cases, society presumably wants counsel to assess any regulatory situation on its merits, a task requiring independence and detachment. This becomes a harder task if the prevailing ideology of law reflects a business paradigm. Under such circumstances, the lawyer has great incentives to go with the political flow and relatively few incentives to embrace other principles. Although the professionalism paradigm will never eliminate self-interest or cowardice in the face of pressure, it surely provides more insulation of independent legal judgment than would a business-based construct.

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156. So strong is the aura of regulation created under the professionalism paradigm that judges may be disciplined severely even for lack of candor in matters unrelated to their judicial duties. *See, e.g., In re Davey*, 645 So. 2d 398, 408 (Fla. 1994).

157. *See, e.g., United States v. Nixon*, 418 U.S. 683, 713 (1974) (rejecting the President's assertion of executive privilege over tape recordings of White House meetings in opinion authored by Chief Justice Warren Burger, a Nixon appointee, with three other Nixon appointees sitting on the Court); *see also In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 923 (8th Cir. 1997) (holding that personal lawyer's notes of meetings involving Hillary Rodham Clinton were not protected by executive privilege); *Swidler & Berlin v. United States*, 524 U.S. 1, 10 (1998) (ruling that privilege survives the death of a client in a politically charged case involving Independent Counsel Kenneth Starr's investigation of President Clinton and Starr's effort to obtain the lawyer's notes of the late Vincent Foster, a White House aide).

For government prosecutors and defenders, the issues are analogous. Although both have a duty to zealously represent their clients, currently, they also have substantial duties to the system; this is particularly true of prosecutors. At a minimum, neither can suborn client perjury or defraud the court. Both face hard decisions, however, such as whether to cross-examine a truthful witness so as to make the witness appear untruthful; how to exercise discretion in commencing prosecution and withholding or modifying claims; and what degree of zealousness to adopt in enforcing judgments. These issues are hard enough when counsel is guided by norms designed for such situations and given some protection from partisan pressure. Without this guidance and insulation, it becomes extremely difficult to reach correct resolution of close questions.

If the primary theme of law is business, why should the prosecutor behave with restraint or anything beyond minimal fairness?<sup>158</sup> His objective, of course, is obtaining convictions, and business generally lionizes the commercial actor who plays as hard as the rules will allow—and plays to win. For this sort of business-paradigm prosecutor, there may be no act left unindicted, no disclosure beyond the constitutional minimum, and theatrics galore designed to secure victory, even if it confuses or positively misleads the jury.

Although prosecutors unleavened by professionalism are a particular worry, the government defense lawyer, as well as the privately retained defense lawyer, faces similar questions under the business paradigm. For example, if the defense lawyer thinks an appeal to racial prejudice will work, should it be made? The professional lawyer would at least have many things to ponder before playing any “race card,” but the business construct lawyer may see no restraint. Winning is the object established by the business paradigm, and there is nothing other than the consuming public’s opprobrium to stop the lawyer from doing whatever it takes to win.

The potential cultural gap between the business paradigm and the professionalism paradigm may be similar for criminal defense counsel, whether employed privately or by the government. For prosecutors and regulatory lawyers, the difference seems significant. They possess government power that can easily be abused. In addition, they are not subject to the market discipline that, presumably, is one of the selling points for the business paradigm. A zealous compliance attorney or prosecutor can continuously and diligently work without

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158. According to one recent book, prosecutors try to do the right thing by not abusing their power. See MARK BAKER, D.A. PROSECUTORS IN THEIR OWN WORDS (1999), reviewed by Lisa Stansky, *Witness for the Prosecution*, A.B.A. J., May 1999, at 76, 77 (“If you’re looking for all kinds of true confessions from the shark tank, look someplace else. [P]rosecutors generally try to do what’s right, whether or not it fits the letter of the law,” Baker writes, “I didn’t find many knee jerkers . . . I found more compassion among them than dogma.”).

worrying about sources of payment, cost-benefit analysis, or the marginal utility of a continued pursuit of quarry.

The unguided missile or zealot without perspective is the flip side of an overly politicized government lawyer. The former is so invisible to the political system that he or she may abuse power without being called to account for their actions or to cease when appropriate. According to testimony before Congress, this is the type of behavior occasionally displayed by IRS agents who come to view an investigation as pursuit of the taxpayer rather than an inquiry into the appropriate resolution of a payment question.<sup>159</sup> An attorney freed from the professionalism paradigm may be pressured to do what is politically advantageous rather than what is legally wise or even required. Both situations seem more likely if the practice of law by government counsel is not subject to some system of professional norms and regulation. Accordingly, society needs a professionalism paradigm rather than a business paradigm.

### 3. Is "Business Ethics" More of an Oxymoron than "Lawyer Professionalism"?

One reason Pearce has difficulty constructing an operational business paradigm without borrowing from the professionalism paradigm is the impoverished nature of business ethics. By "impoverished," I do not mean to suggest that all, or even a significant percentage of, businesspersons are unethical. Nor do I suggest that lawyers are on average more ethical than those in business or other walks of life. Rather, I suggest the following: Currently, business lacks a well-developed and widely accepted code of conduct.<sup>160</sup> Even if there were "Model Rules of Business Conduct," there would be no adequate means to enforce such rules, save the government.<sup>161</sup> Fur-

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159. See, e.g., David Cay Johnston, *Senate Panel Applauds Changes at IRS*, N.Y. TIMES, Apr. 15, 1999, at C8; William Roth, *Fighting the Power to Destroy*, INVESTOR'S BUS. DAILY, Apr. 14, 1999, at A24; Richard W. Stevenson, *Senate Votes 97-0 to Overhaul I.R.S. After Complaints*, N.Y. TIMES, May 8, 1998, at A1.

160. In part, this is an inevitable consequence of not being a profession. One hallmark of a profession is its organizational structure and relatively high level of control over education and entry, which permits the profession to establish and transmit "formal knowledge" of how the profession is to be practiced. See FREIDSON, *supra* note 7, at 25-26.

161. Freidson has observed:

Weak professions can only use moral suasion and the issuance of official standards that have none of the force of organized institutional credentialing. An example of this is the series of "professional standards" for social work in various settings issued as "policy statements" by the National Association of Social Workers . . . [which are precatory unless adopted by a supervising government agency, a process in which the Social Workers have had some success].

In the case of stronger professions, we find not mere recommendations but the establishment of a legal requirement . . . .

*Id.* at 85. At this juncture, it is probably overly generous to characterize business even as a "weak" profession.

thermore, business lacks a consistent system for teaching ethics and requiring ethical training as a criterion for conducting business. Available data suggest that an adequate system of business ethics will not emerge from market activity.

It is far more difficult to remove a destructive business actor from business than to remove destructive lawyers from law—lawyers can be disbarred. Although businesspersons can be banned from certain industries, they cannot be effectively banned from commercial life. Despite the boom in business ethics courses and writings during the past decade, one is hard-pressed to find any realtors, salespersons, or entrepreneurs drummed out of these fields by their peers or any regulatory authority except, perhaps, the state. States often have significant departments of business and professional regulation. Under Pearce's business paradigm, would these replace lawyer self-regulation or would lawyers become an essentially unregulated industry? Although one hates to be a contrarian in an era when markets are worshiped and entrepreneurs are modern folk heroes, Cardozo's words about important duties that can arise other than by contract come to mind.<sup>162</sup>

My skepticism of a business paradigm improving upon the professionalism paradigm status quo is also fueled by contemporary instances where wrongful, even reprehensible conduct has occurred in the business community—and been ignored or even embraced.<sup>163</sup> The force correcting business wrongdoing continues to come from law rather than from within the business community.<sup>164</sup> Consequently, it is most odd that Pearce urges law to emulate business. The metaphor of the fox guarding the henhouse irresistibly comes to mind.

In sum, the real world of business ethics gives cold comfort if one's mission is to improve lawyering by organizing it more like business. While business writers frequently exhort commercial actors to behave honorably,<sup>165</sup> there is, to date, relatively little institutionalization of ethical responsibility in business.<sup>166</sup> Further, more concrete

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162. In upholding a cause of action against a service provider by a buyer, even though there was no privity of contract, Judge Cardozo wrote:

We state the defendants' obligation, therefore, in terms, not of contract merely, but of duty. . . . The defendants, acting, not casually nor as mere servants, but in the pursuit of an independent calling weighed and certified at the order of one with the very end and aim of shaping the conduct of another. Diligence was owing, not only to him who ordered, but to him also who relied.

*Glanzer v. Shepard*, 135 N.E. 275, 277 (1922).

163. See discussion *infra* Part V.

164. The importance of group norms in influencing behavior is explained in Part III *infra*.

165. See, e.g., Dan Lonkevich, *Profits, Ethics Not Mutually Exclusive*, NAT'L UNDERWRITER (Life & Health/Fin. Servs. ed.), May 5, 1997, at 26.

166. See G. Mick Smith, *Can Insurance People Be Taught Ethics?*, NAT'L UNDERWRITER (Life & Health/Fin. Servs. ed.), Nov. 16, 1998, at 61 (positing that ethical training of businesspersons is feasible, but advocating ethical training that is more phi-

proposals for ethical business conduct tend to resemble the way legal ethics would address the issue.<sup>167</sup>

### III. THE PSYCHOLOGY AND SOCIOLOGY OF THE LEGAL PROFESSION AND THE REGULATORY CONSTRUCT FOR LAWYERS

Although I am less critical of the status quo than Pearce and others, my objection to a proposed business paradigm is not premised on the notion that things are perfect in the kingdom of the professionalism paradigm. Rather, I fear that things will only worsen under a business paradigm or an overly business-like professionalism paradigm, such as Pearce's "Middle Range." This misgiving stems not from reverence for lawyers but appreciation of their human frailties. It is in fact this very frailty, combined with the nature of lawyering,<sup>168</sup> which requires that any paradigm governing lawyers be effective in fostering desirable conduct. Something other than traditional, external, governmental regulation or *de facto* regulation—via criminal or civil liability—is needed to ensure effective functioning.

Human beings are imperfect—but still, they respond to environmental stimuli; better behavior results from an environment and regulatory system that encourages better behavior. The professionalism paradigm provides this by helping to create and sustain a culture that, despite its failings, reduces unwanted conduct. It helps build ethical lawyers by creating group norms, including rules of ethics, and enforcing ethical behavior. Where law has failed in these areas, the failure has occurred not because of a deficiency in the professionalism paradigm, but because business considerations and business thinking have been allowed to intrude too greatly into the professionalism paradigm.

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losophical and less regulatory than that found in law). Even participants in the business ethics movement at least tacitly acknowledge that business ethics are a long way from being institutionalized.

Business ethics . . . is strictly speaking a philosophical field, a division of applied philosophy, in this instance of applied ethics.

The threat to business ethics as thus conceived is fourfold: (1) the threat from diluted competence; (2) the threat from unfulfillable expectations; (3) the threat from co-optation; and (4) the threat from the replacement of critical by descriptive ethics.

Richard T. DeGeorge, *Will Success Spoil Business Ethics?*, in *BUSINESS ETHICS: THE STATE OF THE ART* 42, 45 (R. Edward Freeman ed., 1991).

167. See, e.g., Sam Friedman, *Disclosure Is the Only Way to Reassure Clients that Brokers Are Not Double-Dealing*, *NAT'L UNDERWRITER* (Prop. & Casualty/Risk & Benefits Mgmt. ed.), Nov. 16, 1998, at 55 (advocating required disclosure to affected parties and implicit consent to continued agency as solution for concern over possible insurance broker self-dealing).

168. See *supra* notes 37-103 and accompanying text (discussing the definition of "professional occupation," client dependence and vulnerability in the delivery of legal services, and the need to maintain lawyers' independence from political and economic pressures).

The professionalism paradigm provides a more effective framework for encouraging better behavior than any imaginable form of the business paradigm because the business paradigm simply has no such culture- and norm- building apparatus.<sup>169</sup> Business ethics, as currently formulated, would not offer sufficient guidance for lawyers or standards for disciplining lawyers who violate rules of conduct or professional norms. In fact, the business paradigm could only achieve such an apparatus if it borrowed from legal professionalism, again raising the question whether Pearce's proposed shift is really necessary.

Thus, the professionalism paradigm comes as close as anything we have yet developed to an effective means of regulating lawyering activity. It is worth retaining because it has fostered the creation of a regulatory framework with workable, although sometimes problematic, rules that are widely publicized and offer the necessary guidance and standards. To adapt Gertrude Stein's famous aphorism, there is a "there" there for legal ethics that has yet to emerge for business ethics.<sup>170</sup>

Furthermore, lawyer professionalism and the professionalism paradigm are simply not in the bad shape Pearce suggested. Without doubt, there are many instances where attorneys fail to act according to the demonstrated tenets of professionalism. However, just as we should not be blind to the legal profession's shortcomings, neither should we paint a darker picture than is warranted.

#### A. *Before and After: The Historical Backdrop to Lawyer Behavior*

Some historical perspective is in order. *De facto* lawyers<sup>171</sup> have existed since the dawn of early culture as village elders, religious leaders, and military disciplinarians. More *de jure* lawyering appears to have accompanied the rise of more advanced civilizations in China, India, Persia, Greece and Rome. Still, the more familiar legal profession is a creature of only the past few hundred years. Although it is now fashionable to lionize the English Inns of Court system and at-

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169. See ELIZABETH WOLGAST, ETHICS OF AN ARTIFICIAL PERSON: LOST RESPONSIBILITY IN PROFESSIONS AND ORGANIZATIONS 2, 28-36, 58-95 (1992) (explaining that work for corporations, governments, and other artificial entities tends to detach constituents of these entities from feelings of individual responsibility, fostering more antisocial behavior); See also LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION 3-6, 27-58 (1991) (explaining that the context in which individuals operate shapes behaviors and attitudes).

170. GERTRUDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 289 (1937).

171. I am referring here to individuals whose roles in society were very lawyer-like, in that they frequently had specialized knowledge about their societies' laws or customs not widely available to most and in that they frequently provided advice and guidance to others in their community. However, what I will refer to as a "*de jure*" lawyer is an individual for whom this very specialized function defines his role in society. The roles of *de facto* lawyers, on the other hand, are broader, and encompass other skills and knowledge which do not relate directly to the function of a lawyer.

tempt to rekindle its spirit of community and professionalism, the fact remains that law was, until the nineteenth century, a field that one entered through self-taught apprenticeship and on the job training.<sup>172</sup>

In the United States, legal education moved from the *ad hoc* apprenticeship style of lawyering to formal law schools during the nineteenth century—a positive development.<sup>173</sup> In addition to employing law professors, newly established law schools provided a more consistent basis of lawyer training, and one more divorced from market forces. Students were taught “the law” without the instant need to serve clients or deliver legal analysis influenced by client needs—another good thing. The implicit notion behind a full-time law school with full-time faculty is that market influence, with both its corruption<sup>174</sup> and its disciplinary insight, will come soon enough.

The Watergate scandal appalled lawyers and nonlawyers alike with the level of attorney misconduct brought to light and had a significant impact on both legal education and regulation of attorneys. Among the many developments was renewed interest in the teaching of professional responsibility in law schools; it soon became a required course and the focus of a dramatic upsurge in scholarly attention.

Not coincidentally, state bar regulation of lawyers also increased in the wake of Watergate. It is true that some of the regulation can be uncharitably described as a rear-guard action by the forces of legal privilege and protectionism, as, for example, efforts to ban or strangle lawyer advertising.<sup>175</sup> Still, on the whole, this has been a good de-

172. See Jeffrey W. Stempel, *All Stressed Up but Not Sure Where to Go: Pondering the Teaching of Adversarialism in Law School*, 55 BROOK. L. REV. 165, 166-69 (1988) (reviewing STEPHAN A. LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION (1987) and summarizing the development of legal education in United States).

173. See *id.*

174. I regard the business aspects of law as unavoidable and something of a necessary evil. Some business influences are of course useful to law. A law office need not be run inefficiently. The hunger for business success often helps to promote zealous, even courageous, client representation. Certainly, lawyers are entitled to be paid, and it is always useful in Professional Responsibility class to discuss the means of effecting this without becoming unduly mercenary. The business value of profit also spurs some legal activity that is very socially useful. For example, contingent fees permit ordinary people to litigate for vindication of their rights, even if they occasionally lead to profits criticized as windfalls. See also *supra* notes 145-46 and accompanying text (describing multi-billion dollar fees awarded Florida's outside counsel in tobacco litigation).

175. See, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977) (establishing a First Amendment right for a legal clinic to advertise prices for particular legal services despite state's ban on such advertisements); see also FLORIDA RULES OF PROFESSIONAL RESPONSIBILITY Rule 4-7.3 (forbidding communication with injured party or relative until 30 days after the event causing injury). This post-*Bates* advertising restriction was upheld against constitutional challenge in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995).

velopment and reflects improvement of the profession rather than its decline.<sup>176</sup>

Therein lies the attendant paradox. We see more instances of lawyer discipline and are tempted to take the increase as evidence of a growing professionalism problem; however, it is probably evidence of improving professionalism. Many transgressions detected, reported, and punished today probably went unscathed fifty or seventy years ago. Yet, because we now have better records for discovering lawyer transgressions, there is a tendency to misread this development as evidence of decline. Statistics on lawyer discipline may be like statistics on crime; better reporting and enforcement yields more data. This may seem to indicate an “upsurge” in crime, but an *apparent* increase should not be confused with an *actual* increase, in crime or lawyer misconduct.<sup>177</sup>

Although Watergate is a modern black mark on the profession, it involved lawyers educated, admitted, trained, and regulated prior to 1972. Thirty years later, the profession arguably does a better job than it did in preventing and punishing lawyer misbehavior. Recent impeachment-related events in Washington, and the roles of lawyers in the drama, are hardly cause for celebration, but at least these lawyers appear not to be involved in political espionage and cover-up, as was the case during Watergate. It is doubtful that a business-based construct of lawyering would do any better. Some of the doubt is based upon the reasons noted above regarding the lack of a fully formed system of business ethical responsibility. There simply is no effective yardstick for determining when a businessperson has crossed the line of ethical behavior. The best yardstick business has is the one provided by the legal profession through statutory and common-law constraint.

Undoubtedly, in law there has been protectionism in the guise of ethics regulation—and favoritism. Rhetorically, one might ask whether we see fewer disciplinary actions involving attorneys from prominent large firms because those attorneys are less ethically challenged or because those firms are less likely to be fully prosecuted. Even admitting a significant degree of imperfection, however, there

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176. See Geoffrey C. Hazard Jr. et al., *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983).

177. See JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW* (3d ed. 1995) (discussing methodological problems in gathering and measuring information and pointing out that a decrease in issuance of speeding tickets may be due to a reduction in the number of enforcement officers rather than to a reduction in the incidence of speeding). I am of course speaking in proportional terms. There may be a net increase in lawyer misconduct today simply because there are now twice as many lawyers as in 1970. Presumably, there is more net social utility provided by this larger group of lawyers as well. Regarding whether the ethical conduct of lawyers is better or worse than in the past, the relevant comparison is whether a higher percentage of legal activity results in a higher percentage of discipline.



is much to appreciate in the current system of lawyer regulation under the professionalism paradigm.

Under the status quo, even the powerful frequently answer for ethical improprieties and pay a significant penalty. For example, a Minnesota Supreme Court Justice quit after being accused of cheating while taking the Florida Bar Examination.<sup>178</sup> The Chief Judge of the New York Court of Appeals was convicted of stalking, removed from the Court, and disbarred.<sup>179</sup> A United States Supreme Court Justice was denied ascension to the Chief Justice post and resigned in disgrace upon disclosure of his alleged ethical improprieties.<sup>180</sup> A Florida lawyer was suspended from practice for a year because he had an undisclosed conflict of interest while representing the seller in a land deal.<sup>181</sup> Would business leaders, particularly prominent or politically powerful business leaders, who committed similar wrongs be as frequently, readily, and effectively examined and sanctioned?

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178. See Amy Tarr, *Removal Urged of Justice Who Cheated on Exam*, NAT'L L.J., Mar. 4, 1985, at 6; Austin C. Wehrwein, *Minnesota Justice Quits over Probe*, NAT'L L.J., Mar. 25, 1985, at 10. Minnesota Supreme Court Associate Justice John J. Todd wanted to gain admission to the Florida Bar. Todd, because of his prominent position, succeeded in convincing Bar authorities to allow him to take the exam at his chambers in St. Paul, Minnesota. This alone was an obviously unusual and, perhaps, improper accommodation. Based on his law clerks' testimony, Justice Todd was accused of cheating on the exam by making use of written materials, and even using the law clerks to bring him material. The story broke, Justice Todd resigned from the Court in disgrace, and his Florida Bar exam was invalidated.

179. See SOL WACHTLER, *AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR* 5 (1997). Sol Wachtler, Chief Judge of the New York Court of Appeals, highest New York court, was arrested and convicted for stalking his former paramour and threatening her daughter's safety in a bizarre effort to drive her back into terminated illicit relationship. Judge Wachtler was subsequently imprisoned, removed from the Court, disbarred, and later released from prison.

180. See LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 372-76 (1990); BRUCE ALLEN MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE* 570-575 (1988). Justice Fortas had engaged in improper business dealings with a financier who had pending business before the Court. In addition, Fortas had engaged in arguably improper conduct by continuing to serve as a White House advisor during his time on the Court, including apparent communication with then-President Lyndon Johnson regarding pending Court matters. Fortas was not disbarred, however, and regained some measure of stature in private practice. See *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the well-known "snail darter" case, in which Fortas successfully argued before the Supreme Court to suspend construction of the planned Tellico Dam on the grounds that the project would destroy the last known habitat of an endangered species. However, Fortas' former colleagues at the prestigious Washington law firm of Arnold & Porter (named Arnold, Fortas & Porter prior to the appointment of Fortas to the Court) would not accept him back into the partnership. See Kalman, *supra*, at 380-85.

181. See Chris Poynter, *Attorney Punished over Business Deal: George Harold Carswell Jr. Received a One-Year Suspension but Can Petition Immediately to Be Reinstated*, TALL. DEM., May 10, 1996, at 2B (describing how an attorney was suspended from practice for one year due to representation tinged with conflict of interest). The attorney represented a seller of real property in connection with the sale while at the same time having an undisclosed agreement with the prospective buyer under which the attorney would manage the property for a fee. See *id.*

There have, however, been some unwise developments in lawyer regulation. Conflicts, for example, are more readily tolerated today. Firms may employ screening mechanisms as a means of sterilizing lawyers "infected" with a conflict, who change firms.<sup>182</sup> Lawyers divide as to whether screening should be permitted.<sup>183</sup> If the pro-screening forces are correct, then our commitment to professionalism has not softened. If, however, the anti-screening view is correct, then there has been ethical slippage. This has come about not because of fidelity to the professionalism paradigm, but because lawyers have succumbed, to some degree, to the business paradigm and to a desire to acquire or retain paying clients rather than turn them away.

Similarly, the 1980s and 1990s saw the rise of law firms "firing" clients, or lawyers who would take with them unwanted clients, in order to free the firm to accept newer, more lucrative clients, without running afoul of the conflict of interest prohibitions of Model Rule 1.7.<sup>184</sup> One court referred to this as the law firm dropping the client

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182. See RULE 1.9. The Rule would prohibit a lawyer from representing a current client if the matter for the current client is "substantially related" to a matter on which the lawyer worked for a former client. However, despite the Rule provisions on imputed conflicts, when such a tainted lawyer changes firms, a court may not necessarily disqualify his new firm if the "infected" lawyer is adequately "screened" from the current legal activity on the matter. This has even been permitted in situations where any imputed conflict would be a concurrent conflict within the meaning of Rule 1.7. See, e.g., *Cromley v. Board of Education*, 17 F.3d 1059 (7th Cir. 1994). The *Cromley* court permitted screening, despite an arguably current conflict of interest. There, the plaintiff's attorney in a discrimination case against a school board had accepted a partnership in the firm representing the defendant school board and then withdrew as counsel for plaintiff. The court refused to disqualify the school board's firm, finding that former plaintiff's counsel was adequately screened from contact with his new firm's ongoing defense against his now former client.

The *Cromley* case seems wrongly decided. Not only does it tolerate a current conflict situation of high adversariness, but it also utterly ignores the plaintiff's attorney's blatant breach of his duty of loyalty. See GILLERS, *supra* note 131, at 322 (implicitly criticizing the *Cromley* decision for failing to inquire into this breach). Compare the *Cromley* court's attitude to the resistance to screening found in pre-Model Rules cases such as *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 229-31 (2d Cir. 1977), which imputed the conflict of a mere affiliated counsel to a firm in a case involving civil litigation, despite attempts to screen out the conflicts.

*Cromley* reflects the professionalism paradigm quite heavily compromised, perhaps even trumped, by the business paradigm and provides a consequently disturbing example of what may take place should the business ethos become dominant in law.

183. See AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 204(2), 213 (Proposed Final Draft No. 1, 1996) (permitting screening). But see Neil W. Hamilton & Kevin R. Coan, *Are We a Profession or Merely a Business? The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57 (1998) (opposing the use of screening).

184. See, e.g., *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1345 (9th Cir. 1981); *Strategem Dev. Corp. v. Heron Int'l*, 756 F. Supp. 789, 793 (S.D.N.Y. 1991); *Tera-dyne, Inc. v. Hewlett-Packard Co.*, 1991 WL 239940 (N.D. Cal. 1991); *Hartford Accident & Indem. Co. v. R.J.R. Nabisco, Inc.*, 721 F. Supp. 534, 540 (S.D.N.Y. 1989) (involving firing the lawyer in order to indirectly fire the client).

“like a hot potato.”<sup>185</sup> Despite trying hard not to be unfair to Pearce’s high hopes for market regulation of lawyers, I cannot help but see the “hot potato” cases as further examples of lawyers attempting to operate under a business paradigm but (usually) being thwarted by the ethical constraints of the professionalism paradigm.<sup>186</sup> Further, I am relieved that the professionalism paradigm provides this bulwark, and I find this a substantial argument in favor of retaining it.

With tolerance for lawyer screening and the “hot potato” phenomenon as examples, I am fortified in my skepticism about a business-based regulatory construct. No matter how much Pearce or others buff the business paradigm, it is likely to lead to less ethical conduct rather than more, because it increases the likelihood that lawyers will do what is most monetarily advantageous for them, irrespective of other concerns.

### B. *The Importance of Group Norms and Environment*

Lawyers, like anyone else, react rationally to their environments.<sup>187</sup> If their environment is one that rewards ethical behavior and punishes breaches of professional responsibility, most lawyers will conform their conduct to the set, scrutinized, and enforced professional standards.<sup>188</sup>

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185. *Picker Int’l, Inc. v. Varian Assocs., Inc.*, 670 F. Supp. 1363, 1365; see also GILLERS, *supra* note 131, at 308-11 (discussing the “hot potato” problem and its variants).

186. An exception is *Hartford Accident & Indem. Co. v. R.J.R. Nabisco, Inc.*, 721 F. Supp. 534, 541 (S.D.N.Y. 1989), in which the firm was permitted to fire the lawyer in order to indirectly fire the client and then represent a new client, adverse to the client whose firing was engineered. See GILLERS, *supra* note 131, at 327-28; see also *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 440 (1st Cir. 1991) (declining to disqualify firm from representing litigant against client under somewhat different circumstances where complaining party could be characterized as former client in unrelated matter).

187. See WOLGAST, *supra* note 169, chs. 2-4, 8; see also ROSS & NISBETT, *supra* note 169, ch. 2 (1991); PETER M. BLAU & W. RICHARD SCOTT, *FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH* ch. 4 (1962); FREIDSON, *supra* note 7 at 85 (noting that although group norms are important in shaping behavior in any setting, shaping of member norms is stronger where the profession itself is stronger and more developed).

188. Professional or group norms are:

... a code of rules that lays down for the individual what he should do so as not to damage collective interests and so as not to disorganize the society of which he forms a part. If he allowed himself to follow his bent, there would be no reason why he should not make his way or, at very least, try to make his way, regardless of everyone in his path and without concern for any disturbance he might be causing about him. It is this discipline that curbs him, that marks the boundaries, that tells him what his relations with his associates should be, where illicit encroachments begin, and what he must pay in current dues towards the maintenance of the community.

DURKHEIM, *supra* note 79, at 14-15 (1958); see also *id.* at 31-35, 171-175; TALCOTT PARSONS, *ESSAYS IN SOCIOLOGICAL THEORY* 34-49, 370-85 (1954). Particularly, Parsons notes that group rules and norms tend to discourage “deviant” or unethical behavior that may result in “yielding to expediency, above all through financial temptations and pressures from clients.” *Id.* at 377.

Even the informal atmosphere of a work setting can have dramatic impact upon *esprit de corps* and productivity,<sup>189</sup> and informal organization can be as important to work performance as any formal system.<sup>190</sup> Thus, group norms are critical in determining people's behavior at work.<sup>191</sup> Further, these norms are affected by group structure in important ways.<sup>192</sup> For example, one well-regarded study found better work performance to be associated with such factors as increased worker control, better job security, and reduced competitive conflicts within the group.<sup>193</sup>

While much of the past occupational research related to "blue collar" workers, a number of studies investigated the impact of bureaucratic or informal norms upon workers involved in more nuanced activity. For example, one study of welfare caseworkers found that the establishment of a "pro-client atmosphere" had significant impact upon workers' attitudes toward clients and work on behalf of clients.<sup>194</sup> According to the author of the study, the observations:

suggest that a worker's orientation influences not only his own performance but also his reaction to the performance of other

189. See MERTON, *SOCIAL THEORY*, *supra* note 79, at 230-59 (1968); see also BLAU & SCOTT, *supra* note 187, at 90-91 (discussing workplace studies demonstrating that "increased productivity was a function of improved human relations" and that changes in social situations at work often were associated with productivity); HARRISON M. TRICE, *OCCUPATIONAL SUBCULTURES IN THE WORKPLACE* 20-45, 48-51 (1993).

A classic example is the so-called "Hawthorne effect," named after an industrial experiment at the General Electric plant, located in Hawthorne, New York. The experiment was designed to test the effect of lighting on industrial production.

When illumination was regularly increased, productivity increased in two of the three departments, but the increases were not parallel to the changes in illumination. A second study divided workers in one department into an experimental and a control group, with illumination being increased in the former and held constant in the latter; production increased in both of the two groups. A third study decreased illumination in the experimental group; again, productivity of workers increased until the illumination had been reduced to a point where operators could no longer see their work. The conclusion seemed inescapable that the improved productivity noted was not due to increased illumination. The experimenters pointed out that many relevant conditions—including social ones—had not been controlled. Apparently what was involved in these striking changes was that groups of workers routinely engaged in monotonous tasks were singled out for attention by management and by the researchers. This attention gave them a feeling of importance and made their jobs more interesting, and their consequent greater work satisfaction led them inadvertently to work faster.

BLAU & SCOTT, *supra* note 187 at 89-90.

190. See TRICE, *supra* note 189, at 20-45; BLAU & SCOTT, *supra* note 187, at 91.

191. See BLAU & SCOTT, *supra* note 187, at 92-93 (summarizing research on industrial workers as evidence of this point).

192. See *id.* at 100-104.

193. See FRITZ JULES ROETHLISBERGER & WILLIAM DICKSON, *MANAGEMENT AND THE WORKER* (Harvard University Press 1966), *discussed approvingly and summarized in* BLAU & SCOTT, *supra* note 187, at 91-94.

194. See Peter M. Blau, *Structural Effects*, 25 AM. SOC. REV. 178, 180-83 (1960). This effect occurred notwithstanding the individual worker's pre-existing attitudes. See *id.*

workers in his group. If a pro-client orientation prevails in a group, then the individual who merely checks client eligibility without providing casework services experiences disapproval, whereas the individual who provides services to clients earns the approval of his colleagues. The desire for social approval thus constrains workers in pro-client groups to provide casework services to clients regardless of their own orientations to clients. In groups where the prevailing social climate is anticlient, social pressure works in the opposite direction, and the individual is socially rewarded for carefully checking eligibility but not for furnishing casework services. It is in this way that social processes—the distribution and direction of sanctions in interaction—exert an influence on a worker's approach that is independent of his own orientation to clients.<sup>195</sup>

In short, "prevalence of pro-client values in a group probably gives rise to norms protecting the interests of clients."<sup>196</sup>

It is important that core values be emphasized. Group norms create formal and informal pressure for conformity, but that pressure is resisted in significant degree when the worker is secure in status, either formally, as is, for example, the boss or partner, or informally, as is, for example, the popular or valuable worker.<sup>197</sup> Nonetheless, norms "that pertain to basic values of a group" are "too significant to permit any member to violate them."<sup>198</sup> Thus, people will conform their behavior to fundamental norms, regardless of their status.

The degree of group cohesion may also make client relations less important to the worker's performance or success.<sup>199</sup> On a more macrocosmic level, "the position of the work group in the larger organization's division of labor influences its social solidarity."<sup>200</sup> What this suggests is that how strongly members identify with a group will determine how much influence the group's norms will have over their behaviors.

While many of these studies date from the 1930s to the 1950s,<sup>201</sup> nothing in the recent literature casts doubt upon the earlier findings.

195. BLAU & SCOTT, *supra* note 187, at 102.

196. *Id.* at 103.

197. See BLAU & SCOTT, *supra* note 187, at 104-06; see also CHRIS ARGYRIS, PERSONALITY AND ORGANIZATION (1957); J.K. CHADWICK-JONES, SOCIAL EXCHANGE THEORY: ITS STRUCTURE AND INFLUENCE IN SOCIAL PSYCHOLOGY (1976); GEORGE C. HOMANS, THE HUMAN GROUP (1950); GEORGE C. HOMANS, THE NATURE OF SOCIAL SCIENCE (1967); GEORGE C. HOMANS, SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS 140-44 (1974); WILLIAM L. SKIDMORE, SOCIOLOGY'S MODELS OF MAN (1975); George C. Homans, *Social Behavior as Exchange*, 63 AM. J. SOC. 597 (1958); Harold H. Kelley and Martin M. Shapiro, *An Experiment on Conformity to Group Norms Where Conformity Is Detrimental to Group Achievement*, 19 AM. SOC. REV. 667-77 (1954).

198. BLAU & SCOTT, *supra* note 187, at 106.

199. See *id.* at 108.

200. *Id.* at 110.

201. See BLAU & SCOTT, *supra* note 187, at ch. 4 (surveying the literature of the field and making considerable reference to older studies, giving impression that work in the area may be subsiding).

Furthermore, a more recent study conducted by Patricia Martin and Marlene Powell<sup>202</sup> has produced findings consistent with the earlier studies, including Blau's examination of informal norms among welfare caseworkers.<sup>203</sup> The study examined the attitudes and expectations of law enforcement officers, prosecutors, and judges, the structure of the organizations in which they worked, and the effects of these attitudes and structures on how they responded to rape crimes.

Using data from 130 Florida organizations that process rape cases, Martin and Powell found that even "well-meaning" police officers were, because of organizational structure and attitudes, "oriented to routinely treat victims unresponsively."<sup>204</sup> They concluded that the officers' behavior was very much influenced by factors such as self-concept, rules, expectations, and informal norms, as sociology and social and industrial psychology have for some time posited. Further, the study found their behavior was particularly influenced by frameworks and frames of activity,<sup>205</sup> concepts drawn from the interpretive theory of famed social psychologist Erving Goffman, which provided much of the foundation for their study.<sup>206</sup>

Under the framework theory, organizations and individuals working within organizations are also subject to the "rules and routines" of the institution. "Rules" include not only routines but also "procedures, conventions, roles, strategies, organizational forms, and technologies around which . . . activity is constructed."<sup>207</sup> The term also includes the organization member's "beliefs, *paradigms*, codes, cultures, and knowledge that surround, support, elaborate, and contradict those roles and routines."<sup>208</sup>

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202. See Patricia Yancey Martin and R. Marlene Powell, *Accounting for the "Second Assault": Legal Organizations' Framing of Rape Victims*, 19 L. & SOC. INQUIRY 853, 872-79 (1994) (describing specific norms, frames of activity and frameworks correlated with less responsive behavior toward victims).

203. See Blau, *Patterns of Deviation*, in FORMAL ORGANIZATIONS, *supra* note 187.

204. Martin & Powell, *supra* note 202, at 853.

205. "Frameworks are cognitive schemata through which individuals interpret and give meaning to concrete events; *frames of activity* are behavioral responses or actions that are appropriate in given situations." Martin & Powell, *supra* note 202, at 859 (citing ERVING GOFFMAN, AN ESSAY ON THE ORGANIZATION OF EXPERIENCE: FRAME ANALYSIS (1974) [hereinafter GOFFMAN, FRAME ANALYSIS]; JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS (1989); David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464 (1986)).

206. See GOFFMAN, FRAME ANALYSIS, *supra* note 205; ERVING GOFFMAN, ASYLUMS (1961) [hereinafter GOFFMAN, ASYLUMS]. Martin and Powell also relied on more recent institutional theory. See MARCH & OLSEN, *supra* note 205.

207. MARCH & OLSEN, *supra* note 205, at 22. See also Martin & Powell, *supra* note 202, at 860 ("Rules specify routines that organizational members are expected to and, indeed, try to follow.").

208. MARCH & OLSEN, *supra* note 205, at 22 (emphasis added), *quoted in* Martin & Powell, *supra* note 202, at 860.

Applying this theory, Martin and Powell confirmed the influence of a community's norms over its members. Individuals make decisions about their actions according to "appropriateness within a conception of identity."<sup>209</sup> They "assess their options against standards of what is considered *appropriate* for them and the situation, rather than against a standard of all possible outcomes based on rational choice assumptions."<sup>210</sup> Such rules, routines, and conventions shape behavior even "when it is not obviously in the narrow self interest [sic] of the person responsible to do so."<sup>211</sup>

Consequently, for legal organizations as for other organizations, work is shaped by the community. To use Martin and Powell's painful but powerful illustration: "Bull Connor could not have hosed black citizens in Birmingham, Alabama, during the civil rights movement without community tolerance of his behavior."<sup>212</sup> Martin and Powell found that prosecutors, judges, defense attorneys, police, and hospitals are shaped by the community and society in their attitudes and conduct toward rape victims.<sup>213</sup> This study suggests that improved conduct can result from consciousness-raising and other efforts aimed at affecting organizational and community attitudes.<sup>214</sup>

### C. Promoting Group Norms Under a Regulatory Regime

One might question the relevance of some of these studies to the current debate about lawyers: Much of the past research was performed on "blue collar" workers rather than professional or managerial workers, and much of it focused on improved productivity rather than improved judgment, independence, loyalty, and other traits more directly germane to the practice of law. However, particular studies have focused on lawyers and have tended to confirm the prevailing sociological literature derived from studies of other work groups.<sup>215</sup> Even mass-market books on lawyers that are not designed as scholarly inquiries tend to reflect the manner in which lawyers

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209. Martin & Powell, *supra* note 202, at 860 (emphasis removed) (quoting MARCH & OLSEN, *supra* note 205, at 38).

210. Martin & Powell, *supra* note 202, at 860.

211. MARCH & OLSEN, *supra* note 205, at 22, *quoted in* Martin & Powell, *supra* note 202, at 861.

212. Martin & Powell, *supra* note 202, at 872.

213. *See id.* at 872-73.

214. *See id.* at 888-90.

215. *See generally* JEROME E. CARLIN, LAWYERS' ETHICS (1966); CARLIN, *supra* note 19; GALANTER AND PALAY, *supra* note 32; JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (rev. ed. 1994); ROBERT L. NELSON, PARTNERS WITH POWER (1988); THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA (Gerard W. Gawalt ed., 1984); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE (1998); SMIGEL, *supra* note 19.

conform to these contextual and regulatory factors.<sup>216</sup> Furthermore, the fact is that lawyers, despite their professional status, are unlikely to behave differently from other human beings.

Brought home to the issue of lawyer regulation, then, the teachings of sociology buttress what our common sense innately tells us: Behavior is a result of structures and norms. Consequently, the structure and norms that society chooses will have a powerful effect on the manner in which lawyers conduct themselves. Whether it is a professionalism paradigm or a business paradigm, the chosen framework will set the "frames of activity" within which lawyering takes place. It is therefore important that the structure be one that fosters close identification with the legal community as a whole and emphasizes important core values. Because the professionalism paradigm holds greater promise for protecting the independent judgment, loyalty to clients, and duty to the system required of lawyers, it retains clear advantages over the business paradigm.

Undoubtedly, some lawyers cheat on the current professional system and would do so under any future system. Some will err because of adversarial, financial or social pressure or because of a dysfunctional organizational culture where they practice.<sup>217</sup> Some will be insensitive to conflicts due to the lure of profit or out of a belief that they are too prominent to be questioned.<sup>218</sup> Others will violate the

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216. See JOSEPH C. GOULDEN, *THE BENCHWARMERS: THE PRIVATE WORLD OF THE POWERFUL FEDERAL JUDGES* (1974); GOULDEN, *supra* note 19; HARR, *supra* note Error! Bookmark not defined.; HOFFMAN, *supra* note 19; GERALD R. STERN, *THE BUFFALO CREEK DISASTER* (1976); JAMES B. STEWART, *THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS* (1983).

217. See, e.g., Matter of Jordan Schiff, No. HP 22/92 (Feb. 2, 1993), Departmental Disciplinary Committee, First Judicial Department, N.Y. Sup. Ct., *reprinted in* GILLERS, *supra* note 131, at 775 (illustrating a young lawyer's display of outrageously rude and sexist behavior toward opposing counsel who may have practiced in firm where senior partner set tone of rudeness, sexism, and unprofessional behavior); Bob Van Voris, *Client Memo Embarrasses Dallas Firm*, NAT'L L.J., Oct. 13, 1997, at A1 (describing how prominent plaintiff's firm was accused of ethical impropriety in content and tone of memorandum given to witnesses in preparation for depositions, which defense lawyer characterized as a document that "tells how to lie," after which plaintiff's firm did not address the propriety of the apparent coaching but instead counterattacked by arguing that memorandum was improperly taken and retained).

218. See, e.g., Paul M. Barrett, *How Ex-Milbank Partner Gellene Ended up on Trial over a Conflict*, WALL ST. J., Feb. 23, 1998, at B6 (describing how in Milbank, Tweed bankruptcy case, John Gellene, the partner appearing in the matter, was prosecuted and convicted for fraud for failing to disclose a conflict of interest); Paul M. Barrett, *Inside a White-Shoe Law Firm's Conflict Case*, WALL ST. J., Jan. 23, 1998, at B1 (describing how prominent New York firm Milbank, Tweed, Hadley & McCloy agreed to repay \$1.9 million in bankruptcy fees in face of allegations of improper conflict of interest representing both debtor and investor that was potential target of fraud claims by debtor); Paul M. Barrett, *Milbank Tweed Ex-Partner Convicted*, WALL ST. J., Mar. 4, 1998, at B13; Harvey Berkman, *Counsel Conflicts Decried: Critics Say Ken Starr's Caseload Makes Him Too Partisan for Whitewater Probe*, NAT'L L.J., Mar. 25, 1996, at A6 (describing critics' argument that Ken Starr's investigating President Clinton was a violation of professional responsibility rules on conflict of interest); Anthony Lewis, *Lord High Executioner*, N.Y. TIMES, Jan. 26,



rules inadvertently, particularly in close cases where a decision that seemed reasonable at the time it was made is, in hindsight, deemed a violation.<sup>219</sup> There will be areas of unavoidable difference of opinion among reasonable people.<sup>220</sup> A few—hopefully very few—will cheat simply because they are “cheats” who have passed undetected through college and law school. On the whole, however, lawyers will respond to a system that elicits good conduct.

This simple truth seems to have been overlooked or at least underemphasized by Pearce and others who advocate more emphasis on business in the practice of law. Much of the discussion draws upon real world events or makes assumptions while saying almost nothing about the literature of human behavior. Scholarship in psychology gives us insight into the behavioral influences affecting the individual. Sociology and group psychological study provide windows on the manner in which persons think and behave in social settings. As noted above, inquiry of this sort seems to have fallen out of fashion in legal literature. Prior to the recent focus on the perceived decline of lawyers and law practice, there was a good deal of examination of individual and group behavior and its influences. Prior to 1980, Talcott

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1998, at A19 (accusing Starr of inappropriately meddling in Clinton impeachment process out of partisanship); Melody Petersen, *A Client Asks: 'Weren't You My Lawyer?'*, N.Y. TIMES, Feb. 17, 1998, at B1 (stating that businessman had accused prominent firm Skadden, Arps, Slate, Meagher & Flom of wrongfully dropping him as client in favor of co-venturer seen as more lucrative future client for firm, and that plaintiff had alleged that in this matter and two others “Skadden, Arps turned against one client, or that client’s best interests, so that another client could profit”); Dean Starkman, *Willkie Farr Is Criticized for Role in Case*, WALL ST. J., Jan. 27, 1998, at B8 (stating that U.S. Bankruptcy Trustee had criticized prominent New York firm for failing to disclose conflict of interest and recommended firm’s forfeiture of \$4.6 million in fees).

219. See Juliet Eilperin, *Female Lawyer Fined for Not Accepting Male Client: Ruling that Law Firm Office Is Public Accommodation Sparks a Feminist Debate*, NAT’L L.J., May 12, 1997, at A7. The decision of the Massachusetts Commission Against Discrimination was that attorney Judith Nathanson could not limit her family law practice to female clients in cases of divorce. The Commission’s decision sparked considerable protest and has divided commentators in the bar and the academy. See Symposium, *A Duty to Represent? Critical Reflections on Stopnicky v. Nathanson*, 20 W. NEW. ENG. L. REV. 5 (1998). I have previously described the issue as a “simply hard” one and “a difficult question,” and it remains so to me. See Jeffrey W. Stempel, *A More Complete Look at Complexity*, 40 ARIZ. L. REV. 781, 791 (1998). Cf. Debra Burke et al., *Pro Bono Publico: Issues and Implications*, 26 LOY. U. CHI. L.J. 61 (1994) (“Although attorneys may owe duties to perform pro bono service for indigent litigants which are historically, constitutionally, practically, and ethically based, as well as need-based, mandating that such service be made available to indigent civil litigants may raise legitimate concerns.”); Deborah L. Rhode, *Can a Lawyer Insist on Clients of One Gender?*, NAT’L L.J., Dec. 1, 1997, at A21. When attorneys “err” in situations like this, it can hardly be said that the fault lies with the professionalism paradigm.

220. See Geoffrey C. Hazard, Jr., *Compulsory Bar Dues and Politics Don’t Mix*, NAT’L L.J., Jan. 19, 1998, at A26, in which an ethics expert takes the position in his regular column that bar associations with compulsory dues should not take positions on political issues unrelated to law practice and the courts, suggesting that affirmative action, punishment for child molesters, same-sex marriage, and caps on medical malpractice damages are such nonrelevant political matters. The California Bar and other state bars have at least implicitly disagreed by taking positions on such issues.

Parsons and others conducted significant studies and articulated theories of worker behavior, including that of professionals.<sup>221</sup> Robert K. Merton's work stood out; indeed, he coined the term "self-fulfilling prophecy."<sup>222</sup> In the 1980s and 1990s, however, these sources are seldom found in legal scholarship. Although I accuse him of paying it insufficient attention, Pearce is among the few to note in any way this body of work in legal writings.

Some of the inattention to the literature on workers in groups and society is a function of its very success. The observations made fifty years ago seem obvious and trite. There seems to be no need to dissect it with the zeal reserved for a new work in cognitive theory by Tversky and Kahneman.<sup>223</sup> Nonetheless, it is odd that despite the proliferation of "law and [fill in your favorite discipline]" inquiry during the past three decades, relatively little has been done by bar critics or supporters to examine lawyers in light of research on occupational and group behavior. This body of work, primarily sociological rather than psychological, powerfully reveals the influence of social structure and expectation upon behavior.

In a nutshell, research in this area demonstrates that institutions and their ground rules and norms matter a great deal. Thus, it would be a mistake to overlook this "lost learning"<sup>224</sup> as Pearce and others have done in determining to ditch professionalism in favor of the business paradigm. The conduct of lawyers in the twenty-first cen-

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221. See, e.g., TALCOTT PARSONS, *THE PROFESSIONS AND SOCIAL STRUCTURE* (1939); TALCOTT PARSONS, *THE SOCIAL SYSTEM* (1951); PETER M. BLAU, *THE DYNAMICS OF BUREAUCRACY* (1955); B.J. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM* (1976); EMILE DURKHEIM, *MORAL EDUCATION* (1961); EMILE DURKHEIM, *PRAGMATISM AND SOCIOLOGY* (John B. Allock ed., J.C. Whitehouse trans., 1983); DURKHEIM, *PROFESSIONAL ETHICS*, *supra* note 79; ELIOT FREIDSON, *DOCTORING TOGETHER: A STUDY OF PROFESSIONAL SOCIAL CONTROL* (1975); ELIOT FREIDSON, *PROFESSIONAL DOMINANCE* (1970); C. WRIGHT MILLS, *WHITE COLLAR* (1951); D. RUESCHEMEYER, *LAWYERS AND THEIR SOCIETY* (1973); R. Bucher & J. Stelling, *Characteristics of Professional Organizations* 10 *J. HEALTH & SOC. BEHAV.* 3 (1969); H.L. Wilensky, *The Professionalization of Everyone?*, 70 *AM. J. SOC.* 137 (1964).

222. See, e.g., MERTON, *ON THEORETICAL SOCIOLOGY*, *supra* note 79; MERTON, *SOCIAL THEORY*, *supra* note 79; ROBERT K. MERTON, *SOCIOLOGICAL AMBIVALENCE AND OTHER ESSAYS* (1976).

223. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOL.* 207 (1973) (discussing heuristics by which persons assess issues, sometimes rationally and sometimes erroneously). Spurred by the work of Tversky and Kahneman, cognitive theory has been prominently discussed in the legal literature of the 1990s and utilized to justify or oppose various legal rules, doctrines, and norms. See, e.g., Neil B. Cohen & Aaron D. Twerski, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 *U. ILL. L. REV.* 607; Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 *U. CHI. L. REV.* 1129 (1986).

224. See Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 *ALB. L. REV.* 325, 390 (1995) (assessing the development of commercial law under the UCC and suggesting that modern debates about revision tend to retread old ground well-analyzed by scholars and practitioners of the 1930s, or to be oblivious to this "lost learning").

ture will be shaped by their regulatory environment, which includes not only rules, enforcement, reward, and sanction, but informal norms as well.

Even if Pearce is right about the current malaise affecting lawyers, the growing violation of historical taboos, and the acuteness of the paradigmatic anomaly he perceives, his analysis suffers from a significant, arguably fatal, flaw. Faced with occurrences creating tension in the system of lawyer regulation, he assumes that the only means of resolving the anomaly is through a change in the system. Pearce overlooks the degree to which the regulatory system can change the behavior of its subject. So viewed, the professionalism paradigm is both a cause and a casualty of lawyer behavior. Even if the profession is in crisis, a reinvigorated and heightened professionalism paradigm may resolve the crisis, at least as well as any proposed paradigm shift to a business paradigm.

#### IV. THE SUPERIORITY OF THE PROFESSIONALISM PARADIGM'S FRAMEWORK

Viewed from the sociological perspective, the question then becomes: Are we more likely to foster good behavior by lawyers, or at least minimize bad behavior, under a professionalism paradigm or a business paradigm? I prefer to place my bets on professionalism for the following reasons: (1) The proffered business paradigm lacks sufficient ethical content; by contrast, professionalism is accompanied by a comprehensive set of rules outlining the bounds of permissible lawyer conduct. (2) The professionalism paradigm provides more means for detection, supervision, and enforcement, and, unlike the business paradigm, professionalism is supplemented by a system of informal norms. (3) The professionalism paradigm requires lawyer loyalty to clients even when outside pressures or pecuniary interests would otherwise draw lawyers in directions adverse to the client, as well as certain duties to the system and third parties. By contrast, even modern business ethics impose no similar duties. Instead, business theory urges them to look out for themselves, no matter what the consequences.

##### A. *The Professionalism Paradigm: Comprehensive Rules and Precedential Interpretation*

It is difficult to determine exactly what would constitute rules of lawyer responsibility under a business paradigm.<sup>225</sup> Further, even if

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225. See Kemba Dunham, *Right and Wrong: What's Ethical in Business? It Depends on When You Ask*, WALL ST. J., Jan. 11, 1999, at R48 (noting lack of widespread agreement on core code of business ethics and stating: "While there may be fewer outrageous abuses than in the past, many business ethicists say there remains a long way to go"); see

one could zero in on the elusive target, any set of regulations developed under the business paradigm probably would not be particularly apt or attractive. The primary objective of business activity is profit.<sup>226</sup> Thus, most business theories urge commercial actors to look out for themselves no matter what the consequences, so long as the conduct stops short of outright illegality.

What ethical guidelines may be found in business are for the most part relatively straightforward aspects of common decency: make a product of acceptable quality, give a day's work for a day's pay, do not defraud, and try to keep the customer happy.<sup>227</sup> Many of these business bromides, however, can be seen as tips for success more than ethical aspirations or restrictions. Business ethics have not been very concerned with matters such as conflicts of interest, independent judgment, loyalty, and confidentiality, matters central to the effective discharge of the lawyering function.<sup>228</sup> Turning the practice of law over to an organizing construct that does not deal with these factors is folly.

These factors, of course, lie at the center of lawyer professional responsibility. The professionalism paradigm, moreover, has developed a comprehensive set of rules and regulations outlining the bounds of permissible lawyer conduct in these critical areas. Although imperfect, the framework provides "black letter" guidance to lawyers and has been augmented through years of precedential interpretation.

Thus, unlike the mythical and amorphous "Model Rules of Business Responsibility" Pearce hopes to see by the year 2050, there already exist real ABA *Model Rules of Professional Conduct* that speak

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also Tina Kelley, *Charting a Course to Ethical Profits*, N.Y. TIMES, Jan. 8, 1998, § 3, p. 1 (noting Boeing's use of an ethics director but not describing functional set of ethics rules).

226. At least, this is the black-letter law of business purpose. See *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 583-84 (N.J. 1953); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders."). For a broader examination of corporate purpose that goes beyond money-making but finds business ethics problematic, see Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477 (1995).

227. See R. EDWARD FREEMAN, *BUSINESS ETHICS: THE STATE OF THE ART* (1991). Perhaps I am unfair to Freeman and other business ethicists, but after reading this book and others in the genre, I am still asking Gertrude Stein's question about whether there is a "there there" in the case of business ethics that goes beyond the limits of the Golden Rule. Although "do unto others as you would have them do unto you" is a pretty good maxim for living, it hardly provides the sort of developed rules for regulating lawyer activity already in place under the professionalism paradigm. See Mitchell, *supra* note 226, at 528-29, 536 (arguing that corporate actors are not held to sufficient moral accountability; corporate managers "are constrained by current law to act more as children than as rational adults who recognize their own moral agency"); Aspen Institute, 1999 Seminar Schedule, *The Corporate Conscience: Ethics for Leaders* (Jan. 1999 program brochure) (suggesting business ethics derive from classical ethical theory and are implicitly not designed for the practice of law).

228. See *supra* notes 127-38, 225-27 and accompanying text.

to important ethical concerns that might be overlooked, ignored, or knowingly violated if attorneys were to unilaterally consider their own best economic interests. The *Model Rules* prohibit conflicts of interest<sup>229</sup> or affiliations that might impair the lawyer's detached, neutral, sound judgment to which the client is entitled.<sup>230</sup> Confidentiality is required,<sup>231</sup> as is competence<sup>232</sup> and some minimum level of client control, including control of the objective of the representation.<sup>233</sup>

In addition, lawyers are required to safeguard client property,<sup>234</sup> have some restriction on fee charges,<sup>235</sup> and have limitations on their withdrawal from representation.<sup>236</sup> Lawyers must also act as officers of the court and the legal system generally.<sup>237</sup> Lawyers are further obliged to serve the profession through quality-control responsibilities, such as supervising subordinate attorneys<sup>238</sup> and reporting serious ethical misconduct.<sup>239</sup>

### B. Promoting Adherence to Standards of Conduct

The professionalism paradigm provides more means for detection, supervision, and enforcement. Lawyers operate in the presence of clients, third parties, and other counsel. Because the non-clients with whom the lawyer deals are often adverse, a natural private police force shadows the working attorney. If any one of these parties feels dissatisfied or wronged by the lawyer's behavior, they may take action to expose the allegedly wrongful conduct and to obtain relief. This also exists in business to some degree. For example, competitors are often the instigators of antitrust or trade and tariff violations. However, the corps of self-interested, private attorneys general in the business world enjoy a considerably more distant vantage point from which to pursue their claims than do those who work in proximity to lawyers and have otherwise strong incentives to take action against misbehaving lawyers.

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229. See RULES 1.7, 1.9, 1.10, 1.11, 1.12.

230. See RULES 1.8, 5.4.

231. See RULE 1.6.

232. See RULE 1.1.

233. See RULE 1.2.

234. See RULE 1.15.

235. See RULE 1.5.

236. See RULE 1.16.

237. See RULES 3.1, 3.2, 3.3., 4.1.

238. See RULES 5.1, 5.2, 5.3.

239. See RULE 8.3. The duty is not a paper tiger. See *In re Himmel*, 533 N.E.2d 790, 796 (Ill. 1988) (suspending attorney's license to practice law for failure to report that another lawyer had stolen from a client). In an effort to recover the money, the victim hired Himmel, who agreed in a settlement with the other attorney to keep mum about the ethical breach. See *id.* at 795. Since the decision, lawyer complaints about other lawyers have greatly increased, numbering in the hundreds each year in Illinois alone. See *The Himmel Effect: 'Snitch Rule' Remains Controversial but Effective, Especially in Illinois*, A.B.A. J., Apr. 1997, at 24.

Those dissatisfied with lawyer actions have available to them a wider array of remedies than commonly exists for businesspersons. A more expansive variety of meaningful sanctions is available against the transgressing attorney. In the business world, the wronged party can demand informal satisfaction, file suit or, depending on the infraction, complain to a prosecutor. Bad business conduct is usually punished only by civil liability, with only occasional criminal prosecution. By contrast, bad conduct by the lawyer subjects him or her to criminal prosecution and civil liability, as well as discipline by the profession and, perhaps, contempt of court. The organized bar and the state's high court have the ability to find that a lawyer has sinned and to deliver a death penalty of sorts—disbarment—that would not be a realistic threat in the business world. Further, wrongdoing that results only in civil liability can be spread and shifted through insurance. Thus, the professionalism paradigm creates a heightened threat encouraging greater lawyer adherence to professional norms than would the business paradigm.

The professionalism paradigm—simply because it defines lawyers as professionals rather than ordinary market participants—creates a system of informal norms encouraging better behavior by lawyers. Business has no comparable analogue. Although many ethical businesspersons serve as role models to others in the community, there is no sanctioning mechanism for the “bad” businessperson similar to that which currently exists for the “bad” lawyer. The sanctioned businessperson is likely to enjoy continued acceptance in the business community or, if shunned, will lose only commerce for some modest time interval.

Lawyers, of course, are not always formally disciplined or held liable because of improper behavior.<sup>240</sup> Nonetheless, lawyers who have breached a confidence, performed poorly, bilked a client, gouged on fees, or concealed relevant information are more likely than businesspersons to face immediate or informal sanctions. Offending lawyers are more likely than offending businesspersons to lose future referrals or suffer adverse judicial rulings because of the court's lingering doubts. Businesspersons can more often simply sell another widget to the next passing customer.

### *C. Promoting Important Values Above Quest for Profit*

In addition, the very nature of lawyering makes a professionalism paradigm more appropriate for the lawyer regulation. The multifaceted nature of legal service is a significant part of the reason why Pearce's proposed business paradigm should be rejected. Business-

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240. See *supra* notes 197-221 and accompanying text (regarding influence of group structure and norms on individual behavior).

persons have one primary goal: commercial success.<sup>241</sup> The objective of business is to benefit the owners or managers of the entity, usually through relatively swift monetary reward. Although the diffuseness of business-ethics writings makes it possible that I am underinformed, it does not appear that mainstream business ethicists suggest that a businessperson has any superior duty.

By contrast, the regime of legal ethics developed under the professionalism paradigm has clearly established two duties of counsel that under certain circumstances are superior to pecuniary success: The duty of loyalty to the client and the duty to the system are decreed in many black-letter rules of lawyering and implicitly supported in judicial contempt power and in the very structure of the system's admission and disciplinary architecture.

Although external conduct standards are applied to the business community through the positive law of the governing jurisdiction, the business ethos calls for avoiding legal regulation if possible, and minimizing it to the degree permitted. Ironically, of course, business frequently does this with the help of lawyers acting pursuant to their duty of client loyalty. Although Pearce acknowledges the troubling specter of a lawyer who is but a "business servant,"<sup>242</sup> his thesis fails to fully appreciate the implication. Rather than attempt to rein in the business servant under the regulatory regime of the professionalism paradigm, Pearce instead suggests codifying a paradigm of business servitude.

Certainly, many businesses display social conscience. Illustrations abound of businesses contributing to charity, working for community improvement, and so on. Nevertheless, the bulk of this effort is motivated by the self-interest of the business in public relations and the indirect and deferred profits likely to come from a more stable community—better schools, and the like. While this is all very admirable, it is not the equivalent of a duty to the system enforced against the business by the system. Rather, business engages in good works when it accrues to its benefit; there is no canon of any business code of ethics requiring business to act against its pecuniary self-interest. Lawyers, however, must do so because of their duties to the system. It is at least questionable whether similar obligations would be imposed upon lawyers working under regulations propounded under a business paradigm.

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241. I use the term "commercial success" to encompass profit maximization, growth or any other reasonable goal sought by company management to avoid entering the debate about whether business really seeks profit maximization or instead pursues other goals. Still, any commercial goal I have seen adopted or urged has always been one designed to benefit the owners or managers of the entity.

242. See Pearce, *Paradigm Shift*, *supra* note 31, at 1231-53 (discussing the concept of a lawyer as a potentially slavish "business servant").

Although a question may be posed whether a business paradigm is more pro-client than the professionalism paradigm, it is a question that need not long detain the inquiry. It is true that entrepreneurial zeal may make lawyers bulldogs for clients, but this presents another set of problems. Ultimately, the net impact is anti-client, because the dog's affections can prove to be fickle in the face of business opportunity. More significantly, any version of a business paradigm that I can discern serves the client only to the degree that financial benefit accrues to the businessperson. Business ethos requires no residual loyalty to a customer who has outlived its usefulness.

Businesses treat customers or prospective customers well because it is in their pecuniary interest to do so. When it is not, business owes nothing to the current, former, or prospective customer. If a business has an opportunity to acquire a better customer, it may terminate relations with an existing customer, even one that has relied upon the business. Although the business may be required to pay contract damages, the compensation will often be assessed according to a theory of "efficient breach." The business pays only what the spurned customer would have realized had the contract been kept. There is almost never an additional penalty for even cold-blooded breach, and courts resist characterizing events surrounding such a breach as a tort justifying exemplary damages. In other words, the business paradigm provides only the mildest penalty for disloyalty or abandonment.

By contrast, the legal ethics launched under the professionalism paradigm make client loyalty perhaps the highest duty of the attorney. Even when the relationship is over or the client is dead, substantial duties of loyalty continue to weigh upon counsel.<sup>243</sup> Lawyers may not reveal the past confidential communications of clients.<sup>244</sup> They may not produce trial preparation materials absent court order.<sup>245</sup> They may not take in new clients if the new client's matter is substantially related to the matter involving the former client.<sup>246</sup> Lawyers, of course, cannot simultaneously represent two clients with directly conflicting interests.<sup>247</sup> Nor can they represent a client where the lawyer's faithfulness to the client may be compromised by the lawyer's other business or personal ties.<sup>248</sup> There is nothing resembling a widely accepted business code that prohibits such behavior by commercial actors.

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243. *See Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998) (holding that attorney-client privilege survives death of the client).

244. *See* RULE 1.6.

245. *See* FED. R. CIV. P. 26(b)(3).

246. *See* RULE 1.8.

247. *See* RULE 1.7.

248. *See* RULE 1.8.



Lawyers function quite differently from businesspersons, and under the professionalism paradigm, lawyers enjoy ethics regulation reflecting the inherent tension in their multiple rules and duties. Consequently, lawyers operating under the professionalism paradigm frequently have duties imposed upon them that transcend their ability to maximize profits at the expense of current or former clients. There appears to be no basis for thinking that this praiseworthy aspect of American law would improve under a business paradigm of regulation.<sup>249</sup> There is substantial ground for fearing that this aspect of lawyer regulation would deteriorate if a business paradigm replaced the professionalism paradigm.<sup>250</sup>

The duties to the client and the system are part and parcel of one's identity as a lawyer, not out of any misplaced sense of altruism or charity, but because they are essential attributes of the lawyer's work. Without loyalty to the client, law itself cannot be practiced. Without a corresponding duty to the system, law can be an instrument of social destruction rather than social cohesion; therefore, there are exceptions to the general duties of client loyalty. For example, client confidences may be revealed if they involve an intent to commit a future crime or if the lawyer's services have been enlisted to perpetrate fraud.<sup>251</sup> Where a lawyer knows of adverse controlling legal authority that an opponent has failed to invoke in a contested matter, the lawyer must inform the court even though this works against the immediate interests of the client.<sup>252</sup>

Because the lawyer's roles and duties are varied, nuanced, and often in conflict, lawyer regulation requires a sophistication and sensitivity that one is hard-pressed to see in theories of business behavior. Although business thinking has developed sophisticated approaches to the means by which business accomplishes its goals, the basic business theory about goals remains a simple one: make money. Because the practice of law has a considerably wider array of goals, it is unlikely that a system of legal regulation run through a business paradigm would successfully shoulder the burden of addressing varied aspects of law practice as well as the professionalism paradigm.

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249. See *supra* text accompanying notes 178-82 (describing cases of effective discipline of lawyers).

250. See *supra* notes 141, 226-28 and accompanying text (noting the absence of well-established business ethics and that the primary goal of business, profit, would impede adequate protection for client, confidentiality, independent judgment, and client loyalty). See Part V *infra* for examples of questionable business conduct that did not appear to cause lasting harm to the perpetrators.

251. See RULE 1.6(b)(1).

252. See RULE 3.3.

## V. THE DANGERS OF REJECTING PROFESSIONALISM

Adding further fuel to this concern is the occasionally abysmal track record of business on ethical matters. In particular, we often see instances of businesses attempting to control or constrain professional judgment by lawyers. If this is what business does when dealing with professionals regulated under a professionalism paradigm, one shudders to think what may take place in the future under a business paradigm, when lawyers lack even the ideological protection of their own paradigm. If lawyers are governed under a business paradigm, this may reduce the tension between lawyers and certain clients such as liability insurers, but the absence of tension would simply reflect the profession's surrender to the dark aspects of the business world.

Merely reading the newspaper and case reports makes one aware of the danger which awaits if lawyers are subject to regulation by business ideology.<sup>253</sup> Too often, business ethics consist of not merely the disturbing "caveat emptor" ideal, but also the distasteful "survival of the fittest" or "devil take the hindmost" ideals. A few recent or current examples of note illustrate.<sup>254</sup>

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253. Even where commercial actors are supposed to be professionals, one finds troublesome instances of suspect conduct. *See, e.g.*, MICHAEL H. TROTTER, *PROFIT AND THE PRACTICE OF LAW: WHAT'S HAPPENED TO THE LEGAL PROFESSION* (1997). A reviewer characterized Trotter's analysis as one that "sees attorneys as usually well-meaning individuals trapped in a system that ignores ethics and invites abuse." Kevin M. Quinley, *Look at Law Firms a Helpful Service for Readers*, *BUS. INS.*, Nov. 16, 1998, at 20; *see also* Paul Beckett, *SEC Has New Standards for Accountants*, *WALL ST. J.*, June 15, 1998, at B10 (documenting how government regulators impose professional conduct rules on accountants, members of a profession); Monica Langley, *Columbia Tells Doctors at a Hospital to End Their Outside Practices: Showdown Nears as Physician in Forth Worth Refuses Administrator's Demands*, *WALL ST. J.*, May 2, 1997, at A1 (noting conflict between doctors and a hospital company regarding the appropriateness of outside practice and hospital control over doctors); Elizabeth MacDonald & Joann S. Lublin, *In the Debris of a Failed Merger: Trade Secrets*, *WALL ST. J.*, Mar. 10, 1998, at B1 (noting that former clients were concerned about leakage of sensitive information due to the involvement of two of the "Big Six" accounting firms, Ernst & Young and KPMG Peat Marwick, despite the professional stature of accountants, due to confidentiality rules which are less stringent and established than those applicable to lawyers); Melody Petersen, *When an Auditor's Hats Clash: KPMG Case Shows Varied Duties Can Create Conflicts*, *N.Y. TIMES*, Jan. 7, 1998, at D1 (noting concern that KPMG Peat Marwick may have been shouldering "too many" roles for Teachers Management and Investment Corp., including: "client," "self-regulator," "bill collector," "auditor," and "consultant"); Hope Viner Samborn, *Shutting Out Former Partners: Courts Are Now Umpiring the Growing 'Free-Agency' Among Lawyers*, *A.B.A. J.*, Jan. 1999, at 32 (reflecting concerns about ethical breaches and disloyalty occasioned by lawyers changing firms, an increasing practice).

254. The scope of this article obviously prevents sustained examination of purported ethical lapses by business. However, there seems to be no shortage of topics for further investigation. *See, e.g.*, Lee Ann Gjertsen, *N.Y. Recommends Brokers Disclose Fees*, *NAT'L UNDERWRITER* (Prop. & Casualty/Risk & Benefits Mgmt. ed.), Sept. 28, 1998, at 9 (regulators require disclosure to correct possible misleading of clients and self-dealing by insurance placement brokers); Sally Roberts, *Greenberg Designated to Take Helm of M & M*, *BUS. INS.*, Jan. 25, 1999, at 1 (large insurance broker Marsh & McLennan selects Jeffrey

A. *Testing the Constraints of the Business Paradigm: The Behavior of Financial Institutions During and Following World War II*

It may seem unduly melodramatic to invoke the banking and insurance nonpayment, stonewalling scandals as examples of business misbehavior. Unfortunately, it is also apt. The undeniable factual evidence indicates that in the wake of World War II and the Nazi Holocaust, European banks simply escheated to themselves the unclaimed accounts of murdered or dislocated Jewish depositors.<sup>255</sup> European life insurers did the same regarding life insurance policies unclaimed by beneficiaries in the wake of the War.<sup>256</sup> In both cases, it appears that banks and insurers conducted "business as usual" and

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W. Greenberg as CEO, notwithstanding the fact that Greenberg's father, Maurice Greenberg, is CEO of American International Group, world's largest insurance company and a party frequently adversarial to Marsh & McLennan and its clients); Eben Shapiro, *Manager's Dual Roles Anger Star Client*, WALL ST. J., Mar. 6, 1998, at B1 (comedian Gary Shandling files suit alleging that former manager "was mired in conflicts of interest and cut deals to benefit himself at Mr. Shandling's expense"); Michael Siconolfi, *Merrill Broker Protests Policies, Is Fired, Finds His Clients Divvied up: He Says Trumped-up Charge Was Used to Oust Him and Grab His Customers*, WALL ST. J., Feb. 27, 1998, at A1; *State Farm Settles Policyholder Lawsuit for over 100 Million*, WALL ST. J., June 12, 1998, at A6, ("State Farm Insurance Cos. [sic] has paid more than \$100 million to settle a lawsuit by 117 victims of the Northridge, Calif., earthquake, who alleged that the company wrongly restricted their insurance coverage prior to the 1994 disaster . . .").

255. See Tom Bower, *The Genocide Bank*, DAILY MAIL, Feb. 6, 1999, at 17 (referring to the role of Deutsche Bank in financing the Auschwitz concentration camp and other cooperation with the Nazi regime); see also Alex Brummer, *A Hook for Holocaust Justice; American Lawyers and Finance Regulators Are Giving Jewish Groups a Powerful Tool to Crack Open the Vaults of Banks, Art Collections and Firms Tainted by the Nazis*, GUARDIAN, Dec. 17, 1998, at 19, available in LEXIS, News Library, Guardn File; Desson Howe, *A Wealth of New Information on Holocaust; Declassified Wartime Documents at Archives Are Generating Lots of Interest*, WASH. POST, Nov. 18, 1998, at B1 (recording that documents regarding the Nazi financing efforts show looting of Jewish bank accounts, insurance policies, and other assets, often with open cooperation or at least no significant resistance from both German and other European financial institutions); Henry Weinstein, *Holocaust Survivors, Swiss Banks OK Settlement*, L.A. TIMES, Jan. 23, 1999, at A13. European businesses also employed slave labor provided by the Nazi captors. See Edmund L. Andrews & Barry Meier, *Germans Seek Plan to Avoid Suits over Nazi-Era Labor*, N.Y. TIMES, Dec. 14, 1998, at A12 (noting that according to one source, German companies used 750,000 slave laborers from concentration camps, half of whom were Jewish).

256. See Andrew McCathie, *Corporate Germany Under Pressure over Nazis Links*, DEUTSCHE PRESSE-AGENTUR, Feb. 5, 1999, available in LEXIS, News Library, Dpa File (reporting that, according to one German historian, "the Nazis pursued the wealth held by the Jews and other victims of Hitler as a way of helping to fund their exploits" and in addition to anti-Semitism "were out to steal and were very interested in money"); *National Archives Holds News Conference on the Holocaust Conference*, FDCH Political Transcripts, Dec. 3, 1998, available in LEXIS, News Library, Poltrn File (transcribing the remarks of the Undersecretary of State Stuart Eizenstadt and others, who described how Nazis and European insurers converted insurance policies held by Jews and noted: "It's not coincidental that the six [insurance] companies which are voluntary—voluntarily participating have insurance business in the United States."); Sean Somerville, *Suing for Reparations; Holocaust: The Success of Lawsuits Against Swiss Banks Has Given New Impetus to War-Crimes Class Action Suits*, BALTIMORE SUN, Jan. 17, 1999, at 1D, available in LEXIS, News Library, Balsun File.

pretended that what must have been an inordinate spike in orphaned accounts and policies was merely an unusual upsurge in abandonment by depositors and policyholders and their families.

This complicit attitude on the part of some segments of the financial business community was not confined to European institutions. While there is no suggestion that any American institutions inappropriately handled specific accounts, several have come under fire recently for having put their economic interests ahead of both decency and patriotism.<sup>257</sup>

I do not want to ride the morality play train more than is warranted, but these events must surely give pause to anyone concerned about the legal system and the ethics of businessmen and lawyers. To be fair to the banks and insurers, the ravages of war undoubtedly left them less organized for a time. Looking back today, there may be legitimate reasons why current management cannot be blamed for records discarded long ago. Yet yesterday's management was culpable at almost an obscene level: Even when weighed against the most compelling of moral and ethical considerations, *profit* came first.

This is not to suggest that lawyers have a morality genetically superior to that of bankers and insurers. Indeed, some information has surfaced to suggest that some lawyers emulated the financial community in their relations with Nazis or German interests.<sup>258</sup> However, the fact remains that, while the business paradigm is at best neutral as to this type of behavior, the professionalism paradigm, by emphasizing duties to the client, inherently disapproves and discourages it.

To test the comparative ethical quotient of law and business, one can hypothetically make a law firm the focal point of this drama. Visualize a large, prestigious American law firm during World War

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257. See, for example, Michael Hirsh, *The Hunt Hits Home: Did U.S. Companies Cozy up to the Nazis?*, NEWSWEEK, Dec. 14, 1998, at 48, describing a letter, dated only five months after Pearl Harbor, from the Paris branch chief of Chase National Bank, a "pillar of Wall Street," to then-vice president Siegfried Stern, in which the chief boasted of the "pleasant relations" which the Paris branch enjoyed with many German organizations and Nazi officers. The article points out that "[o]nly a few miles from branch office, Jews were being loaded into cattle cars, and thence to slaughter in Eastern Europe."

258. The Hirsh article provided the following disturbing account:

In 1940, one of the nation's most prestigious law firms, Sullivan & Cromwell, joined together with the Wallenberg family of Sweden—famed for producing Raoul, a Holocaust martyr who saved Jews in Budapest—to represent Nazi German interests, says Abe Weissbrodt, a former Treasury Department lawyer who prosecuted the case in 1946. The scam? Sullivan & Cromwell drafted a voting trust agreement making the Wallenbergs' Enskilda Bank a dummy owner of the U.S. subsidiary of Bosch, a German engine-parts maker, so the Nazis could retain control. The papers were drawn up by John Foster Dulles, a Germanophile who later became Secretary of State and whose name today graces Washington's international airport (the scheme worked during the war, but in 1948 Bosch was finally auctioned to a U.S. buyer).

*Id.* at 48.

II with branch offices throughout Europe. During and after the War, contact ceases from many of the clients who had paid sizeable retainers to the firm. What might happen if one of the firm's managing partners decided that the funds were abandoned and now belonged to the firm?

It seems unlikely that a significant subset of lawyers could engage in the thievery that apparently gripped some European banks and insurers.<sup>259</sup> Even if an unscrupulous managing partner suggested such tactics, under the current paradigm he or she would likely be stopped by others in the firm, reported for ethical violations, removed from the firm, or otherwise thwarted.

Lawyers are trained to give great loyalty to clients. Some may occasionally stop short of the fiduciary goal of putting client interests above their own in little ways, as, for example, billing for the hour that was not optimally productive or suing to collect an unpaid bill, but client abandonment is, if not altogether forbidden, strongly frowned upon.<sup>260</sup> Even commingling of client and personal funds is forbidden,<sup>261</sup> and it is so rigorously enforced in some states that it can lead to disbarment, even when no client loses money.<sup>262</sup>

Loyalty rules are not aspirational or left to individual conscience; violations can lead to professional discipline. In fact, in many instances lawyers are even required to report the violations of others.<sup>263</sup> Civil liability to the injured party is a distinct possibility, or even a likelihood, and there are few barriers to such a suit by clients or third parties.<sup>264</sup> In a case such as the conversion of assets of deceased clients, plaintiffs would probably not even need to proffer an expert witness on professional responsibility to prevail.<sup>265</sup> Case law further

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259. This is different from having an isolated lawyer or even a small firm engage in unethical conduct. See Dunham, *supra* note 225.

Throughout history there have been those who considered it a matter of personal honor to deal fairly and also those who thought that anything one could do without penalty was acceptable. The question is, at base, whether human nature has changed. To that, I find, the answer is, "It has not."

*Id.*

260. Still, lawyers are legally permitted a wider zone of client abandonment than is, perhaps, desirable. See RULE 1.16(b) (setting forth the circumstances under which a lawyer may withdraw from representation); see also *supra* text accompanying notes 241-49 (regarding a lawyer's discretion to discharge clients).

261. See RULE 1.15.

262. See, e.g., *In re Warhaftig*, 524 A.2d 398, 402 (N.J. 1987) (disbarring an attorney who had "borrowed" money from client funds, although he only took an amount less than he was confident his fees would be, the fees were to fund cancer treatment for his wife, no client was ever injured, and he replaced the funds).

263. See RULE 8.3.

264. See generally RONALD E. MALLIN & JEFFREY M. SMITH, LEGAL MALPRACTICE (4th ed. 1996) (surveying doctrinal and practical aspects of malpractice exposure and litigation); see also GILLERS, *supra* note 131, at 733-52.

265. See *Olfe v. Gordon*, 286 N.W.2d 573, 578 (Wis. 1980) (finding that expert testimony is not required to sustain a malpractice action against a lawyer where malpractice

suggests that on questions of credibility and evidentiary inference, ties go to the client-plaintiff rather than the attorney-defendant.<sup>266</sup>

Under the professionalism paradigm, the norm of client loyalty means that the law firm in the above hypothetical would be roundly criticized and ostracized by its peers. No similar reaction seems to have taken place with regard to the financial institutions' behavior during World War II. Those highly respected banks and insurers remain respected banks and insurers. Sadly, they may suffer no loss of business because of their reprehensible conduct. This is hardly a persuasive brief for institutionalizing a business paradigm for the law.

### B. *Loyalty and Duties to Third Parties*

American business may lack examples of anti-client action as dramatic as that of the European abandonment of Jewish depositors and policyholders.<sup>267</sup> Nonetheless, American businesses, operating under the business paradigm, do not have the same kind of loyalty to their clients and customers as lawyers operating under the professionalism paradigm. It is true that the business ethic, particularly in the wake of the total quality management preached by W. Edwards Deming initially and by Tom Peters to this day,<sup>268</sup> advocates treating customers well as part of a long-term relationship.<sup>269</sup> But an underlying

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consists of breach of contract, deception, and failure to follow client instructions, rather than alleged poor judgment or inadequate performance of services).

266. See, e.g., *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693-94 (Minn. 1980) (affirming client's judgment in malpractice action in the face of attorney testimony that there had been no retention).

267. There are, however, widespread accounts of anti-social behavior by business, much of it uncovered by and prosecuted by lawyers: asbestos, the Ford Pinto gas tank, the Dalkon Shield, and tobacco, to name a few. See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (affirming jury verdict in asbestos case); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 771 (1981) (affirming jury verdict in Ford Pinto case); Sheldon Engelmayer & Robert Wagman, Note, *Lord's Justice: One Judge's Battle to Expose the Deadly Dalkon Shield I.U.D.*, 99 HARV. L. REV. 875 (1986) (book review) (discussing one trial judge's determined efforts to "see justice done" in famous Dalkon Shield case—and arguing he went too far beyond his appropriate neutral role); Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 857 (1992) (discussing the "first wave of cigarette litigation," which began in the mid-1950s).

A discussion of this interaction of business and law is too much of a detour into the realm of torts and compensation for this paper. Nonetheless, a word on the point is in order: One is hard-pressed to find similar instances of injury inflicted by lawyers in the ordinary course of business. Much of the reason for this is simply the limited scope of legal work. A bad brief does not have the ripple effect of a dangerous product. Even so, it may also be that lawyers rarely beget massive tort liability because the professional rules and norms governing lawyers discourage harmful antisocial behavior.

268. See W. EDWARDS DEMING, *OUT OF CRISIS* (1986); TOM PETERS AND ROBERT WATERMAN, *IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST RUN COMPANIES* (1982); PHILIP CROSBY, *QUALITY IS FREE* (1979) (discussing TQM and related modern theories of management and company performance).

269. See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1121-27 (1991) (noting that corporate culture affects behavior of individual corporate constituent actors); see also Richard B. Hoffman & Wil-

ing premise of this post-caveat emptor enlightened business theology is that this applies only to the customers you want. Indeed, there is a good deal of business literature about avoiding or jettisoning unprofitable clients,<sup>270</sup> although law has this as well. Certainly, good businesses treat good customers well—and try not to gratuitously harm less favored or unwanted customers. Nevertheless, when there is profit to be made by turning on a customer, distributor, or joint venture partner, the business ethic appears to permit this freely, even if such behavior is not encouraged.

Two recent examples from the soft drink industry demonstrate the business paradigm's lowered standard of loyalty. Although this may be a mundane source of case study, it is nonetheless illustrative of my point.

Prior to its 1980s resurgence, Coca-Cola was considered an only modestly well-performing company, in large part because of its relations with its bottling subsidiaries or contract bottlers.<sup>271</sup> Coke's solution was to change the corporate and contractual relationships to make them less advantageous for the bottlers and more advantageous for Coca-Cola.<sup>272</sup> The then-CEO Roberto Goizueta was generally praised for this new, more aggressive strategy.<sup>273</sup>

While Coke's actions may be good, even excellent, business, they are hardly shining examples of loyalty. I do not mean to suggest this is blameworthy conduct in the business arena. In fact, that is my point: the business paradigm approves of and even praises conduct that would be impermissible or at least questionable under the lawyer's professionalism paradigm. To me, this makes the professional-

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liam M. Lucianovic, *Long Range Planning: A Reality in the Judicial Branch*, 44 AM. U. L. REV. 1599, 1600 n.1 (1999) ("Total Quality Management (TQM) has become a general rubric for initiatives for increased quality and customer awareness in public and private organizations."). *But see* David G. Oedel, *Deming, TQM and the Emerging Managerial Critique of Law Practice*, 37 ARIZ. L. REV. 1209, 1215 n.34 (1995) (attributing to *American Lawyer* publisher Steven Brill the aphorism that TQM is "[b]ullshit" without substance at its core).

270. *See* Rich Brooks, *Alienating Customers Isn't Always a Bad Idea, Many Firms Discover: Banks, Others Base Service on Whether an Account Is Profitable or a Drain*, WALL ST. J., Jan. 7, 1999, at A1 (finding that banks seek to provide minimalist, even halting, service to smaller, less favored customers and tacitly encourage less profitable customers to take business elsewhere).

271. *See* Thomas E. Ricks, *Coca-Cola Celebrates New Success After Restructuring Its Bottlers*, WALL ST. J., June 28, 1984, available in 1984 WL-WSJ 215184 (noting that before the advent of its "new killer instinct" Coke had been trailing Pepsi in both grocery-store and diet soft-drink sales).

272. *See id.* (describing how Coke "bought out, eased out or [shook] up" over one half of its bottling business in the United States).

273. *See, e.g.,* Peter W. Bernstein, *Coke Strikes Back: A Cuban-Born Chief Executive Is Marshaling the All-American Company's Bottlers to Counter the Pepsi Challenge*, FORTUNE, June 1, 1981, at 30 (describing the new strategy and declaring that "to an organization that had grown complacent, [Goizueta] has already added life").

ism paradigm, in its ability to protect clients, substantially superior to any business paradigm for use in law.

More recently, Coca-Cola and other major soft-drink brands have begun moving into lucrative vending machine markets that were previously served by their own distributors. Coke is able to undersell its former allies by selling soda from its own vending machines at a lower price.<sup>274</sup> While there has been some criticism, it is not clear that it violates any law. Presumably, Coke did not launch this business operation without the advice of talented legal counsel, and its activities will likely avoid any legal liability.

Still, apart from the legal or public-relations ramifications emerging from this business strategy, the episode illustrates the difference between legal practice and business. The business community by and large supports such aggressive tactics by business, even when it rebounds to the detriment of current and former business "allies." By contrast, lawyers are prohibited from similar conduct by conflict of interest prohibitions and similar rules and norms forbidding or discouraging a lawyer from changing tactics or loyalties to the detriment of a client or a third party who has relied upon the lawyer.<sup>275</sup> Furthermore, legal precedent places some limits on the degree to which a lawyer may drop a client "like a hot potato."<sup>276</sup> In this way, the professionalism paradigm has a clear advantage over the business paradigm.

### C. The HMO Example

When professionalism bends too far to the will of business, the results may be discouraging and, at times, frightening and revolting. During the 1990s, managed health care provided a laboratory for gauging these unsettling results. The rise of managed care in health insurance, typically associated with Health Maintenance Organizations (HMOs), has changed the relationship of doctors to insurers and, more ominously, toward patients. HMOs and other managed care health insurance plans have, to a large degree, established systems where plan administrators displace physicians in making health care determinations.<sup>277</sup> Many adopt compensation systems

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274. See Constance L. Hays, *When Your Bottler Is Your Rival: Vending-Machine Owners Ask Whose Side Coke Is on*, N.Y. TIMES, Jan. 21, 1999, at C1.

275. See generally GILLERS, *supra* note 131, at chs. III, V, & VI.

276. See, e.g., *Picker Int'l, Inc. v. Varian Assocs., Inc.*, 670 F. Supp. 1363, 1365 (N.D. Ohio 1987) (using the "hot potato" metaphor), *aff'd*, 869 F.2d 578 (Fed. Cir. 1989); *Unified Sewerage Agency v. Jelco, Inc.*, 646 F.2d 1339, 1345 n.4 (9th Cir. 1981) (prohibiting lawyer withdrawal from representation as a means of curing conflict of interest by jettisoning an earlier acquired, but less financially desirable, client). See also GILLERS, *supra* note 131, at 308-11 (discussing the "hot potato" issue).

277. See George Anders & Laurie McGinley, *Actuarial Firm Helps Decide Just How Long You Spend in Hospital*, WALL ST. J., June 15, 1998, at A1; see also Allison Bell, *Aetna*



that create a financial incentive for doctors not to recommend further care for their patients, thus exposing patients to injury and even death, so that the doctor tied to such a plan can enjoy greater profits.<sup>278</sup>

A particularly vexing feature of the modern health care landscape is the "capitated" plan, in which a physician is paid according to the number of patients allotted to his or her practice regardless of the medical services delivered to the patient populace. In effect, the doctor is paid a flat rate and makes more money when fewer patients are treated with fewer services.<sup>279</sup> Now you know why it takes

*Institutes External Review Policy*, NAT'L UNDERWRITER (Life & Health/Fin. Servs. ed.), Jan. 18, 1999, at 5; Allison Bell, *Jury Hits HMO with \$1.4 Million Verdict*, NAT'L UNDERWRITER (Life & Health/Fin. Servs. ed.), Nov. 10, 1997, at 52 (jury verdict for plaintiff in case where she claimed "[c]ost-cutting effort by [HMO] led a doctor at one of its clinics to hold back on ordering biopsies and other diagnostic tests"); Katherine Eban Finkelstein, *The Sick Business: Why For-Profit Medicine Couldn't Care Less*, NEW REPUBLIC, Dec. 29, 1997, at 23; Susan E. Reed, *Miss Treatment, Is Managed Care Unfair to Women?*, NEW REPUBLIC, Dec. 29, 1997, at 20; Thomas W. Self, *One Man's Battle with the Managed-Care Monster*, N.Y. TIMES, July 13, 1998, at A17.

278. See generally Neal St. Anthony, *Hatch Getting Ready to Mix It up as Attorney General*, MINNEAPOLIS STAR TRIB., Dec. 1, 1998, at D1, available in LEXIS, News Library, Strib File (describing incoming Attorney General and former Commerce Commissioner's effort to require health insurers to provide coverage that insurers opposed on business grounds); Michael Bradford, *Report's Release Angers Kaiser*, BUS. INS., Apr. 28, 1997, at 1 ("Kaiser Foundation Health Plan of Texas is crying foul over regulators' release of a report critical of its operations in Texas after the HMO agreed to pay the state a \$1 million fine and make changes in the way it provides health care.") The report criticized Kaiser for, among other things, interfering with the professional judgment of its member physicians. See *id.* Ironically, one of Kaiser's complaints after release of the report was its purported breach of doctor-patient confidentiality. See *id.*; see also Steven Brostoff, *Health Care Battle Lines Drawn*, NAT'L UNDERWRITER (Life & Health/Fin. Servs. ed.), Jan. 25, 1999, at 1 (describing current efforts in Congress to enact a "Patients' Bill of Rights" and opposition from some insurers and employers); Thomas M. Burton, *Self-Examination: An HMO Checks up on Its Doctors' Care and Is Disturbed Itself; United, in an Unusual Study, Finds that Drugs, Tests Are Often Underutilized; Some M.D.'s Are Worried*, WALL ST. J., July 8, 1998, at A1; Martin Gottlieb & Kurt Eichenwald, *A Hospital Chain's Brass Knuckles, and the Backlash*, N.Y. TIMES, May 11, 1997, § 3, at 1 (describing adverse reaction to business-driven patient care provided in the Columbia/HCA hospital system); Alfred I. Jaffe, *Managed Care Plans Should Be Liable Because They Are Practicing Medicine*, NAT'L UNDERWRITER (Life & Health/Fin. Servs. ed.), Sept. 21, 1998, at 49; Lucette Lagnado, *Old-Line Aetna Adopts Managed-Care Tactics and Stirs a Backlash: Some Doctors and Employers Recoil as Insurer Copies Tough HMO It Acquired*, WALL ST. J., July 29, 1998, at A1 (describing adverse reaction to Aetna's expansion of tightly managed care practiced by recently-acquired U.S. Healthcare); Darryl Van Duch, *Employed Physicians Unionizing: But Can HMO-Affiliated Independents Do the Same?*, NAT'L L.J., July 21, 1997, at A1 (describing conflicts over control between health insurers and physicians and the arguable tendency toward deprofessionalization of medicine fueled by insurers); Ron Winslow, *Measure of HMO Membership Falls for First Time*, WALL ST. J., Jan. 26, 1999, at B7 (attributing the drop in HMO membership to customer dissatisfaction).

279. See Allison Bell, *Jury in Aetna HMO Case Awards \$120 Million to Widow*, NAT'L UNDERWRITER (Life & Health/Fin. Servs. ed.), Jan. 25, 1999, at 3 (involving a suit over a health insurer's refusal to pay for chemotherapy and bone marrow transplant based on a decision made by plan administrators rather than the treating physician); see also Joseph D'Allegro, *Texas AG Sues 6 HMOs over Doctor Compensation*, NAT'L UNDERWRITER (Life & Health/Fin. Servs. ed.), Dec. 28, 1998, at 1 (describing how a state Attorney General con-

months to get a non-emergency appointment in some health plans and why a sick child sometimes is not seen by a doctor for days unless the illness is viewed as life threatening.<sup>280</sup> It is hard to imagine a law firm taking a similar approach to a client's appointment request, although similar problems may face prepaid legal services.<sup>281</sup>

### 1. *A Closer Look at the HMO Problem: Shea v. Esensten*

A single case capsulizes quite well the problem that arises when the business paradigm arguably dominates the professionalism paradigm. In *Shea v. Esensten*,<sup>282</sup> the widow of an HMO patient alleged gross malpractice occasioned by the doctor's impaired professional judgment. The court's recitation of the facts of the case provides a startling illustration of the harms that can result when professionalism takes a back seat to business considerations:

After being hospitalized for severe chest pains during an overseas business trip, Patrick Shea made several visits to his long-time family doctor. During these visits, Mr. Shea discussed his extensive family history of heart disease, and indicated he was suffering from chest pains, shortness of breath, muscle tingling, and dizziness. Despite all the warning signs, Mr. Shea's doctor said a referral to a cardiologist was unnecessary. When Mr. Shea's symptoms did not improve, he offered to pay for the cardiologist himself. At

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tended in a lawsuit that HMOs are providing financial incentives to doctors "who limit medical care to patients" rather than providing care deemed best according to a physician's professional judgment); *Denver Doctors May Quit HMO*, BUS. INS., Nov. 16, 1998, at 2.

280. Because of adverse public reaction to such perverse financial incentives and coverage restrictions, some health insurers have either revised their practices or attempted to better monitor treatment and explain policy to patients. See Milt Freudenheim, *Playing a New Health Care Tune*, N.Y. TIMES, Dec. 27, 1998, at B2; Editorial, *Some Good News for HMOs for a Change*, NAT'L UNDERWRITER (Life & Health/Fin. Servs. ed.), Sept. 21, 1998, at 48; Lagnado, *supra* note 278 (describing how Aetna first adopted a tightly managed care under the recently-acquired U.S. Healthcare but reversed field in light of adverse reaction by customers and observers).

281. Nonetheless, well-run prepaid plans can be an effective means of increasing the public's access to affordable legal services. See Russell G. Pearce et al., *An Assessment of Alternative Strategies for Increasing Access to Legal Services*, 90 YALE L.J. 122 (1980).

282. 107 F.3d 625 (8th Cir. 1997), *cert. denied*, 118 S.Ct. 297 (1997). The scope of this Article does not permit an extensive discussion of the nature of the HMO influence on physicians or a full analysis of the utility and ethics of group insurance for either medicine or law. See generally John P. Little, *Managed Care Contracts of Adhesion: Terminating the Doctor-Patient Relationship and Endangering Patient Health*, 49 RUTGERS L. REV. 1397 (1997); Sheldon M. Retchin et al., *Outcomes of Stroke Patients in Medicare Fee for Service and Managed Care*, J. AM. MED. ASS'N, July 9, 1997, at 5 (finding that stroke victims receive better treatment when not in HMOs); Special Issue, *Health Law: Balancing Legal, Economic, and Ethical Concerns*, FLA. B.J., Apr. 1998; John Ware et al., *Differences in 4-Year Health Outcomes for Elderly and Poor, Chronically Ill Patients Treated in HMO and Fee-for-Service Systems*, 276 J. AM. MED. ASS'N 1039, 1039 (1996) (finding that these patients fare better under traditional health insurance, worse in HMOs). *But see* Robert H. Miller & Harold S. Luft, *Managed Care Plan Performance Since 1980*, 271 J. AM. MED. ASS'N 1512 (1994) (surveying studies and finding more of them favorable than unfavorable toward HMOs).

that point, Mr. Shea's doctor persuaded Mr. Shea, who was then forty years old, that he was too young and did not have enough symptoms to justify a visit to a cardiologist. A few months later, Mr. Shea died of heart failure.

Mr. Shea had been an employee of Seagate . . . [which] provided health care benefits to its employees by contracting with [an HMO] known as Medica. . . . Unknown to Mr. Shea, Medica's contracts with its preferred doctors [including Shea's family doctor] created financial incentives that were designed to minimize referrals. Specifically, the primary care doctors were rewarded for not making covered referrals to specialists, and were docked a portion of their fees if they made too many.<sup>283</sup>

Shea's widow brought an ERISA claim for breach of fiduciary duty and a state wrongful death action against the doctor and the HMO, contending that had Shea known of the doctor's conflict of interest, he would have sought a cardiologist at his own expense and received appropriate, life-saving treatment.<sup>284</sup> Reversing the trial court, the Eight Circuit rejected the HMO's ERISA-based defense that it need not disclose the financial interest compromising the doctor's judgment because they were not "material facts affecting a beneficiary's interest."<sup>285</sup> Instead, the court went on to state that

Mr. Shea had the right to know Medica was offering financial incentives that could have colored his doctor's medical judgment about the urgency for a cardiac referral. . . . When an HMO's financial incentives discourage a treating doctor from providing essential health care referrals for conditions covered under the plan benefit structure, the incentives must be disclosed and the failure to do so is a breach of ERISA's fiduciary duties.<sup>286</sup>

Although *Shea* may be an example of the dire consequences that infrequently flow from the "mass-merchandising" medical treatment delivered under many HMO plans, similar complaints are hardly rare.<sup>287</sup> The Clinton Administration has proposed a "Patient's Bill of Rights" that has substantial congressional support precisely because

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283. *Shea*, 107 F.3d at 626-27.

284. *See id.* at 627. Under the procedures of the Medica HMO, Shea could only see a specialist and be covered under the HMO with a referral from the primary-care physician. *See id.* The Court described the Medica arrangement as permitting the doctor to "earn a bonus for treating less." *Id.*

285. *Id.* at 627. The Appeals Court accepted the view that ERISA preempted the state wrongful death action but found a claim for relief arising under ERISA because of the HMO's failure to disclose its "referral-discouraging approach to health care." *Id.* at 628. The duty was premised on a fiduciary's common-law duties, arising under the law of trusts, to deal fairly and honestly with plan members. *See id.* (relying upon *Varity Corp. v. Howe*, 116 S. Ct. 1065, 1070-1075 (1996)).

286. *Id.* at 629.

287. *See supra* notes 227-79.

of the ravages of such perverse incentives.<sup>288</sup> In the furor over HMO and managed care reform, the implications regarding the practice of medicine itself are often overlooked. Shea's untimely death is a shocking human tragedy. It also represents the tragedy of modern medicine. Doctors are being told how to practice or being paid to practice in the manner desired by non-physicians. In short, doctors today have, to an uncomfortably large degree, lost the independent judgment that makes them professionals. In medicine, we have seen the onslaught of the business paradigm and it is not a pretty sight.<sup>289</sup> The arguable excesses of law's professionalism paradigm may have produced more than a few padded bills and suboptimally competitive markets, but I doubt it killed any clients.

Not only have doctors succumbed to the economic power of the health insurers and the insurers' veneration of financial incentives, but the legal system has failed to intervene adequately enough to protect doctors from themselves. Note that the *Shea v. Esensten* decision did not forbid the HMO's use of incentives designed to keep sick people from specialists. The HMO was required only to disclose that it was essentially bribing doctors to give more limited care.<sup>290</sup> Apparently, the HMO could bribe away without legal liability after disclosure. Whether *Shea v. Esensten* really gives any protection to persons in need of medical care may hinge on the quality of disclosure. With little difficulty one can imagine "disclosure" of the arrangement by means of a boilerplate, fine-print form, which is unlikely to be adequately appreciated by HMO members. If courts permit this sort of disclosure to insulate HMOs from legal liability, *Shea v. Esensten* will be a hollow victory for patients and the medical profession.

As further evidence of the legal profession's perhaps undue deference to the dominance of business-thinking, the inarguable correctness of *Shea's* condemnation of the HMO's policy has not been uni-

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288. See, e.g., *HMO Reform: Lawmakers Play It Again*, AM. HEALTH LINE, Jan. 21, 1999, available in LEXIS, News Library, Hltlne File (describing the bill's introduction in the Senate and expectations that Republicans would also support some form of "patient protection" legislation); see also Alison Mitchell, *Showdown Ahead over Political Agenda in Congress*, N.Y. TIMES, Apr. 13, 1999, at A18.

289. See *supra* notes 278-89 and accompanying text. See also *Herdrich v. Pegram*, 154 F.3d 362, 368-76 (7th Cir. 1998), cert. granted, 120 S.Ct. 10 (1999) (No. 98-1949) (providing background information and a powerful argument against HMO control over medical decision making). As the *Herdrich* Court observed, "doctors, not insurance executives, are qualified experts in determining what is the best course of treatment and therapy for their patients." *Id.* at 377. Of course, the medical profession has its side to the story as well. See, e.g., Michael Kirsch, *Lawyers, Heal Thyselves*, A.B.A. J., May 1999, at 96 (arguing in article by practicing gastroenterologist that many medical malpractice suits are frivolous and admonishing lawyers that they "have allowed [their] profession to be transformed into a trade. Market forces have become [lawyers'] North Star").

290. See *Shea*, 107 F.3d at 628-29.

formly endorsed by other courts facing similar issues.<sup>291</sup> In *Herdrich v. Pegram*,<sup>292</sup> a recent decision following the *Shea* approach, the dissent argued that the doctor's undisclosed financial interest alone did not constitute a breach of fiduciary duty.<sup>293</sup> The laissez-faire approach of the dissent is hard to square with the facts of cases like *Shea* and *Herdrich*. In these cases, the doctors had clear financial incentives militating against zealous devotion to giving patients adequate care; accordingly, patients suffered harm after demonstrably lackluster treatment.

#### D. "Managed Care" in Insurance Defense

Unfortunately, lawyers cannot be smug about the degree to which the doctors have surrendered to the dark side of the business paradigm's force. Law's turn to test the intestinal fortitude of the profession is coming or may already be upon us. I refer to the increasingly prevalent insurance company attempts to control attorney professional judgment in liability insurance defense assignments. It is almost perfectly congruent with the managed care evil to which doctors seem to have succumbed.

Beginning in the 1930s, liability insurers began offering to policyholders not only indemnity protection if the policyholder was successfully sued for negligence but also a "duty to defend" the policyholder when sued.<sup>294</sup> This combination product has proved sufficiently popular that, since World War II, the typical liability policy sold in the United States includes a duty to defend.<sup>295</sup> This is true for automobile insurance (effectively required as a condition of driving) and for the commercial general liability insurance sold to businesses as their basic protection against litigation and other claims.

Under the typical liability policy, a policyholder facing a settlement demand or lawsuit tenders the claim to its liability insurer. By

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291. See, e.g., *Herdrich v. Pegram*, 154 F.3d 362, 371-72, 383 (7th Cir. 1998) (following *Shea*, with dissenting judge opposed); *Weiss v. CIGNA Healthcare, Inc.*, 972 F. Supp. 748, 755 (S.D.N.Y. 1997) (criticizing *Shea*); *Lazorko v. Pennsylvania Hospital*, 1998 U.S. Dist. LEXIS 10062 (E.D.Pa. 1998) (distinguishing *Shea*); see also *Kiefer v. Ceridian Corp.*, 976 F. Supp. 829, 845 (D. Minn. 1997) (agreeing with *Shea* that federal pension law preempts related common-law causes of action and holding that, when suing under the Employee Retirement Security Act of 1974, plaintiffs may not also sue under other provisions of the act related to a breach or fiduciary duty); *Drolet v. Healthsource, Inc.*, 968 F. Supp. 757, 761 (D. Mass. 1997); *D.A.B. v. Brown*, 570 N.W.2d 168, 172 (1997); *Andersen v. Lyman-Richey Corp.*, 253 Neb. 748, 752 (Nebraska 1998). All the above cases cite *Shea*, but still permit substantial business-based control of HMO care decisions.

292. 154 F.3d 362.

293. See *id.* at 383 (Flaum, J., dissenting).

294. See ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW § 111 (2d ed. 1996); JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 14.01, at 14-3 (2d ed. 1999) [hereinafter STEMPEL, INSURANCE CONTRACT DISPUTES].

295. See ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW § 9.1(b), at 989 (practitioner's ed. 1988); STEMPEL, INSURANCE CONTRACT DISPUTES, *supra* note 294, at § 9.03(a).

contract, the insurer normally has a duty to defend the policyholder but is also given the right to retain chosen counsel and has absolute authority to settle the claim as the insurer sees fit.<sup>296</sup> Insurers have always driven relatively hard bargains with defense counsel. For example, insurers are notorious for negotiating low hourly rates with their lawyers, and they have long been considered to excessively scrutinize their bills.<sup>297</sup> Recently, however, the insurance industry has entered an entirely new and disturbing phase of efforts to control counsel. Today, many insurers establish billing rules for attorneys that attempt to circumscribe counsel's professional judgment by setting limits on discovery activity, legal research, consultation, retention of expert witnesses, and time spent on case preparation.<sup>298</sup>

This activity appears to be coming to an early fork in the road in Montana. the Montana Supreme Court has invoked a special provision permitting it to sit as a trial court in a test case challenging the legality of these rules.<sup>299</sup> The case is dryly but profoundly captioned: *In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*.<sup>300</sup> Insurance defense lawyers in Montana filed the suit to challenge the billing restrictions as impermissible intrusions on their professional judgment and delivery of legal services. The defense lawyers seek a declaratory judgment that such guidelines violate the rules of professional conduct and thus the lawyers need not abide by the guidelines.<sup>301</sup>

The attempts of insurers to manage legal services so closely are made more complex—and in my view improper—by the “tripartite” relationship among the policyholder, its insurer and the attorney.<sup>302</sup> Traditionally, the liability insurance contract has been considered permissible even though it permits the insurer to control the defense, including selection of counsel. Importantly, however, the policyholder has usually been considered “the client,” while the insurer is but a

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296. See STEMPEL, *INSURANCE CONTRACT DISPUTES*, *supra* note 294, § 9.03.

297. See Nancy J. Moore, *The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?*, 4 CONN. INS. L.J. 259, 285-90 (1997); Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers*, 4 CONN. INS. L.J. 205, 216-17 (1997) [hereinafter Silver, *Unnecessary Casualties*].

298. See Bill Ibelle, *The War Between Insurers and Defense Lawyers*, LAWS. WKLY. USA, Oct. 5, 1998, at B1; Hope Viner Samborn, *No-Frills Approach Proving Costly: Insurers' Demands to Economize Are Too Much for Some Defense Firms*, A.B.A. J., Mar. 1998, at 30; Darryl Van Duch, *Test Case for Insurers' Billing Rules*, NAT'L L.J., Jan. 25, 1999, at A1.

299. See Van Duch, *supra* note 298.

300. *Id.* The Case Caption is Civil No. 98-612.

301. See *id.*

302. This tripartite relationship is thoroughly discussed in Moore, *supra* note 297, at 261-85.

third-party payor.<sup>303</sup> Consequently, even though counsel is selected by and paid by the insurer, the lawyer's fiduciary and professional duty is to the policyholder. For example, counsel for the policyholder may not reveal confidences of the policyholder to the insurer and the policyholder is owed a duty of zealous representation.

In effect, the Montana suit and similar complaints by defense lawyers contend that insurer case management guidelines interfere with the lawyer's duty of zealous and competent representation by allowing the business judgment of the insurer to override the lawyer's professional judgment. In short, the Montana litigation and the new practice of insurance defense cost-control affect lawyers in much the same way HMOs affect doctors. It may not be too melodramatic to say that the legal profession is facing several forks in the road. In reaction, the legal establishment may react in one of several ways.

First, it could simply surrender completely to business forces.<sup>304</sup> Some have argued that this fate has already befallen physicians under the managed care regime and that the quality of medical care, at least in particular cases, has fallen.<sup>305</sup> Second, it could completely re-

303. Nevertheless, there is some current debate surrounding this proposition. See Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583 (1994) (arguing that both the policyholder and the insurer are "clients" of the lawyer) [hereinafter Silver, *Insurance Defense Counsel*]. But see Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 CONN. INS. L.J. 1, 6-9 (1997) (supporting the one-client view); see also Pepper, *Fundamentals*, supra note 93 (1997) (assessing both views and noting divergence of the tripartite insurer-policyholder-counsel relationship from the traditional one-client situation but finding, on the whole, that the policyholder should be considered the client).

304. Although he does not advocate complete surrender, Pearce has essentially embraced something akin to this view, by lionizing the predicted development of LMOs (Legal Maintenance Organizations). See Pearce, *Law Day 2050*, supra note 31, at 12.

305. One of the difficulties of this "professional judgment vs. business" question is that this issue, to some extent, may place the aggregate good in conflict with the individual good. For example, advocates of managed care can make a convincing case that the overall quality of medical care for the populace has improved as a result of managed care. It serves as a check against overtreatment, needlessly defensive medicine, inefficiency, and physician fraud (yes, I admit that professionals on occasion engage in fraud—just as do businesspersons). By seemingly restricting price increases in medical care, managed care has arguably made health care more affordable. Yet, weighed against this arguable macrocosmic benefit are many instances of microcosmic detriment, cases like *Shea v. Esenstein*, where the professional's judgment is too greatly warped by financial self-interest or even constrained in a manner that results in a patient receiving inferior care.

Some, particularly those with a utilitarian philosophy, under which the optimal situation is one that produces the greatest good for the greatest number, or with a wealth-maximization perspective, according to which society gains if there is a net increase in wealth, even if some individuals lose wealth in the process, find it an acceptable situation. See BAILEY KUKLIN & JEFFREY W. STEMPEL, *FOUNDATIONS OF THE LAW* (1994) (analyzing the perspective in chapter 1 (Ethics and Law) and chapter 2 (Economics and Law)). I disagree with each perspective. In the realm of medicine and law, the greatest good for the greatest number is a more problematic criterion than in other areas of commerce and policy. If cost-benefit analysis is to be applied, it should be done by professionals—not by business or the unguided marketplace. There will nonetheless be difficult decisions. For example, should the defendant spend an additional \$20,000 on expert witnesses? There

ject any intrusions on lawyers' professional judgment and resist any legal services arrangements outside the traditional model of a single client retaining a particular lawyer in connection with a representation. Third, it could permit more innovation in the means by which lawyers are employed and perform services, subject to baseline, bright-line rules protecting core professional judgment, with courts and the organized bar reviewing concrete cases for compliance. The establishment could also adopt a hybridized or sliding scale of regulation that encompasses any three of these paths for particular types of cases.

Although predictions are always dangerous, I suspect the profession and the judiciary will adopt a moderate path that does not shut the door to business efforts to subject law to some degree of efficiency. To a large degree, this has already taken place. The law permits prepaid legal insurance, which essentially operates as a capitated plan. This creates a danger that the individual plan member will receive substandard legal care due to the plan's overall goals of efficient operation and expanded access to legal assistance for the many. In prepaid plans, however, it is the lawyer who makes the determinations regarding the rendering of legal services; thus, in these plans, professional judgment and control is retained.

Similar to prepaid legal insurance is the tripartite relationship already permitted by the law, in which the insurer by contract has substantial control over the defense of claims against the policyholder. The very arrangement could be deemed unethical. It removes from the client (i.e., the policyholder) control over selection of counsel and the resolution of the case. It exposes the client to possible self-dealing by the lawyer and the more powerful insurer, a source of steady repeat business for the defense lawyer. Courts have tolerated this strain on lawyer professionalism in order to permit the social benefits of more widely available liability insurance, cost containment, and commerce. Courts have permitted the liability insurance defense arrangement and elected to protect the interests of the client by giving policyholders a cause of action against the insurer for bad faith in cases where the insurer and counsel work for their own interests rather than those of the policyholder.<sup>306</sup>

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will even be heart-wrenching decisions. For instance, should the hospital spend \$500,000 to try to save premature quintuplets, even though survival is unlikely under any circumstances? These difficult decisions should be made by expert professionals and not according to the business bottom line. For a view more supportive of managed care and the net social utility justification for insurer supervision of medical professionals, see David A. Hyman, *Professional Responsibility, Legal Malpractice, and the Eternal Triangle: Will Lawyers or Insurers Call the Shots?*, 4 CONN. INS. L.J. 353, 380-95 (1997).

306. See STEMPER, *INSURANCE CONTRACT DISPUTES*, *supra* note 294, at ch. 10 (explaining the bad faith cause of action).



The majority of courts also permit use of staff counsel, which can be viewed as establishing a regime that undermines the attorneys' professional judgment and creates potential conflicts of interest.<sup>307</sup> Courts and regulators have also generally permitted billing arrangements other than straight fees for legal services or hourly charges. For example, flat-fee billing is generally permitted.<sup>308</sup>

At some point, however, the courts and the legal establishment must not permit any further erosion in lawyer-client loyalty and professional judgment. In my view, that time is at hand given billing practices and other situations such as those challenged in the Montana litigation. It is one thing to permit the insurer to choose counsel, achieve economies of scale, and drive hard bargains settling claims with third-parties suing the policyholder. It is quite another for the insurer to micromanage the retained lawyer and to forbid the lawyer from engaging in the tasks counsel would otherwise deem necessary for effective representation of the policyholder.

In short, insurer billing guidelines represent too great an intrusion upon the lawyer professional's judgment and representation of the client.<sup>309</sup> In addition, the billing guidelines initiative appears to be part of a larger insurer initiative to alter the tripartite relationship in ways that could prove detrimental to the policyholder client. Insurers reacted vigorously to oppose a draft of the American Law Institute's *Restatement of Law Governing Lawyers* that, in their view, embraced too narrow a perspective of the lawyer-client relationship and failed to appreciate the nuances of the tripartite relationship.<sup>310</sup> Scholars funded by the insurance industry wrote to argue not only to defend the tripartite relationship but also to argue for a "two-client" characterization of insurance defense.<sup>311</sup> For a variety of

307. See Moore, *supra* note 297, at 244 (noting a "vast majority of opinions issued by courts and advisory bodies" permitting the use of staff counsel). *But see* Gardner v. North Carolina State Bar, 341 S.E.2d 517 (N.C. 1986) (holding the use of in-house defense counsel violative of professional responsibility rules).

308. See Silver, *Unnecessary Casualties*, *supra* note 297, at 222 (arguing that there is "no sound basis in professional responsibility law" to prohibit flat fees). *But see* American Ins. Assoc. v. Kentucky Bar Assoc., 917 S.W. 2d at 572 (holding that flat fee billing by an insurer violated Rule 1.7 and Rule 1.8(f)).

309. *But see* Silver, *supra* note 297 (supporting such insurer activity); STEPHEN GILLERS, ETHICAL ISSUES IN MONITORING INSURANCE DEFENSE FEES: CONFIDENTIALITY, PRIVILEGE AND BILLING GUIDELINES (1998) (monograph done for Law Audit Services, Inc.).

310. See William T. Barker, *Lobbying and the American Law Institute: The Example of Insurance Defense*, 26 HOFSTRA L. REV. 573 (1998); see also Jonathan Groner, *Insurance Lobby Aims at Normally Staid ALI*, LEGAL TIMES, June 10, 1996, at 1; Charles Silver, *The Lost World: Of Politics and Getting the Law Right*, 26 HOFSTRA L. REV. 773 (1998) [hereinafter Silver, *The Lost World*].

311. See Ronald E. Mallen, *Legal Experts' Proposal Threatens Insurance Defense Agreements*, WASH. LEGAL FOUND. LEGAL BACKGROUNDER, Apr. 26, 1996, at 1, available in LEXIS, News Library, Wlf File; Charles Silver & Kent Syverud, *The Professional Responsibilities Of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 275 (1995) (recognizing two-client characterization as legitimate in an article based on research funded by the in-

reasons, the two-client model, like other “modernizations” of the now-traditional two-client model is a bad idea. It undermines lawyer-client loyalty and professional judgment in a situation fraught with danger, in light of the disparate strength, sophistication, and wealth insurers hold over policyholders.

### *E. The In-House Counsel Problem*

Similarly, in the insurance context, use of in-house counsel poses substantial ethical difficulties. Insurers have, to a substantial degree, moved from managing outside counsel in liability insurance defense matters to forming their own cadre of inside counsel.<sup>312</sup> In-house counsel has been an increasing development throughout the law since the 1970s but has existed in some form throughout the twentieth century. The move of legal services in-house has been thought to foster substantial savings and concentration of expertise. In the insurance defense context, however, it presents problems. In the ordinary rendering of legal services to a business, questions of client identity are clear. The in-house lawyer works for the company and has the company as a client. But, when the company is a liability insurer defending a policyholder, the in-house lawyer works for the company and has another—the policyholder—as a client.

According to the rules of professional responsibility, the lawyer must put the client/policyholder’s interest first, must preserve the attorney-client privilege, must keep confidences, must zealously represent the client, even when it is potentially not in the interest of the third-party payor insurer, and he or she must exercise the best professional judgment on behalf of the client.<sup>313</sup> The in-house insurance defense lawyer, however, must discharge these already difficult duties while drawing a paycheck from the insurer. The insurance company may wish the lawyer to spend less time and money on the cli-

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insurance industry); Silver, *Insurance Defense Counsel*, *supra* note 303; Charles Silver & Michael Sean Quinn, *Are Liability Carriers Second-Class Clients? No, but They May Be Soon—A Call to Arms Against the Restatement (Third) of the Law Governing Lawyers*, *COVERAGE*, Mar./Apr. 1996, at 21; Charles Silver & Michael Sean Quinn, *Wrong Turns on the Three Way Street: Dispelling Nonsense About Insurance Defense Lawyers*, *COVERAGE*, Nov./Dec. 1995, at 1.

The above articles supporting the two-client model have been termed “increasingly shrill” by one of the ALI *Restatement Reporters*. See, e.g., Morgan, *supra* note 303, at 6 (opposing two-client model); see also Thomas D. Morgan & Charles W. Wolfram, *Insurance Defense Lawyers and the Restatement: A Reply to Professors Silver and Quinn*, *COVERAGE*, Jan./Feb. 1996, at 8 (rejecting two-client model in favor of *Restatement* approach). See generally Robert E. O’Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 *TUL. L. REV.* 511, 520-21 (1991) (outlining the nature of the tripartite relationship).

312. See Debra Baker, *A Grab for the Ball*, *A.B.A. J.*, Apr. 1999, at 42 (noting that move by insurance companies to use of staff counsel has fed into concern among many about future of the profession).

313. See *RULE 1.8(f)*.

ent's cause while also hoping the lawyer will advise the company if the client makes an admission against interest that will hold the company in lurking coverage dispute. Even if the in-house lawyer is not at immediate risk of being discharged for zealous client advocacy and resistance to any improper insurer influence, the lawyer probably wants increased compensation and promotion in the future. Being a good lawyer—to the policyholder-client—may not be in the in-house attorney's best *job* interests.<sup>314</sup>

Insurers have also worked to create "captive" outside insurance defense firms. Although these firms are organized as separate professional and commercial entities, they are not law firms in the traditional sense. The firm is assembled by an experienced outside insurance defense lawyer working at the behest of the insurer. Once so assembled, the new firm's work exclusively consists of representing policyholders insured under liability policies issued by the founding insurer or its affiliates.<sup>315</sup> Although I do not want to denigrate the professionalism or independence of captive firms, a good case exists for treating such firms as *in-house* counsel for the insurer, at least for regulatory purposes, rather than as traditional *outside* counsel.

My point is not to conduct a searching analysis of the role of lawyers and liability insurance defense. The issue is complex, evolving, and requires extensive analysis. Much excellent scholarship on all sides of the issue is already in print.<sup>316</sup> Whatever the ultimate resolution of this difficult and important matter in the delivery of legal services, however, it is vital that the analysis and decision be made according to professional norms rather than business norms. Under a business paradigm applying business norms in the interest of business, the important and difficult questions appear not to be raised,

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314. Professor Silver takes a diametrically opposed view and defends use of in-house counsel for defense of policyholders absent palpable conflict of interest. See Silver, *Unnecessary Casualties*, *supra* note 297, at 243-56. Responding to his extensive defense of the practice is impossible in the space allotted to this article. Suffice it to say that I disagree with his apparent view that routine use of in-house counsel cannot, as a structural matter, present ethical problems for the insurance company lawyers. However, I propose regulating in-house counsel or installing guarantees of professional independence rather than leaving staff counsel to company regulation. See *id.* at 250-51 (explaining that Professional Responsibility Professor Bruce Green of Fordham Law School concludes that staff counsel may review case files with insurer-employer, but only if the policyholder "clients" consent).

315. See Silver, *Unnecessary Casualties*, *supra* note 297, at 237-38.

316. See generally Symposium, *Liability Insurance Conflicts and Professional Responsibility*, 4 CONN. INS. L.J. 1 (1997) (containing a collection of articles addressing the issue of professional responsibility in liability insurance by Thomas D. Morgan, Kent D. Syverud, Stephen L. Pepper, William T. Barker, Tom Baker, Robert H. Jerry II, Charles Silver, Nancy J. Moore, George M. Cohen, David A. Hyman, and Robert E. Keeton); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995); Eric Mills Holmes, *A Conflicts-of-Interest Roadmap for Insurance Defense Counsel: Walking an Ethical Tightrope Without a Net*, 26 WILLAMETTE L. REV. 1 (1989); Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511 (1991).

are given short shrift, or are readily resolved in favor of the greatest business benefit—to the business with the most economic power.<sup>317</sup>

Concerns of the individual client are left in the dust without much reflection or remorse. Business thinking by insurers led to the rapid proliferation of inside counsel, captive law firms, and managed care for lawyers. Some insurers have even gone so far as to actively discourage the use of counsel by third-party claimants.<sup>318</sup> All of this was done to benefit the insurers' bottom line. Under the business paradigm, that is enough reason to forge ahead. Under the more sophisticated client protection regime of the professionalism paradigm, serious questions are asked and limits are likely to be placed on insurer tactics that hurt clients or undermine lawyers' professional judgment.

#### F. The "Megafirm"

The proliferation of law firms "acquired" by other companies presents similar issues. Consulting and accounting firms have added legal services to their repertoire of business operations. In Europe, the trend has been particularly pronounced. Today, the largest provider of legal services on the Continent is Arthur Andersen, known to most of the world as an accounting firm rather than a law firm.<sup>319</sup> This phenomenon has not yet engulfed the United States, largely because of the dominating professionalism paradigm.<sup>320</sup> Although some may find this a regrettable relic of the nineteenth century, I disagree.

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317. Like Prof. Pearce, Prof. Silver seems to suggest that lawyers should simply learn to "lump" the consequences of economic force rather than attempting to constrain it under a professionalism paradigm.

[A]lternative fee structures will revolutionize the way many lawyers practice, just as managed care regimes have radically altered the practice of medicine over the past ten years. When significant economic actors press for change, change will come, even if the solons of the legal profession do not want it. Creative clients and creative lawyers seeking to win their business will find ways to come to terms.

Silver, *Unnecessary Casualties*, *supra* note 297, at 216.

Unintentionally, Silver makes my case, right down to the use of managed care as a basis of comparison. To some extent, the entire point of a professionalism paradigm is the appropriate constraint of economic power and resistance to it as may be necessary to effect other vital professional goals such as client loyalty, client protection, the integrity of the system, and so on. At some point, a healthy system of law prevents or at least discourages the "creative" efforts of avarice made by its membership. Rather than resisting or taming the potentially corrupting influence of wealth, the business paradigm seems premised on celebrating wealth.

318. See Bill Ibelle, *Allstate Tells Car Crash Victims, You Don't Need a Lawyer: Plaintiffs' Attorneys Fight Back, with Little Success*, LAWS. WKLY. USA, Mar. 24, 1997, at B1.

319. See John E. Morris, *King Arthur's March on Europe: Arthur Andersen Is on a Mission to Conquer the Continent's High-End Legal Markets*, AM. LAW., June 1998, at 49.

320. As one observer explains:

In most of the industrialized world, lawyers are prohibited from practicing in partnership or sharing profits with nonlawyers. In practice, that hasn't stopped

The traditional rule of the legal profession is that lawyers should not be in a mixed practice with nonlawyers.<sup>321</sup> The rationale for the rule is that this might make for decision making in the delivery of legal services that is governed by a nonlawyer or influenced by the interests of nonlawyers.<sup>322</sup> In other words, American lawyers and society have been unwilling to allow law firms to be operated by businesspersons and unwilling to place lawyers in a situation that might override the attorney's professional judgment. Model Rule 5.4, for example, provides that legal fees not be shared with a nonlawyer,<sup>323</sup> that lawyers not be in partnership with nonlawyers "if any of the activities of the partnership consist of the practice of law,"<sup>324</sup> and that persons recommending or paying the lawyer not "direct or regulate the lawyer's professional judgement in rendering such legal services."<sup>325</sup> In addition, Model Rule 5.4(d) provides that:

A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a corporate director or officer thereof; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.<sup>326</sup>

Model Rule 5.4 has been substantially adopted in all of the states but is subject to significant variation in technical format and in the degree of restrictions placed on lawyers.<sup>327</sup> States differ in their par-

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Andersen or its Big Five competitors in professional services from setting up law firms, or merging or affiliating with existing ones. To comply with the law, the law practices remain owned by their lawyers. Typically, some of these will be Andersen SC [Arthur Andersen's umbrella organization, arranged as a Swiss *societe cooperative*] partners. But not always.

*Id.* at 52.

Andersen-like acquisitions of American law firms have not resulted in the U.S. because of the more stringent prohibition on non-lawyer ownership or control and because of the U.S. lawyer's culture of independence developed under the professionalism paradigm.

321. See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 5.4 (2d ed. 1998); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 14.1 (1986).

322. See HAZARD & HODES, *supra* note 321, § 5.4:102; WOLFRAM, *supra* note 321, § 14.1.

323. See RULE 5.4(a).

324. RULE 5.4(b).

325. RULE 5.4(c).

326. RULE 5.4(d).

327. See STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* at xxxi (1998). "[W]e see significant variation among jurisdictions . . . [in the

particular rules about limited liability corporations or partnerships, but in essence they have all permitted lawyers to do business in this form, provided that lawyers are in charge of law firms, no matter what the organizational structure.<sup>328</sup> The American Law Institute's Restatement of Law Governing Lawyers expresses this sentiment by saying that "a non-lawyer may not own any interest in the firm, and a non-lawyer may not be empowered to or actually exercise the right to direct or control the professional activities of a lawyer in the firm."<sup>329</sup>

This historical separation of law and business to safeguard lawyer independence is under increasing stress.<sup>330</sup> The organized bar is currently debating a proposed liberalization of Model Rule 5.4<sup>331</sup> to expressly permit situations similar to the *de facto* mega-law firms of Arthur Andersen and other accounting groups.<sup>332</sup> In addition, the continuing concerns about in-house counsel and insurance defense remain, illustrating the robustness of business influence on the delivery of legal services.<sup>333</sup> There is similar tension in the rules and regulations regarding permissible activity by individual nonlawyers or associations.<sup>334</sup> The government may, under some circumstances,

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area of] relationships between lawyers and nonlawyers (Rule 5.4) . . . ." *Id.*; see also *id.* at 300-04 (setting forth the specific differences among the jurisdictions).

328. See HAZARD & HODES, *supra* note 321, § 5.4:201.

329. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 11.

330. See Larry Bodine, *Avoid 'Business Deals' with Clients: \$1.4 Million Verdict Against D.C. Lawyer*, LAWS. WKLY. USA, July 29, 1996, at B17; see also Stephen Gillers, *The Anxiety of Influence*, 27 FLA. ST. U. L. REV. 123 (1999); Geoffrey C. Hazard, *Conflict of Two Roles*, NAT'L L.J., Mar. 25, 1996, at A21 (focusing on conflicts in the context of a single representation and raising concerns that are applicable to ongoing conflict potentially created when lawyer is part of larger organization that may have interests different than those of the legal client); Darryl Van Duch, *Bullish on Spinoffs: Entrepreneurial Lawyers Remain Undaunted by Potential Ethical Pitfalls*, NAT'L L.J., Aug. 10, 1998, at A1.

331. See GILLERS & SIMON, *supra* note 327, at xiv-xv (noting that ABA Ethics 2000 Committee is re-examining several issues of law firm organization and delivery of services in light of changes in the market of law practice).

332. See John E. Morris, *The Global 50*, AM. LAW., Nov. 1998, at 45, 47 (ranking the world's largest law firms and the legal capacity of accounting firms). Arthur Andersen has approximately 1,500 attorneys spread over 27 countries in its organization and, despite its "March on Europe," is not even the largest accounting/law firm. See Morris, *supra* note 319. PricewaterhouseCoopers is listed as having 1,663 lawyers in 39 countries. See *id.* Only two law firms (Baker & McKenzie at 2,300 lawyers and the British firm Clifford Chance with 1,795 attorneys) are larger. See *id.*

333. See *supra* text accompanying notes 297-319.

334. See Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 GEO. J. LEGAL ETHICS 209, 211 (1990); Deborah L. Rhode, *Policing The Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 60 (1981) (supporting lowered barriers to non-lawyer practice); Richard B. Schmitt, *Advocates Act as Lawyers, and States Cry 'Objection!'*, WALL ST. J., Jan. 14, 1999, at B1 (describing state limitation of non-lawyer activity as advocates in securities arbitration, divorce, bankruptcy, and insurance matters as well as concern that legal self-help books might constitute unauthorized practice of law).

be viewed as a nonlawyer attempting to control lawyers with adverse impact on professional judgment and independence.<sup>335</sup>

In general, however, the American professional norm has largely been effective in keeping the delivery of legal services under the control of lawyers, at least in the narrow sense. Although these restrictions on non-lawyer partnering can be labeled protectionist or self-dealing, they are, on the whole, consistent with "good," public-regarding professionalism rather than narrow self-interest.<sup>336</sup>

Clients, particularly economically powerful commercial clients, inevitably have considerable effective control over lawyering. The legislature and the executive also have considerable effective control to the extent that this does not so infringe upon the judiciary that it constitutes a violation of separation of powers. Thus, lawyers can only be so protectionist, whatever their baser desires.

Without rules limiting the ability of financial forces to completely call the tune in the practice of law, delivery of legal services could become yet another operating division of modern business, subject to all the typical temptations and excesses to which business decision making frequently succumbs. For this reason, the bar, operating under the professionalism paradigm, has traditionally separated lawyering from business in the organization of firms and the delivery of legal services; this remains a positive benefit to clients and society. To the extent a proposed change in lawyer regulation moves away from this protection of professional judgment, it should be rejected.

### G. Other Examples

Even respected businesses routinely display as a matter of course conduct lawyers should regard as improper or questionable. Unfortunately, such behavior is frequently approved or ignored. It is restrained or sanctioned only under extreme circumstances, normally as a result of criticism from outside the business. As a result, one

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335. See David E. Rovella, *Low-Bid Contracts Divide Public Defenders: Old-Line Legal Aid Lawyers Say Defendants Will Suffer; Others Say Things Are Fine*, NAT'L L.J., Dec. 8, 1997, at A7.

336. Restrictions on non-lawyer control of lawyers are thus so dramatically different from restrictions on law practice that the latter are substantially anticompetitive with no corresponding element of public protection. See Stephen Gillers, *The High Cost of an 'Ethical' Bar*, AM. LAW., July/Aug. 1998, at 87 (citing examples of absolute bans on nonrefundable retainer payments and firm departure or dissolution agreements that can be construed as restrictions on an attorney's "right to practice law" forbidden under Rule 5.6(a)). See, e.g., *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998) (holding a nonresident law firm engaged in unauthorized practice by performing legal services in California for a California client under a fee agreement governed by California law, notwithstanding that nonresident lawyers were admitted in good standing elsewhere and were not accused of providing deficient service); Debra Baker, *Lawyer, Go Home: Firms Negotiating Multistate Deals Should Take Heed of California Decision on Unauthorized Practice*, A.B.A. J., May 1998, at 22.

need not be a legal chauvinist to state that business is simply less ethical than law, at least by the yardstick developed for law.

Consequently, I find the thought of law subject to a business paradigm a bit frightening. One need not look far to find for examples of concern. Illustrations may be found in the Keating Five scandal; professional sports, where conduct which would be considered unethical if engaged in by lawyers is frequently exhibited; the recent International Olympic Committee scandals; and the media, as reflected in the successful financing and marketing of Tom Brokaw's *The Greatest Generation*.

### 1. *Keating Five Scandal*

In 1989, it was revealed that Charles Keating, Chairman of the now-defunct Lincoln Savings & Loan, had made substantial contributions to five U.S. Senators.<sup>337</sup> These Senators had advocated rather strongly on Keating's behalf when Keating was seeking to force government regulators to back off.<sup>338</sup> The regulators had cause for concern: Lincoln Savings & Loan failed not long after the efforts of the Keating Five. Sadly, many of the Lincoln depositors were retirees who had entrusted the bulk of their life savings to the institution. Keating was convicted of fraud but served comparatively little jail time before his conviction was overturned.<sup>339</sup>

The fallout from this scandal included a Justice Department action against the prestigious New York firm of Kaye, Scholer, Fierman, Hays & Handler.<sup>340</sup> Kaye, Scholer and partner Peter Fishbein were said to have gone beyond mere aggressive lawyering, and more than one observer viewed their representation as akin to aiding and

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337. Alan Cranston, a Democrat from California, saw \$800,000 of Keating money flow to a favored foundation, while the others received substantial contributions of between \$50,000 and \$250,000 directly to their campaign funds. In addition to Cranston, the Keating Five included Senators John Glenn, Democrat from Ohio, Donald Riegle, Democrat from Michigan, Dennis DeConcini, Democrat from Arizona, and John McCain, Republican from Arizona. See Dennis F. Thompson, *Mediated Corruption: The Case of the Keating Five*, 87 AM. POL. SCI. REV. 369 (1993); see also Jill Abramson, *Cranston Is Only "Keating Five" Member Who Is Charged with Ethical Misconduct*, WALL ST. J., Feb. 28, 1991, at A4; Richard L. Berke, *Ethics Unit Singles Out Cranston, Chides 4 Others in S & L Inquiry*, N.Y. TIMES, Feb. 28, 1991, at A1.

338. See *supra* note 337.

339. See *Keating v. Hood*, 922 F. Supp. 1482, 1485 (C.D. Cal. 1996), *review denied* 890 P.2d 1119; Adam Zagorin, *Charlie's an Angel: Charles Keating, Demon of the \$500 Billion S & L Fiasco, Is Now Innocent, Sort of*, TIME, Feb. 3, 1997, at 36. Keating served 4.5 years of a 12-year sentence for wire and securities fraud that was eventually set aside on technical grounds. See John Lippman, *Keating's U.S. Conviction Is Overturned*, WALL ST. J., Dec. 3, 1996, at A2.

340. See Susan Beck, *Keating's Bouncer*, AM. LAW., Jan./Feb. 1990, at 40; see also Susan Beck & Michael Orey, *They Got What They Deserved*, AM. LAW., May 1992, at 67-81; Amy Stevens & Paulette Thomas, *How a Big Law Firm Was Brought to Knees by Zealous Regulators: At Kay Scholer, Survival Prevailed over Principle as Partnership Panicked*, WALL ST. J., Mar. 13, 1992, at A1.



abetting, while others attributed any errors to simple inattentiveness.<sup>341</sup> Ultimately, the case was settled, with the firm and its malpractice carrier paying \$41 million in settlement,<sup>342</sup> and the Keating lawyers paid for their alleged sins, notwithstanding their ability to spread the loss to other lawyers via malpractice insurance coverage.<sup>343</sup>

By contrast, the political consequences of interfering with financial institution solvency regulation are harder to discern. Senators Cranston, Riegle, and DeConcini retired shortly after this episode and did not attempt a re-election campaign that might have tested the degree of political punishment for such advocacy.<sup>344</sup> Senators Glenn and McCain not only escaped the scandal relatively unscathed but prospered. Senator Glenn quickly regained his folk hero status as a former astronaut, burnished the legacy with a tour of duty on a space station, and retired in 1998 more popular than ever.<sup>345</sup> Senator McCain enjoys frequent favorable press and is now a presidential candidate.<sup>346</sup>

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341. The merits of Kaye Scholer's conduct have divided prominent legal ethicists. Compare WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998); Simon, "Thinking Like a Lawyer" *About Ethical Questions*, 27 HOFSTRA L. REV. 1 (1998); and Simon, *Ethics, Professionalism, and Meaningful Work*, 26 HOFSTRA L. REV. 445, 470-71 (1997) with Geoffrey C. Hazard, Jr., *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041 (1997); and Hazard, *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEG. ETHICS 701 (1993). Simon, a Stanford law professor, criticizes Hazard, a University of Pennsylvania law professor and former Director of the ALI, for having submitted an expert witness affidavit concluding Kaye Scholer conduct was ethical, but Hazard defends the affidavit and disputes Simon's analysis. For further discussion, see Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75 (1993).

342. See William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 L. & SOC. INQUIRY 243, 244 (1998); see also Douglas M. Branson, *No Contest: Corporate Lawyers and the Perversion of Justice in America*, 48 CASE W. RES. L. REV. 459, 464 n.18 (1998) (book review) (discussing prominent firm of Jones, Day, Reavis & Pogue, which paid \$51 million in a similar case to settle claims arising from S & L crisis); Peter C. Kostant, *When Zeal Boils Over: Disclosure Obligations and the Duty of Candor of Legal Counsel in Regulatory Proceedings After the Kaye Scholer Settlement*, 25 ARIZ. ST. L.J. 487 (1993); Stevens & Thomas, *supra* note 340 (reporting government allegations and successful settlement, but also portraying firm in more sympathetic light as being punished merely for zealous representation of a problematic client).

343. See Stevens & Thomas, *supra* note 340.

344. See John Jacobs, Editorial, *Gov. Gray Davis Embarks on a Political Honeymoon*, SACRAMENTO BEE, Jan. 5, 1999, at B7, available in LEXIS, News Library, Sacbee File (noting Cranston was an honored guest at the new California Governor's inaugural, where he enjoyed a standing ovation); Dave Leshner, *Davis Sworn in*, L.A. TIMES, Jan. 5, 1999, at A1.

345. See Timothy R. Gaffney, *Group Plans Soaring Tribute*, DAYTON DAILY NEWS, Apr. 20, 1999, at 1A available in LEXIS, News Library, Daydnw File; Rick Kushoran, *At Last, Love*, SACRAMENTO BEE, Mar. 22, 1999, at C1, available in LEXIS, News Library, Sacbee File (noting that Glenn continues to enjoy hero status).

346. See Amy Silverman, *The Pampered Politician*, PHOENIX NEW TIMES, May 15, 1997, at 1, available in LEXIS, News Library, Phnxnt File (noting that "in 1990, pundits

While the claim of some observers that American politics is little more than a system of open, legalized bribery<sup>347</sup> may be somewhat hyperbolic, the manner in which the Keating Five scandal, after so much public outcry, was so quickly forgotten and forgiven by the electorate and the media is disheartening. One might conclude that servitude to money and powerful business interests has become business as usual for both Congress, which has power to censure and expel members, and the voting public that takes it all in defeatist stride: There appear to be few suspensions from practice or disbarment from the political bar.<sup>348</sup>

Thus, although the Keating Five episode and the Savings & Loan debacle is a black eye for politicians and lawyers alike, it serves to illustrate that even though lawyers can look bad under a professionalism paradigm, professionalism's disciplinary architecture may have more teeth than that of politics. Further, one must keep in mind that, to a large degree, the corruption of politics is orchestrated by businesspersons acting as businesspersons are supposed to act—self-interestedly for profit. Given these consequences, why are Pearce and others attracted to a business paradigm? Is the idea to lower the performance of lawyers below that reflected in the Keating Five matter?

## 2. "Professional" Sports

One might question whether "professional" sports is governed by the business paradigm. It seems clear, however, that these athletes are not governed by the professionalism paradigm; this group does not satisfy any of the traditional criteria used to define what it means to be a professional. While zone defenses have become increasingly sophisticated and playbooks may be thicker, the complexity of the skills and knowledge required does not rise to the requisite level. Nor is there evidence of any autonomy-for-altruism trade-off by the paid athlete. On the other hand, few can doubt that pro sports has become big business today. Even in a world of strikes and con-

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agreed that McCain's political career was over," but that this has been forgotten by press and public).

347. See Editorial, *Airwave Avarice*, L.A. TIMES, Dec. 7, 1998, at B4; Editorial, *Ripped Off by the Bankers*, CAP. TIMES (Madison, Wis.), Mar. 23, 1999, at 8A, available in LEXIS, News Library, Captms File; Molly Ivins, *Party on: There Are Issues for Debate in the State GOP but No One Is Talking*, FT. WORTH STAR-TELEGRAM, June 11, 1998, at 9, available in LEXIS, News Library, Fwstel File (all comparing U.S. political system to one of legalized bribery via campaign contributions).

348. Only one of the Keating Five, DeConcini, was a lawyer—and a former prosecutor at that, as Pima County attorney. See ALMANAC OF AMERICAN POLITICS (1998): On one hand, this gives some hope for thinking that most lawyer politicians might have recognized the inappropriateness of zealously and mindlessly advocating for the personal benefit of large contributors in regulatory or adjudicatory matters. More likely, it is only coincidence.

tract holdouts by star players, calling the athletes autonomous professionals is a stretch.<sup>349</sup>

For purposes of the professionalism and business paradigms, however, what matters is the degree to which this segment of the business community demonstrates the qualities society requires in lawyers: loyalty, judgment, fidelity and candor to the system, to name a few.

A short look at both the trading block and the free agency market makes inquiry into the concept of loyalty in sports a short discussion. The increasing mobility of lawyers has created problems in this area, such as, for example, the "hot potato" phenomenon, but the frequency with which today's professional athletes switch teams makes the legal community's difficulties pale in comparison. Furthermore, where lawyers improperly jump ship, there are rules that may be enforced and malpractice actions that can be prosecuted. In comparison, the anti-tampering rules and forced player compensation in the pro leagues are not trivial, but neither are they substantial.

It is in the areas of candor and duty to the system, fairness and honesty, however, that professional sports provides the best window into the culture of community operating without the benefit of the professionalism paradigm. In any pro football game one is almost certain to see a receiver fielding a pass on the bounce but falsely pretending to the referee that the ball was cleanly caught before it hit the ground.<sup>350</sup> This kind of misrepresentation—to the referee, the other players, the fans in the stadium, and the television audience—evidences professional sports' weak sense of commitment to the integrity of the system. Instances of pass interference, receivers pushing off to get free, and holding by the offensive line, among other transgressions, are all too common. The "smart" players are those who clutch and grab most artfully so as to escape detection.<sup>351</sup> Worse, when caught in the act, the perpetrator's response is frequently to protest and deny. Candor toward the tribunal indeed.

349. Ironically, unionization has historically been seen as inconsistent with professional status.

350. I borrow this illustration from Prof. Stephen Carter's address to Yale Alumni at the 1996 American Association of Law Schools Annual Meeting (Jan. 10, 1996) (San Antonio, Texas). Carter related the story of watching football with his son and attempting to field the innocent lad's inquiry regarding why the player would so blatantly lie to the referee about catching a ball that clearly had been trapped. A colleague of Carter's suggested that the answer to the question involved another question: "What are the rules about playing by the rules?" In effect, I am suggesting that in pro sports (and many business environments), the metarule is not to play by the rules when one can get away with it. This distinguishes pro sports, I hope, from practicing law.

351. For example, celebrated Denver Broncos star linebacker Bill Romanowski is reported to illegally grab the opposing tight end on nearly every play to impede the receiver. See Gerald Eskenazi, *Romanowski Still on a Hitting Streak*, N.Y. TIMES, Jan. 27, 1999, at D2. In the culture of pro football, Romanowski is not vilified for chronic cheating. He is celebrated for his art in escaping detection. See *id.*

The same philosophy can be seen in professional basketball and ice hockey. In basketball, players routinely protest indisputably correct calls, displaying thespian skills rivaling those of the gridiron. Hockey players work to perfect the subtle hooks, trips, and holds that neutralize opposing offensive threats; in fact, it was frustration with these sorts of practices that drove Pittsburgh Penguins superstar Mario Lemieux into premature retirement.<sup>352</sup>

The athletes have made an art of learning what they can get away with, and they have no qualms about using it in order to gain advantage over an opponent. Misrepresentation to the referee is just part of the game. This should not be surprising in a field which produced aphorisms like:

- “Winning isn’t everything; it’s the only thing.” (football),<sup>353</sup>
- “Nice Guys Finish Last” (baseball);<sup>354</sup> and
- “If you can’t beat ‘em in the alley, you can’t beat ‘em on the ice (hockey, of course).<sup>355</sup>

352. See Cammy Clark, *Irked Lemieux Threatens Retirement*, ST. PETE. TIMES, Apr. 7, 1994, at 6C; *NHL May Discipline Lemieux*, RECORD (Bergen Co., N.J.), Feb. 5, 1992, at C5, available in LEXIS, News Library, Njrec File; *Mario Lemieux Retires*, THE INDEPENDENT, Apr. 28, 1997, at S1, available in LEXIS, News Library, Indpnt File (Lemieux criticizes League’s tolerance for clutch and grab hockey, calling it a “garage league” (often reprinted as “garbage league” in press) and eventually retires from this and chronic back problems).

353. Attributed to Green Bay Packers Coach Vince Lombardi. See Furman Bisher, *‘Catfish’ Hunter Remains a True Sports Legend*, ATLANTA J. & CONST., Feb. 11, 1999, at G9; Tom McEwen, *Lightning Detour*, TAMPA TRIB., Jan. 24, 1999, at 11.

354. Said by manager Leo Durocher. I did not discuss baseball skulduggery in the text. Typically it is not as prevalent, save for spitballs by the pitcher, which are by definition hard to detect and prove since pitchers seldom are ejected for fouling the ball, but use of the spitter is widely rumored. However, baseball also has its trapped flyballs and tagged baserunners claiming to be safe when the video replay clearly shows otherwise.

355. Generally attributed to “Terrible” Ted Lindsay, a Detroit Red Wings Center during the 1950s who was both a prolific scorer and an extremely physical player known to inflict cuts requiring stitches on the opposition. According to hockey folklore, however, Lindsay’s stickwork paled beside that of teammate Gordie Howe. Despite his talent for rearranging the faces of opponents, Howe is one of hockey’s all-time stars and heroes, largely because he is the second-leading goal scorer of all time. See Kelley Teahen et al., *100 Who Made an Impact: Who Are the 100 Most Important People of the 20th Century?*, LONDON FREE PRESS, Jan. 1, 2000, at D2, available in LEXIS, News Library, Londfp File (naming Howe as one of 100 most influential people of the 20th century and describing him as “notable for scoring records and a fierce pair of elbows”). Howe appears to be popular with fellow players as well as fans, which illustrates the culture of machismo in the sport and the degree to which violations of the rules are tolerated. See, e.g., Mike Heika, *Hockey Legend Reflects on His Career, the NHL, Hull’s Goal, Being a Parent*, DALLAS MORNING NEWS, Dec. 16, 1999, at K499, available in LEXIS, News Library, Dalnws File (interviewing Hockey great Wayne Gretsky, who named Howe as his favorite player). Compare basketball, which is not without its own stars renowned for playing rough. See, e.g., Gordon Monson, *Malone’s ‘Bows Are Just Part of the Package. In Malone’s World, Elbows Happen*, SALT LAKE TRIB., May 27, 1999, at E1, available in LEXIS, News Library, Sltrib File (saying, of Utah Jazz player’s elbows: “Sometimes they knock a guy into Never-Never Land. Sometimes, they crack a dome. Sometimes, they gash a player’s face . . .”).

In this regard, professional sports is the ultimate business and athletes are the ultimate businessmen. In pro sports, there is no ambiguity about advertising effectiveness, market penetration, quality control, or position vis-a-vis rivals. The game is either won or lost (or tied) and league standings are in plain view. The ethic of the enterprise is success and nearly any price can be paid for success. This ethic has no concern for violating rules, only for avoiding detection. It encourages hard play and forgives transgressions of the rules in pursuit of victory. Thus, the question arises: If this is what takes place under a business paradigm, why advocate adopting this organizing ethos for law?

### 3. *Lessons from Modern Journalism*

Recently, Tom Brokaw, the well-known NBC news anchor, also became a best-selling author. His book, *The Greatest Generation*,<sup>356</sup> describes the trials and triumphs of the cohort of Americans who won World War II, rebuilt much of the world in the wake of war, and drove the ensuing fifty years of prosperity and progress in the United States. It was released in late 1998 and immediately soared to the top of the *New York Times* bestseller list.

Because of Brokaw's long association with NBC, it is not surprising that NBC-related television programs have paid a good deal of attention to the book. Brokaw has, for example, made guest appearances promoting the book on the *Today* show (twice), *Late Night with Conan O'Brien*, *Dateline NBC*, *Hockenberry*, and *Tim Russert*, and was an online chat guest on MSNBC.com.<sup>357</sup> Some of this is, I suppose, to be expected. Logrolling for friends and colleagues is a time-honored tradition.<sup>358</sup> What is not generally known is that NBC owns part of the book, just under twenty-five percent. Clearly, this gave NBC "a huge incentive to gear up the network's in-house publicity machine to pitch the title."<sup>359</sup>

In other words, NBC used its journalistic platform to promote a product it would profit from, but apparently failed to disclose the connection.<sup>360</sup> Brokaw and NBC, however, appear to regard the roy-

356. TOM BROKAW, *THE GREATEST GENERATION* (1998).

357. See Kyle Pope, *NBC Boosts Brokaw Book and Gets Boost Back*, WALL ST. J., Jan. 25, 1999, at B1.

358. But the bounds of ordinary logrolling may have been breached:

NBC employees have gushed about it [the book] on the tube. "I mean only to pay tribute to you here and not embarrass you," Matt Lauer, co-host of "Today," told Mr. Brokaw during one of his appearances on the program. "But your book is breaking all kinds of sales records. Have you had a chance to stop and think why?"

*Id.*

359. *Id.*

360. At least it appears there has been no voluntary disclosure of NBC's financial interest on programs promoting the Brokaw book. According to a newspaper account, NBC

alty-sharing arrangement, publication and marketing of the book as a home-run with no ethical concerns. Brokaw has been quoted as saying, "I don't think there was any subterfuge" in the promotion of his book.<sup>361</sup>

Similarly, ABC news anchor Peter Jennings co-authored *The Century*, a retrospective look at the American experience that is being heavily promoted by and tied in with the network, which is running a program based on the book. "For the networks, which have been scrounging for new sources of revenue to offset declining viewership, book deals are a logical next step."<sup>362</sup>

But is it ethical? Or, put in a less emotionally loaded manner: are these book-TV star arrangements consistent with good journalism--"professional" journalism, so to speak? Brokaw appears to be correct in saying there was no "subterfuge" by the network, but neither does there appear to have been any disclosure or any attempt to maintain neutrality.

A substantial degree of journalistic perspective and impartiality is immediately sacrificed when networks that are supposed to be in the business of reporting and sifting the news determine that the most newsworthy books on the market just happen to be those from which the network stands to profit. At the very least, plain, full, and frequent disclosure seems necessary<sup>363</sup> when supposedly objective journalism becomes a source of outside profit. Unfortunately, however, although there is a relatively well-formed body of journalistic ethics, there seems to be no internal professional norm frowning upon these kinds of financial interests, despite their potential to cloud journalistic judgment. Non-NBC print media has implicitly criticized the Brokaw-NBC arrangement,<sup>364</sup> but that appears to be the extent of media reaction.

Thus, even in journalism, arguably a profession, commercialization appears to have reduced ethical consciousness. By contrast, rules and norms of lawyer professionalism frown on financial ties that cloud professional judgment, forbidding them or at least requir-

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"has kept its involvement in the Brokaw book a relative secret," although when queried, NBC appears to have been forthcoming with this information to the *Journal* reporter. *Id.* According to Brokaw, the network was given a stake in the book's profits because the book utilized the work of NBC researchers who had worked with Brokaw on a film documentary regarding World War II and the Normandy Invasion. *See id.* A portion of the book's proceeds will be donated to a scholarship fund established by Brokaw for children of NBC News employees. *See id.*

361. *See* Pope, *supra* note 357.

362. *Id.*

363. ABC presumably would disagree and distinguish its situation with the Jennings book on grounds of an obvious pecuniary connection between the book and the television program, "The Century." Mr. Jennings' agent was quoted as saying, "Believe me, you'd have to be brain-dead not to make the connection." *Id.*

364. *See id.*

ing disclosure and consent.<sup>365</sup> These norms are both self-enforced and privately enforced by rival counsel. Sanctions and civil liability may be available as well, although criminal liability is rare.

## VI. CONCLUSION: THE CONTINUING NEED FOR THE PROFESSIONALISM PARADIGM

The business paradigm proposal makes for most provocative reading, and the Pearce salvo is particularly noteworthy. It also avoids the diffuse fuzziness of other many of the other, less radical, proposals for fixing lawyer deficiencies, most of which call in vague and nostalgic terms for a return to past norms and behavior. Rather than harking us back to Atticus Finch, Pearce points us toward the future, which apparently will look more like (choose your favorite or most threatening): Warren Buffett, Al Dunlap, Bill Gates, Michael Milken, Ron Pearlman, or Ted Turner.

One cannot help but applaud Pearce's clarity of vision and articulation of a more well-formed and distinct action plan for addressing today's widely perceived malaise of the legal profession. The problem, of course, is that Pearce's plan is to fix the legal profession by having it cease to be a profession. It is tempting to label this the regulatory equivalent of asphyxiating a patient to put a stop to her pain.

Alternatively, business paradigm blueprints, and in particular the Pearce Proposal, become so compromised that the new world order looks suspiciously similar to the old world order. Any regime for regulating lawyers is likely to be better if it begins with the proposition that attorneys are something different than garden variety businesspersons and the law is something different than the floor of a mercantile exchange.

The business paradigm thesis, however, must be addressed on its own terms. Appeals to nostalgia and platitudes about professionalism are a poor defense against the rising tide of legal commercialism. Waiving the Atticus Finch flag is simply not an effective and persuasive means of defending a professionalism paradigm for lawyers. One lawyer-economist has observed that changes in the legal services market have made inside counsel the "segment of the profession most likely empowered to play" the role of lawyer as gatekeeper and that since "a necessary condition for professionalism is market power," lawyers "had better start paying attention to those who have it."<sup>366</sup> Both inside counsel and those paying them such attention will likely enjoy greater perspective serving the public interest when they operate under the ethos of professionalism—not because of the romantic attractions of the professionalism paradigm but because of its practi-

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365. See RULE 1.8.

366. Ronald J. Gilson, *supra* note 5, at 916.

cal tools for enhancing the three key concerns: client loyalty, duty to the system, and independent judgment.

Giving the law-as-business thesis what I hope is its due, I continue to find it as frightening as the polemics of any anti-lawyer tract. I say this, I hope, not out of reflexive defense of tradition or hostile reaction to proposed change. Rather, the law-as-business "cure" is likely to be worse than any disease currently infecting the legal corpus. Pearce sees lawyers failing to fulfill lofty professional ideals and proposes that law be constructed as a business rather than as a learned profession. This is not very different from local law enforcement coping with a juvenile delinquency problem by repealing the bulk of the laws violated by the delinquents. Making this pivot surely will reduce at least the officially reported rate of crime and juvenile delinquency—but it hardly makes for a better society.

My disagreement with the business paradigm is also that it fails to appreciate the ways in which law is rightfully differentiated from business. In light of those differences, the business paradigm is particularly troublesome in that it fails to appreciate the degree to which human beings can follow self-interest to the detriment of society if permitted and not restrained by an infrastructure encouraging and enforcing socially responsible behavior.

For entrepreneurs, business managers, advertisers, lay workers, and customers, the pursuit of self-interest probably does lead to socially optimal outcomes, or at least outcomes that are better than those enjoyed under a planned economy. Adam Smith made a convincing case for this 300 years ago. The fall of the Soviet Union and the prosperity of the West in the late twentieth century seems to confirm Smith's vision.<sup>367</sup> To the extent that self-interest gets out of hand, the external restraint of the law (e.g., antitrust, securities fraud, tort, etc.) appears to be a solution preferable to stifling the spirit of private enterprise and gain that has fueled modern economic development.

For lawyers, judges, and lawyers acting in government, politics, and academia, an ethic of unbridled self-interest is suboptimal or counterproductive. A duty of zealous representation is imposed on lawyers and is supported by a system that attempts to protect the attorney-client relationship from outside influences, prohibits conflicts of interest (or at least requires disclosure and informed consent), bars arrangements that cloud the analysis and judgment of counsel, and so on. A similar duty to the courts, the judicial system, and to the political system at large is also imposed on lawyers. Metaphorically, lawyers—in all walks of the profession—may not pretend to

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367. But today's "wild west" Russia also underscores the need for regulatory infrastructure. See Kronman, *Legal Professionalism*, *supra* note 91, at 5 ("Even the freest market requires framing conditions that stabilize it . . .").



have caught the ball that bounced on the ground.<sup>368</sup> Lawyers must be candid to the tribunal and, in many instances, disclose adverse authority and blow the whistle on client crime, fraud, perjury, or intent to injure. These lawyer roles and the different contexts in which legal services are rendered often create tensions and difficulty in discerning the right resolution of questions of legal ethics. Resolving these tensions in turn, requires more of the legal system than simply standing aside and letting the chips fall as they may in a contest that stresses survival of the fittest.

In short, law is different than business. Law needs a different organizing precept than business and a different set of norms—norms of professional responsibility rather than economic gain. It is no accident that over the centuries law has evolved a system of lawyer-centered ethical rules in a professionalism paradigm. Current strains on the system of legal ethics and the concept of professional roles simply are not severe enough to sustain a claim for radical change. There is no fundamental anomaly unresolvable by the system. Rather, the system of lawyer professional responsibility is under *de facto* attack by business-centered forces at odds with the requisite professional norms. This attack needs to be repulsed and the fortress of professional responsibility solidified. Advocates of a business paradigm want to dismantle the fortress too soon and replace it with a structure inappropriate for the task. Rather than giving in to the worst modern trends affecting the law and rationalizing it as a “paradigm shift,” lawyers and society should rage against any dying of the light of professionalism, even as society adapts the practice of law to modern times.<sup>369</sup>

Perhaps most of all, law needs a regulatory construct that seeks out the best in human nature rather than its most profitable or self-interested. At the very least, a regulatory system must seek to elicit behavior from the regulated that serves society well in light of the goals at issue. The business paradigm may square well with human nature (i.e., greed) but that is precisely its problem. Lawyers are supposed to surmount greed, at least enough to put client loyalty first and serve the system adequately. The business paradigm offers

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368. See *supra* text accompanying notes 350-56 (discussing routinized cheating and deception in professional sports).

369. “Do not go gentle into that good night; Old age should burn and rave at close of day; Rage, rage against the dying of the light.” *Do Not Go Gentle into That Good Night*, reprinted in NORTON ANTHOLOGY OF MODERN POETRY 926-27 (Richard Ellman ed., 2d ed. 1988); THE POEMS OF DYLAN THOMAS 207-08 (Daniel Jones ed. 1971). See also Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1508, n.47 (1992) (invoking the poem as a metaphor for the tenacious but dwindling hold of the trans-substantivity ideal for civil procedure rules). Despite the perhaps inapt invocation of Thomas’s poem because of the aura of inevitable, if noble death, that pervades it, I believe the legal profession can be saved by a little serious rage in defense of the professionalism paradigm.

insufficient incentive to elicit this behavior while the professionalism paradigm helps to define and seek the desired behavior. Peer group pressure can be a powerful force for good or evil, as discovered by young Julian English in the *Appointment in Samarra* excerpt that began this article.

On a symbolic level as well, the professionalism paradigm better serves lawyers, their clients, and society. Group identity can be a powerful force in resisting outside pressures, including political pressure or economic duress or temptation. Lawyers are likely to resist these outside influences more successfully if they think of themselves as professionals held to professional standards. Despite the aura of protectionism that has surrounded much professional activity, the separate, arguably elevated status of the professional can be a powerful force for improving the conduct of professionals. Even in an era where successful businesspersons become folk heroes, the business paradigm offers no such beacon of guidance.

Law's modern problems demand a response delivered from lawyers operating within the behavior-enhancing model of professionalism rather than an inapt, unformed, and arguably debased business construct. Spurning a professional's self-concept for that of business not only debases lawyers but also threatens society.

