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Reconstructing Professionalism

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I. INTRODUCTION

The "commoditization of law" is to be welcomed and not feared, Chair of the ABA Law Practice Management Section, Joan Bullock, writes.[1] Law firms must transition "away from the traditional model of legal services delivery," adapt to an environment in which "client preference is driving legal service delivery," and "operate as businesses."[2] Bullock encourages lawyers to move past the "gloom and doom" that dominates many conversations about the state of the legal profession and to act upon the "gaps in legal service delivery that are waiting to be exploited."[3]

Fears and criticisms that lawyers are abandoning professionalism for profit have filled the pages of bar journals and law reviews for decades.[4] But Bullock's comments are different. She is not worrying that lawyers *are* treating the practice of law just like any other business. She is suggesting that they *should*—they should conceptualize their work not as the service of a learned profession,[5] but as the profit-driven delivery of a commodity.[6]

However jarring the recommendation may sound, Bullock is not alone. Amidst widespread calls of crisis in the American bar, scholars, commentators, and bar leaders alike are proposing that we move away from the logic of the profession and toward that of the market.[7] Some reason that in an increasingly competitive market for legal services, lawyers have no choice but to operate as market actors, and that we should regulate them accordingly.[8]

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[1] Joan Bullock, *Perspectives: From the Chair of the ABA Law Practice Management Section*, 39 LAW PRACTICE 4 (July/Aug. 2013), http://www.americanbar.org/publications/law_practice_magazine/2013/july-august/perspectives.html.

[2] *Id.*

[3] *Id.*

[4] *See infra* notes 138–41 and accompanying text.

[5] *See* MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2013) (describing the traditional view of the role of the lawyer as "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice").

[6] *See* Bullock, *supra* note 1 (discussing how lawyers should be efficient and cost effective).

[7] For an excellent exception to this trend, see Rebecca Roiphe, *Redefining Professionalism*, 26 U. FLA. J.L. & PUB. POL'Y 193, 195–97 (2015), which focuses on professional independence as a reason professionalism.

[8] *See, e.g.*, David A. Kessler, *Professional Asphyxiation: Why the Legal Profession is Gasping for Breath*, 10 GEO. J. LEGAL ETHICS 455, 459–61 (1997) (noting that lawyers must confront the fact that they are in a competitive market for legal services with all of the forces that market actors face).

Others argue that market mechanisms provide the most promising solutions to a range of problems facing the American bar. They contend, for example, that access to justice can best be addressed by lowering or eliminating licensure requirements, by commoditizing and automating legal services, and by permitting non-lawyer investment in litigation and law firms.[9] They hope to bolster client autonomy by treating the ethics rules as default rules in an otherwise contractual relationship between lawyer and client. And, they advocate "risk management systems" in place of professional regulation.[10]

These and countless other reform proposals are varied in the problems they address, but unified in the logic and assumptions they employ. They frame lawyers and clients as rational market actors, and lawyering as an arms' length exchange of services for a fee. They represent a growing trend among scholars and commentators of the legal profession who increasingly rely on market logic in addressing the problems and challenges of contemporary lawyering. This Article identifies, analyzes, and critiques this trend.

From one perspective, the trend is not at all surprising. Neoliberal thought, which seeks to extend market rationalities to all areas of social life, has become the "common-sense way" of our era.[11] At the same time, the American legal profession is "under siege" and "in crisis" in ways that make market solutions look particularly promising.[12] Today's lawyers face intensifying competition from accountants, consultants, and other occupational groups; growing price pressures from in-house counsel; and increasing demands for unbundled, outsourced, and even automated legal services.[13] Not only do traditional forms of professional regulation appear inadequate to address these

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[9] *See infra* Section II.A.

[10] *See infra* Section II.A.

[11] DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2–3 (2005).

[12] *See, e.g.*, Byron C. Keeling, *A Prescription for Healing the Crisis in Professionalism: Shifting the Burden of Enforcing Professional Standards of Conduct*, 25 TEX. TECH. L. REV. 31, 33–34 (1993) (discussing the "crisis in professionalism" in the American legal market); Paul Sullivan, *Learn to Be a Lawyer-Entrepreneur*, 87 ILL. B.J. 497, 497 (1999) (arguing that "lawyers are under siege" because clients are more demanding and legal services "have been reduced to a commodity level").

[13] *See infra* notes 27–36 and accompanying text.

challenges, they look protectionist and self-interested in light of a history of abuse.[14]

And yet, the professional form facilitates significant value that lawyers contribute to society—value that will be lost if we reconceptualize and reform lawyering pursuant to market logic. Individually and collectively, lawyers guide clients through the legal system as trusted advisors and advocates; they empower clients against powerful adversaries or an overreaching state; they challenge and constrain client demands that contravene the law; and they involve clients in the creation of law on the books and in action.[15] They perform this work by employing what I characterize as five "relational dynamics" of lawyering, which are not captured by market logic and market exchange.[16] These relational

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[14] *See, e.g.*, JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 88, 99–101 (1976) ("Successful practitioners, fearful of thrusts from below within the profession, wielded higher standards as a weapon in defense of the elitism that enhanced their own stature. . . ."); Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 668 (1981) (arguing that "rules of legal ethics are an attempt by elite lawyers to convince themselves that they have resolved their ethical dilemmas"); Susan P. Koniak, *Who Gave Lawyers a Pass? We're Pointing the Finger at Everyone but the Real Culprits in Corporate Scandals*, FORBES, Aug. 12, 2002 (contending that lawyers have been main culprits in corporate scandals but regulation has done nothing to punish or prevent this conduct).

[15] *See* MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2013) (discussing the various functions of a lawyer).

[16] A rich literature, which spans many disciplines, recognizes the importance of relational, as opposed to atomistic and individual, perspectives on society. *See, e.g.*, JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 3 (2011) discussing the relational perspective); Luigino Bruni & Robert Sugden, *Fraternity: Why the Market Need Not Be a Morally Free Zone*, 24 ECON. & PHIL. 35 (2008) (proposing an "alternative understanding of market interactions as instances of a wider class of reciprocal relationships in civil society, characterized by joint intentions for mutual assistance"); CHARLES TAYLOR, THE MALAISE OF MODERNITY 43–55 (1991) (describing the individualist approach to social interactions and its view of relationships); CAROL GILLIGAN, IN A DIFFERENT VOICE 1–3 (1982) (discussing the "different modes of thinking about relationships and the association of these modes with male and female voices in psychological and literary texts"); AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE, at vii (1970) (noting that the theory of collective choice belongs to several disciplines, including economics). These perspectives are also present within the legal ethics literature. *See, e.g.*, ROBERT K. VISCHER, MARTIN LUTHER KING JR. AND THE MORALITY OF LEGAL PRACTICE: LESSONS IN LOVE AND JUSTICE 25 (2013) (discussing legal ethics in the context of Martin Luther King Jr.'s "set of moral claims" and nothing that King "never let disagreement derail his pursuit of relationship"); Russell G. Pearce & Eli Wald, *Rethinking Lawyer Regulation: How a Relational Approach Would Improve Professional Rules and Roles*, 2012 MICH. ST. L. REV. 513, 514–16 [hereinafter Pearce & Wald, *Rethinking Lawyer Regulation*] (discussing the recent effort to rethink the regulation of

dynamics, which include trust, judgment, loyalty, empowerment, and service, are critical to the role we want lawyers to play in upholding the rule of law and the legitimacy of our legal system. I argue that they will be ignored and undermined by reforms that conflate the rule of law with the rule of the market.

Fortunately, we need not choose between acceptance of the status quo or a hasty embrace of market reforms. Drawing on nineteenth century ideas that accompanied the rise of the professions, I show that lawyers can pursue a third, more fruitful approach: strengthening professional regulation to channel and constrain market forces in productive ways, rather than allowing market forces to dictate professional regulation in dangerous ways. Sociologists in the late nineteenth century believed that the professions could serve as important intermediaries between the state, the economy, and society, without being captured by the market.[17] Building on their insights, I argue that reforms to the legal profession should not just seek efficiency in the delivery of legal services; they should seek to empower lawyers to facilitate and mediate relationships pursuant to law, rather than wealth or power.

This paper proceeds in four parts:

Part II reviews the growing prevalence of market discourse and rationality in the legal ethics literature. It shows that proposals addressing a wide range of contemporary problems are unified by a common approach. Exhibiting significant trust in the market and distrust in the profession, they frame lawyers and clients as rational market actors, and law as a commodity to be exchanged in an arm's-length transaction. The unifying logic of these proposals

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lawyers in the rational context); Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1, 17 (2011) [hereinafter *The Obligation of Lawyers*] (analyzing the previously predominant view of the public sphere, including politics, law, and business, as relying upon relational self-interest); Thomas Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 963–65 (1987) (noting that legal ethics has been "distorted" by the "old issue in academic moral philosophy" of radical individualism); Robert K. Vischer, *Big Law and the Marginalization of Trust*, 25 GEO. J. LEGAL ETHICS 165, 171–73 (2012) [hereinafter Vischer, *Big Law*] (discussing relationship-centered trust in the context of the attorney-client relationship and questioning whether it still exists in the modern legal market). I am greatly indebted to these scholars work, even as I diverge from their approaches in some core ways. *See infra* note 181.

[17] *See infra* Part III.

gives rise to a market-exchange model of lawyering, which views lawyering as a business, just like any other business.

Part III shows that while the market-exchange model is garnering significant support today, it would have been roundly rejected a century ago. Late nineteenth century social reformers believed that strong professional associations provided a necessary counterweight to unpredictable market forces. With respect to the legal profession in particular, they worried that "pervasive commercialism" might "reduce a prestigious profession with an essential role in the administration of justice to a mere money-getting trade."[18] Their confidence in professional associations was later abandoned because of an unlikely alliance of two distinct streams of thought—the extreme distrust of the professions that arose from the neo-Marxist critique of the 1970s and 1980s, and the extreme faith in the market that arises from neoliberalism.[19] As Part III describes, these intellectual currents dismissed all normatively positive accounts of the profession and replaced them with the market-exchange model of lawyering.

Part IV argues that much will be lost if we follow the scholarly trend and accept the market-exchange model as a blueprint for reform. From criminal defense to corporate transactional practice, empirical work shows that clients benefit from the human side of lawyering—from lawyers they can trust, who employ reasoned judgment in translating their individual concerns into action. Society benefits from lawyers who balance private interests with the interests of the legal system at large. These features of professionalism are impossible to quantify and monetize. They are ignored and undercut by market-based reforms to the legal profession, like those that would authorize unlicensed, unbundled; and automated legal services. I argue that the market-exchange model of lawyering therefore threatens to create precisely what it posits—lawyering as pure market exchange—with harmful and unintended consequences for the rule of law.

Part V concludes that in addressing the problems of lawyering today, we should return to the core commitments and normative

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[18] James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 FORDHAM L. REV. 2395, 2399 (2003) (citing *Report of the Committee on Code of Professional Ethics*, 29 A.B.A. REP. 600, 600 (1906)).

[19] *See infra* Sections II.B, III.C.

potential of the professional form, cognizant that the contemporary American legal profession represents just one attempt to meet that potential. Reforms should proceed along two separate lines: first, the legal community should strengthen its existing self-regulatory structures; and second, it should construct new regulatory structures to oversee the rise of new service providers, technologies, and competitive pressures. In this way, the profession can constrain and harness market forces in productive ways, rather than being controlled by them in deleterious ways.

I do not argue that we should, or even could, eliminate market forces from the practice of law. Lawyering is and always has been an occupation for pay, and market forces can be productive and desirable sources of innovation in legal practice.[20] My argument is that lawyering is also a profession, with critical commitments to the state and to society. The resulting tension—between commercialism and professionalism—has been at the core of sociological thought on the professions from the beginning of the professionalization movement in the late nineteenth and early twentieth century.[21] This tension cannot be resolved through an embrace of market forces any more than it can be hidden behind traditional rhetoric of professionalism and commitment to the public interest. Rather, it must be continually mediated and managed through professional structures and ethical rules that harness market forces in productive rather than protective ways. The task, therefore, is to modify the profession's rules and structures in new and innovative ways so as to address contemporary challenges.

II. THE MARKET-EXCHANGE MODEL OF LAWYERING

A survey of three of the most prominent debates in the legal ethics literature reveals that the relevant questions are being framed, analyzed, and answered in terms of market rationalities. Reviewed below, these debates address three things: access to

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[20] *See* Bates v. State Bar of Ariz., 433 U.S. 350, 371–72 (1977) ("[T]he belief that lawyers are somehow 'above' trade has become an anachronism. . . ."); Goldfarb v. Va. State Bar, 421 U.S. 773, 786–88 (1975) (holding that lawyers engage in "trade or commerce" such that the legal profession is not exempt from antitrust laws); *see also infra* Part V.

[21] *See infra* Part III.

justice, client autonomy and choice, and lawyer conduct and misconduct. In each case, the literature frames lawyers and clients as rational market actors, law as a commodity, and lawyering as an arm's-length exchange of services for a fee. The result is a market-exchange model of lawyering.

Also as set forth below, ethics committees, bar associations, and law firms are supporting and acting upon this model. In much the same way that policymakers and reformers in the late twentieth century came to embrace cost-benefit analyses and anti-regulatory reforms for industries across the country, bar leaders and commentators are supporting market-based reforms to the delivery of legal services.

A. CURRENT DEBATES IN THE LEGAL ETHICS LITERATURE

1. Access to Justice. Few would dispute that the vast amount of unmet civil legal need is one of the most pressing problems facing the contemporary legal profession.[22] By many estimates, over 75% of the civil legal needs of low and moderate income individuals in this country remain unmet.[23] Overwhelmingly, scholars frame the challenge as one of cost, and conclude the answer is to reduce the price of services.[24]

A growing body of empirical research suggests that cost is *not* the most salient problem for most individuals with unmet civil legal need.[25] More pressing problems include lack of awareness or

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[22] *See* Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 869–70 (2009) (noting the inadequacy of legal services to those who need it most); Eric Holder, U.S. Attorney Gen., Address at the Equal Justice Works 25th Anniversary Gala (Oct. 20, 2011), *in* JUSTICE NEWS, OFFICE OF PUBLIC AFFAIRS, U.S. DEP'T OF JUSTICE, http://www.justice.gov/atj/opa/pr/speeches/2011/atj-speech-111020.html ("[T]he assistance of public interest lawyers has never been more urgently-or-desperately-needed."); Laurence Tribe, Senior Counselor, Access to Justice, Keynote Address at the National Institute of Justice Conference: Indigent Defense and Access to Justice (June 14, 2010), http://nij.ncjrs.gov/multimedia/video-nijconf2010-keynote-tribe.htm#tab1 ("[A]s a nation, we face nothing short of a justice crisis.").

[23] Rhode, *supra* note 22, at 869.

[24] *See, e.g.*, Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice Through the (Un)Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43, 44 (2014) ("[T]he problem of access [to justice] is primarily a problem of cost—meaning the total cost of identifying, securing and implementing legal help. . . ."); *see also* Milan Markovic, *Juking Access to Justice to Deregulate the Legal Market*, 29 GEO. J. LEGAL Ethics 63, 69–80 (2016) (summarizing this position).

[25] *See* THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVICES IN NEW YORK, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, FINDINGS OF LAKE RESEARCH

understanding that a problem is legal in nature, lack of belief that a lawyer could help, embarrassment, perceived futility, fear, and resignation.[26] Regardless, the legal ethics literature remains nearly exclusively focused on how to lower the costs of legal services.

Thus, countless proposals frame legal services as a commodity that can and should be disaggregated and routinized to reduce costs.[27] Many scholars propose that we unbundle[28] and computerize[29] as many services as possible in order to deliver

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PARTNERS ON CIVIL LEGAL NEEDS AMONG LOW-INCOME NEW YORK STATE RESIDENTS, at app. 17, at 4–5 (Nov. 2010), https://nycourts.gov/accesstojusticecommission/PDF/CLS-Task forceReport.pdf (finding that underreporting and a failure to recognize civil legal problems, among other reasons, are the main barriers to legal help, and costs are a secondary reasons); D. MICHAEL DALE, A.L. BURRUSS INST. OF PUB. SERV. AND RESEARCH, KENNESAW STATE UNIV., CIVIL LEGAL NEEDS OF LOW AND MODERATE INCOME HOUSEHOLDS IN GEORGIA: A REPORT DRAWN FROM THE 2007/2008 GEORGIA LEGAL NEEDS STUDY 1–2 (June 2009), https://www.georgiaadvocates.org/library/attachment.224725 (finding that the key reason individuals did not seek legal assistance was due to a lack of knowledge).

[26] *Id.* at 27–28; *see also* CONSORTIUM ON LEGAL SERVS. AND THE PUB., AM. BAR ASS'N, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 22 (1994) (explaining that considerable confusion exists among low-income households about their eligibility for free legal services); Markovic, *supra* note 24, at 72–73 (noting that factors other than cost cause lack of access to justice).

[27] *See, e.g.*, Benjamin H. Barton, *The Lawyer's Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067, 3070 (2014) (arguing that increasing amounts of work that was once "[b]espoke" can and should be "commoditized, mass produced, and sold at a much, much lower cost"); *see also infra* notes 28–31.

[28] Unbundling entails offering discrete services disaggregated from traditional legal representation. *See generally* Molly M. Jennings & D. James Greiner, *The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review*, 89 DENV. U. L. REV. 825 (2012). Many scholars make arguments in support of this approach. *See, e.g., id.* at 831–32 (arguing that this is a good solution for individuals who cannot "afford to hire a lawyer for an entire matter"); David A. Hyman & Charles Silver, *And Such Small Portions: Limited Performance Agreements and the Cost/Quality/Access Trade-Off*, 11 GEO. J. LEGAL ETHICS 959, 974–75 (1998) (discussing limited performance agreements and noting that the competitive markets these could create would lead to comparable or higher quality legal services at lower prices); Rhode, *supra* note 22, at 897–98 (noting that unbundled legal services provide a less costly alternative to full representation that could increase access to justice); John C. Rothermich, Note, *Ethical and Procedural Implications of "Ghostwriting" for Pro Se Litigants: Toward Increased Access to Civil Justice*, 67 FORDHAM L. REV. 2687, 2728–29 (1999) (concluding that unbundled legal services are increasing access to justice).

[29] These scholars propose a range of technology-driven strategies for lowering costs, including online dispute resolution systems, online document completion and assembly services, web-based guided interviews, and methods of online unbundling and delivery of discrete legal tasks. *See, e.g.*, James E. Cabral et al., *Using Technology to Enhance Access to Justice*, 26 HARV. J.L. & TECH. 241, 246–56 (2012) (describing recent technological innovations that have improved access to justice); William E. Hornsby, Jr., *Gaming the System: Approaching 100% Access to Legal Services through Online Games*, 88 CHI.-KENT L.

constituent parts more efficiently and cost-effectively. Some support relaxing "unauthorized practice of law rules" to permit the lay provision of legal services.[30] Others support limited licensing schemes, which would allow individuals with some legal training but not a full law degree to register with the state and perform specified legal tasks in particular areas of the law.[31] In both cases, the argument is that service providers who invest less in their training will charge less for their services.

Another group of scholars views increased capital as the answer to access to justice problems.[32] Some advocate new capital

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REV. 917, 931–34 (2013) (analyzing the impact of the internet on the delivery of legal services); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041, 3054–55 (2014) (arguing that machine intelligence will change various aspects of legal work and lower the cost of legal services); Ronald W. Staudt, *All the Wild Possibilities: Technology that Attacks Barriers to Access to Justice*, 42 LOY. L.A. L. REV. 1117, 1128–34 (2009) (discussing the development and impact of legal aid document assembly software that aids both legal aid clients and self-represented litigants); Michael J. Wolf, *Collaborative Technology Improves Access to Justice*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 759, 773–85 (2012) (describing collaborative technology such as online dispute resolution systems that may help improve access to justice).

[30] Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 457 (2001) ("[T]he only services that should be limited to lawyers are those that directly affect workings of the courts, for example, signing and filing court papers and appearing in court. Any other services, from giving legal advice to drafting legal documents such as wills or contracts, should be fully deregulated and open to full competition.").

[31] *See, e.g.*, Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 615 (1994) ("Consumers would benefit from the provision of a variety of quasi-legal services by nonlawyers. . . ."); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371–72, 409 (2004) (discussing the inequitable delivery of legal services and arguing for limited licensing schemes where nonlawyers could, similar to accountants and real estate brokers, offer legal assistance specific to their specialties); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 709–13 (1996) (arguing that the most effective approach would be a regulate, and not prohibit, nonlawyer provision of specific legal services); Laurel A. Rigertas, *Stratification of the Legal Profession: A Debate in Need of a Public Forum*, 2012 J. PROF. LAW. 79, 126–34 (discussing possible reforms to allow the "stratification" of the legal profession where nonlawyers are licensed to provide certain legal services); Cristina L. Underwood, *Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 WASH. L. REV. 437, 442 (2004) (discussing the legal profession's need to protect the public by offering economical alternatives to lawyer services).

[32] *See, e.g.*, Edward S. Adams & John H. Matheson, *Law Firms on the Big Board? A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV 1, 30, 36 (1998) (arguing that allowing law firms to access public equity markets would increase capital available and better provide for society's needs in legal services); Hadfield, *supra* note 24, at 54

structures for law firms—including, for example, non-lawyer owners, investors, or managers—as a means of drawing more funding into the low end of the market and facilitating economies of scale.[33] Others advocate third-party financing of legal claims to increase capitalization, spread risk, and allow for innovation in the inexpensive delivery of services.[34] Proponents argue that these arrangements will lower fees.[35] They also contend that because similar arrangements are becoming increasingly prevalent abroad, U.S. jurisdictions will have to follow suit if their firms are to remain competitive.[36]

("Innovation of novel ways of meeting legal needs also requires increased capital relative to what is required for traditional legal practice."); Renee Newman Knake, *Democratizing the Delivery of Legal Services*, 73 OHIO ST. L.J. 1, 6–7 (2012) (contending that large corporations like Google and Wal-Mart should be able to deliver legal services because they have the financial means to invest in innovative mechanisms and an extensive body of ethics rules would still protect lawyer independence); Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 77 (2004) ("Litigation financing firms provide an option to plaintiffs with good cases but with meager or not financial resources."); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1291 (2011) (arguing that funding of litigation by outside investors could be a solution to lack of access to justice).

[33] *See, e.g.*, Adams & Matheson, *supra* note 32, at 36 (arguing that access to capital markets would have a number of benefits for law firm clients including "client convenience and non-duplication of expenses"); Hadfield, *supra* note 24, at 43, 45–46 (noting that prohibitions on corporate practice of law prevent the use of important organization tools used in other industries that "impose quality and reduce errors" and that a change in production will be necessary to meet the demand for legal services); Knake, *supra* note 32, at 6–7 (arguing that corporations have the financial capacity to more effectively deliver legal services and create new innovations).

[34] *See, e.g.*, Martin, *supra* note 24, at 77 (arguing that third-party financing of litigation will provide valuable financial resources, level the playing field, and not raise concerns about chumperty or usury); Steinitz, *supra* note 32, at 1291 (noting that third-party financing would allow lawyers "to increase their capitalization and grow their firm, diversify, and spread the risk as does any business").

[35] *But see* Nick Robinson, *When Lawyers Don't Get All the Profits: Non-Lawyer Ownership, Access, and Professionalism*, 29 GEO. J. LEGAL ETHICS 1, 19, 25, 29 (2016) (HLS Program on the Legal Prof. Res. Paper N. 2014-20) (reporting a lack of discernable impact on access to justice issues in jurisdictions that have recently liberalized their legal services markets to permit these types of ownership structures).

[36] *See, e.g.*, Hadfield, *supra* note 24, at 58–59 ("The fact that comparable services are unavailable to Americans but now pervasively available to those living in the U.K., under rules that do not impede organizational choices like this, is compelling evidence that the corporate practice of law is an impediment."); Roberta S. Karmel, *Will Law Firms Go Public?*, 35 U. PA. J. INT'L L. 487, 511–25 (2013) (comparing the regulation of law firm business structures in different countries); Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 FORDHAM L. REV.

Lowering the cost of legal services is undoubtedly desirable, but these proposals are premised on the problematic assumption that once affordable services are available, potential clients will find them. They therefore frame clients as rational consumers of legal services who look for, and can be held responsible for finding, the highest quality services at the most affordable prices. They frame lawyers as commodity producers who should deliver legal information as efficiently and cost-effectively as possible and draw new sources of capital and funding into the legal services industry. Lawyers should, in Bullock's words, "exploit" new opportunities in the delivery of legal services.[37] If and when they fail to do so, non-lawyer service providers will step in as more efficient and cost-effective commodity producers.

Increasingly, lawyers, bar leaders, and state disciplinary committees are adopting these proposals and accepting their logic. The automated and online delivery of legal services is a burgeoning industry, actively encouraged in some states and discouraged in only a few.[38] Nearly every jurisdiction now permits unbundled services, giving rise to a number of new types of legal services firms,[39] and the District of Columbia permits non-lawyer ownership of law firms.[40] Washington State recently initiated a

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2193, 2197 (2010) (comparing the regulations of law firm business models in Canada, England, and the United States).

[37] Bullock, *supra* note 1.

[38] McGinnis & Pearce, *supra* note 29, at 3043 ("[M]achine intelligence is not a one-time event that lawyers will have to accommodate. Instead, it is an accelerating force that will invade an even-larger territory and exercise a more firm dominion over this larger area."); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 918, 918 n.159 (2012) ("Commercial form wills have been available for decades, and their continued popularity among lay testators demonstrates demand for reform promoting standardization and simplification."). For examples of on-line legal services programs, see, for example, LEGALZOOM, http://www.legalzoom.com; KIIAC, http://kiiac.com/index.htm; LAWDEPOT, http://www.lawdepot.com; and, HOTDOCS, http://www.hotdocs.com.

[39] *See* John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995, 3002–15, 3037 (2014) (describing new entities created to offer corporate clients an alternative to big law firms, often involving sophisticated unbundling).

[40] D.C. RULES OF PROF'L CONDUCT r. 5.4 (D.C. BAR ASS'N 2015). But note that while support for alternative business structures is strong among academics, it is weak among lawyers and bar leaders. In 2009, the ABA created the Ethics 20/20 Commission to consider a range of issues related to technology and globalization, including the possibility of revising the rules prohibiting non-lawyer ownership of law firms. The Commission dismissed an early proposal without offering its reasons and never returned to the issue. *See* ABA COMM'N ON ETHICS 20/20, ABA COMMISSION ON ETHICS 20/20 FINAL REPORT 8

program of limited licensed legal technicians, which will permit individuals with limited legal training to perform nearly all legal tasks related to family law except for appearing in court.[41] Washington is planning to expand the program into other areas of the law,[42] and California appears poised to follow.[43]

2. Client Autonomy and Choice. A second prominent debate in the legal ethics literature addresses the best ways in which to increase client autonomy and choice. Scholars and commentators have long sought to empower clients as informed consumers of legal services. During the 1970s, for example, advocates of attorney advertising successfully argued that increased public information would raise public awareness and drive down prices.[44] Today, continued efforts to increase client awareness are accompanied by new efforts to expand the menu of available and affordable options. Although these efforts can be advantageous for

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(Feb. 2013) ("[T]he Commission considered a proposal to permit a limited form of nonlawyer ownership, but concluded that the case had not been made for a change to existing policy." (footnotes omitted)). This blind adherence to tradition is clearly problematic, and is distinct from my prescription that the bar should seek to harness market forces through professional structures and ethical rules, rather than embracing market forces as productive in and of themselves. *See infra* Part V.

[41] WASH. ADMISSION TO PRACTICE r. 28(B)(4) (WASH. STATE BAR ASS'N 2014); *see also* Brooks Holland, *The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice*, 82 SUPRA 75, 90 (2013) ("[N]otwithstanding vocal opposition within the WSBA and from other interested parties, the Washington State Supreme Court ultimately adopted the LLLT Rule, the first limited-practice rule of this scope in the country.").

[42] *See* WASH. STATE BAR ASS'N, LIMITED LICENSE LEGAL TECHNICIAN (LLLT) BOARD MEETING MINUTES (Dec. 19, 2013), http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Limited-License-Legal-Technician-Board/LLLT-Board-Meeting-Minutes-and-Materials.20Community/Committees_Boards_Panels/LLLT%20Board/Meeting%20Materials/20131219%20Meeting%Materials.ashx (noting that "[t]he Board will begin exploring new practice areas in 2014" and that "new practice area[s] will make LLLTs more marketable and the profession financially viable").

[43] *See* Robyn Hagan Cain, *Will California Threaten Lawyer Livelihood with Legal Technicians?*, GREEDY ASSOCIATES (Feb. 4, 2013, 12:01 PM), http://blogs.findlaw.com/greedy_associates/2013/02/will-california-threaten-lawyer-livelihood-with-legal-technicians.html (explaining that the California State Bar is "mulling the idea of a limited-practice licensing program" that "would provide legal services to clients who couldn't otherwise afford attorneys").

[44] *See, e.g.*, Bates v. State Bar of Ariz, 433 U.S. 350, 371–72 (1977) ("We are not persuaded that restrained professional advertising by lawyers inevitably will be misleading."); Goldfarb v. Va. State Bar, 421 U.S. 773, 787–93 (1975) (discussing the application of antitrust laws to the regulation by states of legal professionals and noting that states have an interest in protecting their citizens through this regulation).

all involved, they also entail risks. They are premised on the notion that if sufficient information is available regarding lawyers and their services, clients can and should be given complete freedom in choosing among an expansive menu of service options.

Many of these efforts overlap with proposals to increase access to legal services, but broaden their focus to encompass a greater range of clients and services. For example, some scholars advocate unbundling on the theory that all clients should "be allowed to buy exactly what they want to [from lawyers] and no more."[45] Other scholars advocate new forms of law firm ownership on the belief that new sources of capital will not only reduce prices for individual clients, but also grant firms greater flexibility in pursuing innovative transactions and legal strategies for high-end corporate clients.[46] Still others support third-party litigation funding as a means of shifting risk away from corporate defendants and, in doing so, shielding both defendants and their shareholders from the destabilizing and potentially devastating effects of prolonged litigation.[47]

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[45] Jennings & Greiner, *supra* note 28, at 832; *see also* FORREST S. MOSTEN, UNBUNDLING LEGAL SERVICES: A GUIDE TO DELIVERING LEGAL SERVICES A LA CARTE 9 (2000) (discussing clients' control over the process as a benefit of unbundling); Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2139 (2010) (quoting Interview by Richard Susskind with Leah Cooper, Managing Attorney, Rio Tinto (Oct. 9, 2009), http://www.legalweek.eom/legal-week/analysis/1556450/legal-process-outsourcing-richard-susskind-leah-cooper) (discussing Rio Tinto's standard for using CDA lawyers).

[46] *See, e.g.*, Adams & Matheson, *supra* note 32, at 30, 36 (discussing the benefits of allowing law firms to access equity markets, including greater innovation); Edward S. Adams, *Rethinking the Law Firm Organizational Form and Capitalization Structure*, 78 MO. L. REV. 777, 778, 789–90 (2013) (arguing that law firm incorporation and disclosure would have various benefits); John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 90 (2000) (discussing the benefits of multidisciplinary services); Bruce MacEwen, Milton C. Regan, Jr. & Larry Ribstein, *Law Firms, Ethics, and Equity Capital*, 21 GEO. J. LEGAL ETHICS 61, 83 (2008) (arguing that a derivatives-enabled model for law firms would increase innovation in products and legal services).

[47] *See, e.g.*, Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367, 367, 378 (2009) (advocating for "a regime under which lawyers would team up with capital providers to price and absorb litigation risk from corporate defendants after a litigation triggering event had occurred and a lawsuit has been filed"); Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1279 (2012) ("[U]niting aggregate litigation with third-party financing can reduce agency costs."). *But see* W. Bradley Wendel, *Alternative Litigation Finance and Anti-Commodification Norms*,

A number of scholars and commentators focus specifically on sophisticated clients, proposing that they be allowed to contract around particular provisions of the ethical codes.[48] They propose that sophisticated clients should be permitted to decide whether they want to pay for the protections of these rules or whether they would prefer, for example, to waive future conflicts of interest or grant their lawyers an equity interest in lieu of traditional fees.[49] Explicitly describing clients as rational market actors and the lawyer-client relationship as an arms'-length market exchange, these scholars note that sophisticated clients do not suffer from significant information asymmetries,[50] and that where harm does occur, sophisticated clients are likely to be compensated adequately by money damages in malpractice suits.[51]

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63 DEPAUL L. REV. 655, 659 (2014) (noting concerns "about the commodifying effect of allowing investments in lawsuits").

[48] *See, e.g.*, Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97, 129 (2009) (discussing conflict waivers in the corporate client context); Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 972–73, 988–91 (2001) (explaining that sophisticated clients, who are often advised by inside or outside counsel, can understand the implications of waiving future conflicts and arguing that such waivers are needed due to the growth in both size and sophistication of law firms and their clients); Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 312, 326–29 (2000) (arguing for enforcement of future conflict waivers when clients are represented by independent counsel); Audrey I. Benison, Note, *The Sophisticated Client: A Proposal for the Reconciliation of Conflicts of Interest Standards for Attorneys and Accountants*, 13 GEO. J. LEGAL ETHICS 699, 733–34 (2000) (arguing for sophisticated client waivers of conflict and noting that these sophisticated clients have the ability to weigh the risks of such waivers); Sara J. Lewis, Note, *Charting the "Middle" Way: Liberalizing Multijurisdictional Practice Rules for Lawyers Representing Sophisticated Clients*, 22 GEO. J. LEGAL ETHICS 631, 636 (2009) (endorsing the liberalization of MJP rules only for lawyers representing sophisticated clients).

[49] *See* Benison, *supra* note 48, at 733 (discussing sophisticated client waivers); DiLernia, *supra* note 48, at 129 (discussing the role of in-house counsel in the relationship between corporate clients and lawyers at large firms); Lerner, *supra* note 48, at 988–91 (arguing for the enforcement of prospective conflict waivers); Lewis, *supra* note 48, at 636 (arguing for the liberalization of MJP rules for lawyers representing sophisticated corporate clients); Painter, *supra* note 48, at 326–29 ("[A]dvance waivers should be uniformly enforced, but only when the client is independently represented at the time of the waiver.").

[50] *See, e.g.*, Benison, *supra* note 48, at 733–34 (arguing that some sophisticated clients are as able or possibly more able to assess the risks of accepting conflicted representation); Lewis, *supra* note 48, at 636 (arguing that sophisticated clients "do not need the paternalistic protection of MJP rules to save them from hiring incompetent lawyers").

[51] *See, e.g.*, Lewis, *supra* note 48, at 655 (noting that sophisticated clients are more likely to be adequately compensated with damages and favorable settlements); *see also* David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 831–32 (1992) (explaining

Client autonomy and choice are undoubtedly desirable in some contexts, but they are dangerous in many others. Few would dispute that excessive client autonomy, leading to insufficient professional independence, was partially to blame for the corporate scandals of recent years.[52] When clients disaggregate and spread their legal work over many lawyers in different positions—as Enron, Worldcomm, and other corporate giants did[53]—they can prevent any one lawyer from gaining sufficient knowledge and understanding to act as an effective gatekeeper.[54] When clients can demand legal services on their own terms, irrespective of the profession's ethical rules, they can exert overwhelming pressure on lawyers to ignore their public-facing duties and to focus exclusively on client demands.[55] Nevertheless, many scholars continue to advance proposals that would increase the autonomy of corporate clients.[56] They continue to conceptualize these clients as rational market actors who are entitled to the products and services of their choice.

As with access to justice proposals, these proposals are increasingly influencing bar committees. As noted, almost all states now permit the provision of unbundled legal services, and the District of Columbia permits non-lawyer ownership of law

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that clients with small claims are unlikely to "gain access to the malpractice system" while corporate clients can "credibly threaten malpractice suits").

[52] *See* Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics and Enron*, *in* ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 625, 641–42 (Nancy B. Rapoport & Bala G. Dharan eds., 2004) (discussing the lack of sufficient professional independence with the lawyers involved in the Enron scandal).

[53] *See id.* at 636 (explaining that Enron's outside counsel "agreed to highly restrictive limitations on the scope of its review, which further circumscribed the value of its advice").

[54] *See* Steven K. Berenson, *From the Ashes of the Lawyer-Statesman Rises the Lawyer-Democrat: Practical Legal Wisdom from the Ground Up*, 2014 J. PROF. LAW. 17, 37 (arguing that the unbundling of corporate legal practice leads to "a failure to develop the kind of deep, longstanding attorney-client relationships that provide the conditions for the development of practical wisdom in client representation"); Dana A. Remus, *Out of Practice: The Twenty-First-Century Legal Profession*, 63 DUKE L.J. 1243, 1263, 1269–73 (2014) (describing how corporate clients can "manipulate the coverage of the professional rules to their advantage by using different lawyers for different purposes so that each lawyer is not "fully independent" or "fully informed" and are ultimately "co-opt[ed] into facilitations desired business strategies").

[55] *See* Barton, *supra* note 31, at 474 ("Certain legal tactics may be enormously successful on an individual basis, but may erode faith in the justice system as a whole.").

[56] *See supra* notes 45–51 and accompanying text.

firms.[57] Litigation financing, particularly for corporate clients, is a multi-million dollar industry,[58] and the American Bar Association and many states have revised their ethics codes to permit sophisticated clients to waive the protections of certain provisions of the ethics rules.[59]

3. Lawyer Conduct and Misconduct. A third central debate in the legal ethics literature asks how we can most effectively inform and encourage good lawyer conduct while deterring and punishing misconduct. Overwhelmingly, scholars characterize traditional mechanisms of professional regulation—including the character and fitness requirement for admission to the bar, the provisions of the ethics codes, and the enforcement efforts of state disciplinary committees—as ineffective, outdated, and self-interested.[60] In their place, they advocate privatized regulation and other means of policing ordinary business activity.[61] Expressing a common

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[57] *See supra* note 40 and accompanying text.

[58] *See* Binyamin Appelbaum, *Lawsuit Loans Add New Risk for the Injured*, N.Y. TIMES, Jan. 17, 2011, at A1 (reporting that the industry "lends plaintiffs more than $100 million a year").

[59] For changes permitting advance waiver of conflicts, see, for example, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-436 (2005); N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2006-01 (2006); D.C. Bar Legal Ethics Comm., Ethics Op. 309 (2001); State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1999-153 (1999); New York Cty. Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 724 (1998); and S.C. Bar Ethics Adv. Comm., Op. 93-23 (1993). For changes permitting payment for services with an equity interest in the client, see, for example, ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-418 (2000); Colo. Bar Ass'n Ethics Comm., Formal Op. 109 (2001); D.C. Bar Legal Ethics Comm., Op. 300 (2000); N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2000-3 (2000); Pa. Bar Ass'n Legal Ethics and Prof'l Responsibility Comm., Formal Op. 2001-100 (2001). See also John S. Dzienkowski & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405, 415 (2002) for a discussion of the "rise of the new economy" where there are many examples of lawyers acquiring equity stakes in their clients).

[60] *See, e.g.*, David B. Wilkins, *Making Context Count: Regulating Lawyers after Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1152–54 (1993) (discussing the decline of the traditional model of professional regulation due to its inability, among other things, to tailor rules to specific contexts).

[61] *See, e.g.*, CLIFFORD WINSTON, ROBERT W. CRANDALL & VIKRAM MAHESHRI, FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS 83 (2011) (arguing to "deregulate entry into the legal profession by allowing any individual or firm to provide legal services without having to satisfy occupational licensing of ABA regulatory requirements"); RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 33–36 (2008) (predicting that changes in the legal profession will be driven by the market); David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203, 265 (2004) ("[M]arket forces can serve to better regulate the behavior of lawyers than has been done using the historical self-regulating model. . . ."); Deborah Jones Merritt & Daniel C. Merritt, *Unleashing Market Forces in Legal*

sentiment behind these proposals, David Barnhizer, writes that we need to "accept[ ] that the private practice of law is exclusively a business conducted for profit maximization like any other and to regulate it in ways consistent with that fact."[62] Stated otherwise, these proposals view lawyers as ordinary agents, who can be prevented from self-dealing or shirking with the right market incentives and constraints.

Thus, the literature is full of proposals to extend broadly applicable anti-fraud and consumer protection laws to lawyers[63] and to increase reliance on civil liability for malpractice[64] (even as many practicing lawyers resist these moves[65]). Commentators suggest that increasing the amount of publicly-available information regarding lawyers' services, fees, and conduct records would exert much stronger influence on lawyer conduct than professional regulation does, as it would empower clients to reward well-performing lawyers with their business while avoiding poorly-behaving lawyers.[66] Employing similar reasoning, many scholars also support and advocate risk management systems as a means of conditioning lawyer conduct.[67] Premised on the notion

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Education and the Legal Profession, 26 GEO. J. LEGAL ETHICS 367, 381 (2013) (arguing that relying on direct market forces rather than inefficient professional restrains will best serve clients); Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-as-Business Paradigm*, 27 FLA. ST. U. L. REV. 9, 16 (1999) (discussing the bar's "embrace of the idea that law practice [is] a business" and the rejection of the "dichotomy between a self-interested business and an altruistic profession").

[62] Barnhizer, *supra* note 61, at 232; *see also* Merritt & Merritt, *supra* note 61, at 381 (describing what the legal profession would look like as an open market).

[63] *See, e.g.*, Merritt & Merritt, *supra* note 61, at 383 ("An open market for legal services would not abandon all regulation; it would replace self-interested guild regulation with all of the anti-fraud and consumer protection laws available in our legal system."); *see also* Steinitz, *supra* note 32, at 1334 (arguing to incorporate consumer-protection obligations from insurance and financial regulation to the regulation of litigation funding).

[64] *See, e.g.*, Barnhizer, *supra* note 61, at 265–66 ("[I]t is important to streamline the doctrines of malpractice liability so that wronged clients can have effective recourse against their former lawyers.").

[65] *See, e.g.*, Brief on the Merits of Petitioners at 6, Heintz v. Jenkins, 514 U.S. 291 (1995) (No. 94-367), 1994 WL 706068 (arguing against application of the Fair Debt Collection Practices Act to lawyers).

[66] *See* Merritt & Merritt, *supra* note 61, at 383 (suggesting that deregulation would discipline dishonest and incompetent attorneys just as effectively as the current system and would increase the quality of legal work); Steinitz, *supra* note 32, at 1334 (promoting the filing and disclosure requirements to protect clients).

[67] *See, e.g.*, Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 96 (2008) [hereinafter Davis,

that appropriate conduct can be reduced to a cost-benefit analysis, these systems impose standardized policies and procedures that are designed to maximize efficiency and profitability while minimizing the risks of malpractice, professional discipline, and other sanctions.[68]

Risk management systems have an increasingly important role to play in law firm management,[69] but there is reason to proceed with caution. Anthony Alfieri highlights a danger of these systems in arguing that by replacing individual exercises of judgment with standardized policies and procedures, risk management systems may undermine lawyers' ethical decisionmaking capabilities.[70] Alfieri's critique has relevance for all proposals to condition lawyer behavior with market forces. When proceeding in grey areas or attempting to resist client pressures, lawyers who do not regularly practice professional and ethical decisionmaking may be ill-

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Legal Ethics and Risk Management] ("[R]isk management educates, supports, and reinforces ethical decision making on both the institutional and the individual levels." (emphasis omitted)); Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209, 211, 222 (1996) (describing risk management as an effective form of regulation that is "slowly increasing in influence and reach"); *see also* George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305, 307 (1997) (arguing that legal malpractice insurance can "further the deterrence goals of liability by improving the behavior of the insureds"); Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1959 (2006) (arguing for the use of corporate compliance programs in law firms to reduce risk and promote ethical behavior); Charles Silver, *Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis*, 65 FORDHAM L. REV. 233, 233–34 (1996) (examining Anthony E. Davis's claims about the impact of liability insurance on lawyers' behavior in light of basic insurance law and insurance economics).

[68] Davis, *Legal Ethics and Risk Management*, *supra* note 67, at 98–99.

[69] In a recent study on management-based regulation of Australian law firms, Susan Fortney found that a comprehensive system of self-assessment and internal management, which entails a risk management aspect, can create a strong and meaningful ethical infrastructure. *See* Susan Saab Fortney, *The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 112 (2014) ("[M]anagement-based principles can help transform a lawyer disciplinary system from a reactive one to a proactive one that educates and assists lawyers in conducting their practices ethically and efficiently."); Susan Saab Fortney & Tablia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L.J. 152, 168–72, 181–82 (2012) (describing the decision of the study and analyzing the results).

[70] *See* Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1939 (2006) ("[R]isk management systems may actually imperil lawyer ethical judgment and moral reasoning.").

equipped to make difficult decisions.[71] Lawyers who are told that they are business people first and foremost are also more likely to act that way.[72] We are already seeing this in large corporate law firms, which increasingly resemble their clients in both structure and practices.[73]

Despite these concerns, countless scholars and commentators continue to advocate market-based mechanisms for conditioning lawyer behavior.[74] Countless bar leaders and law firms are following suit, adopting risk management systems as the most effective means of conditioning and controlling lawyer behavior, and dismissing traditional forms of professional regulation as outdated and problematic.[75] The message to lawyers is loud and clear—they are to base their conduct primarily on market signals and incentives, and only secondarily on individual judgment and ethical decisionmaking.

As this discussion has shown, market based proposals are being advanced to address the most fundamental problems facing lawyers today. Some of these proposals' proponents present them as pragmatic and interstitial responses to particular problems in the delivery of legal services; others more openly advocate abandonment of the professional form. Regardless of their proponents' intent, these proposals are unified by a common approach to conceptualizing the work of lawyers. They frame clients as rational consumers of legal services, lawyers as commodity producers, and the attorney-client relationship as an arms'-length exchange of services for a fee. As developed in Part IV below, the resulting model of lawyering envisions only one means of interaction and negotiation (over price and through the market) and accounts for only two sets of interests (those of lawyers and clients). Third-party and systemic interests are largely ignored, as are the broader webs of relationships in which

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[71] *See id.* (noting that these systems put moral decisionmaking at risk by shifting responsibility for making hard judgments to others in the firm).

[72] *See infra* note 246 and accompanying text.

[73] *See* Alfieri, *supra* note 70, at 1930 (discussing the transformation of large law firms "into mechanisms of single-minded profit and arid productivity").

[74] *See supra* notes 61–68 and accompanying text.

[75] *See* Davis, *Legal Ethics and Risk Management*, *supra* note 67, at 114–15 (noting that many large law firms now employ a General Counsel as a risk management system).

both the market and lawyering are embedded.[76] These are dramatic omissions and modifications to traditional conceptions of lawyering, which envision a lawyer serving as a "representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."[77]

B. NEOLIBERALISM, IN SOCIETY AND THE ACADEMY

And yet, the market-exchange model rings a bell for anyone familiar with contemporary legal scholarship. Why? Because it employs language and logic that pervades the legal academy, and contemporary society generally. Its proponents may be diverging from traditional conceptions of lawyering, but they are also echoing and expressing neoliberal thought, which has been called the "common sense of our era."[78]

Even though the term "neoliberalism" is too expansive and diffuse to define with precision,[79] it usefully draws our attention to market-based norms that we have largely internalized.[80] In recent years, the term has been most closely associated with the economic

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[76] *Cf.* EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 154–63 (MacMillan Press 2d ed. 1984) (discussing the incorrect conceptions of "private" law, such as contracts, that fail to account for the broader social overlay and consequences); *see also* Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 487 (1985) ("[Actors] attempts at purposive action are instead embedded in concrete, ongoing systems of social relations."); KARL POLANYI, THE GREAT TRANSFORMATION, THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 45–58 (Beacon Press 2001) (arguing that these views of the market ignore the fact that the market is surrounded by a complex network of social relationships).

[77] MODEL RULES OF PROF'L CONDUCT, pmbl. [1] (AM. BAR ASS'N 2013).

[78] HARVEY, *supra* note 11, at 2–3.

[79] *See, e.g.*, David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 2 n.3 (2014) (" '[N]eoliberalism' is used to name a variety of policy programs and intellectual positions, a warning that it may lack a core definition."); Philip Mirowski, *Postface: Defining Neoliberalism*, *in* THE ROAD FROM MONT PÈLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE 428 (Philip Mirowski & Dieter Plehwe eds., 2009) ("[T]he premier point to be made about neoliberalism is that it cannot adequately be reduced to a set of Ten Commandments . . . .").

[80] Because neoliberalism has become a form of "common sense" in contemporary society, its core tenets are often invisible. *See* Stuart Hall, *Culture, the Media, and the "Ideological Effect,"* *in* MASS COMMUNICATION AND SOCIETY 315, 325–26 (James Curran et al. eds., 1979) ("You cannot learn, through common sense, how things are . . . . [I]ts very taken-for-grantedness is what establishes it as a medium in which its own premises and presuppositions are being rendered invisible by its apparent transparency." (emphasis omitted)).

development policies of the "Washington consensus,"[81] but its origins trace back decades to a 1947 meeting of conservative social thinkers in Mont Pèlerin, Switzerland, under the leadership of Austrian economist Friedrich Hayek.[82] The Mont Pèlerin thinkers recognized the dangers of traditional laissez faire economics, including the market failures that had culminated in the Great Depression, but they feared central planning as the first step down an inevitable path to totalitarianism.[83] They therefore gathered to "diagnose and rectify" the conceptual flaws of classical liberalism.[84] Notwithstanding significant disagreement, they were aligned on core points: they prescribed an ongoing role for the state in creating and maintaining the conditions necessary for a free market, but they were adamant that the state's role be limited to promulgating the necessary background rules.[85] The state was prohibited from promulgating foreground rules to direct the market towards particular ends,[86] as intentional human interventions would threaten dangerous and unpredictable results.[87] They explained the market as a "spontaneous order"—

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[81] These include the economic policy prescriptions directed at supporting free trade and globalized free markets and promoted in developing countries by the International Monetary Fund, the World Bank, and the U.S. Treasury Department. *See* John Williamson, *What Washington Means by Policy Reform*, *in* LATIN AMERICAN READJUSTMENT: HOW MUCH HAS HAPPENED? 7, 18 (John Williamson ed., 1990) ("The economic policies that Washington urges on the rest of the world may be summarized as prudent macroeconomic policies, outward orientation, and free-market capitalism.").

[82] Dieter Plewhe, *Introduction*, *in* THE ROAD FROM MONT PÈLERIN, *supra* note 79, at 4–5.

[83] *See id.* at 10, 13 (discussing these scholars' concerns about the need to "confront the perceived evils of planning and the failures generated by laissez-faire attitudes" and their attempts to revise liberal theory to defeat totalitarianism).

[84] *Id.* at 16. The Mont Pèlerin Society's initial mission statement expressed its intent "to facilitate an exchange of ideas between like-minded scholars in the hope of strengthening the principles and practice of a free society and to study the workings, virtues, and defects of market-oriented economic systems." *About MPS*, THE MONT PELERIN SOCIETY, https://www.montpelerin.org/about-mps/.

[85] *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 16, 41 (1944) (discussing the benefits of "industrial freedom" and the removal "barriers to the free exercise of human ingenuity" while warning of the dangers of industrial monopoly where competition is suppressed).

[86] *Cf.* Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387, 395 (2012) ("Background rules are constitutive of the legal concept, meaning, without those basic foundational rules, the concept would not exist. Foreground rules are those rules that are meant to respond to the play of the background rules. They are regulatory in nature, and not constitutive of the concept.").

[87] HAYEK, *supra* note 85, at 77 (discussing the dangers of economic planning and noting that "[t]hose most immediately interested in a particular issue are not necessarily the best

the result of human action but far too complex for human understanding or design.[88]

Over the years, the Mont Pèlerin Society (which continues to meet annually) has repeatedly and emphatically emphasized the importance of a limited state.[89] But, the neoliberal state is better understood as redefined than as limited.[90] Although the state cannot intervene in the market to produce particular substantive results, it can, and indeed *must*, promulgate law and disseminate social norms that facilitate competition, free trade, and rational economic action in all areas of social life—from health care to education to politics.[91] By doing so, the neoliberal state delegates responsibility for sustaining social order to its citizens, who order themselves pursuant to market logic.[92] The goal is the aggregation of individual preferences, rather than the creation of social solidarity—as Margaret Thatcher famously declared: "[There is] no such thing as society, only individual men and women . . . ."[93]

Contemporary commentators have described neoliberalism as the "thought collective" that grew out of the Mont Pèlerin Society and seeks to extend market logic to all areas of social life.[94]

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judges of the interests of society as a whole"); *see also id.* at 51 (discussing the limits of human knowledge).

[88] F.A. HAYEK, 3 LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE 38 (1981).

[89] They have been able to do so because of neoliberalism's exclusive emphasis on background rules, which can be presented as "hardly rules at all." Desautels-Stein, *supra* note 86, at 396.

[90] *See* Jamie Peck & Adam Tickell, *Conceptualizing Neoliberalism, Thinking Thatcherism*, *in* CONTESTING NEOLIBERALISM: URBAN FRONTIERS 26, 33 (Helga Leitner, Jamie Peck & Eric S. Sheppard eds., 2007) ("Only rhetorically does neoliberalism mean 'less state;' in reality, it entails a thoroughgoing *reorganization* of governmental systems and state-economy relations.").

[91] *See id.* ("Projects like privatization, devolution, deunionization, and deregulation involved significant *extensions* of state power, together with the construction of new bureaucracies and modalities of government. . . .").

[92] *See* Wendy Brown, *Neo-liberalism and the End of Liberal Democracy*, 7 THEORY & EVENT. 4 (2003) ("[T]hrough discourse and policy promulgating its criteria, neo-liberalism produces rational actors and imposes market rationale for decision-making in all spheres."); *see also id.* ("[N]eo-liberalism normatively constructs and interpellates individuals as entrepreneurial actors in every sphere of life.").

[93] HARVEY, *supra* note 11, at 22–23.

[94] *See* Mirowski, *supra* note 79, at 428 ("[Neoliberalism] is better . . . approached as a 'thought collective,' " defined as " 'a community of persons mutually exchanging ideas or maintaining intellectual interaction.' " (internal citations omitted)); Grewal & Purdy, *supra* note 79, at 4 ("Neoliberalism, then . . . names a suite of arguments, dispositions,

Observing that its influence on politics and popular consciousness has been broad and expansive,[95] they describe it as "hegemonic" and the "common-sense way many of us interpret, live in, and understand the world."[96] They note that Clinton and Obama, no less than Reagan and Thatcher, have embraced the state's role in facilitating competition, free trade, and rational economic action in all areas of society (even if they have done so in very different ways).[97] They also observe that we as a citizenry have largely accepted our charge as rational actors—we make countless daily decisions, which are framed as cost-benefit analyses and for which we will be held responsible.[98] Individually, we may object to neoliberalism's tenets and seek to recover the values it pushes aside. Collectively, we have failed to probe the countless substantive and distributional decisions that lie behind its

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presuppositions, ways of framing questions, and even visions of social order that get called on to press against democratic claims in the service of market imperatives."); HARVEY, *supra* note 11, at 3 ("[Neoliberalism] holds that the social good will be marginalized by maximizing the reach and frequency of market transactions, and it seeks to bring all human action into the domain of the market.").

[95] *See* HARVEY, *supra* note 11, at 2–3 (describing how neoliberalist thinking began expanding in the 1970s); *see also* Colin Gordon, *Governmental Rationality: An Introduction*, *in* THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 1, 16, 38–43 (Graham Burchell et al. eds., 1991) (describing the broad impacts of neoliberalism).

[96] HARVEY, *supra* note 11, at 2–3; *see also* PIERRE BOURDIEU, ACTS OF RESISTANCE: AGAINST THE TYRANNY OF THE MARKET 34 (Richard Nice trans., 1998) ("Everywhere we hear it said, all day long—and this is what gives the dominant discourse its strength—that there is nothing to put forward in opposition to the neo-liberal view, that it has succeeded in presenting itself as self-evident, that there is no alternative."); Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 115, 119 (2000) (observing that "[neoliberal ideology] pervades contemporary policy, scholarship, and culture").

[97] *See* Brown, *supra* note 92 (explaining that "neo-liberal political rationality . . . undergirds important features of the Clinton decade as well as the Reagan-Bush years"); *see also* WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 202–03 (2010) (providing examples of Regan embracing a neoliberalist view of the state's role in economic action); McCluskey, *supra* note 96, at 127 (citing Gerald F. Seib & Alan Murray, *Changed Party: Democrats' Platform Shows How Different They Are from 1972*, WALL ST. J., July 15, 1992, at A1) ("As a Wall Street Journal article approvingly noted, the [neoliberal] choice of efficiency over redistribution now has bipartisan support.").

[98] *See* Mirowski, *supra* note 79, at 437 (discussing "freedom" as concept where "autonomous self-governed individuals . . . striv[e] to improve their lot in life by engaging in the market exchange"); *see also* ZYGMUNT BAUMAN, DOES ETHICS HAVE A CHANCE IN A WORLD OF CONSUMERS? (2008); DAVID HARVEY, THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE (1990); THOMAS LEMKE, FOUCAULT, GOVERNMENTALITY, AND CRITIQUE (2011).

neutral-sounding language of utility, efficiency, and market rationality.[99]

Neoliberalism's influence in the legal academy is no less significant than its influence in society at large. Just four years after the first meeting of the Mont Pèlerin Society, Hayek moved to the University of Chicago and cofounded law and economics.[100] Initially a conservative movement, law and economics gradually gained respect as an intellectually rigorous methodology.[101] As it did, it gained adherents from across the political spectrum.[102] Today, it is a dominant discourse in the legal academy.[103]

Certainly, law and economics has opponents—scholars who challenge the notion that all of law can be subject to cost-benefit analyses, or that individuals can ever, much less always, be understood as rational actors.[104] But its rhetoric and rationality have spread throughout the academy, and its dominance can hardly be questioned.[105] Cost-benefit analyses play a role in virtually every debate, and efficiency is always assumed to be a central value.[106] Even when the rational actor model is

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[99] *See generally* HARVEY, *supra* note 11.

[100] In 1951, Hayek moved to the University of Chicago from the London School of Economics and, along with Aaron Director and others, cofounded law and economics. MILTON FRIEDMAN & ROSE D. FRIEDMAN, TWO LUCKY PEOPLE: MEMOIRS 33 (1998). For an excellent history of the birth and rise of law and economics, see STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 216 (2008).

[101] *See* TELES, *supra* note 100, at 216, 218 (describing the movements transitioning from "off the wall" into an accepted "discipline").

[102] *Id.* at 218.

[103] *Id.*

[104] *See, e.g.*, Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303, 307–15, 335 (2005) (identifying flaws with core tenets of law and economics, including rational choice theory and efficiency and wealth maximization analysis). *But see id.* at 335 (observing that law and economics has "reached heights scaled by no other jurisprudential school").

[105] Bruce A. Ackerman, *Law, Economics, and the Problem of Legal Culture*, 1986 DUKE L.J. 929, 932 (observing the growing prominence of the lawyer-economist, bringing with it "conversational shifts" in legal scholarship); Michael D. Murray, *The Great Recession and the Rhetorical Canons of Law and Economics*, 58 LOY. L. REV. 615, 619 (2012) ("[C]ritics and supporters alike agree that law and economics has established itself as the dominant and most influential contemporary mode of analysis among American legal scholars."); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 767 (1987) ("Economics . . . has branched out from market to nonmarket behavior, thus taking in the subject matter of most interest to legal thinkers." (footnotes omitted)).

[106] *See* Murray, *supra* note 105, at 621–22 (noting that "[t]he characterization of legal phenomena as incentives and was" along with the "rhetorical economic concept of efficiency" are core values in law and economics).

successfully challenged, it is rarely discarded but merely modified to account for individual preferences and motivations other than price.[107] In the estimation of many, law and economics has been "the most successful intellectual movement in the law of the past thirty years."[108]

Against this backdrop, it seems not at all surprising that scholars, commentators, and bar leaders have begun using economic language and logic in responding to the problems and challenges of lawyering. In trusting the market to offer solutions to seemingly intractable problems in the delivery of legal services, they are merely echoing and expressing the "common sense" of our era. They are casting lawyers and clients as they are cast in all areas of life—as rational actors, judged by their success in the market exchange and held responsible for the consequences of their choices. They are allowing for only one means of interaction between lawyers and clients—over price and through the market. And, they are designing the attorney-client relationship to serve the neoliberal goal of aggregating individual preferences. Although few proponents of these proposals self-identify as law and economics scholars, they nevertheless employ economic assumptions, language, and logic that have become ubiquitous in the legal academy and in society at large.

If this approach seems all but inevitable today, it would have been anathema a century ago. How did we get here? And why? To see how far we have traveled from the early theories that grounded the American legal profession, the next Part addresses the history of social thought on the professions.

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[107] *See, e.g.*, Kenneth G. Dau-Schmidt, *Legal Prohibitions as More than Prices: The Economic Analysis of Preference Shaping Policies in the Law*, *in* LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES 153, 153 (Robin Paul Malloy & Christopher K. Braun eds., 1995) ("Law and economics scholars have identified various areas of laws . . . in which legal prohibitions and penalties are not merely intended to act as a price on the proscribed behavior, but are also intended to influence the underlying preferences . . . . In such cases the traditional economic analysis of law will not give an adequate positive or normative description of the phenomenon.").

[108] TELES, *supra* note 100, at 216; *see also* Judge Alex Kozinski, Address at the Fourth Annual Frankel Lecture, Who Gives A Hoot About Legal Scholarship?, *in* 37 HOUS. L. REV. 295, 317 (2000) (noting that Calabresi, Posner, and law and economics scholars "have transformed the language and structure of many legal arguments . . . not merely in areas such as antitrust, which have a more or less direct relationship to economics, but also in virtually all areas of the law").

III. THE RISE AND FALL OF THE PROFESSIONAL PROMISE

In the late nineteenth century, social thinkers addressed a society that had been torn apart and rebuilt, largely by market forces. Seeking to preserve and build social ties, these thinkers looked for institutions that could stand between the state and its citizenry without being subsumed by the same market forces. Emile Durkheim, widely considered the father of sociology, identified professional bodies as uniquely situated to play this role. As set forth below, he believed that professional groups could forge social ties, integrate state and society, and weave the social fabric in which market exchange is embedded.

Although formulated in a different time and amidst different constraints, Durkheim's vision offers a useful contrast to contemporary discourse and a useful starting point from which to understand the early structure and the normative potential of the American legal profession.[109] It has been dismissed from contemporary debates not because it lacks value, but because of an

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[109] Within sociological thought, Durkheim has frequently been characterized and then dismissed as deeply conservative and anti-democratic. *See, e.g.*, ROBERT A. NISBET, EMILE DURKHEIM 24 (1965) (noting that Durkheim "worked with many of the values of religious and political conservatives" but also inspired many Enlightenment Scholars with his "methodological essence"); Lewis A. Coser, *Durkheim's Conservatism and Its Implications for His Sociological Theory*, *in* EMILE DURKHEIM, 1858–1917: A COLLECTION OF ESSAYS, WITH TRANSLATIONS AND A BIOGRAPHY 212–13 (Kurt H. Wolff ed., 1960) (defining Durkheim's conservatism as a cautions approach to change). As a number of scholars have argued, this characterization is unfair. It fails to understand the meaning he attributed to particular terms and ignores the historical and political context in which he wrote. For example, Susan Stedman Jones explains that while Durkheim did in fact focus on the maintenance of "order" in society, he used "order" to mean "the set of relations that should obtain in society or the proper form of social organization that serves the interest of humanity," not "the preservation of the status quo," or "maintenance of a hierarchy and inequality." SUSAN STEDMAN JONES, DURKHEIM RECONSIDERED 27, 48 (2001) (emphasis omitted); *see also id.* at 24 ("Democracy for Durkheim requires exactly those qualities that posed such a threat to order for the Traditionalists: more reflection, will and deliberation, and therefore more change . . . ."); LAURA DESFOR EDLES & SCOTT APPELROUTH, SOCIOLOGICAL THEORY IN THE CLASSICAL ERA 81–82 (2005) ("[T]o consider Durkheim politically conservative is also erroneous in light of how he was evaluated in his day. Durkheim was viewed as a radical modernist and liberal, who, though respectful of religion, was most committed to rationality, science, and humanism."). Regardless, I am not advocating wholesale adoption of Durkheim's worldview. I am advocating a Durkheimian vision for the potential role of the legal profession in society, which is a decidedly democratic vision. *See* JONES, *supra*, at 25 (describing Durkheim's role for the professions as decentralizing power from the state to society).

unlikely alliance of two distinct strands of thought—neoliberalism, discussed above, and a powerful neo-Marxist critique of the professions, discussed below.

A. DURKHEIM'S PROFESSIONS

Although—high status occupations, such as law, medicine, and the clergy, date back to antiquity,[110] professional associations did not form and mobilize to secure professional privileges until the nineteenth century.[111] Late in the century, with professionalization on the rise, social thinkers began to address the societal role of the professions. Durkheim, who published his influential treatise on the division of labor in 1893, was one of the first to do so.

Writing amidst the massive social and economic disruptions of the Industrial Revolution,[112] Durkheim addressed the foundational question of social organization in a modern society: how could social order be maintained in an increasingly complex world? If preindustrial societies were held together by familial ties and common values, how could social order be maintained when those ties were broken by an advanced and complex division of labor?

Durkheim quickly rejected two potential answers: increased reliance on the state, on one hand, or the market, on the other. He explained that law emanating from the state was necessary but not sufficient. He feared twin dangers—that the state would become an overgrown and repressive agency, or that it would remain too far removed from everyday life to effectuate social solidarity.[113] As for the market, he flatly rejected his

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[110] *See* Terence C. Halliday, *Knowledge Mandates: Collective Influence by Scientific, Normative and Syncretic Professions*, 36 BRIT. J. SOC. 421, 423 (1985) (explaining that law, medicine, and the clergy are the longest standing professions); T.H. MARSHALL, CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT 146 (1964) (discussing the growth and decline of various professions over time).

[111] *See* Richard L. Abel, *Taking Professionalism Seriously*, 1989 ANN. SURV. AM. L. 41, 44 (describing the process taken by American lawyers to restrict entry into the profession beginning in the late nineteenth century).

[112] *See* Lewis Coser, *Introduction* to DURKHEIM, *supra* note 76, at x–xi (describing the "sea of change" that accompanied the industrial revolution); HAROLD G. VATTER, THE DRIVE TO INDUSTRIAL MATURITY: THE U.S. ECONOMY, 1860–1914, at 62–65 (1975) (describing some of the drastic discontinuities of the industrial revolution).

[113] *See* DURKHEIM, *supra* note 76, at 83–86 (describing the tradeoffs between individual and collective solidarity in society); *Preface to the Second Edition of* DURKHEIM, *supra* note

contemporaries' assertion that as the advanced division of labor required increasingly frequent and complex contractual relationships, social solidarity would be created and strengthened.[114] This merely begged the question, he argued, since the existence of contractual relationships presupposed the existence of moral and social norms that would facilitate the creation and govern the effect of such relationships.[115] "[T]he contract is not sufficient by itself," he explained, "but is only possible because of the regulation of contracts, which is of social origin."[116]

Having rejected both the state and the market as the source of social solidarity, Durkheim looked for institutions that could intermediate between the state and its citizenry without being subsumed by market rationalities.[117] He viewed professional bodies, based on occupational groups, as uniquely situated to play this role. As occupations, these groups would necessarily be a focal point of their members' lives. Because their governing rules were "inspired by concern not for some individual interest or another, but for the corporate interest," they could draw their members' focus up and out towards the interests of the collective.[118]

76, at liv (arguing that the state is too remote and disconnected from individuals to help them socialize).

[114] *Id.* (arguing that "[a] society made up of an extremely large mass of unorganized individuals" needs secondary groups, such as professional groups, interposed into society to maintain social solidarity). Durkheim's contemporaries Henry Maine and Herbert Spencer argued that social order would be ensured through market exchange. *See* Coser, *supra* note 112, at xiv ("To Spencer as well as to Maine, the general trend of human evolution was marked by the gradual decline of societal regulation and the emergence of unfettered individualism.").

[115] *See* DURKHEIM, *supra* note 76, at 154–63 (describing the interrelationship between social norms and contractual relationships); *cf.* Kenneth J. Arrow, *Social Responsibility and Economic Efficiency*, 21 PUB. POL'Y 303, 301 (1973) ("Every contract depends for its observance on a mass of unspecified conditions which suggest that the performance will be carried out in good faith without insistence on sticking literally to its wording."); Granovetter, *supra* note 76, at 487 ("Actors do not behave or decide as atoms outside a societal context, nor do they adhere slavishly to a script written for them by the particular intersection of social categories that they happen to occupy. Their attempts at purposive action are instead embedded in concrete, ongoing systems of social relations.").

[116] DURKHEIM, *supra* note 76, at 162.

[117] *See Preface*, *supra* note 113, at xxxii–xxxix (discussing institutions such as unions and corporations that act as intermediaries between the state and its citizens). But note that Durkheim did not limit his vision to the "learned professions"; he viewed it as applying to all occupational groups. BURKHEIM, *supra* note 76, at 91–92.

[118] *See Preface*, *supra* note 113, at xli.

Durkheim argued that "this attachment to something that transcends the individual, this subordination of the particular to the general interest" could foster common norms, values, and beliefs, which in turn, could ensure solidarity in modern society.[119] Durkheim emphasized that neither the state nor the market could play this role.[120] Christine Parker and Tanina Rostein summarized his argument as such:

> [W]e cannot trust market forces, or state regulation, to inculcate ethics. Ethics must be the concern of sufficiently cohesive self-regulating occupations, which teach their members to look away from their own self-interest, and rather, toward the whole community, and thus develop the general disinterestedness on which moral activity is based.[121]

Durkheim was cognizant of the danger that occupational groupings could follow the path of medieval guilds, which had long used secrecy to consolidate market power and advance financial self-interest.[122] He argued that the socializing potential of the professional form could guard against this danger by ensuring that members considered the interests not only of their occupational groups, but also of society as a whole.[123]

In addition to this socializing function, Durkheim believed that professional bodies held value as a means of bolstering democratic

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[119] *Id.* at xlii; *see also id.* xxxix ("What we particularly see in the professional grouping is a moral force capable of curbing individual egoism, nurturing among workers a more envigorated feeling of their common solidarity, and preventing the law of the strongest from being applied too brutally in industrial and commercial relationships."); EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 12–13, 23–24 (Cornelia Brookfield trans., 1958) (arguing that moral standards should be raised though some type of economic regulation and that professional groups can act as moral spheres).

[120] DURKHEIM, *supra* note 119, at 23–24 (arguing that professional groups should serve as the moral center to encourage social solidity, and that the market and the state are both incapable of serving this role).

[121] Christine Parker & Tanina Rostain, *Law Firms, Global Capital, and the Sociological Imagination*, 80 FORDHAM L. REV. 2347, 2356 (2012).

[122] *See* DURKHEIM, *supra* note 76, at 292 (describing how trade guilds changed from a "common refuge for all" to being under the exclusive control of the masters).

[123] *See Preface*, *supra* note 113, at xli (describing how professional groups subordinate individual interests to corporate interest) which necessarily submits to a moral code that benefits society).

accountability and legitimacy. He explained that professions were uniquely situated to facilitate a two-way exchange between society and state.[124] They could represent and translate citizens' interests up to the state, ensuring that the state promulgated laws that reflected and responded to those interests. They could also represent and translate the state's laws and activities down to the citizenry, ensuring that citizens could conform their conduct to the laws and, when necessary, voice objection.[125] In this way, the professions could serve as a check on arbitrary state power and as a mechanism for democratic participation in law-making.[126] They could weave the social fabric in which both law and market exchange are embedded.[127]

Although not limited to learned professions, Durkheim's vision has long had particular relevance for lawyers, who are both entrusted with specialized expertise and explicitly charged with mediating between the state and society. The relevance did not go unnoticed by early leaders of the American bar, who drew on his insights in organizing the emerging profession and formulating its first nationally-applicable code of conduct.

B. THE EARLY AMERICAN BAR

As Durkheim wrote *The Division of Labor*, the American legal profession was emerging from half a century of disarray.[128] Lawyers had played a prominent role at the founding and in the

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[124] *See id.* at xliii (explaining that attachment to something greater than individual self-intent forms the basis of society morality); *cf.* DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE (2008) (discussing the theory of democratic legitimacy and arguing that intermediaries between the state and its citizens are necessary for effective engagement and political legitimacy).

[125] *See* DURKHEIM, *supra* note 119, at 23–24 (noting the importance of regulating moral civility and arguing that leaving moral activity "entirely to individuals . . . can only be chaotic").

[126] *See id.* (recognizing the benefits to individuals of "taking shelter under the roof of a collectivity that ensures peace to him").

[127] *See id.* (explaining that the sense of morals is applicable to all aspects of communal life).

[128] *See* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 248 (1953) (describing the "thorough deprofessionalizing of the Bar" that occurred between 1836 and 1870); *see also* 2 ANTON-HERMAN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA: THE REVOLUTION AND THE POST-REVOLUTIONARY ERA 286 (1965) ("The general contempt and distrust in which the contemporary legal profession was held by the public at large around the middle of the nineteenth century was often well deserved . . . [in light of] the almost complete absence of any professional organization or internal discipline after 1830. . . .").

early republic.[129] As Tocqueville famously described, they had served as an American political aristocracy.[130] But, the Jacksonian era brought intense distrust of elitism and with it, sustained efforts to eliminate entry requirements and open lawyering to all.[131] Subsequently, the fundamental legal disagreements of the Civil War threatened to eliminate any unified conception of lawyering as a profession.[132]

It was during Reconstruction and after that the American legal profession came of age.[133] Legal historian Rebecca Roiphe writes:

> After the Civil War, the rapid expansion of the market and the growth of big cities rendered interactions impersonal and unpredictable. Networks of trusted

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[129] *See* Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1183–84 (2009) (noting that lawyers "fill[ed] the vacuum of public leadership authority" at the founding and took leadership roles in a variety of areas) [hereinafter Gordon, *The Citizen Lawyer*]; Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14 (1988) (describing the "assumption of a special responsibility beyond that of ordinary citizens" that lawyers undertook) [hereinafter Gordon, *The Independence Lawyers*]; Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 250–53 (1992) ("[T]he ultimate protection against majority interference with the rights necessary to achieve virtue would be the judiciary and the legal system.").

[130] *See* Gordon, *The Citizen Lawyer*, *supra* note 129, at 1183–84 (citing 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 276 (Henry Reeve trans., Arlington House Press 1966) (1835)) ("Tocqueville was calling lawyers the American [aristocracy'—a ruling class more legitimate than nobles or gentry because they were an aristocracy of merit."); *see also* Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 383 (2001) ("The legal elite's original and uniquely American understanding of the lawyer's role was that lawyers were America's governing class."); Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1348 (2007) (arguing that American thinkers based this view of lawyers on republican ideology; not on a view of lawyers as a natural aristocracy).

[131] *See* RICHARD L. ABEL, AMERICAN LAWYERS 40–48 (1989) (tracing developments in legal education and professionalism during the nineteenth century).

[132] *See* Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2050–51 (2005) (describing legal disagreements during the Civil War and the "decided shift in terms of statesmanship").

[133] Rebecca Roiphe, *A History of Professionalism: Julius Henry Cohen and the Professions as a Route to Citizenship*, 40 FORDHAM URB. L.J. 33, 42–43 (2012) (discussing the emergence of the law as a distinct and protected profession in the late nineteenth century); *see also* BURTON J. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA 80–128 (1976) (discussing changes in the legal profession during and after Reconstruction).

> friends and business partners gave way to anonymous corporate interactions. . . . [R]eformers sought to bring not only order and efficiency but also morality to the growingly diffuse and diverse national community. Against this backdrop, lawyers grew to national prominence once more.[134]

Bar leaders reinstituted entry and training requirements, founded modern law schools, and reestablished bar associations.[135] The Bar Association of the City of New York was organized in 1870, and the American Bar Association in 1878.[136] Lawyers expanded their domain of work, moving out of courtrooms and into new forms of work in business and government.[137]

These changes soon sparked accusations that lawyers were abandoning their public obligations for profit,[138] which would become a familiar theme in the history of the American legal profession.[139] In a 1905 Harvard commencement address, Theodore Roosevelt lamented the number of lawyers who had become "hired cunning" for wealthy and powerful corporations and entrepreneurs.[140] An ABA report worried that "pervasive

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[134] Roiphe, *supra* note 133, at 41–42.

[135] *See id.* at 43 ("In addition to educational requirements and entry restrictions, the legal profession sought to regulate its own conduct.").

[136] Spaulding, *supra* note 132, at 2020–21.

[137] *See* Roiphe, *supra* note 133, at 42 ("The great trial lawyers and orators of the nineteenth century were gradually being replaced by business experts who spent more time practicing in offices than advocating in courts.").

[138] Marc Galanter & Thomas Palay, *Public Service Implications of Evolving Law Firm Size and Structure*, *in* THE LAW FIRM AND THE PUBLIC GOOD 19, 38–39 (Robert A. Katzmann ed., 1995) (quoting *The Commercializing of the Profession*, AM. LAW., Mar. 1895, at 84–85) ("For the past thirty years [the bar] has become increasingly contaminated with the spirit of commerce, which looks primarily to the financial value . . . of every undertaking."); *see also* Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 61 (Gerard W. Gawalt ed., 1984) (reviewing "the extraordinary outpouring of rhetoric, from all the public pulpits of the ideal—bar association and law school commencement addresses, memorial speeches on colleagues, articles and books—on the theme of the profession's 'decline from a profession to a business' ").

[139] Gordon, *The Citizen Lawyer*, *supra* note 129, at 1178 ("[L]aments that law has decayed from a profession to a business . . . are perennial themes in our professional culture, sounded anew in every generation.").

[140] Altman, *supra* note 18, at 2404–05 (quoting Theodore Roosevelt, Address at the Harvard Commencement Exercise (June 28, 1905), *in* XIV HARVARD GRADUATES' MAGAZINE NO. 53, at 7–8 (Sept. 1905)).

commercialism . . . was threatening to reduce a prestigious profession with an essential role in the administration of justice to a mere money-getting trade."[141] Bar leaders responded in a number of ways. They repeatedly emphasized "the gentlemanly distinction between a profession and a trade."[142] They also drafted and promulgated the first code of conduct for all the country's lawyers—the ABA's 1908 Canons of Professional Ethics.[143] The Canons advised lawyers "to eschew commercialism in all facets of their professional practice. . . ."[144]

To deny lawyering as a business is as problematic as embracing it as nothing more than a business and, along with the lack of enforceable standards, rendered the Canons ineffective as a regulatory tool.[145] But the Canons were nevertheless significant for at least two reasons. First, by instructing lawyers to balance multiple and sometimes conflicting duties to clients, opponents, third parties, and the legal system,[146] they articulated a critical role for lawyers in coordinating actions, interactions, and relationships throughout society and between society and the state. Rooted in Durkheim's understanding of the professions, this view of lawyering became central to our understanding of the ideal role of lawyers in American society.[147]

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[141] *Id.* at 2399 (citing REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS, 29 A.B.A. REP. 600, 600 (1906)).

[142] *Id.* at 2401.

[143] FINAL REPORT OF THE COMM. ON THE CODE OF PROF'L ETHICS, 33 A.B.A. REP. 567 (1908).

[144] Altman, *supra* note 18, at 2401.

[145] *See id.* at 2495 ("[A]bsent some new mechanism to enforce the Canons' provisions, the market for legal services was likely to undermine the Canons' vision of conscientious lawyering and its anti-commercialism. . . ."). In addition to lacking efficacy, the Canons have been strongly and appropriately criticized for facilitated discriminatory and protectionist behaviors through much of the twentieth century. *See generally* AUERBACH, *supra* note 14. My point here is not to defend them but to show that they embodied and expressed a vision of the lawyer's role that echoed Durkheim's vision.

[146] For example, the Canons expected lawyers to "zealously represent their clients, but only insofar as" was consistent with "their personal duties and views as gentlemen and their republican duties as 'officers of the court' with a special obligation for achieving moral and legal justice." *See* Altman, *supra* note 18, at 2452–55; *see also* MODEL CANONS OF PROF'L ETHICS Canons 15, 18, 32 (AM. BAR ASS'N 1908) (requiring a lawyer's "entire devotion" and "norm zeal" for a client, while also treating all witnesses and adverse litigants with respect and acting with strictest principles of moral law" as a public duty).

[147] More than a century later, the ABA's Model Rules of Professional Responsibility continue to express a similar relational view of lawyering. *See generally* ABA MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2013).

Second, the Canons advanced the professionalization process generally, representing a "significant milestone in the development of the modern legal profession."[148] Professionalization, in turn, facilitated the development of specialized expertise,[149] the strengthening of the bar's independence,[150] and the socialization of lawyers in distinctive norms, patterns of thought, and ethical commitments.[151] These defining characteristics of the legal profession were necessary preconditions for the role Durkheim had envisioned—professions as self-regulating entities, intermediating between state and society. As discussed in Part IV, they are critical to the value lawyers contribute to society.

C. THE PROFESSIONAL PROJECT CRITIQUE

Half a century after Durkheim wrote *The Division of Labor* and the American legal profession "came of age," functionalist sociologists such as Talcott Parsons and William Goode attracted renewed attention to the study of the professions.[152] These scholars claimed Durkheim as their predecessor.[153] Their

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[148] Altman, *supra* note 18, at 2508; *see also* WILBERT E. MOORE, THE PROFESSIONS: ROLES AND RULES 113–16 (1970) (describing the development of associational regulations in a profession); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 48 (2007) (explaining the purpose and function of codes for occupational groups); Altman, *supra* note 18, at 2402 (noting that the Canons were an important part of the ABA's "efforts to define the legal profession" and were the "capstone" in movement to become a profession).

[149] Through the creation of the modern law school, the bar standardized training of lawyers in a form of specialized expertise and reasoned judgment that was generally inaccessible to members of the public. Through licensing requirements, it ensured baseline competency among all lawyers.

[150] Strengthening the bar's independence by establishing an institutionalized regime of self-regulation was one of the principal motivations for the Canons project. *See Report of the Committee of Code of Professional Ethics*, 29 ABA REP. 600, 602 (1906) (discussing the need for ethical professional standards "to promote the administration of justice and uphold the honor of the profession").

[151] *See* Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 232, 235 (Robert L. Nelson et al. eds., 1992) (discussing the role of free market liberalism in shaping legal ethics). For discussion of these norms and beliefs, see *infra* Section IV.A.*5*.

[152] *See generally* TALCOTT PARSONS, *A Sociologist Looks at the Legal Profession*, *in* ESSAYS IN SOCIOLOGICAL THEORY 370 (1964); William J. Goode, *Community Within a Community: The Professions*, 22 AM. SOC. REV. 194, 195–96 (1957). For a summary and overview of these and other functionalist scholars' work, see also KEITH M. MACDONALD, THE SOCIOLOGY OF THE PROFESSIONS 1–3 (1995).

[153] MACDONALD, *supra* note 152, at 2.

scholarly approach, however, diverged from his in significant respects. Whereas Durkheim's core question had been how occupational groups could be organized to further social solidarity, Parsons, Goode, and others asked what constituted a profession.[154] In answering this question, they observed socially-functional traits of particular professional groups (generally law and medicine), and then characterized these traits as necessary aspects of professionalization generally.[155] Frequently, they accepted as truth the professions' own descriptions of their priorities and commitments, including altruism and public service.[156] Based on this, they concluded that the professional privileges of monopoly power and self-regulation were necessary means by which professional groups could develop and apply socially-valuable expertise.[157] Stated otherwise, they portrayed the professions in an overwhelmingly positive light.

Two decades later, a group of neo-Marxist scholars of the profession took aim at the work of the functionalists.[158] These scholars began by critiquing the functionalists' core question—"is

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[154] *See* PARSONS, *supra* note 152, at 372–73 (discussing the characteristics of a "profession").

[155] *Id.* at 372–75 n.2 (identifying public service and altruism as core characteristics of the professions); William T. Gallagher, *Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar*, 22 PEPP. L. REV. 485, 497 (1995) (citing Goode, *supra* note 152, at 195–96) ("The professions share a higher standard of behavior and training than the lay community and, because of this, enjoy special social advantages, discretions, and autonomy denied the larger society.").

[156] *See, e.g.*, PARSONS, *supra* note 152, at 370–81 (analyzing the role of the legal profession and noting that it has imposed norms of conduct to promoted the public good); *see also* MACDONALD, *supra* note 152, at 3 (discussing the traits that the "mainstream" of sociology had assigned to the professions).

[157] *See, e.g.*, PARSONS, *supra* note 152, at 381 (arguing that the legal profession overall serves "functions [that] are useful to society").

[158] *See, e.g.*, ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR 184–86 (1988) (arguing that the professions maintain their authority through "legitimation," drawing from shifting cultural values); ABEL, *supra* note 131, at 20 (contending that service providers must seek social closure to become a profession, which includes market control and collective social mobility, and which requires "control over the production of producers"); AUERBACH, *supra* note 14, at 88, 92, 99–102 (suggesting that many facets of the modern legal profession are tooted in xenophobia towards immigrants and a fear of radicalism and socialist ideas); MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS, at xvii (1977) ("Professionalization is thus an attempt to translate one order of scarce resources—special knowledge and skills—into another—social and economic rewards."); *see also* MACDONALD, *supra* note 152, at 3–5 (providing a summary and overview of the work of these scholars).

this occupation a profession?"[159] The more relevant question, they believed, was how particular occupational groups were able to complete the "professional project," whereby they achieved monopoly power and social status.[160] As Keith MacDonald explained:

> If the possessors of [specialized] knowledge can form themselves into a group, which can then begin to standardize and control the dissemination of the knowledge base and dominate the market in knowledge-based services, they will then be in a position to enter into a 'regulative bargain' with the state. This will allow them to standardize and restrict access to their knowledge, to control their market and supervise the 'production of producers'.[161]

Larson and others concluded that the "professional project" entailed a coherent and consistent course of action, directed at market control and social status.[162]

Where the functionalists had uncritically accepted the professions' stated claims and public commitments, Larson and others documented the self-interest and protectionism that lie behind much of that rhetoric.[163] A number of scholars focused on the legal profession in particular: Andrew Abbott described the

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[159] MACDONALD, *supra* note 152, at 6 (quoting EVERETT C. HUGHES, THE SOCIOLOGICAL EYE 340 (1971) ("[I]n my own studies I passed from the false question 'Is this occupation a profession' to the more fundamental one 'what are the circumstances in which people in an occupation attempt to turn it into a profession and themselves into professional people?'")).

[160] *See* LARSON, *supra* note 158, at xii–xiv (articulating the goal of "examin[ing] here how the occupations that we call professions organized themselves to attain market power"); MACDONALD, *supra* note 152, at 4 (explaining that this paradigm "took as its subject matter the actions and interactions of individuals and groups, how they constituted their social worlds as participants and how they constructed their careers").

[161] MACDONALD, *supra* note 152, at 10–11 (citations omitted); *see also* LARSON, *supra* note 158, at xvii (describing professionalization as the "attempt to translate . . . special knowledge and skills . . . into . . . social and economic rewards").

[162] *See* LARSON, *supra* note 158, at 6 (noting that the resources used by the "professional project" had a "determining impact on the resulting organizational and ideological structure" and aimed to increase "trustworthiness among strangers" and to "market expert advice"). Larson acknowledged, however, that "the goals and strategies pursued by a given group [may not be] entirely clear or deliberate for all the members." *Id.*

[163] *See id.* at xii–xiv (explaining that "ideal-typical constructions do not tell us what a profession is, only what it pretends to be").

American bar's efforts to solidify and expand its "jurisdiction" as against encroachment by non-lawyers;[164] Richard Abel demonstrated the extent to which the profession's ethics rules protected lawyers rather than clients or the public;[165] and Jerold Auerbach documented the organized bar's successful efforts, throughout much of the twentieth century, to use barriers to entry to exclude minorities, Jews, and women.[166] These scholars' work resonated with a larger social movement criticizing the complacencies of established institutions. It was hugely influential in repudiating normatively-positive accounts of the professions and in focusing scholarly attention on their dysfunctions.[167]

These neo-Marxist scholars never directly addressed Durkheim's work which, as noted, differed from the functionalists' work in significant respects. Durkheim did not engage in the descriptive project of identifying which occupations were professions; he engaged in a normative project of determining how occupational groups could advance social organization and solidarity.[168] He proposed that the professional form *could*, not that it necessarily *would*, bolster social solidarity in at least four interrelated ways: (i) by fostering shared norms and values that prioritize collective and societal interests over individual self-interest;[169] (ii) by strengthening democratic legitimacy and accountability through communication between the state and its citizenry;[170] (iii) by serving as a check on arbitrary state power;[171] and (iv) by forging productive social bonds both within society and between society and state.[172] Notwithstanding these important

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[164] *See* ABBOTT, *supra* note 158, at 252–53 (describing "[t]wo developments [that] allowed the American profession to avoid [such encroachment]").

[165] *See* ABEL, AMERICAN LAWYERS, *supra* note 131, at 122–43 ("The content of the ethical code and the nature of its enforcement both reflected jockeying among lawyers for competitive advantage."); Abel, *Taking Professionalism Seriously*, *supra* note 111, at 44 ("American lawyers became a profession by restricting entry.").

[166] *See generally* AUERBACH, *supra* note 14.

[167] *See, e.g.*, SUSSKIND, *supra* note 61, at 9–11 (discussing the inefficiencies of the legal profession and changes that would result if the profession became more market-driven).

[168] *See supra* Section III.A.

[169] *See supra* notes 118–19 and accompanying text.

[170] *See supra* note 125 and accompanying text.

[171] *See supra* note 127 and accompanying text.

[172] *See supra* note 124 and accompanying text.

differences, Durkheim's normative vision for the professions was pushed aside along with the discredited work of the functionalists.

A handful of scholars resisted this move, but were unsuccessful in stemming the tide. Anthony Kronman sought to recover the "lawyer-statesman" of a former era—the lawyer who developed and used practical wisdom while serving both private and public interests.[173] Because Kronman focused on the individual moral actor, he was ineffective in countering the growing cynicism of professions as institutions. Larry Fox resisted all reforms that threatened what he viewed as the central value of the profession—the lawyer's ability to advocate zealously on behalf of a client.[174] Because Fox failed to account for a host of additional values the profession had long recognized, he was criticized for misunderstanding the tradition he so staunchly defended.[175]

Legal historian Robert Gordon was more circumspect, characterizing the professional project critique as powerful and persuasive but as presenting an incomplete picture.[176] He observed that throughout history, American lawyers had sometimes acted in publicly-oriented ways, and at other times in self-serving ways.[177] As a result, neither the extreme optimism of the functionalists nor the extreme cynicism of the neo-Marxists was warranted. Sociologist Keith MacDonald similarly observed that although some actions by the professions appeared to be

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[173] *See generally* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

[174] *See, e.g.*, Lawrence J. Fox, *Can Client Confidentiality Survive Enron, Arthur Andersen, and the ABA?*, 34 STETSON L. REV. 147, 156 (2004) (arguing against reforms after Enron that allowed lawyers to disclose confidential client information because it "infects the lawyer-client relationship"); Lawrence J. Fox, *Ethics 2000: Is It Good for the Clients?*, 12 PROF. LAW. 17, 19 (2001) (contending that the "Ethics 2000 Commission has adopted a large number of proposals that can hardly be characterized as client-friendly"); Lawrence J. Fox, *Pro: Taking a Stand for Professionalism*, PA. LAW., Mar. 1992, at 16, 16 ("Lawyers play a unique role in American society, at their most sensitive, interposing themselves between their clients and the government.").

[175] *See, e.g.*, Peter C. Kostant, *Paradigm Regained: How Competition from Accounting Firms May Help Corporate Attorneys to Recapture the Ethical High Ground*, 20 PACE L. REV. 43, 44, 49–51 (1999) (criticizing Fox's views concerning disclosure and other ethical rules).

[176] *See* Gordon, *The Citizen Lawyer*, *supra* note 129, at 1200–01 (noting that "[l]eft-wing critics attacked [professions] as elitist conspiracies to exclude, dominate, exploit and paternalistically control social inferiors" and admitting that this critique had "some validity").

[177] *Id.* at 1169, 1183–84 (noting that lawyers "seek wealth, power, fame, and reputation for themselves" but "also devote time and effort to public ends and values").

"mere self-enhancement," other actions consistently entailed service to clients, patients, and society at large.[178]

Notwithstanding these voices of moderation, the professional project critique ushered in a period of deep distrust of the professional form.[179] It highlighted the ways in which the professional privileges could be abused to the detriment of society, leading scholars and commentators to lose faith in any normatively-positive account of the professions' role in society. The stage was then set for neoliberalism to exert its influence, framing market-based solutions as the only viable alternative.

Durkheim's writings on the professions were an unfortunate casualty of these developments, but they need not be. We can and should understand the legal profession as uniquely situated to play the role he envisioned—as mediating relationships within society and between society and the state—while also acknowledging the profession's problems and dysfunctions and working to remedy them. Moreover, we can and should use Durkheim's insights as a useful guide for evaluating the practices of contemporary lawyers, and for understanding what will be lost if we abandon the rationality of the profession and embrace the market-exchange model. The next Part turns to these tasks.

IV. THE RELATIONAL VALUE OF LAWYERING

As discussed in Part II, the market-exchange model of lawyering allows for a single mode of interaction and negotiation between lawyer and client—over price and through the market. If the goal is to aggregate individual preferences and the market is a superior "information processor,"[180] this is indeed an efficient model. But as set forth below, it exacts a price. The model blinds us to what I characterize as five non-market based "relational

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[178] MACDONALD, *supra* note 152, at 34–35; *see also* Randall Collins, *Changing Conceptions in the Sociology of the Professions*, *in* THE FORMATION OF PROFESSIONS: KNOWLEDGE, STATE AND STRATEGY 11, 11–15 (Rolf Tortsendahl & Michael Burrage eds., 1990) (discussing the varying sociological views of the professions in the context of the "life-cycle" of research in the social sciences).

[179] *See* Collins, *supra* note 178, at 13 (discussing the "upsurge" of criticism of the professions in the 1960s and 1970s in which professions "were seen as part of the stratification of society" and "were critically scrutinized as part of the structure of privilege").

[180] Mirowski, *supra* note 79, at 435 (summarizing the views of Hayek).

dynamics," which lawyers draw upon in working towards the vision of profession Durkheim articulated.[181] Reviewed below, these include trust, judgment, loyalty, empowerment, and service.[182] A model can be normatively helpful even if descriptively incomplete, but the market-exchange model is not benignly incomplete. It is self-fulfilling, prescribing ethical rules that undermine or eliminate the relational dynamics it ignores.

A. RELATIONAL DYNAMICS

1. Trust. Trust, often viewed as foundational to the lawyer-client relationship, is the first dynamic of lawyering that the

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[181] As developed in this Part, I use "relational dynamics" to refer to the ways in which lawyers work to coordinate and facilitate actions, interactions, and relationships throughout society. This presents an understanding of lawyering that is distinct and juxtaposed to lawyering as a means of responding to the preferences of individual clients with commoditized services. My use of "relational" is therefore distinct from its use in recent years by other scholars. *See, e.g.*, Pearce & Wald, *Rethinking Lawyer Regulation*, *supra* note 16, at 514 (arguing that lawyering and legal ethics should be based in "relational self-interest," which acknowledges "that all actors are inter-connected," and that "maximizing the good of the individual or [group] requires consideration of the good of the neighbor, the [constituent, community], and of the public" (brackets in source text)); Pearce & Wald, *The Obligation of Lawyers*, *supra* note 16, at 17 ("Relational self-interest recognizes that the public good sometimes exists independent of and in addition to collective self-interests. . . ."); Vischer, *Big Law*, *supra* note 16, at 204 (arguing that "the central feature of the attorney-client relationship" is the client's trust in the relationship itself). Below, I argue that the attorney-client relationship is, at times, close and personal, as these scholars posit, but it is not always. Often, it is impersonal and distant, particularly in corporate practice. *See* Edward A. Dauer & Arthur Allen Leff, *Correspondence: The Lawyer as Friend*, 86 YALE L.J. 573, 580 (1977) ("[T]he relationship between lawyers and clients and, together, as others is frequently almost the antithesis of friendship."); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 116 ("The fact that the lawyer presents himself . . . as sympathetic and committed to the client and yet . . . detached from and indifferent to his client's ends leads the client to view his own ends with detachment and indifference"). Some scholars argue that it is the detachment, *not* the closeness, that characterizes the relationship. *See* KRONMAN, *supra* note 173, at 296–300 (noting that the fascination with moneymaking and the growth of large firms working with corporate clients has "unsettle[d] the delicate balance of sympathy and detachment"). My use of the word "relational" allows for significant diversity in how personal or impersonal the attorney-client relationship may be, as it refers broadly to lawyers' work in mediating webs of relationships throughout society.

[182] Certainly, different practice areas and work settings entail significantly different types of work. But in a vast majority of contexts and as discussed in this Part, lawyering entails some or all of these relational dynamics, which are ignored by the market-exchange model's arms'-length transaction of information for a fee.

market-exchange model first ignores and then undermines.[183] Trust is facilitated by certain features of the professional form: the bar's implicit guarantee that all licensed lawyers have baseline competency; the ethics codes' assurances of loyalty, confidentiality, and other client protections; and lawyers' structural independence from outside pressures.[184] Based on these features, clients trust their affairs to lawyers who, as fiduciaries, are bound to act in good faith and in furtherance of their clients' interests.[185]

In contrast to many other fiduciary relationships (such as between banker and investor or trust agent and beneficiary), the relationship between attorney and individual client is often uniquely personal.[186] Within its confines, clients routinely share private and sensitive information about personal, legal, and financial matters. Lawyers help clients to distinguish legal from non-legal problems, to explore available options, and to determine objectives. Many individual clients report that a lawyer's trustworthiness and ability to provide a close and personal relationship are among the most important traits they look for from a lawyer—far more important than the lawyer's training, competence, or specialty.[187] They explain that a lawyer's role as

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[183] *See* Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1043 (1981) (noting that many clients will not enjoy the same kind of attorney-client relationship because "market forces prompt attorneys to attend more assiduously to the interests of wealthier clients"); Vischer, *Big Law*, *supra* note 16, at 187–88 (arguing that the trust between a lawyer and clients may be diminished when the clients "have to protect themselves, whether through contract or the knowledge that the lawyer wants to keep their business").

[184] *See* Vischer, *Big Law*, *supra* note 16, at 168–73 (discussing the foundational concepts of the duty of trust).

[185] *Id.* (discussing the need for clients to be able to trust that lawyers have the clients' best interests in mind and are not acting in self-interested ways).

[186] *See id.* at 173 ("Trust as a rational calculation may work fine in my relationship with 'a' car dealer, but how will it work in my relationship with 'my' attorney?").

[187] *See* COREY S. SHDAIMAH, NEGOTIATING JUSTICE: PROGRESSIVE LAWYERING, LOW-INCOME CLIENTS, AND THE QUEST FOR SOCIAL CHANGE 6–11 (2009) (citing interviews of clients expressing that friendship and trust were at the forefront of what they wanted from lawyers); Marcus T. Boccaccini et al., *Client-Relations Skills in Effective Lawyering: Attitudes of Criminal Defense Attorneys and Experienced Clients*, 26 LAW & PSYCHOL. REV. 97, 111, 119 (2002) (citing a poll in which clients ranked obtaining clients' opinions, spending time with clients before court, and keeping clients informed of their cases as among the things they cared most about in a lawyer; also citing evidence that inmates cared more about a lawyer who cared about them, would keep them involved, and would spend time with them before their court date than about the lawyer's skills); Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical*

trusted advisor in navigating the legal system is as significant as the lawyer's more formal role in advocating before a tribunal or negotiating with an opponent.[188] They also report that the presence and help of an advocate feels more significant than the ultimate legal outcome in conditioning their perceptions of the fairness of the system.[189]

The benefits of this personal relationship extend far beyond strictly legal and financial outcomes. For many clients, the empowerment that comes from the help and personal support of an advocate in the legal arena translates into empowerment in other areas.[190] In addition, studies show that individuals who navigate a legal problem without a lawyer have much greater problems with stress, depression, and other mental health issues than individuals who have a lawyer, and that continuing legal problems can have negative consequences for mental health.[191]

Even in the corporate context, where the relationship between lawyer and client is infrequently personal, trust is still highly desirable. Lawyers need a comprehensive understanding of a

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Findings and Implications for Legal Practice, 25 LAW & PSYCHOL. REV. 81, 115 (2001) ("[W]hile criminal defendants regard their lawyer's legal ability as important, they are equally concerned with their attorney's loyalty and client relation skills."); Anne E. Thar, *What Do Clients Really Want? It's Time You Found Out*, 87 ILL. B.J. 331, 331 (1999) (reporting that the most important thing clients wanted from a lawyer was to know that the lawyer cared, and that they were far more concerned about this than the aptitude or knowledge possessed by the attorney); *see also* Ann Juergens, *Valuing Small Firm and Solo Law Practice: Models for Expanding Service to Middle-Income Clients*, 39 WM. MITCHELL L. REV. 80, 110–11 (2012) (reporting results of a study of small firms and solo practitioners who served moderate-income clients, which found that the principle factors in lawyer success were relationship-building, communication, and collaboration with non-lawyers).

[188] *See* Boccaccini et al., *supra* note 187, at 111, 119 (discussing the results of a study in which clients indicated that a lawyer's client-relation skills are just as important as the lawyer's legal skills).

[189] *See* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 64–65, 219–20 (1988) (describing the importance of the perception of fairness in the legal system and discussing a study finding that accused felons largely feel indifferent to the outcome of the case but are highly sensitive to procedural justice issues regarding their attorney's advocacy).

[190] *See, e.g.*, David M. Engel & Frank W. Munger, *Rights, Remembrance, and the Reconciliation of Difference*, 30 LAW & SOC'Y REV. 7, 48 (1996) (noting that "the influence of rights on individual lives and on everyday life may nonetheless be very important" and that "the creation of new rights appears to be connected to positive developments in the shaping of individual identity and the strengthening of productive relationships with others").

[191] Pascoe Pleasence et al., *Mounting Problems: Further Evidence of the Social, Economic and Health Consequences of Civil Justice Problems*, *in* TRANSFORMING LIVES: LAW AND SOCIAL PROCESS 86–87 (Pascoe Pleasence et al. eds., 2007).

client's situation in order to advise them well,[192] but clients will only share confidential information with lawyers who they trust to keep the matter private.[193] Similarly, clients will only accept and follow a lawyer's evaluation and advice if they trust the lawyer to act exclusively in their best interests.[194] In the short run, a client may not like hearing that a particular business plan or strategy is imprudent, ill-advised, or even illegal, but a lawyer's judgment in this regard is a core reason the client retains the lawyer in the first place.[195]

By positing the attorney-client relationship as an arms'-length transaction, the market-exchange model ignores this foundational role of trust. Even more troubling, reforms that accept the model's logic and assumptions will diminish or eliminate trust in a significant number of representations. Reforms directed at middle and low-income individuals propose to replace a robust attorney-client relationship with unbundled, commoditized, and computerized services.[196] In the name of lowered cost, these

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[192] *See* PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 38–41 (1984) (discussing Brandeis's views that thorough knowledge of a client's situation was necessary for effective counseling and particularly for devising strategies that could harmonize the client's short-term interests with the interests of the legal system).

[193] *See* Vischer, *Big Law*, *supra* note 16, at 188 ("A 'thick' attorney-client relationship requires mutual trust because approaching the other as a subject requires mutual vulnerability.").

[194] But note that appreciating the importance of trust in this regard does not dictate an ethical rule of absolute confidentiality, as Larry Fox argues. *See* Fox, *Can Client Confidentiality Survive Enron, Arthur Andersen, and the ABA?*, *supra* note 174, at 156 (arguing that exceptions to the confidentiality rule "infect[ ] the lawyer-client relationship"). Trust between lawyer and client is and can be developed in a number of ways, and does not require an absolute guarantee of confidentiality in all circumstances—even if, for example, a client is knowingly using the lawyer's services in furtherance of fraudulent or illegal action. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2)–(3) (AM. BAR ASS'N 2013) (permitting disclosure under such circumstances).

[195] Gordon, *The Independence of Lawyers*, *supra* note 129, at 18 ("[O]ne purpose of legal advice is to remind clients who may be tempted to ignore the infrastructure for the sake of short-term profits of the usefulness of underlying business conventions . . . as well as of the explicit rules of the legal framework."); Harold M. Williams, *Professionalism and the Corporate Bar*, 36 BUS. LAW. 159, 165–66 (1980) ("A counsel does a disservice when, in effect, he limits his advice to whether the law forbids particular acts or to an assessment of the legal exposure, and does not share with the client his view of the possible ramifications of the various alternatives to the short- and long-term interests of the corporation and the private enterprise system. He preempts the opportunity for his client to make the fullest possible judgment by not providing the full range of information and advice of which he is capable and on which the client can make the most informed choice.").

[196] *See supra* notes 27–31 and accompanying text.

reforms explicitly propose to eliminate the human and personal aspects of lawyering for the clients who need and value them most. Reforms directed at wealthy and sophisticated clients, meanwhile, propose to disaggregate a robust attorney-client relationship into various pieces that can be spread among different lawyers.[197] In the name of increased client flexibility and choice, these reforms propose to treat trust—and therefore a lawyer's gatekeeping function—as entirely optional. This will give sophisticated clients greater opportunities to access legal expertise on their own terms, free from the robust attorney-client relationship in which a lawyer gains full knowledge and understanding of the client's situation.

Proponents of these reforms may argue that this concern is overstated, as a relationship of trust between lawyer and client is increasingly rare.[198] This is a reason to strengthen this feature of lawyering, not to abandon it. Others may object that the true hallmark of the attorney-client relationship is detachment, not trust.[199] But it is a unique combination of the two that characterizes the relationship between lawyer and client. At the same time that lawyers need their clients' trust to offer effective representation, they know that they need not, and generally will not, personally adopt their clients' positions and beliefs.[200] Lawyers' ability to create this unique type of relationship is the product of professional training and socialization in particular patterns of thought, discussed below.[201] It is at the core of lawyers' ability to advocate effectively for a diverse range of clients, but it would be eliminated by the market-exchange model.

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[197] *See supra* Section II.A.*2*.

[198] *See* Vischer, *Big Law*, *supra* note 16, at 185 ("If law firm culture has become an atomized pursuit of the bottom line, we have a trust problem.").

[199] *See supra* note 111.

[200] The ethical rules prohibit lawyers from publicly affirming a personal belief in the justness of the client's cause or position. MODEL RULES OF PROF'L CONDUCT r. 3.4(e) (AM. BAR ASS'N 2013). This detachment, in turn, facilitates a number of beneficial behaviors by lawyers. It allows lawyers to separate the legal and emotional aspects of a case and focus on the legal, to broaden their focus from the particulars of a case to the systemic implications, and to offer representation to a diverse range of individuals and entities, even those who might otherwise find no support in society. *See* KRONMAN, *supra* note 173, at 66–74, 98–99 (noting the legal benefits of this "sympathetic detachment"). For a discussion of the importance of detachment, see generally *id.*

[201] *See infra* Section IV.A.*5*.

2. Judgment. Reasoned judgment, grounded in specialized legal expertise, is a second critical dynamic of lawyering that the market-exchange model first ignores and then undermines. The social value of specialized expertise has long been offered as a justification of the professional form.[202] Through training, licensure requirements, and professional discipline, a professional body can ensure baseline standards of knowledge and competence.[203] Legal practice entails more than specialized expertise, however; it requires lawyers to employ reasoned judgment in applying that expertise to the particulars of a client's case.[204]

When lawyers exercise professional judgment in this way, they facilitate a two-way exchange between clients and the state. When they represent and advance clients' claims through informal negotiation, litigation, and lobbying, they use their judgment and expertise to translate clients' claims and interests into terms that the legal system can recognize and act upon.[205] Given that the arguments and positions they advance may become a part of binding law, this process allows clients to influence the law's development. When lawyers counsel and advise their clients, they use their judgment and expertise to translate the law into terms clients can understand and act upon. Given that their advice may be the sole interpretation that a client relies upon, this process frequently gives determinate meaning to the law.[206] A lawyer's

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[202] *See* MACDONALD, *supra* note 152, at 82, 196–97 (noting that a core justification of the professional form is its ability to develop and apply specialized expertise through training and licensure requirements). *See generally* ELIOT FREIDSON, PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY (1994); ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC (2001).

[203] This is thought to be particularly critical in complex and esoteric fields such as law and medicine, where most lay people are ill-equipped to understand or evaluate the services in question. *See* MACDONALD, *supra* note 152, at 96–97 (noting the emphasis on "professional bodies' modern rational knowledge" and the "allocation of power to those with education qualifications").

[204] *See* W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1170, 1195 (2005) (characterizing professional judgment in legal interpretation as the core of a lawyer's ethical obligations); *see also* KRONMAN, *supra* note 173, at 56 (discussing what it means to show good judgment).

[205] *See* David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 822–23 (noting the value of "construc[ing] and promot[ing] theories of the case consistent with the evidence even if the theories have nothing to do with reality").

[206] *See* Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1547–48 (1995) ("In a complex legal environment much law cannot be known and acted upon, cannot function as law,

advice regarding statutory and regulatory compliance may create the boundaries within which the client acts,[207] and lawyer's work in structuring a novel transaction may become part of the body of private arrangements that the law honors.[208] In these ways, lawyers use their judgment and expertise to enable clients to participate in the creation of both the law on the books and the law in action.[209]

The market-exchange model ignores this interactive process through which lawyers use their judgment and expertise to connect clients with the legal system.[210] Instead, it conceptualizes the provision of legal expertise as entailing a one-way flow of information (from lawyer to client), with nothing but payment flowing back. Many reforms that build upon the model's logic unapologetically propose to replace human judgment with the lower cost alternatives of routinized and automated services.[211] This may be appropriate for a limited number of basic legal tasks, such as simple wills and uncomplicated real estate closings, but it will be highly problematic in countless other areas, at both ends of the market.

At the high end of the market, it will supply savvy and sophisticated clients with even greater access to tailored legal

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without lawyers to make it accessible to those for whom it is relevant. Thus, in our society lawyers are necessary for much of our law to be known, to be functional.").

[207] *See* Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1274–75 (1998) ("An equal opportunity in employment statute covers employers with a minimum number of employees but exempts businesses that use the same number of independent contractors; a lawyer recommends to a client that she structure her workforce to circumvent the statute. An Internal Revenue Service regulation distinguishes between taxable and nontaxable events; a lawyer suggests to a client a description of a past transfer that renders it nontaxable. A corporate client consults an attorney about the necessity of complying with environmental regulatory standards; the lawyer emphasizes that violations are treated as merely technical.").

[208] *See id.* at 1274 ("Most law is made in law offices. . . . In their daily advice to clients, lawyers determine the shape of most law-related interactions. Exercising broad interpretive discretion, lawyers counsel their clients to negotiate particular contractual terms. . . .").

[209] *See id.* ("Lawyers influence not only law 'in the books' but, more importantly, law in action.' "); *see also* Gordon, *The Independence of Lawyers*, *supra* note 129, at 73 ("Through this back-and-forth dialectical interaction, both the client's interests' and the 'law' governing the situation will gradually take the shapes sculpted by the social agents who interpret and transmit them.").

[210] *See* Gordon, *The Independence of Lawyers*, *supra* note 129, at 73 (explaining that "lawyers have to translate client's desires into something processable by the legal system, and investigate the various ways in which legal officials might, in turn, process them").

[211] *See supra* Section II.A.*2*.

expertise, free from the constraints of lawyers' independent judgment and ethical obligations.[212] When lawyers interpret the law with respect to a client's circumstances, they do not (or at least they should not) merely provide advice for which the client is willing to pay.[213] They offer advice that in their reasoned and independent judgment advances the clients' interests while remaining faithful to the law and legal system.[214] Sometimes, this will entail refusing to facilitate a particular strategy or transaction or persuading a client to pursue a different course of action.[215] This type of independent and reasoned judgment should go hand-in-hand with legal expertise, but the market-exchange model transforms it into an optional aspect of lawyering.

At the low end of the market, the risk is not just that individualized judgment will become an optional aspect of lawyering, but that it will become entirely unavailable. The danger is that unbundled and commoditized services will be the only accessible and affordable option for low and middle-income individuals, such that vast segments of society will be denied access to a lawyer's independent and creative legal judgment.[216] Proponents of unbundled, commoditized, and automated services contend that basic information is all that is needed in countless

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[212] *See supra* notes 52–55 and accompanying text.

[213] *See* Wendel, *supra* note 204, at 1168 (explaining that "a lawyer is not simply an agent of her client" and "in carrying out her client's lawful instructions, a lawyer has an obligation to apply the law to her client's situation with due regard to the meaning of legal norms, not merely their formal expression" (emphasis omitted)).

[214] *See* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010) (explaining that the law "gives lawyers certain powers to act for others, and also sets limitations on the lawful use of those powers"); Wendel, *supra* note 204, at 1194–95 (noting that a lawyer's "reasoning process involves the exercise of informed professional judgment, which can be justified on the basis of rules and standards, but which is always incompletely specified, or undetermined by rules and standards").

[215] *See* Gordon, *The Independence of Lawyers*, *supra* note 129, at 77 ("The advice that the client wants immediately to hear, which is what such a market tends to produce, is not . . . at all necessarily in the client's best interest."); Pepper, *supra* note 206, at 1547 (discussing situations in which clients attempt to use lawyers "as an instrument . . . to avoid the law" and how lawyers should act in such situations).

[216] *See* D. James Greiner et al., *the Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts District Court and Prospects for the Future*, 126 HARV. L. REV. 901, 906 (2013 (discussing the ethical concerns that arise in this context); *supra* Section II.A.*1*.

instances of unmet legal need.[217] However, it is frequently impossible to know at the outset of a representation whether the required legal work will be routine or complex,[218] and in a wide variety of contexts, good lawyering entails drawing connections between diverse areas of law and making novel legal arguments. These are things that the professional form uniquely facilitates, but that the proposals of the market-exchange model eliminate. Moreover, although empirical evidence is limited, a recent study revealed that representation by a lawyer (as opposed to other type of service provider) makes a difference, even for relatively basic legal tasks.[219]

3. Loyalty. A third relational dynamic that the market-exchange model ignores, and another defining characteristic of the attorney-client relationship, is loyalty. Lawyers are socialized in the critical importance of loyalty to clients and are guided in particular situations by the conflict of interest provisions of the ethical codes.[220]

The value of a lawyer's loyalty is often expressed from the perspective of the client: loyalty ensures that a lawyer's judgment is not compromised by her own interests or by obligations to other clients; it also ensures that a lawyer will not abandon a client as soon as a more lucrative opportunity arises. The market-exchange model frames this value to the client as the exclusive value of

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[217] *See id.* at 904 ("Advocates of unbundling argue that tit has the potential to address . . . the access-to-justice challenges . . . and the influx of pro se litigants that have flooded the nation's courts . . . .").

[218] Admittedly, lawyers have played a role in creating this complexity, but it is very difficult to envision a modern legal system that would not entail a significant amount of complexity and uncertainty. For example, it is difficult to envision Congress passing a tax code that would be accessible to all members of the public.

[219] In the first randomized quantitative evaluation of unbundled legal services in this country, a recent study found that "full representation mattered." *See* Greiner et al., *supra* note 216, at 936–37 ("[T]he two most important results in [this study] are as follows: 34% of treated-group [represented] occupants, versus 62% of control group [unrepresented] occupants, lost possession of their units, and treated-group occupants saved on average 9.4 months of rent . . . versus an average of 1.9 months of rent saved in the control group."). *But see* Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 489 (2007) (explaining that the appointment of counsel in federal misdemeanor cases may be less important and provide no serious advantage to defendants than in more serious cases).

[220] *See* MODEL RULES OF PROF'L CONDUCT r. 1.7 cmt. 1 (AM. BAR ASS'N 2013) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

lawyer loyalty, such that clients should be empowered to waive the protections if they so choose.

Lawyer loyalty has significant systemwide value, however, which the model ignores. Rules requiring lawyers to prioritize client and other interests above their own require them to acknowledge and appreciate, on a regular basis, that lawyering is about more than self-interest and profit maximization.[221] Rules imputing conflicts of interest to other lawyers within a firm prevent firms from growing too large and diffuse to ensure socialization and internal discipline.[222] Rules requiring lawyers to resist improper pressures from clients require and encourage lawyers to use independent judgment in defining and pursing their clients' interests.[223] These and other loyalty rules draw lawyers' focus up and out from their own self-interest to the interest of their clients, and from a narrow conception of their clients' interests to one that simultaneously accounts for the interests of the legal system and society at large.

The market-exchange model's premise that clients, as rational consumers, should be allowed to waive these protections ignores systemic harm that would likely result. If waiver becomes widespread and lawyer loyalty becomes optional, lawyers will be less likely to exercise independent judgment and more likely to process the client relationship purely in market terms. They will be more likely to pressure clients to waive potential conflicts in advance so as to leave lawyers open to accepting new and lucrative clients.

A lawyer's response to a client who proposes illegal or unethical action offers a useful example of the potential harm. Under the Model Rules, the lawyer may explain the potential consequences of the proposed course of action and counsel against it.[224] Only if the

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[221] *See id.* r. 1.8 (describing a variety of situations in which conflicts of interest might arise between a lawyer and a current client).

[222] *See id.* r. 1.10 (providing that conflicts of all lawyers in a firm are imputed to the entire and providing methods to deal with these conflicts).

[223] *See* Gordon, *The Independence of Lawyers*, *supra* note 129, at 13 ("[A]lthough lawyers' services and technical skills are for sale, their personal and political convictions are not, for they each have a core identity that must be exempt from commodification. The loyalty purchased by the client is limited, because a part of the lawyer's professional persona must be set aside for dedication to public purposes." (emphasis omitted)).

[224] MODEL RULES OF PROF'L CONDUCT r. 1.2(D), 2.1 (AM. BAR ASS'N 2013).

client already has, or imminently will, use the lawyers' services in illegal ways must the lawyer withdraw and take remedial action.[225] As scholars have noted, this arrangement is highly desirable in empowering and encouraging lawyers to remain loyal to clients proposing wrongdoing, and to express this loyalty by working to persuade the client to understand and account for the long-term implications of various courses of actions. If loyalty were based only on contractual provisions, we might lose the lawyer's function in this regard. Cautious lawyers might walk away from a client proposing unethical or illegal conduct. The client might then look for a new lawyer, to whom she would reveal less information so as to obtain the desired services. Less cautious conscientious lawyers might look the other way, refuse to actively participate, and assume that if she withdrew, the client would simply find a more willing lawyer.[226] In both cases, we would lose the lawyer's counseling function.

4. Empowerment. A fourth relational dynamic that the market exchange model both ignores and undermines, but that is central to lawyers' roles in society, is empowerment. In a variety of contexts, lawyers facilitate relationships and interactions that are governed by law rather than by the wealth or power of the implicated parties. The quintessential example is the lawyer's constitutional role in protecting criminal defendants against state overreaching,[227] but in countless civil contexts as well, lawyers facilitate interactions and relationships that might otherwise be precluded by prevailing patterns of dominance, wealth, or power. They represent individuals and causes that might find no other

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[225] *Id.* r. 1.16.

[226] *See* TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY 175–239 (2014) (describing this attitude among many tax lawyers amidst the tax shelter boom of the early 2000s).

[227] *See, e.g.*, Laurel E. Fletcher et al., *Defending the Rule of Law: Reconceptualizing Guantánamo Habeas Attorneys*, 44 CONN. L. REV. 617, 636 (2012) ("Guantánamo lawyers mobilized to protect the role of courts and law in opposition to a political movement that aimed, in their view, to dangerously expand executive powers."); The Honorable Victoria A. Roberts, The Scottsboro Boys A Metaphor for Justice: A Metaphor for Justice, Speech at the State Bar of Michigan Annual Meeting (Sept. 21, 2000), *in* 80 MICH. B.J. 62 (2001) (describing the iconic role of the criminal defense lawyer by reference to a lawyer's representation of the "Scottsboro Boys," nine African American teenage boys who were falsely accused of raping two white girls on a train in a case that was full of legal errors and racism).

support in society.[228] They make it possible for individual plaintiffs to seek relief from, and to communicate objection to, powerful corporate defendants that might otherwise be immune to their objections.[229] And they often perform this work pro bono, for clients who cannot afford to pay.[230]

Proponents of the market-exchange model frequently dismiss the significance of lawyers' pro bono service by emphasizing two distinct points: (i) that lawyers do not perform nearly enough of it, and (ii) that other market actors also support unpopular causes, often with no remuneration. It is certainly true that lawyers perform insufficient amounts of pro bono work to address all of the unmet legal need in the country.[231] Studies show, however, that a significant majority of all lawyers perform some pro bono work;[232] that the overall amount has increased over time, particularly among large law firms;[233] and that other occupational groups do

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[228] Some jurisdictions even require attorneys to accept unpopular causes. The California rules, for example, state that it is the duty of a lawyer "[n]ever to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed." CAL. BUS. & PROF. CODE § 6068(h) (West current through 2017); *see also* Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958) ("One of the highest services the lawyer can render to society is to appear in court on behalf of clients whose causes are in disfavor with the general public.").

[229] They do so by, among other ways, taking cases pro bono or on contingency, or through class actions or other mechanisms of aggregate litigation. *Cf.* Md. Access to Justice Cmm'n, *Fee-Shifting to Promote the Public Interest in Maryland*, 72 U. BALT. L.F. 38, 43–44 (2011) (noting that mechanisms like free-shifting statutes "encourage litigation by small, individual complainants aggrieved by larger, institutional actors" by "level[ing] the playing field for individuals who would otherwise have little opportunity to insist on enforcement of existing laws that check corporate and government behavior").

[230] *See infra* notes 232–33.

[231] *See* Leslie Boyle, Note, *Meeting the Demands of the Indigent Population: The Choice Between Mandatory and Voluntary Pro Bono Requirements*, 20 GEO. J. LEGAL ETHICS 415, 415 (2007) (noting that "four-fifths of civil legal needs of low-income individuals remain unmet").

[232] *See* Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 84–85 (2013) (describing the "dramatic" increase in pro bono services offered in recent years, driving in part by efforts by large firms); *id.* at 100 (reporting that a 2007 nationally representative survey of early-career lawyers found that "74.1% of solo practitioners and 85% of those in firms of two to twenty lawyers reported some pro bono work, while 62.7% of lawyers in the largest firms, those of more than 250 attorneys, reported doing pro bono").

[233] *Compare Pro Bono Survey*, AM. LAW., July/Aug. 1994 (on file with author), *with Pro Bono Survey*, AM. LAW., July 2012 (on file with author) (pro bono hours for the top 100 firms increased from 1,468,609 hours in 1994 to 4,221,477 in 2011); *see also* STANDING COMM. ON PRO BONO & PUB. SERV., AM. BAR ASS'N, SUPPORTING JUSTICE III: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 1, 5 (2013), http://www.americanbar.org/content/dam/aba/administrative/probono_public_service/ls_pb_Supporting_Justice_III_final.authcheckdam.pdf

not perform nearly as much pro bono work as lawyers.[234] Moreover, while market forces can sometimes encourage charitable behavior, they can also lead to highly problematic behavior, such as dropping clients with unpopular causes to protect and attract business from more lucrative clients.[235]

Existing ethical rules require lawyers to work towards a level playing field even when representing more powerful clients. Among other things, rules: (i) prohibit lawyers from directly contacting an opponent represented by counsel,[236] (ii) restrict lawyers' contact with opponents who are not represented by counsel,[237] and (iii) require lawyers representing corporate actors to clarify in all employee interviews that the lawyer represents the organization and not the employee.[238] Along with the broader culture and commitments of the profession, these rules require lawyers in all positions, representing all types of clients, to facilitate relationships that are governed by law rather than the

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(finding that the annual amount of pro bono hours by attorneys has increased from 37 hours in 2004 to 41 hours in 2008 to 56.5 hours in 2011).

234 Law schools are much more active in encouraging and sometimes requiring pro bono service than other professional schools, and the legal profession's commitment to a pro bono ethic is viewed as a model by other occupational groups. *See* Fiona Mcleay, *The Legal Profession's Beautiful Myth: Surveying the Justifications for the Lawyer's Obligation to Perform Pro Bono Work*, 15 INT'L J. LEGAL PROF. 249, 250 (2009) (noting that other professions do not have this obligation and have little interest in pro bono work).

235 To check market pressures and address this problem among lawyers, courts developed the hot potato doctrine, prohibiting lawyers from dropping current clients to sidestep conflicts with more lucrative prospective clients. *See, e.g.*, Santacroce v. Neff, 134 F. Supp. 2d 366, 367 (D.N.J. 2001) ("The 'Hot Potato Doctrine' has evolved the present attorneys from dropping one client like a 'hot potato' to avoid a conflict with another, more renumerative client."); *In re* Rite Aid Corp. Secs. Litig., 139 F. Supp. 2d 649, 658 n.15 (E.D. Pa. 2001) (describing the hot potato doctrine and noting that it did not apply here because the law firm did not switch clients to represent a more favored client). The problem persists, however, and would only worsen under the market-exchange model. In 2011, after the Obama Administration announced that it would not defend the Defense of Marriage Act (DOMA), a House of Representatives coalition hired the law firm of King & Spaulding to defend DOMA. The firm withdrew a week later, ostensibly because of an insufficiently comprehensive intake process, but more likely because of an overwhelmingly negative public reaction including threats by key clients of the firm, including Coca-Cola, to take their business elsewhere. *See* Harry Anastopulos, *Divorcing DOMA: Internal Law Firm Dynamics and Terminating Representation under Rule 1.16*, 25 GEO. J. LEGAL ETHICS 415, 425 (2012) (describing the possible ethical violation committed by King & Spalding by withdrawing from this representation).

236 MODEL RULES OF PROF'L CONDUCT r. 42 (AM. BAR ASS'N 2013).

237 *Id.* r. 4.3.

238 *Id.* r. 1.13.

wealth or power of the parties. They would be undermined if not eliminated by the market-exchange model of lawyering.

5. Service. A fifth and final relational dynamic, which arches over all the others, is service. As the Preamble to the ABA Model Rules of Professional Conduct explains, a lawyer is not just a "representative of clients," but also an "officer of the legal system," and a "public citizen having special responsibility for the quality of justice."[239] For the past century, bar leaders and commentators have consistently echoed similar themes. Brandeis spoke of the people's lawyer, who guided clients towards socially-just outcomes.[240] Kronman wrote about the lawyer-statesman who moves in and out of private practice and public service.[241] Bar committees and law schools emphasize lawyers' heightened duties to perform pro bono work, to be civically engaged, and to uphold the integrity of the legal system.[242]

Exhortations like these are frequently (and sometimes appropriately) dismissed as unrealistic nostalgia or self-serving rhetoric.[243] But lawyers are, in fact, unified by distinctive patterns of thought, which create value for clients, the legal system, and society at large. From the first year in law school, lawyers are taught to parse legal from non-legal factors, to construct legal as opposed to emotional arguments, and to understand the difference between representing a client and personally adopting the client's position. Lawyers are trained to understand and appreciate the value of strong and independent courts, and they are willing to defend them against improper political interference. They are also socialized to understand the essential importance of legal

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[239] *Id.* pmbl. 1.

[240] *See* Cummings & Sandefur, *supra* note 232, at 87 ("[T]he Brandeisian 'people's lawyer' . . . uses his or her influence with private clients to steer them towards the most socially just outcome.").

[241] KRONMAN, *supra* note 173, at 14 (describing the lawyer as, "a devoted citizen [who] cares about the public good and is prepared to sacrifice his own well-being for it," and as having a "special talent for discovering where the public good lies and for fashioning those arrangements needed to secure it").

[242] *See* Cummings & Sandefur, *supra* note 232, at 93–94 (discussing the effectiveness of pro bono experiences at law school and initiatives of the organized bar in encouraging public service among lawyers).

[243] *See, e.g.*, Roiphe, *supra* note 133, at 48–49 (observing that "[m]ost historians have cynically dismissed the moral rhetoric of professionalism as fundamentally disingenuous. Lawyers, they claim, deliberately described their mission as a moral one to justify the market control they exert over their own profession." (footnotes omitted)).

representation in ensuring the fairness and legitimacy of legal proceedings, and to appreciate the importance of extending legal representation to all clients in society.[244] While non-lawyers sometimes question how criminal defense attorneys can represent clients accused of the most heinous crimes, other lawyers generally commend and defend criminal defense attorneys for doing so.[245]

These and other distinctive patterns of thought are the result of common training and ethical obligations, which socialize lawyers in the importance of prioritizing collective and societal interests above individual self interest in unique but important ways. These patterns of thought serve society in critical if, under-appreciated, ways, but they will be undermined by a model that frames lawyers as mere commodity producers and market actors. Research suggests that when people are told they are rational market actors, they are increasingly likely to act like market actors.[246] Meanwhile, the profession's rhetoric of public service may have value and force even while it remains aspirational. As Rebecca Roiphe observes: "The language that professionals use[ ] to justify themselves is itself important. While lawyers may fall terribly far from their aspirations, rhetoric can also function to inspire men and women to live up to a higher goal, to pursue a good beyond their own self-interest."[247]

Foremost among these aspirations is the goal of universal access to justice.[248] As just discussed, lawyers already work

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[244] *See* 1 ANTON-HERMANN CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA: THE COLONIAL EXPERIENCE, at xiv–xvi (1965) (discussing the traditional roles of a lawyer). *See generally* KRONMAN, *supra* note 173.

[245] For example, when Senior Defense Department Official Charles Stimson criticized a number of firms in 2007 for representing Guantánamo detainees, the profession's reaction was swift and severe, prompting an apology by both the Pentagon and the Bush Administration. *See* David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1981–83 (2008) (describing these events).

[246] *See* John R. Carter & Michael D. Irons, *Are Economists Different, and If So, Why?*, 5 J. ECON. PERSP. 171, 171, 176–77 (1991) (testing whether economics students adapt what they learn and "behave more in accordance with predictions of the rational/self-interest model of economics"); *see also* Luz E. Herrera, *Training Lawyer Entrepreneurs*, 89 DENV. U. L. REV. 887, 887 (2013) (arguing for lawyers to envision themselves as "lawyer-entrepreneurs" to survive in a complex and competitive legal market, and acknowledging the "tension between professionalism standards and personal gain").

[247] Roiphe, *supra* note 133, at 49.

[248] *See* COMM'N ON THE FUTURE OF LEGAL SERVS., AM. BAR ASS'N, REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 1 (2016) ("The American public deserves accessible and affordable legal services, and the legal profession has a special obligation to

towards this goal through the necessary but insufficient means of pro bono work. Individually and collectively, lawyers fall short, but they generally acknowledge the severity of the problem.[249] Proponents of the market-exchange model, in contrast, explain the severity away. By contending that the answer is to provide legal services as efficiently and cost-effectively as necessary to reach the poorest segments of society, they severely narrow the goal from providing universal access to *justice* to providing universal access to *the market* for legal services.[250] This shift may be consistent with neoliberalism generally, which derives the state's legitimacy from its ability to provide all citizens with the opportunity to express their preferences on the market.[251] But it drastically decreases the legal profession's ambition. It suggests that lawyers have a duty to ensure access to affordable legal services, of whatever quality the market produces, rather than a duty to ensure access to quality legal services.

These five relational dynamics—trust, judgment, loyalty, empowerment, and service—represent key ways in which today's lawyers work towards Durkheim's vision of the professions. They prepare and empower lawyers to mediate relationships pursuant to law rather than wealth or power, to integrate state and society, and to work toward social solidarity. Lawyers do not always employ these relational dynamics. Their work varies dramatically by client type and context, and they employ different dynamics in different settings. Some lawyers problematically prioritize their own self-interest, rendering these dynamics irrelevant. Nevertheless, these non-market-based dynamics represent critical means by which lawyers help to ensure the continuity of relationships in society. They will be lost if we pursue a market-

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advance this goal. . . . The core values of the legal profession . . . for us, first and foremost, on serving the interests of the public and ensuring justice for all.").

[249] *See, e.g.*, *id.* at 1, 5 (acknowledging the severity of the problem and analyzing the strengths and weaknesses of the current system).

[250] *See supra* Section II.A.*1*.

[251] *See* WILLIAM N. ESKRIDGE & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 22 (2010) ("[T]he state's legitimacy is no longer tied to rules of recognition or the belief that the state is promoting the public welfare, it is more closely tied to the state's affirmative assurance to every citizen of the security and institutions giving those citizens ample room to make the *choices* that fulfill their needs and desires.").

exchange model of lawyering and design ethical rules around a model of lawyering as a commodity exchange.

B. LAWYERS, THE RULE OF LAW, AND THE LIBERAL STATE

The relational dynamics of lawyering have value in their own right, as just discussed. They also have instrumental value in supporting and maintaining the rule of law as distinct from the ordering of the market, regardless of whether we define the rule of law in narrow neoliberal terms or broader democratic terms. Accordingly, by undermining the relational dynamics of lawyering, the market-exchange model will threaten lawyers' ability to uphold the rule of law and the liberal state.

1. A Neoliberal Rule of Law. The rule of law has long been identified as a critical precursor to a well-functioning free market. Hayek, the godfather of neoliberalism and cofounder of law and economics, identified it as absolutely essential to the market. He explained that the state must be "bound by rules fixed and announced beforehand," so that the citizenry could "foresee with fair certainty how the authority will use its coercive powers."[252] He reasoned that citizens would only participate freely in market the exchange if they had this certainty and predictability.[253] Countless subsequent thinkers have agreed that a free market economy requires, at the very least, a stable framework of clearly-defined and predictably-enforced laws,[254] supported by independent courts and well-trained judges.[255]

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[252] HAYEK, *supra* note 85, at 75; *see also* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 156–57 (1960) ("The rationale of securing to each individual a known range within which he can decide on his actions is to enable him to make the fullest use of his knowledge. . . . The law tells him what facts he may count on and thereby extends the range within which he can predict the consequences of his actions.").

[253] *See* HAYEK, *supra* note 252, at 152–57 (arguing that the rule of law enables individuals to foresee what the consequences of their actions will be and make plans with confidence that the rules will be applied universally).

[254] *See* Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253, 258 (David M. Trubek & Alvaro Santos eds., 2006) ("The idea that the legal system is crucial for economic growth now forms part of the conventional wisdom in development theory."); Robert W. Gordon, *The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections*, 11 THEORETICAL INQUIRIES L. 441, 442 (2010) ("Multilateral lending institutions (development banks) have tended to favor the general position . . . that well-functioning markets require the support of a framework of clearly defined and effectively

A stable framework of law, in turn, requires independent lawyers, committed to the relational dynamics of trust, loyalty, judgment, empowerment, and service. A handful of commentators have acknowledged the importance of lawyers as expert agents who can understand and navigate the legal system.[256] But expertise alone is not enough to support the rule of law. Absent the relational dynamics just discussed, a lawyer's expertise is reduced to a commodity, available for sale to the highest bidder. This will reduce the rule of law to the rule of a market—a disastrous result given that the latter cannot function without the former.

To see why this is so, it is instructive to consider the importance of independent judgment. As many scholars have observed, law is frequently indeterminate until interpreted and applied to particular circumstances by a court issuing judgment on a case, an agency administering a regulation, or a lawyer advising a client.[257]

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and predictably enforced legal rules and rights."); Owen M. Fiss, Comment, *The Autonomy of Law*, 26 YALE J. INT'L L. 517, 518 (2001) ("[A]ny well functioning market needs law.").

[255] *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 37 (1997) (arguing that the law should be clear so that individuals can effectively plan their actions and that this requires "modern legal systems that include pervasive administrative bureaucracies and rely heavily on courts to adopt legal norms to rapidly changing conditions"); Fiss, *supra* note 254, at 518–19 ("[T]he market will also need an institution that can interpret and implement the relevant rules of law—a judiciary. This institution must be independent of the contesting parties as well as larger social and political forces."); Gordon, *supra* note 254, at 443 ("The framework of market-supporting rules requires a set of institutions, staffed with appropriate funding and motivation, to do the defining and enforcing . . . . [T]he appropriate institutions [are] courts staffed with 'independent' judges."); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 7–8 (2008) (noting the importance of the "impartial administration" and "the independence of the judiciary" for the effective rule of law).

[256] *See* INT'L BANK FOR RECONSTR. & DEV., WORLD BANK, ECONOMIC GROWTH IN THE 1990S: LEARNING FROM A DECADE OF REFORM 285 (2005) (describing that "[a]s experience [with rule of law initiatives] grew, it became clear that the roots of poor performance in the judicial system lay much less in a lack of resources and skills than in the behavior of judges, clerks, lawyers, and litigants"); *see also* Gillian K. Hadfield, *Don't Forget the Lawyers: The Role of Lawyers in Promoting the Rule of Law in Emerging Market Democracies*, 56 DEPAUL L. REV. 401, 411 (2007) ("[A] legal system that does not generate a reasonable level of expertise in the interpretation, application, and adaptation of rules over time does not generate an effective rule of law.").

[257] *See* H.L.A. HART, THE CONCEPT OF LAW 124–36 (2d ed. 1994) (observing that rules do not determine the scope of their own application); JEREMY WALDRON, LAW AND DISAGREEMENT 79 (1999) (observing that "statutes need interpretation [and] the words of the enactment (and their 'plain meaning') are often insufficient to determine the statute's application"); Pepper, *supra* note 206, at 1547–48 ("In a complex legal environment much law cannot be known and acted upon, cannot function as law, without lawyers to make it accessible to those for whom it is relevant."); Wendel, *supra* note 204, at 1173 ("[T]his

Given this, we could never attain a stable and predictable framework of law if, in using their specialized expertise, lawyers always and only considered what their clients were likely to pay for.[258] Instead, we need lawyers to exercise independent judgment and to observe ethical duties of candor and fair dealing when advising clients or advocating before tribunals.[259] It is particularly critical that they do so in transactional and planning settings, where "there is no impartial referee to resist the lawyer's client-centered construction of the law," such that "[t]he lawyer is the sole legal interpreter and is . . . in effect, a law-giver from the client's point of view."[260]

The other relational dynamics—trust, loyalty, empowerment, and service—are as important as independent judgment in attaining and sustaining a framework of stable law. Lawyers can only serve as gatekeepers and protectors of such a framework if they gain their clients' trust and a broad understanding of their clients' circumstances.[261] They can only advance continuity and certainty in business transactions, and efficiency and administrability within the courts, if they exhibit loyalty in seeing their clients' cases and transactions through to completion, even

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problem cannot be avoided by clarifying the law, because part of the nature of language is its inability to capture the full range of meaning that a text must bear.").

[258] For discussion of the threat of commodification of the civil justice system, see Wendel, *supra* note 47, at 657, who argues that while we need to take anti-commodification arguments seriously, they are not a reason to reject, as opposed to regulate, alternative litigation finance). For the dangers of commodification more broadly, see MARGARET JANE RADIN, CONTESTED COMMODITIES 131–53 (1996); Margaret Jane Radin, *Justice and the Market Domain*, *in* MARKETS AND JUSTICE: NOMOS XXXI, 165, 165 (John W. Chapman & J. Roland Pennock eds., 1989).

[259] *See* Gordon, *The Independence of Lawyers*, *supra* note 129, at 17 ("The system of adversary representation can only work, can only be justified, if it's carried on within a framework of law and regulation that assures approximately just outcomes, at least in the aggregate. At a minimum, lawyers must be independent enough from their clients to support the rules and institutions of the framework, even when doing so hurts their clients."); Wendel, *supra* note 204, at 1173 ("[T]he law cannot operate as a device to settle normative conflict and coordinate activity without a commitment on the part of law-interpreters to respect the substantive meaning standing behind the formal expression of legal norms.").

[260] Wendel, *supra* note 204, at 1199; *see also* MILTON C. REGAN JR., EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER 39 (2004) ("Much of law practice consists of informal understandings about matters such as what arguments are considered within the bounds of good faith, acceptable levels of aggressiveness, the scope of disclosure requirements, how to interact with regulatory agencies, and what constitutes due diligence.").

[261] *See supra* notes 52–55 and accompanying text.

when more lucrative opportunities arise.[262] They can only check unfair competition and wrongdoing in the marketplace if they represent and empower weaker clients against more powerful ones.[263] And they can only resist client wrongdoing if they are committed to serving not only their clients' stated preferences, but also the wellbeing of society and the integrity and legitimacy of the legal system.[264] For all of these reasons, a framework of clear, certain, and predictable laws requires lawyers who view themselves as public as well as private agents, and who engage in a range of non-market based relational dynamics.[265] And yet, we lose those relational dynamics if we pursue reform based on the assumptions and logic of the market-exchange model.[266]

This highlights an internal contradiction, or at least core tension, in neoliberal thought. Neoliberal thinkers recognize the critical importance of the rule of law, a public good, to the liberal state. But they would subsume the actors and institutions primarily responsible for creating and sustaining it, including lawyers, judges, and the legal profession as a whole, within market rationalities. If this can be done—if the rule of law can be maintained without an independent legal profession—neoliberal

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[262] *See supra* Section IV.A.*5*.

[263] *See supra* note 235 and accompanying text.

[264] *See supra* notes 227–30, 232, 234–38 and accompanying text.

[265] *Cf.* Gordon & Simon, *supra* note 151, at 234–35 ("[L]iberalism seeks to accommodate a broad range of individual self-seeking, but it depends on compliance by self-seekers with the boundaries imposed by the rules of the market. . . . [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.").

[266] We may even lose the independent judges who, in our system, are lawyers first, socialized by the profession to respect precedent, stability, and predictability in law, and not just efficiency of the market and economic growth. *See* Gordon, *supra* note 254, at 447–48 ("Judges have to come equipped with the ideas of professional honor and the motivations and social power to enforce the rules—rather than, for example, to cater to the officials or family clans or local notables to whom they owe their positions; or to the litigants from whom they receive their bribes."); Gordon & Simon, *supra* note 151, at 235 ("The most uncompromising free market liberal must deplore the prospect that police officers or prosecutors or judges might behave self-seekingly in their roles and sell their actions to the highest bidders."). Even if we were to train judges on a separate track, we would still need lawyers who, as officers of the court, support, facilitate, and enable the work of judges. And the very decision to train judges separately would acknowledge that at least some aspects of our legal system cannot be subsumed within market rationalities if we are to maintain the rule of law.

thinkers have not yet shown how.[267] And although not determinative, it is telling that all liberal democracies throughout the world have some form of an independent legal profession.[268]

2. A Democratic Rule of Law. Moreover, law in this country has always served a broad range of values unrelated to efficiency and competition on the market, including distributive justice, substantive equality, political freedoms, and democratic participation.[269] These values are highly contested, defying consensus on their content and expression. With respect to each, the law nevertheless achieves and represents a democratic settlement, "enabling coordinated action in our highly complex, pluralistic society."[270] The process of achieving this settlement is a process of creating, sustaining, and expressing a collective vision of society.[271]

Some scholars characterize access to this process (or to aspects of it) as partially constitutive of the rule of law. In the nineteenth century, for example, Albert Dicey described the rule of law as requiring that individuals be permitted to contest the application of law to their actions and circumstances.[272] More recently, Jeremy Waldron described "the procedural and argumentative aspects" of the rule of law, through which citizens participate in

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[267] *Cf.* David Kennedy, *The "Rule of Law," Political Choices, and Development Common Sense*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 254, at 95, 139–50 (observing consensus that legal rules supporting property and contracts were crucial while recognizing that public choice theory would predict that states were not reliable producers of such rules).

[268] TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 370–71 (1987) (discussing ways in which legal professions take primary responsibility for sustaining and advocating the integrity of the legal process and the rule of law throughout the world).

[269] Hayek and other neoliberalism thinkers would, of course, disagree. They would argue that the rule of law can do no more than support and reinforce the market's ordering. *See* HAYEK, *supra* note 85, at 79 ("It cannot be denied that the Rule of Law produces economic inequality—all that can be claimed for it is that this inequality is not designed to affect particular people in a particular way.").

[270] Wendel, *supra* note 204, at 1169.

[271] *See id.* (arguing that this "final settlement" represented by the law "will [not] persist without custodians and defenders").

[272] *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 212–13 (10th ed. 1959) ("Liberty is not secure unless the law, in addition to punishing every kind of interference with a man's lawful freedom, provides adequate security that every one who without legal justification is placed in confinement shall be able to get free.").

legal proceedings.[273] Perhaps we should broaden this vision even further to encompass all opportunities to participate in the development, interpretation, and application of law, and not just through formal legal proceedings before a court or agency. These opportunities to participate, after all, are what give legitimacy to the law's settlement of contested values and issues.[274]

Lawyers play a critical role in this participatory process. As discussed, they create relationships of trust and loyalty with clients, which serve as portals into the legal system.[275] They employ reasoned judgment in translating their clients' claims and interests into terms that the legal system can understand and act upon, and in translating law into terms the client can understand and act upon.[276] They empower weaker clients against opponents, and they serve as a check on overreaching by stronger clients or the state.[277] In these and other ways, lawyers work to engage clients from all stations of life in the legal system, and to ensure that all parties appear before the legal system on as level a playing field as possible—not as richer or poorer, or more or less powerful members of society, but simply as parties to a legal dispute, interaction, or relationship. Lawyers may not always, or ever, achieve these goals, but their work in furtherance of them is

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[273] *See* Waldron, *supra* note 255, at 5 ("[O]ur understanding of the Rule of Law should emphasize not only the value of settled, determinate rules and the predictability that such rules make possible, but also the importance of the procedural and argumentative aspects of legal practice."); *see also* Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 96 (1998) (describing the rule of law "as a system of which the laws are public knowledge, are clear in meaning, and apply equally to everyone" and discussing how citizens participate in this system); Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 420 (2011) ("[T]here is another side to the value of the rule of law that is especially significant in the adversarial American system: law as a structured discourse in which individuals are entitled to articulate their grievances or face their accusers, to stake their claims, and to advance reasons in support of them."); Joel M. Ngugi, *Policing Neo-liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse*, 26 U. PA. J. INT'L ECON. L. 513, 522 (2005) (arguing for a conception of rule of law that does not simply allow those with political and economic power "to steamroll the rest of society").

[274] *See* Carothers, *supra* note 273, at 96 (discussing the relationship between the rule of law and liberal democracy and the importance of political and civil liberties).

[275] *See supra* Sections IV.A.*1*, IV.A.*3*.

[276] *See supra* notes 205–06.

[277] *See supra* Section IV.A.*4*.

nevertheless critical in bolstering the integrity and legitimacy of the legal system.[278]

And yet, we will preclude lawyers from playing these roles if we pursue reforms prescribed by the market-exchange model. If we eliminate the relational dynamics of lawyering, poorer clients may receive increased access to affordable help with discrete and specific legal tasks, but they will have no access to broader representation, which would allow them to interact with and challenge richer and more powerful segments of society. The richer and more powerful segments of society, for their part, will be able to purchase legal expertise free from the restrictions of lawyers' ethical codes. Not only will this create an immediate and often determinative advantage in individual cases, it will also lead to the overrepresentation of corporate and other powerful interests and the underrepresentation of poorer interests in the development of the law over time.[279]

In all of these ways, the market-exchange model threatens to preclude the citizenry from having a voice in whether and how the law should serve a range of democratic values that do not necessarily align with, and often conflict with, market values.[280] Critics have observed that neoliberal influences are already doing this by pushing a host of democratic values beyond the sphere of political debate.[281] Wendy Brown, for example, argues that neoliberalism has "hollowed out" the concept of democracy, leaving

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[278] Important work has shown that lawyers frequently fall short of these goals. For a comprehensive summary, see Gordon, *supra* note 254, at 447, 449, explaining that "[m]ost work on actual professions suggests a much less romantic and indeed distinctly mixed picture of the role of lawyers in building the clusters of norms and institutions that add up to the legal framework of liberal societies." I do not underestimate the severity of these shortcomings, but I also do not think we should allow them to blind us to the value that lawyers, individually and collectively, can and do create for society.

[279] *See* Dana Remus, *Hemispheres Apart, A Profession Connected*, 82 FORDHAM L. REV. 2665, 2678 (2014) (arguing that loosing professional regulation would "threaten harm to the integrity of the legal system as a whole" and "perversely entrench existing and deep-seated inequities in the profession and in society at large").

[280] *See* Fiss, *supra* note 254, at 519 (noting that the neoliberal view of the law fails to recognize a "rich panoply of values . . . such as political freedom, individual conscience, and substantive equity [that] are unrelated to the efficient operation of the market").

[281] *See id.* (discussing attempts by Richard Posner and other scholars "to show that each and every rule of the law in fact serves the market"); *see also* Ngugi, *supra* note 273, at 519–23 (discussing commentators' views that this neoliberal influence has already spread and resulted in "the death of genuine democracy in the hands of the market friendly democracy").

only the existence of formal rights, the market, and voting.[282] She concludes that democratic choice is "effectively reduced to an individual consumer good, little different in kind or importance from other consumer goods."[283]

Individually and collectively, lawyers are uniquely situated to push back against this move or, at the very least, to advance the interests and values that it pushes aside. But they will be unable to do so if lawyering itself is subsumed within market rationalities. Ironically, therefore, lawyering as a relational activity is necessary both to bolster the free market that neoliberalism valorizes and to protect the values it seeks to marginalize.

V. A THIRD WAY

No one questions that improvements in the functioning of the legal profession and the delivery of legal services are sorely needed. Examples of problems and dysfunctions abound, and range from an unacceptable level of unmet legal need, to underenforcement of the ethical rules, to disproportionately high levels of lawyer dissatisfaction, depression, and substance abuse.[284] The alternative to the status quo, however, need not be a hasty embrace of the market-exchange model. A third, more desirable option is to pursue change from within the professional form. This will entail work along two lines: (1) strengthening traditional features of the professional form; and (2) revising ethical rules and professional structures to constrain and harness market forces in productive ways.

First, bar leaders and commentators must acknowledge and act upon the critical importance of core features of the professional form, including strong and well-enforced ethical rules, a strong and collective sense of professional identity, and a proven

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[282] Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 POL. THEORY 690, 703 (2006); *see also* Ngugi, *supra* note 273, at 516 ("The rule of law, as instituted by these Rule of Law projects, serves the purpose of insulating a particular vision of moral foundation or philosophy of the good of the society from the reach of political debate, consensus, or revision by the participants in a given polity. The effect has been that the rule of law becomes the underlying discourse that facilitates and justifies the shift of power and discretion within the government to technocrats who are less responsive to popular demands and politics.").

[283] Brown, *supra* note 282, at 703.

[284] *See generally* DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS (2015).

commitment to universal access to legal services. The American bar can only mediate the social costs of its monopoly and achieve the vision Durkheim articulated if it ensures the efficacy and vitality of these traditional aspects of professionalism.[285]

The bar should therefore act upon reforms that have long been proposed, but too frequently dismissed. Among other things, rules drafting committees should draft new rules requiring and enabling greater independence from powerful clients. State bars should raise and devote greater resources to enforcement of the ethical rules. Law schools, law firms, and other organizations should increase efforts to socialize lawyers in the meaning and value of professionalism, and state supreme courts should adopt new ethical rules that require, instead of encourage, pro bono activity among practitioners, law students, and faculty alike. Alternatively or additionally, states could levy a tax on law firm profits to fund low-income legal service providers. Law professors and bar leaders should also work to improve civics education programs in the public schools, and bar committees should work to develop and use new technologies to advance public understanding of the law and the nature of legal problems. Skeptics may label these reforms unworkable or unrealistic, but lawyers should think long and hard before accepting such a defeatist attitude. Skeptics may also claim that these efforts would prove insufficient to ameliorate all unmet legal need even if fully implemented. This may be true, but a partial solution is better than no solution at all.

As Deborah Rhode recently explained: "We do not lack for reform strategies."[286] "The challenge," she contends, "is to convince lawyers that they have a stake in th[e] agenda for change."[287] If we fail in this regard—and if lawyers therefore fail to take responsibility for the contemporary profession's problems—critics of the profession will be proven correct. In that case, lawyering should cease to be organized as a profession, not because the market promises better results, but because lawyers will have proven themselves unworthy of the economic and ethical

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[285] *See supra* Section III.A.

[286] RHODE, *supra* note 284, at 8.

[287] *Id.*

privileges of professionalism. Thankfully, there is reason to be hopeful, and to believe that lawyers can rise to the occasion.[288]

At the same time that the bar works to strengthen its professional form, it should also pursue a second line of reform—working to harness market forces through professional structures and ethical rules. I have argued that the market-exchange model is destructive of significant value that lawyers produce in society, *not* that market forces are necessarily problematic.[289] To the contrary, market forces can and should facilitate innovation in the delivery of legal services if they are properly constrained.[290] The key is to view and consider them through the lens of the profession. The central inquiry should always be whether a particular reform will address existing problems in ways that advance the profession's goals and values, *not* whether a particular proposed reform will ensure that legal services are delivered as efficiently and cost-effectively as possible.

An example is illustrative. As noted above, Washington State has recently instituted a program of limited licensed legal technicians, and another jurisdiction appeared posed to follow.[291] These programs are being explained and justified as means of increasing efficiency in the delivery of legal services so as to lower costs at the bottom of the market.[292] It is not clear that they will do so,[293] and there are reasons to think they may not.[294]

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[288] *See id.* at 149 ("[L]awyers . . . have been at the forefront of every major movement for social justice in this nation's history.").

[289] Stated otherwise, there is a critical distinction between the market-exchange model of lawyering, which is rooted exclusively in market rationalities, and market forces themselves, which are an inescapable part of lawyering as an occupation for fee. *See supra* note 10 and accompanying text.

[290] It is critical in this respect to remember that while market rationalities are exclusive of the professional form, professional rationalities are not exclusive of market exchange. After all, we have a mixed regulatory regime in which legal services are organized, delivered, and governed by both professional structures and bodies, and though market exchange.

[291] *See supra* notes 41–43 and accompanying text.

[292] *See supra* notes 41–43 and accompanying text.

[293] *See* Richard Moorhead et al., *Contesting Professionalism: Legal Aid and Nonlawyers in England and Wales*, 37 LAW & SOC'Y REV. 765, 798 (2003) (finding that nonlawyer providers "were more expensive and less accessible," but noting that "[t]his is likely to be caused by the particular conditions of our legal aid contracting scheme").

[294] *See* Leslie C. Levin, *The Monopoly Myth and Other Tales about the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2633 (2014) ("Even if the entry of [non-lawyer providers] into the legal services market forces the rates charged for certain legal services downward, it remains to be seen whether those rates will be affordable for low-income

Regardless, a critical question is going unasked and unanswered: can limited licensing schemes address unmet legal need in ways that advance the profession's central goal of mediating relationships pursuant to law, rather than wealth or power? Viewed through this lens, limited licensing schemes seem highly problematic in the areas in which they are being proposed, including family law and landlord-tenant law.[295] Family law cases implicate webs of relationships with significant power differentials. Frequently, these cases are inextricably intertwined with government policy, allowing the state to dictate particular values in families that are breaking up.[296] If such cases are to be decided by law rather than the relative wealth and power of the state and the family, or the two parties to a marriage, it seems critical to involve fully-trained lawyers who can see complexity, make novel legal arguments, and engage in the relational dynamics of lawyering. The same is true for landlord-tenant law, where many landlords come to disputes equipped with highly-skilled lawyers.[297] Tenants will find themselves at an immediate disadvantage if their representatives are service providers with far less knowledge, training, and skill. Proponents of limited licensing schemes may contend that these power imbalances already exist, but this is not a satisfying response. Institutionalizing the arrangement would make it far worse, while other reforms have the potential to make it better.

This is not to say that limited license providers, lay providers, or computerized services will never be appropriate and desirable. In some contexts, they may lower prices and address unmet legal

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Americans."); Richard Zorza & David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 FORDHAM URB. L.J. 1259, 1307 (2014) (acknowledging that non-lawyers may not be able to afford to substantially undercut the price of lawyer competitors and still maintain profitable practices). *But see id.* at 1308–10 (predicting that non-lawyer prices would eventually drop).

[295] *See, e.g.*, Cramton, *supra* note 31, at 586 ("The law of landlord and tenant . . . affects many poor people . . . [who] exist in a semi-socialist regime . . . [and] a very sophisticated system would be required to provide that every lawyer be on call . . . .").

[296] *See* Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25, 26–28 (2014) (discussing the important values affected by family law and the dangers of employing a neoliberal approach to this body of law).

[297] *See* Joel Kurtzberg & Jamie Henikoff, *Freeing the Parties from the Law: Designing an Interest and Rights Focused Model of Landlord/Tenant Mediation*, 1997 J. DISP. RESOL. 53, 60–61 (discussing the power differential between the parties in landlord-tenant disputes).

need without impeding the profession's broader goal of mediating relationships pursuant to the law.[298] They may be appropriate, for example, in areas that do not implicate great complexity or significant power dynamics, such as simple wills and small real estate closings.[299] In other contexts, nonlawyer service providers can be used effectively if subject to oversight by lawyers, such that they are ultimately accountable to professional values. In all cases, carefully designed ethical rules or other forms of regulation will be critical.[300]

Alternative ownership structures for law firms provide another helpful example. These alternative arrangements are frequently advocated as means of drawing more capital into the market for legal services.[301] The question we should be asking however is different—which proposals, if any, are consistent with key client protections and public-facing duties of the profession. Perhaps we

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[298] *See* Cramton, *supra* note 31, at 550–51 (arguing that limited license providers may be appropriate for routine services such as sales of residences and simple wills).

[299] *See* Moorhead et al., *supra* note 293, at 797 (observing that "[t]here may be sections of the legal services market that require lawyers and sections that do not" and suggesting that "areas of legal practice that are the sole or main preserve of lawyers need to be carefully scrutinized to see if they really require fully qualified lawyers to carry out these areas of work").

[300] Many of the market mechanisms the profession currently relies upon are subject to carefully-designed ethical rules, which were the product of this type of deliberation and debate. Early in the twentieth century, for example, significant portions of the bar vigorously opposed contingency fees. *See* Altman, *supra* note 18, at 2420–21 (discussing the immense criticism the draft provision on contingency fees in the 1908 Model Canons received). Some of the opposition rested on purely protectionist grounds, as lawyers sought to defend the professional privilege and the economic interests of clients who would likely be the victims of contingency fee suits. *See id.* at 2489–91 (noting that established lawyers viewed contingent fees as allowing those at the "lower rung of the profession" to attract clients who had lacked financial resources). Some of the opposition, however, rested on legitimate questions regarding the incentives that contingency fees would create, the implications for the integrity of the lawyer-client relationship, and the resulting threats to the client. *Id.* at 2481–82. The rules that currently constrain their use were designed to address these concerns. It is significant to note, however, that questions regarding contingency fee arrangements continue today. *See, e.g.*, John J. Donohue, III, *The Effects of Fee Shifting on the Settlement Rule: Theoretical Observations on Costs, Conflicts, and Contingency Fees*, 54 L. & CONTEMP. PROBS. 195, 211 (191) (arguing the contingency fees create a conflict between clients and attorneys by distorting the parties' settlement decision). Frequently, they appear to create conflicts between lawyers and clients and to benefit lawyers at the expense of clients. The benefits they create may ultimately be worth the tradeoff, but the key is to recognize that it is a tradeoff, and also that their results would be very different if they were not carefully constrained by ethical rules and professional structures.

[301] *See supra* notes 33, 40, 46 and accompanying text.

should permit nonlawyer ownership if the firm is to be held vicariously liable for the missteps of its members, thereby incentivizing strong internal policing mechanisms, or if the nonlawyers are subject to the same ethical obligations as lawyers. The point here is not to solve the problem but to identify the guiding inquiry. The inquiry should be whether particular reforms that draw on market forces can be designed and implemented consistent with the values and goals of our legal system and not just with the goal of maximizing efficiency and increasing competition in the delivery of legal services.[302]

Ultimately, the question of whether particular market-based proposals will improve or worsen existing realities presents extraordinarily complex empirical questions.[303] Existing work paints a decidedly mixed picture, suggesting that further empirical work—and in particular, context-specific work—is critical.[304] My argument here is just that we have reason, on theoretical grounds, to worry about the implications of these proposals for lawyering as a relational activity. We should therefore be cautious, considering each proposed reform through the lens of the profession's goals and values and with the intent of using professional regulation to harness market forces, instead of letting market forces dictate professional regulation.

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[302] *Cf.* Wendel, *supra* note 47, at 659 ("[A] concern about the commodifying effect of allowing investments in lawsuits might support not an outright ban on [alternative litigation funding] but, rather, a regulatory regime that channels investments in litigation into relational contracts, in which the parties are conceived of as being enmeshed in a long-term web of mutual rights and obligations.").

[303] For an excellent synthesis of the empirical evidence that currently exists regarding the difference between lawyer and nonlawyer providers of legal services, see Levin, *supra* note 294, at 2617–21. As Levin explains, many existing studies are of questionable reliability because they are based on nonrandom observational studies, which do not account for other potentially determinative factors. *Id.* at 2617. Levin admits that the results are mixed but concludes that "[t]he evidence suggests that experienced nonlawyers can provide competent legal services in certain contexts and in some cases, can seemingly do so as effectively as lawyers." *Id.* at 2614.

[304] *See, e.g.*, HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 193, 202–07 (1998) (noting that there is no simple answer concerning whether nonlawyers should be permitted as advocates and discussing the questions that need to be answered to pursue future reforms in regulation); Greiner et al., *supra* note 216, at 951 ("Calls to increase the evidential basis for access-to-justice-promoting measures, whether based in courts or in delivery of legal services or in something else, have been increasing for some time."); Moorhead et al., *supra* note 293, at 769 (noting that few empirical studies have been conducted to compare lawyer and nonlawyer performance).

VI. CONCLUSION

Despite the adversarial nature of our legal system and the inescapable nature of lawyering as an occupation for pay, the legal profession performs an essential form of social work. Supported by the professional form, lawyers shape the production and interpretation of law by mediating relationships pursuant to law rather than wealth and power. The assumptions and logic of the market-exchange model of lawyering threaten to ignore and eventually extinguish this work. They also threaten to preclude more meaningful reform by a profession that, at least in theory, is committed to public and civic institutions in ways that regular businesses are not.

The professional form can enable lawyers to embrace, uphold, and strengthen the rule of law as distinct from the rule of the market, but only if all segments of the profession—bench, bar, and academy—accept responsibility for ensuring that it does so. The answer, therefore, is not to abandon the professional form and professional commitments, but to strengthen them, acknowledging that market forces can be beneficial if harnessed through ethical rules and professional structures.