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THE ETHICAL COSTS OF COMMERCIALIZING THE PROFESSIONS: FIRST-PERSON NARRATIVES FROM THE LEGAL AND MEDICAL TRENCHES

JOSHUA E. PERRY[*]

"The practice of law is both a business as well as profession. Quite often this means that there is a conflict between the two."

Lawyer Survey #40

"We're a business. I think everybody knows that. . . . [However,] I don't want that to be the baseline. I want the baseline to be what's right and what's wrong and what's ethically as well as morally permissible."

Lawyer Interview #5

"[Does a patient who can't pay or doesn't have insurance deserve less care?] [I]t becomes a moral and ethical dilemma for physicians when caring for these patients because you want to do the right thing . . . but so often your efforts are hampered and controlled by external forces that you are not big enough to fight against."

Physician Survey #18

"[Being] a professional in medicine [has traditionally guided how we are] to treat patients and families, [but] I think if you really look at the changes in structures within the system, . . . it has become more business-oriented and less about the profession."

Physician Interview #3[**]

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[*] Assistant Professor and Life Sciences Research Fellow, Department of Business Law and Ethics, Kelley School of Business at Indiana University in Bloomington. B.A. 1997 Lipscomb University; J.D. 2002 Vanderbilt University Law School; M.T.S. 2002 Vanderbilt University Divinity School. I am particularly grateful to Charles Scott for generous funding provided through Vanderbilt University's Center for Ethics, as well as his insightful guidance and encouragement during this project's early development. Additional funding for this work was generously provided personally by John H. Edwards, as well as the Cal Turner Program for Moral Leadership in the Professions and the Center for Biomedical Ethics and Society, both located at Vanderbilt University. Valuable research assistance was provided by Roger Conner, Director of the Advocacy Project at Vanderbilt University, as well as Priyanka Das and Curtis Myrick, both graduate students in the Kelley School of Business at Indiana University in Bloomington.

[**] All original survey and interview source material are all on file with the Author, and all identifying information has either been changed or redacted to preserve the confidentiality of all research participants.

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I. INTRODUCTION

Many of the personal essays written by law or medical school applicants express a sincere desire to make a difference in the world. Those seeking entrance into the legal profession might discuss fighting social or environmental injustices as an advocate, while would-be physicians write of the desire to become a healer who helps sick people feel better.[1] Drawing on themes of vocation and service that have been passed down from ancient traditions, and institutionalized in modern codes of ethics and professional responsibility, these future professionals will speak of the desire to enter into the world of law or medicine so as to do good in their communities, contribute meaningfully to the well-being of others, and enjoy a career with a purpose beyond collecting a larger than average paycheck.

Yet, what many students entering into law or medicine fail to realize is that those who seek to practice in these professions must also navigate many of the same business concerns, economic factors, and commercial constraints that confront businesspersons in less service-oriented, more workaday jobs. Payroll, billing, overhead expenses, government bureaucracy, and insurance reimbursement are day-to-day concerns of those who seek to serve clients and patients. Legal and medical professionals must keep one eye on the financial bottom line, and be prepared to perform their professional services within systems dominated by fiscal issues. Some professional schools offer elective courses on business management, economics, accounting, and finance, but such coursework is not part of the mandatory law or medical school curriculum. Nonetheless, such concerns play a substantial role in the professional lives of many doctors and lawyers. Potentially burdensome (and bothersome) fiscal issues may be largely outsourced to office managers and external financial consultants. However, there is no escaping the fact that many of those entering the legal profession are saddled with $100,000 or more in personal debt,[2]

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[1] *See* Lawyer Survey #146 (on file with author) ("I entered the legal profession with the desire to serve and with the knowledge that I could do so while also making a good living. So far I have done well on the latter, but little on the former."). *See generally* Howard S. Erlanger et al., *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 LAW & SOC'Y REV. 851 (1996) (noting that as many as 70% of the first year class at Harvard Law School in 1986 expressed a desire to practice public interest law); Howard S. Becker & Blanche Geer, *The Fate of Idealism in Medical School*, 23 AM. SOC. REV. 50, 51, 55 (1958) ("The medical students enter school with what we may think of as the idealistic notion, implicit in lay culture, that the practice of medicine is a wonderful thing and that they are going to devote their lives to service to mankind. . . . Some of the students' determined idealism at the outset is [a] reaction against the lay notion . . . that doctors are money-hungry cynics.").

[2] Letter from Karen J. Mathis, President, American Bar Association, to Chairman Patrick Leahy, Senate Judiciary Committee, and Ranking Member Arlen Specter, Senate Judiciary Committee (Mar. 5, 2007) (on file with author) ("For the class of 2005, the average private law school graduate incurred $79,000 debt, to pay for annual law school tuition of $29,000. Students at public institutions borrowed on average $51,000 for an annual tuition of $23,000 for non-residents and $13,000 for residents. According to the Department of Education, more than 80% of undergraduate students borrow money to obtain their degrees, with the average student carrying $20,000 in undergraduate debt before pursuing a career in law."). *See also* Karen Sloan, *At public law schools, tuition jumps sharply*, NAT'L L.J., Aug. 3, 2009, *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202432679213 ("During the 2008-09 school year, the average public school tuition for resident students grew by 9% . . . [t]he increase was 7% for average out-of-state tuition at public schools and 6% at private law schools.").

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while nearly a quarter of medical school graduates face student debt in excess of $200,000.[3] At the national level, health care constitutes approximately one-sixth of the U.S. economy, and the corporate legal services market generates over $100 billion a year. Consequently, issues of both personal finance and organizational economics are entrenched features of the legal and medical professions. The challenges posed by these monetary concerns and their impact on the commercialized professions has not yet been explored from the perspective of legal and medical practitioners themselves. Yet, as the first-person narratives in this Article suggest, the business aspects of being a professional present a complex set of ethical challenges in the lives of physicians and attorneys. This Article argues that commercial concerns have a direct and dominant correlation to the ethical concerns professionals encounter in their practice. More often than conflicts of interest, confidentiality concerns, litigation tactics, or end-of-life dilemmas, it is business issues related to finances that create moral discomfort in the lives of lawyers and physicians. On one level, such an observation should not be controversial, as issues relating to morals and money are referenced throughout sacred texts[4] and professional codes.[5] To be a

[3] Robert Steinbrook, *Medical School Debt—Is There a Limit?*, 359 NEW ENG. J. MED. 2629 (2008) (finding that nearly 23% of all graduates had debt in excess of $200,000 and that the median amount of medical student educational debt, including premedical debts, for the medical school class of 2008 was $145,000 for students at public medical schools and $180,000 for students graduating from private medical schools).

[4] *See Shabbath*, *in* 1 THE BABYLONIAN TALMUD. SEDER MO'ED 141-42 (I. Epstein ed. & H. Freedman trans., 1978) ("When man is led in for judgment he is asked, Did you deal faithfully [i.e., with integrity]..." (footnote omitted)); 1 *Timothy* 6:10 (New Revised Standard Version) ("For the love of money is the root of all evils; it is through this craving that some have wandered away from the faith and pierced their hearts with many pangs."); *Surah* 18:46, THE QUR'AN 188 (Abdullah Yusuf Ali trans., 2007) ("Wealth and sons are allurements of the life of this world: but the things that endure, Good Deeds, are the best in the sight of your Lord, as rewards, and best as (the foundation for) hopes."); THICH NHAT HANH, THE HEART OF THE BUDDHA'S TEACHING 113 (1998) ("To practice Right Livelihood (*samyag ajiva*), you have to find a way to earn your living without transgressing your ideals of love and compassion. The way you support yourself can be an expression of your deepest self, or it can be a source of suffering for you and others. . . . Our vocation can nourish our understanding and compassion, or erode them. We should be awake to the consequences, far and near, of the way we earn our living.").

[5] MODEL RULES OF PROF'L CONDUCT, Preamble 5, 9 (2002) ("A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. . . . Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."); CODE OF MEDICAL ETHICS, Principles of Medical Ethics IX (AMA 2001) ("A physician shall support access to medical care for all people."); CODE OF MEDICAL ETHICS, Op. 2.09 (AMA 2003) ("While physicians should be conscious of costs and not provide or prescribe unnecessary medical services, concern for the quality of care the patient receives should be the physician's first consideration. This does not preclude the physician, individually or through medical or other organizations, from participating in policy-making with respect to social and economic issues affecting health care."); AM. BD. INTERNAL MED. FOUND. et al., *Medical Professionalism in the New Millennium: A Physician Charter*, 136 ANNALS OF INTERNAL MED. 243, 244 (2002) (noting that two fundamental principles of the medical profession are (1) "primacy of patient welfare," which "is based on a dedication to serving the interest of the patient," i.e., "altruism," which must not be compromised by "market forces, societal pressures, and administrative exigencies," and (2) "social justice," which, in the context of the health care system refers primarily to "the fair distribution of health care resources," but also the active work of physicians to eliminate "discrimination in health care, whether based on race, gender, socioeconomic status, ethnicity, religion, or any other social category").

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professional in our society necessarily requires one to engage in issues of commerce. In that vein, this Article illustrates that such engagement complicates the aspirations of professionals that seek to help patients or clients or to otherwise fulfill traditional duties of trust and faithfulness. This Article also seeks to illuminate, perhaps more disconcertingly, that the increasing commercialization of law and medicine threatens to further erode the practitioner's identity as a professional who serves a client or patient with a deeper sense of purpose and meaning.

Legal and medical professionals routinely enter into fiduciary relationships with clients or patients who are hurting, seeking help, or need healing. Oftentimes, a person's livelihood or life is on the line, and such relationships can be complex and stressful. Moral tensions that arise from conflicts between a professional's mandate to serve in the best interests of the client or patient, and personal temptations or institutional incentives to serve his or her own economic self-interest make these relationships even more difficult. Or, more systemically, professionals find themselves practicing law or medicine under conditions that constrain their ability to exercise personal, autonomous judgment consistent with their understanding of appropriate professional conduct. As one lawyer noted in an interview for this project, professionals are in the business of selling help, and providing assistance in an overly commercialized environment can result in moral messiness. It is this particular type of messiness that this Article attempts to document and analyze.

The extent to which financial matters serve as a source of moral distress for lawyers and physicians – and the moral tension between serving the self and serving others – is an important and under-identified component of professional life. It is this finding from my qualitative research exploring the "common moral problems in the professions" that I hope to address in this Article. In short, I report on preliminary data that provides rich and textured details of the commerce-related ethical challenges that face legal and medical professionals struggling to act as ethical businesspersons. In Part II, I provide some background context for why this issue is of particular concern to professionals by briefly reviewing the unique elements that characterize professional identity, and the distinct mandate of legal and medical professionals to serve others before the self. Understanding the particular components of professional identity that mark a lawyer's or physician's sense of self is critical to understanding the moral angst reflected in many of the first-person narratives. Part III will describe the "Common Moral Problems in the Professions Project" and present findings from a first-person interview and some survey responses documenting the moral distress that emanates from this personal or systemic conflict between "doing good" and "doing well." While it is difficult to acquire large amounts of qualitative data from lawyers and physicians – for whom time is literally money – the narrative responses presented suggest that business and economic issues do contribute a substantial amount of ethical angst to the lives of lawyers and physicians. Following this section on results, Part IV will further discuss these findings and describe more fully the shared moral concerns of lawyers and physicians struggling to meet client and patient needs amid competing systemic, institutional, and personal interests. Concluding remarks about the future of professionalism and the threat of an increasingly commercialized legal and medical environment are offered in Part V.

II. BACKGROUND CONSIDERATIONS OF THE PROFESSIONAL IDENTITY

In 1915, Abraham Flexner, an early reformer of medical school education, enumerated six criteria necessary to constitute a profession. In Flexner's estimation, "established and recognized professions" such as law, medicine, and ministry were distinguishable from other

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disciplines, such as social work or journalism, on the bases that the former: (1) were "essentially intellectual operations with large individual responsibility;" (2) "derive[d] their raw materials from science and learning;" (3) used these materials for a "practical and definite end;" (4) possessed an "educationally communicable technique;" (5) "tend[ed] to self-organization;" and (6) were "increasingly altruistic in motivation."[6]

At mid-century, Ernest Greenwood, having surveyed the existing sociological literature on occupations,[7] refined Flexner's criteria to create a seminal description of the professional based on five distinguishing attributes: "(1) systematic theory, (2) authority, (3) community sanction, (4) ethical codes, and (5) a culture."[8] By systematic body of theory, Greenwood referred to that set of

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[6] Abraham Flexner, *Is Social Work a Profession?*, *in* PROC.NAT'L CONF. ON CHARITIES & CORRECTION 576, 578, 581 (1918). *See also* Sachiko Iwabuchi, *The Pursuit of Excellence: Abraham Flexner and His Views on Learning in Higher Education*, 15 JAPANESE J. AM. STUD. 139, 148-49 (2004); Conrad S. Ciccotello, C. Terry Grant & Mark Dickie, *Will Consult for Food! Rethinking Barriers to Professional Entry in the Information Age*, 40 AM. BUS. L.J. 905, 905-06 (2003) ("Traditionally, society deemed only lawyers, doctors, and clergy to be professionals. With professional status generally came a great respect for the member's great investment in learning, devotion to service, and ethics. The skill and knowledge possessed by professionals amazed the masses. Few in the poorly educated populace thought they could draft one of their own legal documents, prescribe their own medicines, or understand spiritual matters as well as a professional. With complete customer respect and no competition, professionals commanded virtual monopolies in their respective areas of expertise."); Hugh P. Gunz & Sally P. Gunz, *The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision Making of In-House Counsel*, 39 AM. BUS. L.J. 241, 250 n.33 (2002) (*citing* TERENCE J. JOHNSON, PROFESSIONS AND POWER (1972)) ("The collegiate professions were traditionally law, medicine, and the priesthood. They were evidenced by a degree of mystification of knowledge that increased the power and social distance between professional and client. The problems clients brought to the professional called for that professional to become aware of issues of real intimacy to the client and, as a result, the client would often experience a sense of vulnerability."); John W. Wade, *An Overview of Professional Negligence*, 17 MEM. ST. U. L. REV. 465, 465, 473, 478 (1987) ("Traditionally, there have been four 'learned professions' – law, medicine, ministry, and teaching. . . . [A]ll of them . . . involve the rendering of services . . . [and] with law and medicine there may be a fiduciary relationship with a special duty of loyalty . . . [and] crystallized obligations . . . to use care to keep abreast of new developments in the profession for the activity being undertaken, to decline to undertake the particular task if not qualified to handle it, and to refer to a specialist or expert in the area when that seems appropriate. Their professional organizations establish standards of conduct and codes of ethics; they are also subject to governmental regulation, particularly in being admitted to practice.").

[7] Among the sources Greenwood cites are Talcott Persons, *The Professions and Social Structure,* 17 SOCIAL FORCES 457-67 (1939); THEODORE CAPLOW, THE SOCIOLOGY OF WORK (1954); and Flexner, *supra* note 6, at 576-90.

[8] Ernest Greenwood, *Attributes of a Profession*, 2 SOCIAL WORK 44-55 (1957), *reprinted in* PROFESSIONALIZATION 10 (Howard M. Vollmer & Donald L. Mills eds., 1966). On the question of who is in and who is out, Greenwood argues that the "phenomenon of professionalism" is best understood along a continuum. "At one end of this continuum are bunched the well-recognized and undisputed professions (e.g., physician, attorney, professor, scientist); at the opposite end are bunched the least skilled and least attractive occupations (e.g., watchman, truckloader, farm laborer, scrubwoman, bus boy). The remaining occupations, less skilled and less prestigious than the former, but more so than the latter, are distributed between these two poles. The occupations bunched at the professional pole of the continuum possess to a maximum degree [these five attributes]. As we move away from this pole, the occupations possess these attributes to a decreasing degree. Thus, in the less developed professions . . . these attributes appear in moderate degree. When we reach the mid-region of the continuum, among the clerical, sales, and crafts occupations, they occur

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"abstract propositions that describe in general terms the classes of phenomena comprising the profession's focus of interest."[9] In other words, professionals must master the theory underlying their practical skill, and this intellectual ability, Greenwood suggested, is best mastered through formal education in an academic setting. This idea is in contrast to the dearth of treatises "on the theory of punch-pressing or pipefitting or bricklaying," and the sufficiency of on-the-job training through apprenticeship for these "nonprofessional occupations."[10] Discussing "professional authority," Greenwood noted that the nonprofessional engages customers, who are arguably "always right," while "the professional dictates what is good or evil for the client, who has no choice but to accede to professional judgment."[11] Such authority is conferred via the community, which sanctions the professional's powers and privileges by requiring graduation from an accredited professional school and licensure from the appropriate state agency.

Moreover, Greenwood noted that a common prerequisite to being granted a professional title is "an examination before a board of inquiry whose personnel have been drawn from the ranks of the profession."[12] As a check on such monopoly power, each profession subscribes to a professional code of ethical conduct, whereby "the profession's commitment to the social welfare becomes a matter of public record."[13] Elaborating further on the particular difference between professional and nonprofessional norms, Greenwood wrote:

> In contrast to the nonprofessional, *the professional is motivated less by self-interest and more by the impulse to perform maximally.* The behavior corollaries of this service orientation are many. For one, the professional must, under all circumstances, *give maximum caliber service.* The nonprofessional can dilute the quality of his commodity or service to fit the size of the client's fee; not so the professional. Again, *the professional must be prepared to render his service upon request, even at the sacrifice of personal convenience.*[14]

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in still lesser degree; while at the unskilled end of the continuum the occupations possess these attributes so minimally that they are virtually nonexistent." *Id.* at 10-11.

[9] *Id.* at 11.

[10] *Id.*

[11] *Id.* at 12. For a more contemporary and critical discussion of such professional paternalism in the medical context, *see* Susan M. Denbo, *What Your Genes Know Affects Them: Should Patient Confidentiality Prevent Disclosure of Genetic Test Results to a Patient's Biological Relatives?* 43 AM. BUS. L.J. 561, 595 (2006) (*citing* Roger B. Dworkin, *Getting What We Should from Doctors: Rethinking Patient Autonomy and the Doctor-Patient Relationship*, 13 HEALTH MATRIX 235 (2003); Edward Guadagnoli & Patricia Ward, *Patient Participation in Decision-Making*, 47 SOC. SCI. MED. 329 (1998)). In the legal context, *see* Troy E. Elder, *Poor Clients, Informed Consent, and the Ethics of Rejection*, 20 GEO. J. LEGAL ETHICS 989 (2007); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984); Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979).

[12] Greenwood, *supra* note 8, at 13.

[13] *Id.* at 14.

[14] *Id.* at 15 (emphasis added). The idea that professionals ought to suppress self-interest, orient their career towards maximum caliber service, and even sacrifice personal convenience is the primary component of professionalism with which this paper is concerned. It is some measure of this component that creates ethical confusion as lawyers and physicians attempt to be service-oriented professionals and bottom-line businesspersons simultaneously. The data reported in Part III suggest that maintaining a robust

Toward the end of Greenwood's essay, when discussing the hallmarks of his fifth characteristic, "professional culture," he returned to the theme of service beyond self. According to Greenwood, professionals are further distinguished from nonprofessionals by "the career concept."[15] "A career," Greenwood asserted, "is essentially a *calling*, a life devoted to 'good works.'"[16] By Greenwood's account, self-seeking financial considerations should always be secondary to the psychic satisfactions and service orientation that should mark the career life of a professional person.[17]

In addition to the wealth of sociological literature on the point,[18] at least one court has attempted to answer the question of what constitutes a professional. In 1974, the New York Court of Appeals, considering whether the law is a profession or a business, examined six criteria distinguishing "professionals from others whose limitations on conduct are largely prescribed only by general legal standards and sanctions, whether civil or criminal."[19] The court's six criteria

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commitment to both service and the economic bottom line results in moral confusion regarding to whom one's ultimate allegiance is owed.

[15] *Id.* at 17.

[16] *Id.* (emphasis in original). *See also* WILLIAM M. SULLIVAN, WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA 39 (2d ed. 2005) ("A profession is understood to offer a career . . . while professionalism demands the kind of dedication to purpose characteristic of a vocation or calling."). For an inspiring and beautiful (secular) treatment of the notion of work as a vocation, *see generally* GREGG LEVOY, CALLINGS: FINDING AND FOLLOWING AN AUTHENTIC LIFE (1998).

[17] Greenwood, *supra* note 8, at 17. Greenwood goes so far as to suggest that "the act of embarking upon a professional career is similar in some respects to entering a religious order. The same [obviously] cannot be said of a nonprofessional occupation." *Id.* *See also* Thomas E. Schaefer, *Professionalism: Foundation for Business Ethics*, 3 J. BUS. ETHICS 269, 270-71 (1984) ("Professionalism exists in the service one renders by his activities. While 'pay' or 'profit' may be required so that professional activity may be exercised, professionalism does not aim at any pecuniary goal. . . . The professional, like the artist, takes joy in the activities he performs apart from their external rewards, such as prestige, power, or wealth. The 'professional', in short, is one who performs a significant activity in a spirit of dedication. . . . The term 'professional' implies . . . aspirations at the center of one's life. The term, as referring to the quality of 'one who professes' is linked to the concept of 'vocation.' One is 'called' to a certain task in life, a task suited to the expression of one's personality.").

[18] *See, e.g.*, Bernard Barber, *Some Problems in the Sociology of Professions*, DAEDALUS, Fall 1963, at 669, 672 (observing that professionalism consists of four essential attributes, two of which include a "primary orientation to the community interest rather than to individual self-interest" and "a system of rewards (monetary and honorary) that is primarily a set of symbols of work achievement and thus ends in themselves, not means to some end of individual self-interest."). Thus, again the themes of sublimated self-interest and more deontological orientation toward duty to others emerge as the defining characteristics of those who might lay claim to the title of professional.

[19] *In re* Estate of Freeman, 311 N.E.2d 480, 483 (N.Y. 1974). In this case, the appellant was the sole beneficiary of his father's estate and he objected to the amount of attorney's fees awarded by the court for services rendered to the estate. The son argued that the Surrogate was improperly influenced by the then existing Monroe County (N.Y.) Bar Association minimum fee schedule, which the son argued constituted a violation of New York's antitrust law as set forth in the Donnelly Act. The court concluded that while the Surrogate considered the minimum fee schedule, "he made a sufficiently independent determination of the reasonableness of the fee allowed and, in doing so, was entitled to consider custom and practice in the community." *Id.* at 482. Moreover, the court held that "the law is a profession and not a business and therefore not subject to the Donnelly Act which prohibits business arrangements restraining competition." *Id.*

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included: (1) formal training and learning; (2) "admission to practice by qualifying licensure;" (3) "a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace;" (4) "a system for discipline of its members;" (5) "a duty to subordinate financial reward to social responsibility;" and (6) "an obligation . . . even in nonprofessional matters," to behave "as members of a learned, disciplined, and honorable occupation."[20] The court's discussion of the hallmarks that distinguish a professional concluded with additional emphasis on the service ideal, and a plea "that the [legal] profession not be debased by lesser commercial standards."[21]

Further examination of the literature exploring the general elements of professionalism is beyond the scope of this Article. However, a unifying thread between Flexner, Greenwood, and the New York Court of Appeals should be highlighted in order to frame the forthcoming analysis[22] of the narratives of practicing legal and medical professionals.

William M. Sullivan, Senior Scholar at The Carnegie Foundation for the Advancement of Teaching, provides perhaps the most succinct definition of a professional.[23] Sullivan identifies three features common across the professions: (1) "specialized training in a field of codified knowledge usually acquired by formal education and apprenticeship," (2) "public recognition of a certain autonomy on the part of the community of practitioners to regulate their own standards of practice," and (3) "a commitment to provide service to the public that goes beyond the economic welfare of the practitioner."[24] Regarding this third feature – the common thread this Article adopts as its focus – Sullivan notes a tension that will later be observed in the narrative data collected during the Common Moral Problems in the Professions Project: the opportunity for social and economic advancement afforded by entry into a profession often pulls against the higher sense of calling to contribute to the common good.[25] Meaningful work such as caring for and curing patients, counseling clients and fighting injustice, mentoring students, pastoring parishioners, and designing safe structures are all carried on in a capitalistic society in which professional skills are marketed as goods; pressure exists to compete with peers and to "accede to the demands of profit when they conflict with professional standards of excellence.[26] Sullivan even identifies "today's most salient challenge to professionalism" as the "increasing dominance of market thinking within professional life and organization . . ."[27]

The remainder of this Article examines this "most salient challenge to professionalism" through the narratives of those who earn their living practicing either law or medicine in an increasingly commercialized environment.

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[20] *Id.* at 483.

[21] *Id.* (citing HENRY S. DRINKER, LEGAL ETHICS 210-73 (1953)).

[22] *See infra* Parts III and IV.

[23] *See* WILLIAM M. SULLIVAN, WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA 36 (2d ed. 2005).

[24] *Id.*

[25] *See also* JOHN KULTGEN, ETHICS AND PROFESSIONALISM 347 (1988) (noting that "the ideal of a professional is that of a person dedicated to providing proficient service to those who need it").

[26] Sullivan, *supra*, note 23, at 40.

[27] *Id.* at 42.

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A. Professionalism and the Practice of Law

Standards of legal professionalism have been debated in the United States at least as early as the 1836 publication of *A Course of Legal Study*, by Baltimore lawyer David Hoffman, which included fifty resolutions to assist the young practitioner.[28] Hoffman's forty-ninth resolution offered emphatic commentary on the issue of lawyers and money:

> I am, therefore, firmly resolved never to receive from any one a compensation not justly and honorably my due; and, if fairly received, to place on it no undue value; to entertain no affection for money, further than as a means of obtaining the goods of life, --the art of using money being quite as important for the avoidance of avarice, and the preservation of a pure character, as that of acquiring it.[29]

A number of the other forty-eight resolutions also addressed financial matters, including warnings against commingling of funds, exhortations to refund excessive retainer fees, and prohibitions against favoritism towards larger, more lucrative clients.

Yet, in an address to the Harvard Ethical Society on May 4, 1905, Louis D. Brandeis noted that many believed "[l]awyers are now to a greater extent than formerly business men, a part of the great organized system of industrial and financial enterprise…. And they do not seem to be so much of a distinct professional class."[30] This negative image of lawyers did not improve over the course of the twentieth century. Rather, stereotypes cemented. In 1988, Norman Bowie, the

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[28] David Hoffman, *A Course of Legal Study*, *in* CASES AND OTHER AUTHORITIES ON LEGAL ETHICS 555 (George O. Costigan, Jr. ed., 2d ed. 1990).

[29] *Id.* at 569.

[30] LOUIS D. BRANDEIS, BUSINESS — SINROFESSION 334 (William S. Hein & Co. 1996) (1914) (quoting James Bryce). Justice Brandeis, however, disagreed with the widespread notion that "the Bar had become commercialized through its connection with business," and instead argued that the lawyer's importance to the business world was evidence of a professionalization of business more than a commercialization of the legal profession. *Id.* Acknowledging that "the lawyer does not hold as high a position with the people as he held seventy-five or indeed fifty years ago," he attributed this to lawyers "allow[ing] themselves to become adjuncts of great corporations," while neglecting "the obligation to use their powers for the protection of the people." *Id.* at 337. "We hear much," Brandeis asserted, "of the 'corporation lawyer,' and far too little of the 'people's lawyer.'" *Id.*

Canadian business school professors Sally P. Gunz and Hugh P. Gunz have studied corporate lawyers and the moral distress that arises from their presumed role as "moral guardian[s] or counselor[s]" to the organization. Gunz and Gunz presented exploratory data demonstrating that lawyers differentiate between clients on the basis of their revenue potential. *Client Capture and the Professional Service Firm*, 45 AM. BUS. L.J. 685, 718 (2008). In fact, the qualitative research showed that law firm partners preferred "clients with high status in their industry, their local business community, or their local community at large" who were likely to be "better prospects for good future business." *Id.* Likewise, corporate law firm associates "seemed to be more influenced by the potential for future work . . . with clients that have the prospect of generating a stream of future business." *Id.* The question left unanswered by the pioneering work of Gunz and Gunz is whether these understandable and rational business incentives contribute to a sense of moral dissonance in light of the professional's historic orientation as one who places service above self. In some ways, this Article is a continuation of the empirical examination of the lawyer's professional life that was initiated by Gunz and Gunz.

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Director of the Center for the Study of Values at the University of Delaware, opined that "[w]hat has gone wrong with the law is that most lawyers are using their specialized knowledge to enable the rich and powerful to exploit the poor and ignorant while enriching themselves in the process."[31] As noted in the introduction to this Article, the American Bar Association's turn-of-the-twenty-first century revision of the Model Rules of Professional Responsibility seemed to respond to such perceptions, emphasizing the ethical challenges surrounding the business components of legal practice.[32]

B. Professionalism and the Practice of Medicine

Like lawyers, medical practitioners have historically struggled with the moral issues attendant to commercial activity.[33] Although in ancient Greece money was exchanged for health care, Hippocrates urged the medical community of his day to consider carefully the financial means of the patient, and even to give away services to those in "financial straits."[34] Plato similarly stated that "no physician, in so far as he is a physician, considers his own good in what he prescribes, but the good of his patient; for the true physician is . . . not a mere money-maker."[35]

By the late twentieth-century, commercialism in American medicine was in full bloom as the growth of Medicaid, Medicare, and the private, employer-based system of insurance flooded the system with enormous sums of money.[36] But in the last ten years, a variety of observers have become increasingly concerned about the tension between commerce and professionalism in medical care.[37] Offering a variation on Hippocrates' mandate, Harvard Business School professor John H. McArthur and Harvard Medical School surgeon Francis D. Moore wrote in the late 1990s:

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[31] Norman Bowie, *The Law: From a Profession to a Business*, 41 VAND. L. REV. 741, 744 (1988). Perhaps, despite the rhetoric of service, such a view of lawyers has simply always been the case. *See* ELLIOTT A. KRAUSE, DEATH OF THE GUILDS: PROFESSIONS, STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT 51 (1996) ("American lawyers, at least since the rise of corporate capitalism and perhaps even before, have never been viewed as a profession that serves most people . . . By 1870 or 1880 the division was already clear between the elite bar, serving corporate capitalism, and the mass bar, serving the needs of small businessmen and helping wealthy and upper-middle-class individuals with their wills, estates, lawsuits, and divorces. Only a tiny group of the profession has ever devoted practice to the needs of the poor and lower middle class; even the mass personal service bar seldom works with this group.").

[32] *See* MODEL RULES, *supra* note 5.

[33] Albert R. Jonsen, *A Note on the Notion of Commercialism*, 16 CAMBRIDGE Q. HEALTHCARE ETHICS 368, 369 (2007) ("In our culture, medicine has, for the most part, been a commercial activity (except when monks were its practitioners) and has, as such, always presented moral problems.").

[34] HIPPOCRATES, HIPPOCRATES VOL. I 319 (W.H.S. Jones trans., G. P. Putnam's Sons 1923).

[35] PLATO, THE REPUBLIC, *in* 2 THE WORKS OF PLATO 24 (B. Jowett trans., Tudor Publ'g Co. 1945). *But see* Jonsen, *supra* note 28, at 371. ("Yet, for centuries, the ethics of medicine has insisted that benevolence should motivate the physician.").

[36] Arnold S. Relman, *The Problem of Commercialism in Medicine*, 16 CAMBRIDGE Q. HEALTHCARE ETHICS 375, 375 (2007).

[37] *See* John H. McArthur & Francis D. Moore, *The Two Cultures and the Health Care Revolution,* 277 JAMA 985, 985 (1997) (arguing that while traditions of commercialism and professionalism both share a central role in the evolution of social institutions in the United States, "threats" exist to the "quality and scope of medical care" when "the tradition of medical professionalism is overtaken by the commercial ethic and by corporations seeking profit for investors from clinical care of the sick."); Joseph J. Fins, *Commercialism in the Clinic: Finding Balance in Medical Professionalism*, 16 CAMBRIDGE Q. HEALTHCARE ETHICS 425, 425 (2007)

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> The fundamental act of professional medical care is the assumption of responsibility for the patient's welfare—an unwritten . . . acknowledgement by the physician that '[w]e will take care of you.' The essential image of the professional is that of a practitioner who values the patient's welfare above his or her own and provides service even at a fiscal loss and despite physical discomfort or inconvenience.[38]

Indeed, while most doctors have always made a good living, the practice of medicine has changed in recent decades and profit has, in many instances, surpassed altruism as the locus of professional concern.[39] Arnold S. Relman, physician and former editor of *The New England Journal of Medicine*, observed in 2007 that "financial ambition" seems to increasingly trump professional ethics as physicians now labor in a dysfunctional system "incompatible with the needs of community and personal medical care and with the values of medical professionalism that have traditionally shaped the behavior of our physicians."[40] Dr. Relman advises renewed resistance to the tide of commercialism if physicians hope to "reclaim the moral high ground for a profession in danger of losing its moorings."[41]

It has been said that professionals are the "trustees of socially important knowledge"[42] or, even loftier, the "custodians of our central social institutions."[43] If medical and legal professionals

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("There is a palpable malaise in American medicine as clinical practice veers off its moorings, swept along by a new commercialism that is displacing medical professionalism and its attendant moral obligations."); William S. Andereck, *Commodified Care*, 16 CAMBRIDGE Q. HEALTHCARE ETHICS 398 (2007) (examining the characteristics of healthcare commodification in the context of medical care and exploring its effects on the doctor-patient relationship); Larry R. Churchill, *The Hegemony of Money: Commercialism and Professionalism in American Medicine*, 16 CAMBRIDGE Q. HEALTHCARE ETHICS 407 (2007) (exploring the cultural meaning attached to money and its pervasive force throughout medical research, education, and the delivery of health services); Marc A. Rodwin, *Medical Commerce, Physician Entrepreneurialism, and Conflicts of Interest*, 16 CAMBRIDGE Q. HEALTHCARE ETHICS 387 (2007) (tracing the historical development of medical commerce in the United States from the late 18th century through the early 21st century, and arguing that the primary problem of commercialism in medicine today is the conflict of interest that arises when loyalty to patients and the exercise of independent professional judgment is compromised by physician entrepreneurship); Jacob Needleman, *A Philosopher's Reflection on Commercialism in Medicine*, 16 CAMBRIDGE Q. HEALTHCARE ETHICS 433, 437 (2007) (advocating for reflection among physicians as to "how . . . the money factor . . . impact[s] the human values often assumed to define the art of medicine, understood as the work of always and in everything giving first priority to the health and well-being of the individual patient[.]").

[38] McArthur & Moore, *supra* note 37, at 985.

[39] John Lantos, *RVUs Blues: How Should Docs Get Paid?* 33 HASTINGS CTR. REPORT 37, 45 (2003) (lamenting the loss of the period when "doctoring was more about giving than about getting," and the new forms of physician pay that incentivize expediency and efficiency—as measured in outcomes—to the exclusion of those less measurable, vague healing skills and virtues that contribute a moral value to the physician-patient encounter).

[40] Relman, *supra* note 36, at 376.

[41] *Id.*

[42] STEVEN BRINT, IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE 5 (1994).

[43] This is the language used by Graham Reside, Executive Director of the Cal Turner Program for Moral Leadership in the Professions. *See also* ELLIOT A. KRAUSE, DEATH OF THE GUILDS: PROFESSIONS,

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do understand their role in society as one that transcends self-interest, what happens when that role confronts the business realities of being an active participant in a commercialized system of professional services: a fungible employee with very little autonomy, situated in an institution that is primarily interested in the professional's ability to generate revenue? To better understand this question and its implications for moral life, I turn to the experiences of lawyers and doctors in their own words.

III. THE COMMON MORAL PROBLEMS IN THE PROFESSIONS PROJECT

Several ethics and legal studies scholars have noted that the ethical lives of practicing professionals are "relatively under-explored," with few empirical studies offering much insight.[44] In an attempt to help fill this gap in the literature, I, along with Graham Reside[45] and Bruce Barry,[46] undertook an exploratory qualitative research project designed to better understand the common (understood here as routine or frequent, and also shared) moral problems facing practicing professionals across the fields of law, medicine, and the ministry.[47] While I assumed responsibility for collecting the data from lawyers and physicians, Dr. Reside focused his efforts on the clergy. Dr. Barry provided general leadership and guidance.[48] This Article does not represent a complete report or analysis of the findings from the Common Moral Problems in the Profession Project. Rather, this Article, envisioned as the first in a series, explores the most

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STATES, AND THE ADVANCE OF CAPITALISM, 1930 TO THE PRESENT 2 (1996) (noting the power of professionals who "control[] the services critical to our lives in the modern period.").

[44] Gunz & Gunz, *supra* note 6, at 246 (citing LAWRENCE A. PONEMON & DAVID R.L. GABHART, ETHICAL REASONING IN ACCOUNTING AND AUDITING (1993); William A. Bain, *Focus: Ethical Problems in Ethics Research*, 4 BUS. ETHICS: EUR. REV. 13 (1994); Andrew Crane, *Are You Ethical? Please Tick Yes or No On Researching Ethics in Business Organizations*, 20 J. BUS. ETHICS 237 (1999); Donna M. Randall & Annetta M. Gibson, *Methodology in Business Ethics Research: A Review and Critical Assessment*, 9 J. BUS. ETHICS 457 (1990); Robert C. Ford & Woodrow D. Richardson, *Ethical Decision Making: A Review of the Empirical Literature*, 13 J. BUS. ETHICS 205 (1994)). *See also* Joshua E. Perry et al., *The Ethical Health Lawyer: An Empirical Assessment of Moral Decision Making*, 37 J.L. MED. & ETHICS 461 (2009) (citing W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 17 (1999)). Perhaps the lack of literature reflects the fact that "[e]mpirical ethics research is notoriously difficult." Gunz & Gunz, *supra* note 30, at 701.

[45] Executive Director, Cal Turner Program for Moral Leadership in the Professions, Vanderbilt University; Assistant Professor of Sociology of Religion, Vanderbilt University. Dr. Reside was trained as a sociologist in Emory University's Ethics and Society program. He also holds a Masters of Divinity from Princeton Theological Seminary.

[46] Professor of Management & Professor of Sociology, Owen School of Management, Vanderbilt University. Dr. Barry was trained in the field of organizational behavior at the University of North Carolina.

[47] Our working assumption was that the professions are morally-oriented practices with characteristic standards and commitments. The professions represent "moral orders" that are defined by particular moral concerns and problems. We were interested in better understanding those unresolved or persistent dynamics of one's professional life or routine that are constitutive of his or her professional identity. We were also interested in those ways in which the contours and commonalities of a general professional overlap across the professions. Thus, "common" had a double-meaning from the project's inception.

[48] In addition to physicians, lawyers and clergy, the research team envisions an expansion into the world of business professionals.

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dominant theme to emerge from the narrative data collected from attorneys and physicians – the business of being a professional.[49]

A. Methodology

Qualitative inquiry is marked by a variety of empirical data gathering tools and interconnected interpretive practices, as well as cultural, historical, and interactional observations "that describe routine and problematic moments and meanings in individuals' lives."[50] The qualitative researcher is perhaps best understood as a *bricoleur*, or maker of quilts or mosaics, who seeks to understand the world of lived experience piecemeal.[51] Qualitative research privileges rich description and the detailed exploration of specific cases to better understand the particular lived reality of the subject being studied. This approach stands in stark contrast to the quantitative emphasis on "measurement and analysis of causal relationships between variables," and the use of mathematical formulas, statistical tables and graphs.[52] Qualitative researchers instead present prose, narratives, and first-person accounts to uncover the realities of everyday life.[53]

Thus, the research team for the Common Moral Problems in the Professions Project adopted qualitative interview and open-response survey strategies that we hoped would contribute to a deeper knowledge and understanding of the routine or common moral problems encountered by practitioners across the professions.[54] Specifically, our project sought to answer the question:

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[49] While Drs. Reside and Barry collaborated with me as co-Principal Investigators on the research design and data collection for the Common Moral Problems in the Profession project, this Article is solely my work and responsibility.

[50] Norman K. Denzin & Yvonna S. Lincoln, *Introduction: The Discipline and Practice of Qualitative Research*, *in* HANDBOOK OF QUALITATIVE RESEARCH 5 (Norman K. Denzin & Yvonna S. Lincoln eds., 2nd ed. 2000).

[51] *Id.* (citing CLAUDE LEVI-STRAUSS, THE SAVAGE MIND 17 (2d ed. 1966); Deena Weinstein & Michael A. Weinstein, *Georg Simmel: Sociological ~~Flâneur~~ Bricoleur*, 8 THEORY, CULTURE & SOCIETY 151, 161 (1991); Cary Nelson, Paula A. Treichler & Lawrence Grossberg, *Cultural Studies: An Introduction*, *in* CULTURAL STUDIES 2 (Lawrence Grossberg, Cary Nelson, & Paula A. Treichler eds., 1992)) (discussing the interpretive bricoleur as one who produces *bricolage*; "that is, a pieced-together set of representations that are fitted to the specifics of a complex situation") (citing BELL HOOKS, YEARNING: RACE, GENDER, AND CULTURAL POLITICS 115-22 (1990); HARRY F. WOLCOTT, THE ART OF FIELDWORK 31-33 (1995)) (discussing the quilt maker metaphor).

[52] *Id.* at 13.

[53] Denzin & Lincoln, *supra* note 50, at 5. Qualitative research is not without its critics. It has been derisively labeled "unscientific," "only exploratory," and "subjective." *Id.* at 12 (citing Joan Huber, *Centennial Essay: Institutional Perspectives on Sociology*, 101 AM. J. SOCIOLOGY 194 (1995); NORMAN K. DENZIN, INTERPRETIVE ETHNOGRAPHY 258-61 (1997)). *See also* Gary Alan Fine, *Ten Lies of Ethnography: Moral Dilemmas of Field Research*, 22 J. CONTEMP. ETHNOGRAPHY 267, 268 (1994) ("Qualitative research is both more and less than its public image.").

[54] This study was designed to be exploratory. Its data pool was relatively small and, in some instances, anecdotal. Even given the small pool of data, in both the interviews and the surveys with doctors and lawyers some commonalities emerged. This paper discusses just one of those commonalities – the tension between business realities and professional ideals.

Much of the narrative data were gathered using both semi-structured interviews with practicing lawyers and physicians, and open-ended response questions distributed via the Internet. Gunz & Gunz employed a similar interview-based methodology when they studied the conflict between the role prescribed for legal professionals by society and by professional bodies on one hand, and legal professionals' actual

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with what moral problems do professionals in the fields of law, medicine, and ministry commonly struggle?[55] The scope of this Article is limited to the legal and medical professions, and to an area

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behavior in practice. *Supra* note 30, at 699-702. In the present study, twenty-three lawyers and nine physicians participated in face-to-face, semi-structured interviews with the author. One of the primary aims of this pilot project was to gather data that would serve as a guide for future inquiry. Accordingly, interview participants were identified by peers as particularly thoughtful about issues relating to ethics and the life of a professional. Additionally, efforts were made to include equal representation among men and women, although the gender distribution was regrettably not even. Subjects, did, however, represent a variety of practice settings and years of experience. Of the twenty-three attorneys that agreed to be interviewed, only seven were women. Thirteen had been practicing law for one to seven years, six had been in the practice eight to sixteen years, and four had been in the practice more than seventeen years. These attorneys represented large and small law firms, solo practitioners and in-house counsel across a variety of practice specialties. Noticeably absent from this interview sample are representatives from criminal or government practice. Therefore the applicability of these findings is limited to the experiences of civil attorneys, most of whom labor in firms or corporate practice environments. Further research is necessary to determine whether the link between commercialization and moral distress demonstrated in this article applies in other practice environments.

Of the nine physicians who agreed to be interviewed, only two were women. Three had been practicing medicine for one to seven years, two had been in the practice for eight to sixteen years, and four had been in the practice for greater than seventeen years. These physicians included academic and community doctors across a wide range of specialties. The interviews all began with the same question: "When is the last time you had to stop and think about a problem or dilemma in your practice that had a moral component? Tell me about it." The interviews lasted between thirty and sixty minutes. They were audio-recorded and transcribed. Although some discussion of interview content occurred between the primary investigators, the author was primarily responsible for analyzing the interview transcripts for core themes and content.

In addition to the interviews, open-ended survey response questions were distributed nationwide to approximately 5,400 physicians and 4,900 lawyers. One hundred seventy-five physicians and 158 lawyers returned surveys, reflecting the challenges of gathering substantive qualitative data from those who bill by the hour or rarely have the time to sit at a dying patient's bedside. Using law and medical school alumni lists from a private university located in the Southeastern United States, surveys were distributed via e-mail to physicians and lawyers throughout the country. Of the 158 attorneys who responded, thirty-eight were women. A large majority of respondents practice in law firms, although in-house corporate and government lawyers also responded. Of the 175 physicians who responded, forty-three were women. Approximately seventy-five percent of respondents were either in private or academic practice settings, in about equal number. The remainder identified government, non-profit, business, and "other" as practice settings. The surveys consisted of three related questions. The first asked the respondent to use a single word or phrase to identify one of the moral or ethical challenges that he or she encountered in his or her work as a physician (or as a lawyer). The two follow-up questions asked the respondent to elaborate and, if appropriate, to provide an anecdote to further explain why the problem or challenge is of concern, and how practitioners might best respond to this problem or challenge. The three prompts were then repeated twice, so that a respondent could describe up to three different moral or ethical challenges encountered in their professional life. The questionnaire was also designed so that respondents could type as much or as little as they wanted in the open response space provided in the form. Using graduate student assistants, the survey data was analyzed for core themes and content, and disagreements in categorization were reconciled through discussion.

The institutional review board at Vanderbilt University approved the study, and all interview subjects and survey participants provided informed consent.

[55] The long-range objectives of our project are: (1) to provide a more fine-grained understanding of the moral problems within particular professional domains; (2) to discover if there are common themes across the moral lives of professionals; and (3) to inform pedagogical efforts and ongoing professional identity

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of overlapping ethical concern that emerged from the data: reconciling the practitioner's desire to fulfill professional aspirations, and obligations of service to patients or clients, with the institutional, structural, and self-imposed commercial constraints of the increasingly commercialized reality of professional practice.

B. Results

Below I have bifurcated the reporting of the raw narrative reports, with lawyers' data presented first, followed by physicians' descriptions of life in the trenches. Reproducing blocks of text with minimal editorial comment best preserves the richness of the qualitative narrative data. I have, however, grouped responses according to similar patterns and themes amongst those business-related concerns that, for many professionals, exist in tension with the highest ideals of their professions. While I have included some introductory and transitional commentary, I have reserved the bulk of the analysis for Part IV.

1. Legal Professionals, Billing, and the Business of Serving Clients

Using a diverse vocabulary and a multiplicity of examples, lawyers reported that a reoccurring issue that gives rise to moral distress in their professional lives concerns the economic pressures of their practice.

> . . . [T]his is going to be sort of critical of my own firm, but I think it's probably true of most law firms. As a young associate, even as a middle-level associate, a lot of times you see the partners as they want to make money. And they're going to look at a moral-ethical dilemma in how do we get through this and still make money. And what I want . . . to give younger associates is how [to] approach a moral ethical dilemma, get through it, get to the right decision, feel good about it and whether or not we can make money at the end of it is irrelevant. Sure, we're here to make money. We're a business. I think everybody knows that. . . . [However,] I don't want that to be the baseline. I want the baseline to be what's right and what's wrong and what's ethically as well as morally permissible. [Lawyer Interview #5]

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> You don't appreciate compensation at the partner level [and] that has been the big wake up call for me. That it's all about the money. And I knew that but I had no idea. [Lawyer Interview #10]

Many respondents emphasized the centrality of making money in their law firm experience, and the concomitant moral discomfort this creates. More specifically, respondents frequently raised ethical concerns with respect to the business of being a lawyer in the context of

formation by identifying and filling the gaps in current professional school training and continuing education curricula.

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the billable hour.[56] One partner noted that the meaning of "professional" has evolved into more of an hourly "support help" role because all those in the legal profession that have to record their time have an ethical issue with billing all day, every day. [Lawyer Interview #23]

One lawyer articulated her frustrations over billing and the business of being a lawyer in explicitly moral terms:

> [A]s lawyers, we're licensed professionals and people put their hands in our lives. . . . [W]e deserve to make money and . . . people know they're being charged . . . But what bothers me is that the Code of Ethics requires us to charge a reasonable fee for our services. I think we have a moral obligation to do that because of the kind of confidence that clients put in us, and I think that too many lawyers lose sight of this sort of value for services rendered and just think that whatever the market will bear or whatever people will pay, or whatever folks in the elevator bank upstairs are charging, is what they should be able to charge. I think that people get so focused on charging people an arm and a leg that they don't really think about this value for service, and I just think it's wrong because I think lawyers make plenty of money. . . . [T]his is a really big dilemma [for many lawyers], and I think a lot of lawyers struggle with it, but I think at least just as many are sitting there thinking, 'I've got bills to pay. This is a really hard job. I work really hard. The hell with them. We'll charge them what they'll pay.'[57] [Lawyer Interview #22]

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[56] Billing was a frequent theme discussed by interviewees, and overwhelmingly the most pervasive topic addressed by survey participants. One representative respondent summarized the issue succinctly: "As for the billable hour requirements, I think the profession of law is becoming commercialized to the extent that we're losing a focus on the quality of life and being made servant to the dollar." [Lawyer Survey #2]

[57] Many respondents mentioned the perverse incentives created by hourly billing in six-minute increments. For example, one lawyer answered the survey with a lengthy diatribe on the issue of value to the client: "[The billable hour] doesn't address value especially well. If a lawyer can solve a client's problem with one or two phone calls, spending one hour of work, but delivering a $10,000 return, that's not especially fair for the lawyer. By his nature, that lawyer — who knows he's delivering a big return for little work — may be incentivized to draw it out. On the other hand, as a new lawyer, it's painful sometimes to see my hours. I know that I'm not as efficient as a senior lawyer . . . but it's hard to be objective about what it takes to solve a problem. [For example,] in the category of litigation, this seems like a bigger problem: at the hourly, a lawyer has an incentive to draw out the process and even to appeal, even if the cost-benefit doesn't run in the client's favor." [Lawyer Survey #2]. Another respondent argued a causal connection between hourly billing and depression amongst lawyers: "Personally, I think billable hours are a huge conflict of interest. We should be serving our clients efficiently but it's not in our interest to do so . . . . [W]e thrive on exploiting the biggest conflict of all, [and] I think it frustrates the profession and ultimately leaves it ill-suited to change. I think it is the biggest reason lawyers are so depressed." [Lawyer Survey #17]. On the connection between ethics and mental health or psychological well-being, *see generally* Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity, and Happiness*, 11 CLINICAL L. REV. 425 (2005); Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999); William Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079 (1990); G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 11 AM. B. FOUND. RES. J. 225 (1986).

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Two associate interviewees stated:

> I think one of the ongoing ethical things for attorneys deals with billing and how, you know, I mean there's a contrast there particularly when you're an employee, an associate, between the business that's being run which makes money by billing and wanting to serve the interests of your client at the cheapest possible amount of money. . . . [E]ven if you know other people down the hall or other people in other firms might round up or double bill or whatever, you can't give-in to that temptation. Even if it might affect how much money you make or how you're viewed in the firm. . . . Your obligation is to the client. [Lawyer Interview #17]

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> [J]ust as a general thing, what keeps me up [at night] or bothers me is probably the billable hours. Our rates are very high and so I have this moral conflict about billing people more than I think the work is worth so I'm constantly kind of cutting down my time. . . . [58] I'm constantly leaning on myself, and saying, 'Oh, this took longer than it really should have," and then I'll cut my time down because I don't think the client is getting value, and I think it's somehow wrong to charge them more. That's probably the biggest moral dilemma that I've faced at a private law firm — feeling like a client is not getting value. . . . I don't want to overbill them, and I don't want to rip anybody off. [But] on the other hand, if I cut my time enough then it becomes more and more difficult to make [my firm's billable hours requirements.] [Lawyer Interview #8][59]

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[58] Meanwhile, other associates reported being told by superiors to "cut down their time." "I was often told by partners to make sure I billed only a certain number of hours to a project, regardless of how much time the project actually took. This would result in either (a) me cutting my time on a project so that I wouldn't get credit for the time I spent, or (b) not feeling like I devoted sufficient time to research, drafting, etc., thus not necessarily providing the client with the best work product. . . . As an example, if I received a drafting assignment from a partner, he might say that it should take 5 hours. If it actually took me ten hours, I would sometimes record only five hours because if I recorded ten, I would get yelled at by the partner and he would be less likely to assign me work in the future. This directly affected my compensation and bonus. The flip side of this is that if you don't record all of your time, you are in effect 'stealing' from the firm because you are not allowing the firm to properly bill for the time you spent as an attorney working for them and their clients." [Lawyer Survey #85] A partner echoed: "[Y]ou bill by the time you spent, [but] the flip side of that in terms of being fair to your family [is] [i]f you spend all day on something, legitimately, but you know that the client's tolerance is capped at a certain number, then you may have just given away half your day. You know, is that fair to your partners, to your spouse, your kids? So we wind up writing off a lot of time that's legitimate in the sense it was required . . . [because] there is a tolerance and at some point you've got to decide am I going to eat that time or am I going to lose the client?" [Lawyer Interview #23].

[59] To illustrate further, this respondent told a story about a case "that we don't normally take in a large firm" because it was "just a single individual who had a dispute with the IRS." He noted that this individual had a "good job and makes good money but is not wealthy, [and] to use a firm like this, if you're an individual, to fight a tax case, you absolutely have to be wealthy. I mean there's no way you're going to be

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A former government lawyer, a relative novice at the business practices of private law firms, described a tax litigation matter that was representative of his initiation into the world of law firm economics:

> I worked on one case as a litigator in the tax group . . . [w]here I felt like the partner was sort of churning the case, but I didn't know [for sure] if he was . . . because I didn't really [want to] believe that's what he was doing. But I just [came to] believe that he didn't seem to have the client's interest in resolving the matter at the top of the list. . . . That was a moral dilemma for me because [I was] a brand new associate [and] I felt like I had no leverage [and] very limited knowledge . . . and this uncomfortable feeling. [Lawyer Interview #8]

For junior associates working at law firms, direct communication between client and associate is not always viewed as economical. Such engagement is often considered the purview of the partner, and associate involvement is thought to be an unnecessary expense the client will be unwilling to pay. Yet, associates whose practice is completely detached from actual client interaction report a feeling of powerlessness and alienation that many cited as a source of moral distress in their professional lives.

Indeed, traditional notions of lawyer professionalism, and the majority of formal legal ethics rules, envision duties that are realized in the context of the lawyer-client relationship.[60] But for non-partners, those attorneys without an equity or ownership interest in their law practice, being a law firm employee muddles this traditional professionalism analysis. Professional duties and responsibilities more often resemble the dynamics of non-professional employers and employees, rather than those of the lawyer-client relationship. In an interview, a third year associate noted that if he was "bringing in business" he would be clear with his clients from the start that he was "not going to be willing to be the junkyard dog guy." [Lawyer Interview #7] Although eager to represent his clients to the best of his abilities, and to fully defend their interests, he also stressed communicating to future clients the limits of his representation. For example, he would not use tactics to simply harass the opposing side, nor would he let the

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able to pay the kind of bill that you're going to get from here unless you are a wealthy individual . . . ." This associate noted that as he worked on this individual's case he kept his hours to an absolute minimum, but the client would still complain about the bill. "The client was very nice, but the client is also ignorant of this business and how this business works. The client said, 'I already sent you guys a check for $2000, and I just received another bill for $5000,' and the client is like, 'That's, you know, a ton, and I just can't pay that right now.' And I said, 'Okay, that's fine." And I would try to just cut my time, keep my bill to an absolute minimum. I didn't feel like I could push the partner [to discount the bill] . . . the other problem was because the case wasn't a big fee, important case, it wasn't getting any attention from him." This "other problem" resonates with the findings of Gunz & Gunz, *supra* note 30, at 699-702.

[60] MODEL RULES OF PROF'L CONDUCT, Preamble 2, 4 (2002) ("As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others. . . . A lawyer should maintain communication with a client concerning the representation.").

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litigation "become personal."[61] [Lawyer Interview #7] Yet, he quickly added that, as an employee trying to maintain his own sense of professionalism, he was very frustrated:

> I think the biggest issue is [that] I work for a partner. . . . I represent the client, but I work for the partner. He's the one who pays my salary, who can hire me and fire me. And so I've got to keep two people happy: the client and the partner. . . . [But the partner has] the client contact for the most part and . . . you definitely can't have that conversation with the client about what you are willing to do. It's all about what the partner's willing to do and so you're sort of forced to . . . operate at whatever the partner's ethics standards are [and] . . . it's very frustrating . . . if you guys draw lines in different places. . . . You got to talk to him and explain the difference and a lot of times . . . I think you end up not doing that out of fear of getting fired. [Lawyer Interview #7][62]

A number of other law firm associates also discussed this tension between being a professional and being an employee:

> I put the client at the very top, but I suppose sort of reluctantly pleasing my boss is a close second. . . . I'm working for the partner, and I want to do what the partner views as a good job, and I think the dilemma . . . is that I had a different idea of what was good client service. [In fact], I started getting the impression that the partner didn't care about client service. . . . [I]t's become more of a business than a profession . . . [and the partner's attitude is] as long as these guys are willing to pay, I'm just going to take their money and keep going. [Lawyer Interview #8]

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> We had a couple of really difficult situations where we had a Spanish speaking client, a poor Spanish speaking client, illegal immigrant and trying to communicate with him and talk him back to where . . . it was still going to be good for him . . . was very, very difficult. So my partner and I spent a great deal of time in conflict over the framework with which you talk to people and he was talking within the framework of 'Get their business,' and I mean that's a, that's a different dynamic for me at least.… [The] idea of reaching out and getting somebody . . . the whole business side of things . . . the marketing idea . . . the

61 This interviewee admitted that he hasn't actually had a conversation like this with a potential client, and "so who knows how easy that will be when I actually have to do it."

62 Lawyer #7 is an Associate. Another interviewee, a Partner at a different firm, also addressed this issue: "[Associates] are disconnected, and it's a function perhaps of working for somebody else rather than having the client access. . . . [T]hey're learning how to be a lawyer. They're learning about the business of law. . . . [And when it comes to representing a client] I think I would definitely involve the younger lawyer . . . but the problem is when you represent individuals, you have to be a lot more cost conscious. . . . I have an obligation to my partners to make sure they get paid. . . ." [Lawyer Interview #22]

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> networking . . . I find it all a little repulsive. That's difficult for me. [Lawyer Interview #21][63]

Notably, solo practitioners and lawyers in smaller practices did not report many of the dilemmas discussed thus far in the context of larger firm practice. For instance, one interviewee noted that as the "business owner " she is afforded a great deal of flexibility when it comes to "selling help," and did not report any of the moral distress surrounding billing issues reported by many of the attorneys employed by law firms.

> I'm very fortunate because my billing is what I say it is, and I only need to make how much money I want to make. So for most of my practice I could choose whether to charge certain clients (who I knew could afford it) top rate and every cent, or somebody else on the other hand that I know needs a break, I could do that. That's just not been a problem, and I'm very, very fortunate to be able to do that. . . . I have worked at a small firm and . . . you don't have that kind of flexibility at a firm because your salary and your income is often driven by the fees you generate . . . [and] as a business owner, I understand you have a bottom line but when it's small – like just me – I am . . . free to work free, to discount my time, even to not account for my time. [W]e forget that what we're selling is help. [Lawyer Interview #19][64]

Solo practitioners who participated in this study described a level of autonomy not enjoyed by their law firm colleagues – especially those still at the associate level; however, autonomy can present its own problems. One tax planning, wills, and estates lawyer in his eighth year of solo practice described one such dilemma: a client wanted him to shelter money in ways that the lawyer felt were arguably against the law, and at a minimum, morally problematic. And

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[63] Associate-partner conflict was a recurrent theme in the data, with associate impotency over client issues the primary concern. Lawyer Survey #155 discussed the situation at the "large international firm" where he formerly worked: "[T]wo junior partners who were very insecure could not see that their forcing particular courses of action was not benefiting the client, and any dissent was treated as a reason for dismissal. Given the difference in power structure between associate and partner, the associates at the firm had virtually no choice other than to go along with the bad legal result or to find other employment. I chose other employment and started my own firm. . . ."

[64] The reality, however, as expressed by many lawyers in this study is that the business of selling help is complicated. Lawyer Survey #56 stated it this way: "Truly placing the client's interest ahead of your own interest is very difficult. For instance, a lawyer who needs to be paid by a client who can't afford to pay faces a hard decision about continuing to do uncompensated work. I hope the profession will take seriously its obligation to put client interests ahead of personal interests, [but] I also believe that lawyers have become obsessed about making large amounts of money – or perhaps that money pressures from our personal lives have caused this obsession. Frankly, the lawyers who are good businesspeople don't take the case in the first place if the client can't afford it." Lawyer Survey #129 stated: "Some lawyers will justify having a minimum [one-tenth of an hour billing entry] for a phone call or letter (0.2 [twelve minutes] or 0.3 [fifteen minutes]), regardless of whether it's a ten second voicemail or dictation of a cover letter, by saying that insurance companies are robbing them by forcing low hourly rates and refusing to pay for particular activities. While the reasoning makes sense, it's dishonest billing. Other lawyers bill only for what they actually do . . . are extremely careful to record all their time. In order to make a living, though, these lawyers seem to spend lots of nights and weekends in the office. While their billing is honest, their personal lives suffer for it."

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yet, a former client who had many connections in the community had referred this client to him. As a solo practitioner, the lawyer relies on referrals to "run his small business" in the face of "very real economic realities," including private law school debt. [Lawyer Interview #20] However, he was quick to point out that early in the representation of a new client, he communicates clearly his professional values and personal priorities. [Lawyer Interview #20][65]

From the data emerged a countervailing influence that contributes to a less ethically complicated practice environment, characterized by less profit-driven decision-making: the ability to develop a relationship of trust and respect with a client, often enjoyed by solo practitioners or lawyers at a very small firm. One associate with nearly six years of experience in practice at a law firm with fewer than twenty lawyers made a particularly insightful observation:

> [T]he happiest attorneys [I know] are the ones off on their own doing car wreck cases or whatever. I don't mean all of them. A lot of them go bankrupt, but I mean the ones who've made it. Those guys are the happiest guys. Those guys don't worry about billing, and they don't worry about running the business. They're just representing their clients and making enough to make a living. But then there are the big firms [that are increasingly becoming] an all out business and having . . . a managing partner that doesn't really practice law. He runs the business. [Lawyer Interview #17][66]

A partner with sixteen years experience highlighted this relational element as a key component to maintaining a meaningful connection to professional ideals in the midst of the daily realities of being in the business of delivering legal services:

> [O]ne reason I can't give you a lot of examples [of moral distress in my practice] is. . . because I think it's important to establish . . . a relationship of trust with my client. . . . [T]he people that come to hire me or come to see me, this is what there is. I am the business. I'm selling me and the most effective way I have found to do that is to be very true to who I am. I'm kind of the same in my law practice as I am in my personal life. . . . I have a lot of business and people refer me business so I guess they're happy with the product, but really I

[65] Lawyer #20 elaborated: "I've had a couple situations where, thankfully it was either pre-official engagement or . . . soon [after the Engagement Letter had been signed] . . . so I really hadn't done, you know, I hadn't invested that much and you know, we could kind of calmly and benignly distance ourselves you know, and say, 'Hey, you know, this is, this just isn't going to work out. Sorry.' . . . . I mean, interestingly, talking to you, the doctors are probably the worst about this. You know, because they all talk to each other, and it's very much a, you know, a collegial kind of thing – especially when it comes to money and investing money or, you know, sheltering money or, you know, whatever, tax planning kind of stuff. I mean, I've said, 'Look, we, you know, we could probably take this position, but you know, I'm just not. I mean, I'm just not the guy that can take it for you.'"

[66] Another senior associate made a similar observation, noting that it's "a moral challenge" to practice at "larger law firms entrenched with the billable hour" and "to bill at levels that will sustain the salary" while balancing family and health obligations to one's spouse, children and personal well-being. "Some attorneys respond to this challenge by going to smaller firms, in-house, or leaving the practice of law." [Lawyer Survey #91]

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> think we all find as professionals people may just go with the person they like the best. [Lawyer Interview #19]

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> I'm probably not the best businessman, [because I strive to keep costs down by only researching and analyzing those issues with the highest probability of arising in this case]. [A]nd maybe that's not how you're supposed to do it. I probably do it wrong for some clients, but I think doing it this way you gain your client's trust. I mean, I've been practicing long enough now where I have [my own] clients, and they just trust me now. . . . [M]aybe that's the profession part of it. . . . You know, they might call you up on a personal matter after you've done a couple of business things with them, and they just, you know, trust your opinion. . . . You know, that feels good, and that what practicing law is [all about]. It's more important to me than whether I make partner. [Lawyer Interview #17]

Ultimately, many lawyers seem to experience genuine moral dilemma over the often-competing objectives of making money or advancing their career, and serving the client's best interest. One survey respondent articulated the tension as a choice between short-term and long-term investment:

> Client billing is a moral/ethical issue I face every day. . . . I am hopeful that I am dealing with this issue by being honest with how much time I record. . . . [But] [w]hen you are an associate (and thus often evaluated based upon your "billable hours"), there is a strong urge to pad hours. . . . [Yet] I also have had to recognize that investment in people and relationships is well worth the time investment, even if not time I can "record" and "bill." Such relationships enrich my practice, even if it does not lead to any business. In fact, I have found that if my investment in such relationships is merely to serve myself (let's see who I can meet and thus use for business development), those relationships tend to be shallow and not enriching. Rather, when I truly invest myself in those relationships (regardless of what I get out of it business-wise), those are the most enriching and add the all-important purpose and contentment to my professional career. [Lawyer Survey #16]

2. Medical Professionals & Commercial Constraints on Patient Care

Physicians routinely experience moral distress when commercial concerns compromise their ability to care for patients, especially when those commercial concerns are animated by systemic or institutional forces beyond the physician's immediate control. A dominant theme that emerged from the data was that physicians experience emotional distress when they must deal with patients' financial barriers, such as limited or no health insurance, at the bedside. Such constraints can compromise the physician's Hippocratic obligation to "do no harm," and practicing medicine within a health care system dominated by systemic inequality with respect to resource allocation is an ongoing source of ethical concern. Physician Survey #8 said it most

succinctly: "I believe care should be available to all, and I find it very frustrating to be forced to give what I know to be substandard care because patients can't afford [a higher standard of care]." The elaboration of other physicians reveals the variety of ways that insurance issues and reliance upon safety-net providers[67] create moral dilemmas for practitioners.

> The most common moral dilemma I face has to do with people that need a certain kind of care but there is an issue [with their insurance]. Either they are uninsured or have poor insurance. It would be rare for me to go through a day in the clinic and not face some form of this issue. . . . [For those with poor insurance] I know if I say certain words that it will allow the patient to qualify and if I don't, they probably won't. The insurance company will probably deny it, and I find that to be a problem. . . . You can go to jail for insurance fraud if you say something that is not true. I have never done anything like that where it is just blatantly untrue but where there is a range of possibilities, I find that to be a [moral] problem. [Physician Interview #2]
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> [W]hen your patient gets sick and ends up in an ICU setting, there are some costs associated with daily care in the ICU, and let's say that cost is X. Well, if you get sick, insurance or Medicare or whomever is going to say that that sickness is worth X amount of days in an ICU at so many dollars. Fine. That's what the insurance companies have said. That's what everyone says. . . . If you go over those days, you're no longer getting paid for the care of that patient who's obviously still sick. So how do you improve the payer ability? You can justify it with all sorts of written notes and things but one of the small loopholes in the system of critical care is that a tracheostomy is the highest billing code for an ICU patient. Meaning if you get a tracheostomy, then you gain twenty-one days of care. . . . So if you're on a ventilator, there are a lot reasons why you can justify somebody might need a tracheostomy. Most people would say give him seven days, ten days, and see if they'll come off the ventilator. There is a lot of risk associated with doing a tracheostomy. . . . But in this institution, you would be hard pressed to find a patient in the trauma unit that isn't tracheotomized within five days of being in the hospital. That's not how I was trained. I personally wouldn't do it until I've seen that somebody has failed the possibility of being extubated at least once and yet I know that that occurs on a regular basis to improve the sickness level or whatever you call it that will improve the

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[67] One surgeon noted that he sometimes sees patients that come from as far away as 200 miles, "because there's no doc in the small community where they are or there's no surgeon who will take [Medicaid]." I followed-up by asking, "What's the deal with your colleagues?" He responded, "Honestly, well it's, you know, it's just a business decision." [Physician Interview #8]. *See generally* Joshua E. Perry, *The Safety Net is Not the Solution*, TENN. MED., Apr. 2007, at 37, 38 ("[T]he healthcare safety net is a loosely-organized consortium of public health departments, community health centers, faith-based clinics and public hospitals that partner with doctors and nurses to serve those without health insurance.").

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paying status, the payer that's paying for that patient's status in order to increase the overall value of their stay. [Physician Interview #4]

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When I was doing in-patient attending a month ago, we had an undocumented so-called illegal Mexican woman who had a very serious problem, very serious. Really needs aggressive treatment in a certain way. It is impossible that [this hospital] could follow her, and so I managed to arrange for her to be seen by one of our former residents who runs a [safety-net clinic] that does see anybody, and so I am operating as sort of a behind the scenes consultant. She e-mails me with things, and I give her advice. And I see her, but I can't do anything when I see her. I can't get any lab work or anything because [this hospital] won't let me. It is clearly not the optimum care [she needs] and . . . we end up compromising.[68] [Physician Interview #2]

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[L]et's say there's a patient that's in the hospital and there's nothing active going on with their medical care that requires hospitalization. But let's say that medically the team feels that the best place for them would be a nursing home. Well let's say that they don't have any insurance and the only nursing home in town is one that accepts a state run program, and let's say that they don't have any beds. There are times when we might send that patient home and trust that maybe a social worker or someone else will follow up on them even though medically we don't necessarily think that's the right thing. . . . These kinds of problems with limited resources make you say, "Oh, man. I know this isn't the best thing, but this is kind of the system that we have to work with." [Physician Interview #9]

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[68] Physician Survey #30 explained how "working in [the current] system does not allow [him] to fully fulfill [his] duty to care for some patients." This causes him concern "because it erodes the ethical and professional foundations of everything else." He elaborated: "If I'm attending in the hospital and we have an uninsured patient we are caring for, part of my job is to teach residents and students about their professional obligations to that patient. My professional obligation is not only to complete the minimum legal requirements for this episode of care, but to ensure that the patient's needs are met in the long term. Yet there is no way to do that. I cannot see the patient in follow-up because the institution's policies forbid it. No one in my institution can see the patient to follow-up with them as an outpatient. We will discharge the patient with a list of phone numbers for places where they may receive care regardless of their ability to pay. We do so knowing that there may be a wait of weeks to months. We do so knowing that if the patient needs specialty services, they are extremely unlikely to get them. I can talk about our obligations to patients all day, but in the end, I cannot model them for my students. The system doesn't allow it. Professionalism in that context is an empty aspiration, not a guiding moral foundation."

> I'm a general surgeon and a huge thing that comes up literally daily for me is just access to care for patients. . . . I see patients [referred by a community health clinic] and they understand that I'll see their patients and either not charge their patients at all or like a quarter of what I'd ordinarily charge. I feel very uncomfortable living in a country where if you're a hard working guy and you have a horrible hernia that just hurts you and you don't have insurance, it will cost you $10,000 to fix it, unless you can find me. . . . But if you have an emergency problem and show up in the emergency room, you're going to get taken care of and you'll get bills that you'll never, ever pay your whole life. But you'll get taken care of. And if you choose to have elective surgery, you're going to get hosed. [Physician Interview #8]

Physician Survey #27 put it most bluntly: "It is impossible to maintain personal integrity as a practitioner when the healthcare system has two tiers that are so far apart."

On the other hand, many physicians noted moral frustration at the opposite side of the spectrum, where an excess of resources can lead to conflict with a physician's professional judgment.

> [Physicians are supposed to] first do no harm. It's part of the Hippocratic Oath. But at the same time, we have this societal expectation where if a family member says do it, and they're the next in line, we do it. And you know, that leads to a lot of frustration and thinking about not only this one patient and how unfair it is that we're continuing to do invasive type things, but also on a societal level we're spending thousands and thousands, and tens of thousands of dollars, sometimes hundreds of thousands, completely uselessly. [Physician Interview #9]

Frustration over resource allocation was especially prominent among physicians who care for patients at the end of their lives. One physician noted that "healthcare is not a limitless commodity and yet physicians and hospitals treat it as such. We expend massive resources on dying patients with no hope of meaningful recovery." [Physician Survey #36]

> [W]e had a patient who was 90 years old that we did two operations back to back, one day and then the next, and it's a tremendous pouring out of what are very precious resources . . . a lot of times we question: Is that really the way the health care system should work [because] there are a lot of people that could be helped in a more preventive way. [Physician Interview #3]

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> [I think a lot about] when and how do we might shift the focus away from creating more tests, more expensive tests, more expensive radiology equipment, more expensive medicines, and allocating those resources to provide basic healthcare to everyone. Basic, good quality healthcare to everyone. Because I think every dollar you spend on one patient is a dollar less that you have to spend on someone else and there is certainly a huge amount of the population

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> that doesn't have quality, doesn't have any access to health care and doesn't have quality health care certainly . . . [S]o. . . . it becomes hard [when] there's a patient in front of you. They have abdominal pain. You know that another doctor might order a CT scan on them right then which is not terribly expensive but it's expensive enough. And you know, I don't know that I necessarily need to spend that money. But is that giving this person who's right in front of me the highest quality of care? And that's a hard question to answer because . . . my primary care patients [all have insurance]. They all expect to be getting the highest quality of health care available. So who am I to say you know, we're spending too much money on this group of people? We need to spend less money so that we'll have more money for other people who aren't sitting right in front of me. So that's . . . something that I struggle with and that's hard. It's hard to know where the right line is for that. [Physician Interview #1]

For other physicians, ethical issues arise in the context of having to manage a small business. The Hippocratic Oath, for instance, does not answer moral questions raised by hard business decisions such as the appropriate amount of employee benefits to provide office workers.

> [W]e have a small practice. There's only three docs in this group, and I've basically done the same number and type of operations almost every year for ten years. But every year I get a little less money from insurance and Medicare reimbursements. . . . So, as a practice, we've had to be less generous with our employees. We're looking at the 401(k) plans now and cutting back on that . . . [We've had to] ask the staff to pay the difference [on insurance premium increases.] And so what I've told our office manager is if I'm ever losing money for the practice by seeing so many indigent patients . . . and I'm turning away cases with good insurance and good reimbursement . . . you know, let me know. But I don't feel that I'm losing any money, just my time. The patients are much more grateful than all my other patients, and it makes me feel good just to know that. So, until they tell me you can't do this anymore because it's costing the practice so much money that we're in the red, I'll just keep doing it. [Physician Interview #8]

Finding adequate time to spend with each patient must be balanced with the time demands of bureaucratic and complex reimbursement systems. One physician noted that his most common ethical challenge was finding "the time to do what is best for the patient versus finding the time to document the appropriate level of billing." He elaborated that, "If each outpatient note does not contain at least ten items in review of systems, my coders kick it back to me. I spend the whole day counting: Did I get ten review of systems, did I put down at least 1 exam finding in each of eight different body areas, etc.?"[69] [Physician Survey #44] Such frustrations reveal perverse economic incentives that threaten to compromise patient care.

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[69] Physician Survey #53 echoed this sentiment, and emphatically summarized the wellspring of moral distress described in this Article: "American medicine has been transformed to a business model where everything is counted and restrictions are placed based on the ability to pay."

> [Y]ou don't have time with patients because, especially in internal medicine and other non-procedurally based practices, you don't get reimbursed for spending an hour having a discussion with a patient. So they just have to pack in so many patients to [get] reimbursed as much as they feel like they fairly should be getting reimbursed. . . . [B]ut at the same time, I don't think most doctors want it to be that way. I think they want to have more time, more quality interactions with their patients. But I think that's a major limiting factor, and I think because there's less time to talk, you tend to just prescribe more medicines and order more tests which makes the whole resource utilization problem even worse. [Physician Interview #1]

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> [T]he drive is all about clinical productivity. Seeing lots of people [in] less time. . . . That's probably on a day to day basis one of the more moral things that I face. [I call this] conflicts of obligation, because I want to spend time with my patients, time with my students and residents, time with my family, and still pursue academic interests. [Physician Interview #3]

One physician noted that being "a professional in medicine" necessarily entails treating patients and families in certain ways. Yet, late twentieth-century "changes in structures of the system" have led the practice of medicine to become "more business oriented and less about the profession," which in turn is "driving some of the change in behavior." She continued:

> In the last ten years since I finished [my residency here], the clinical volume coming through the hospital and the number of operations has expanded between 7-15% every year. [But] we have the same number of residents dealing with a tremendous increase of volume and so there is just no way that you could practice the way you did before and certainly there are things that we have access to that are much better now, but I think when you just stop and think about the dramatic shift in the pace of medicine and the pressures around it, it has changed what we felt was right as doctors . . . [W]hen I was a student, the pace, the time I spent with my patients was dramatically different than what trainees now have. [Physician Interview #3]

The physician further noted that the guaranteed salary line of the academic medical setting in which she works differentiates her from colleagues whose compensation is driven by "wanting to do more and more operations." In her estimation, what for her is a conflict of obligation becomes a conflict of interest for those whose decisions about "what is best for the patient" are negatively influenced by "trying to generate more dollars." [Physician Interview #3][70] Another physician contrasted his new practice environment with his practice setting in the United States military:

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[70] Much of the data reflects a deep self-awareness among physicians about this inherent conflict of interest. In response to the question, "What is one of the moral or ethical challenges that you have encountered in your work as a doctor?" one physician wrote: "Providing patient care in an environment that financially rewards physicians solely based on the number of things we do (tests ordered, medication

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> [I] feel pressure to bill for [my] services in a way to maximize revenue for [the hospital] as well as for [my RVU [relative value unit][71] incentives]. While many other practices in the country bill similarly, in a way that maximizes revenue, the financial drive seems dubious at best and largely unethical. I'm saddened after leaving the military, where billing was not an issue, that young physicians find it necessary to get caught up in this pursuit of maximizing revenue rather than focusing on patient safety and clinical care." [Physician Survey #161]

These financial conflicts of interest can be subtle. For example, one interviewee noted the seductive allure of pharmaceutical incentives:

> [When I was a medical student, I thought everyone would always do] the right thing for the patient. Well, you know, that was before I had a mortgage. It was before I had a kid. Before I had $200,000 worth of bills dropped on my lap with a big, fat booklet, and then all of a sudden, hey, you know, doing a talk for Pfizer once in a while, that's not going to hurt, and I'm going to get $1,500 and you know, whatever, it's just a couple of dudes I'm talking to and maybe getting a free dinner out of it. But maybe next time I go to write a prescription, in the way back recesses of my mind, the word Pfizer is going to come into play, and I'm going to write it on there and not know that that had changed my thought process of what the right thing to do is. [Physician Interview #4][72]

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prescribed, surgeries performed)." This physician noted his moral concern in the form of two rhetorical questions: "Have I always remained altruistic in my recommendations to the patient?" and "Does the fact that I will only earn significant money if she pursues surgery influence the manner and content of my presentation of the situation/procedure to her?" [Physician Survey #163]. Another physician noted: "I think at this institution the [financial] bottom line is probably a little bit more stressed than it is in other institutions. I mean at some level you have to make enough money for an institution to continue to function. That is true. [I]f I do a service, I think I should expect to get paid for it. . . . [But] there are things that maybe shouldn't be done or should be done by some other expert, because that's the right thing to do. . . . [For example, suppose] somebody has a surgical need, and it's a procedure that I did as a resident fifty or seventy times. But in the last five years I've done two because there are other people in the institution who are experts at that. But, you know that it's a high-billing procedure and you can do it, because you can do it. You've got privileges to do it. [But w]ould you do it on your own brother? . . . Doing that procedure may bring another X dollars in to your bottom line [and] that makes you look better and so therefore you get a bigger bonus at the end of the year. [That temptation] is out there and witnessed on a weekly basis at the very least. . . . So economics plays a huge part, I think." [Physician Interview #4]

[71] *See* John Lantos, *RVUs Blues: How Should Docs Get Paid?* 33 HASTINGS CTR. REPORT 37 (2003). Lantos notes that RVUs were developed by health policy researchers at Harvard and are designed "to take into account the training necessary to perform certain services, the technical difficulty, the intellectual complexity, the emotional stress, and the time that each service takes in a way that will allow payers and administrators to compare fairly the tasks of different specialists." *Id.* at 40. On the topic of this Article, Lantos observes that, "medicine does work in new, sometimes frightening, sometimes morally ambiguous ways" as doctors are not only "shamans, comforters, healers, guides through the transitions of birth, illness and death" but also "purveyors of the products of the bioscientific revolution." *Id.* at 38.

[72] *See generally* Virginia Sharpe, *Sea change on financial conflicts of interest in health care?* 39 HASTINGS CTR. REPORT 9 (2009); HOWARD BRODY, HOOKED: ETHICS, THE MEDICAL PROFESSION, AND THE PHARMACEUTICAL INDUSTRY (2007); LEONARD J. WEBER, PROFITS BEFORE PEOPLE? ETHICAL STANDARDS AND

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This novice physician, only in her second year of residency, also noted the economic realities of practicing primary care in the current profit-driven climate:

> [T]he time pressures and the financial pressures have been a surprise to me. I think I was told about them [as a student] but I think my attitude was always, 'Nah. I don't need to become rich being a doctor. I can go out and you know, sort of set things up the way I want to and make a little bit less money but still be able to practice medicine the way I want to.' And now the more I move forward, I really sort of worry about that. I have heard stories about doctors who, literally, make no money. One in particular I recently heard about practices full-time and makes no money. He basically makes enough from seeing patients to pay for his clinic staff and his rent. But he makes no money. He does take a long time with his patients and probably could do things more efficiently if he wanted to make money. But instead he spends his spare time giving talks for drug companies so that he can make the income that he feels like he should be making and he's then able to just practice clinical medicine because he enjoys practicing clinical medicine. But that story is terrifying to me, because I always thought if you were willing to make a little bit less money you could still make enough to be comfortable. . . . Maybe that was a little naïve. [Physician Interview #1]

IV. DISCUSSION AND ANALYSIS

Moral distress over client conflicts of interest, confidentiality and privacy issues, and end-of-life concerns tend to garner headlines, but the narratives above suggest that some, perhaps many, practicing lawyers and physicians are more often ethically challenged by commercialized practice environments. These environments are increasingly marked by financial pressures and billing constraints that conflict with the ideals that set these service professionals apart as custodians of the common good. Moreover, altruistic considerations often influence the decision to become an attorney or a doctor in the first place. As the discussion in Part II suggests, even if an individual is not personally motivated by the service ideal in choosing law or medicine, historically, such professionals have been distinguished by their emphasis on service to others above economic self-interest. These narratives, gathered from lawyers and physicians practicing throughout the United States at all career stages, suggest that these professional ideals have been compromised in the contemporary context of legal and medical practice. The result appears to be a kind of identity dissonance experienced in the daily practice of many lawyers and doctors. Are these professionals primarily in business to make money, or is their main objective to help patients or clients? Highlighting the struggle to balance these two concerns may be the most helpful means of demonstrating the ways in which routine decisions give rise to the moral concerns expressed in these qualitative illustrations.

THE MARKETING OF PRESCRIPTION DRUGS (2006); JEROME P. KASSIRER, ON THE TAKE: HOW MEDICINE'S COMPLICITY WITH BIG BUSINESS CAN ENDANGER YOUR HEALTH (2005); MARCIA ANGELL, THE TRUTH ABOUT THE DRUG COMPANIES: HOW THEY DECEIVE US AND WHAT TO DO ABOUT IT (2004); JOHN ABRAMSON, OVERDO$ED AMERICA: THE BROKEN PROMISE OF AMERICAN MEDICINE (2004).

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Although some might argue that the generalizability of anecdotal data is limited, similar patterns of response emerged frequently enough to suggest that these fiscally-rooted moral tensions may be widespread, and that lawyers and physicians are largely unprepared for, and uncomfortable with, the business aspects of legal and medical practice. Even interpreted cautiously, this study clearly suggests the existence of some previously unexplored common ground among medical professionals laboring in the clinic and lawyers practicing commercial law in a firm setting.

First, what these narratives identify is a more subtle and systemic set of concerns that flow from the business of being a lawyer in civil practice, and from the institutional constraints of practicing medicine in the commercialized United States health care system. The kind of moral distress described by the survey respondents and interviewees is unlikely to result directly in the types of headline grabbing ethical failings that would ordinarily lead to disciplinary proceedings or to the loss of one's license to practice. No lawyer is likely to suffer disbarment for fretting over whether to round-up or round-down when billing a client for a ten minute phone call. Likewise, physicians who 'go along to get along' might enjoy an otherwise meaningful and lucrative career, even while silently suffering from psychological discomfort over the limitations placed on their ability to practice their healing arts. But when these practitioners were asked to name a common moral problem with which they routinely wrestle in the course of their professional lives, it was predominantly those issues revealing a dissonance between professional ideals of service and practical realities of commerce, and at a rate at least equal to more traditional topics of moral concern.[73]

In far greater numbers than the existing literature suggests, lawyers framed their discussion of professional ethics in the context of billing concerns, employment issues, and client relations compromised by a lack of genuine client contact. These are the issues that most frequently create moral distress in lawyers' lives. Younger lawyers reported angst over pressures to bill exorbitant amounts of money to clients to whom they felt no meaningful connection. In addition, they expressed confusion as to their presumed role as autonomous professionals who desire to build and nurture client relationships, and their more subservient role as employees who merely generate partner incomes. More senior lawyers, apparently having made peace with the unease over billing practices reported by younger practitioners, framed much of their ethical anxiety in terms of the collection of fees from delinquent clients, payroll issues, and the management of other non-legal concerns related to running a small-to-medium sized business – including keeping the lights on. Many experienced lawyers also lamented the proliferation of financial greed within the legal profession, which they claimed has only increased over the course of their careers, and the larger burdens from law school debt born by the generation coming up behind them.

[73] In response to this inquiry about the types of moral dilemmas encountered in their practice, both lawyer and physician respondents reported the more usual suspects. Lawyers discussed encountering ethical dilemmas related to confidentiality issues, discovery tactics, conflicts of interest arising from multiple clients and clients who insisted on using tactics with which the lawyer was not in agreement. Physicians frequently reported distress around end-of-life and beginning-of-life issues, as well as conflicts of interests between family members, patients, and other stakeholders. The proliferation of ethical literature around these issues and the specific ethics rules and professionalism codes discussing these situations predicted their inclusion in the broad data set. This Article, however, is concerned with the less-well documented phenomenon of moral distress arising from the business of being a professional; a phenomenon that the data suggests is shared across the legal and medical disciplines.

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To the extent that financial and business-related issues complicate the lawyer's ability to act in the client's best interest, and thereby fulfill the fiduciary obligation and professional mandate to consider service before self, many lawyers experience ethical dilemmas or moral frustrations. Particularly for those attorneys practicing in multi-jurisdictional law firms consisting of hundreds, if not thousands, of legal professionals, a climate of profit maximization threatens to cause serious and continued erosion of the sense of service that has historically marked the legal profession. The data suggests that smaller firm settings and solo practice afford more meaningful client contact, and the autonomy to exercise professional judgment that may insulate lawyers from much of the moral distress identified in this paper. However, for many lawyers, particularly those driven by a desire for more complex and sophisticated legal work, in addition to considerable law school debt obligations, these options are not available. For both younger members of the bar – at higher risk of feelings of powerlessness, alienation and confusion – as well as more experienced lawyers – who reported the increased pervasiveness of greed within the profession – a common understanding of professionalism has declined. The moral tensions that arise from being a professional and being a businessperson deserve further consideration.

Similarly, for both more and less experienced physicians, issues related to the commercialism of medicine cause frequent and serious moral concern. The first and most obvious manifestation of these concerns relates to current health care insurance, and to reimbursement schemes that draw bright lines between those with, and those without, adequate medical insurance or the ability to pay. Physicians pursue the study of medicine for many reasons, but chief among them is a deep desire to contribute to the common good. Of course, many applying to medical school also recognize that admiration in their community, greater earning potential, and the pursuit of intellectual curiosities are part of the deal (the same of which could be said of lawyers). But it is still true that caring for the sick constitutes an essential part of the physician's professional identity. This Article finds that the current system of health care delivery in the United States erodes that identity, and creates the potential for long-term psychological harm, including the creep of cynicism, increasing professional burn-out, and physician frustration over systemic barriers to fulfilling one's professional calling. Physicians take an oath to do good, but then must practice in a system where it is often a challenge merely to do no harm.

The second notable finding centers on the allocation of limited and expensive resources, and compensation-influenced factors that seem to dictate which procedures get recommended, and how much time is spent at the bedside. Again, these issues have an obvious economic overlap. Doctors repeatedly discussed in moral terms their frustration with patients and family members who demand that "everything" be done, even when death is imminent, and professional judgment indicates that doing "everything" is not medically appropriate. In response to questions about routine moral or ethical challenges, physicians elaborated on economic pressures from insurance companies and hospital administrators. Physicians labeled it moral distress when asked to describe their feelings over the inability to perform their institution's requisite number of procedures and related bureaucratic paperwork, while still spending what they believe is the necessary amount of quality time to adequately care for patients.

Even if the health care system could be reformed to alleviate disparities between those patients to whom physicians have access and those to whom they have no or only limited access, the data suggests there are even deeper systemic wells from which physicians' moral concern may flow. Specifically, the expectation that physicians will use expensive technologies and other scarce resources, particularly around the end of a patient's life, is neither financially nor morally realistic. As physician and philosopher Jeffrey P. Bishop has noted, physicians may have an

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increasingly delicate leadership role to play in the re-calibration of societal expectations around medicine's ability to stave off death.[74] And yet, to the extent physicians attempt to push against the tide in this area, they will have to confront head-on not only the psychological tendency to deny death, but also the big business interests of what some now refer to as the "new medical-industrial complex."[75]

V. CONCLUSION

I will never forget my first day of law firm practice. I had not yet received the bar exam results, but there I was at my firm's orientation. The partner who would later become my mentor pulled me aside and, with a wry smile, said, "Josh, when I first started my practice, I wanted to do good. But now, after twelve years in this firm, I am satisfied to be doing well." The change in this attorney's motivation left me wondering whether it was even possible to merge my altruistic inclinations with my financial needs. After all, law school had trained me to think about professionalism in terms of service to a client and to society at large, but I had also accumulated enormous legal education debts, and was now facing considerable billable hour expectations from my legal employer. Thus, even on my first day as a lawyer, I glimpsed the treacherous moral terrain that is reflected in the first-person narratives reported in this study.

The research project presented in this Article was designed to explore the tension I encountered on my first day on the job. Along with co-investigators, I endeavored to reveal those moral issues that are commonly encountered in the professional lives of both lawyers and physicians, but which are rarely discussed in the scholarly literature. This project was never envisioned as one that would explore the front-page ethical dilemmas of the day, such as genetic cloning and stem-cell research, patient or client sexual abuse, or conspiracies to assist corporations with corrupt practices. Rather, this project was motivated by a curiosity about what make up the common – which I define here as routine, mundane and non-extreme – moral challenges of professional life in the twenty-first century United States. Secondly, the project sought to discover whether such concerns might be shared across professional boundaries.

My law firm mentor notwithstanding, many of the lawyers who contributed to this study routinely wrestle with moral questions rooted in a tension between doing well and doing good. Given the emphasis on increasingly large law firm bottom lines, as well as the deeply embedded market component to health care delivery, and the willingness to embrace high-cost medical technologies, it becomes difficult to envision curbing the sort of moral distress this Article describes. Common themes to emerge included client and patient alienation, the loss of any meaningful sense of service to the common good, pressures to bill clients and to pursue maximum reimbursements from third party payers, an attendant instability in the balance between work and personal life, a sense of powerlessness from younger practitioners, and a sense of loss from those practicing for several decades. Such concerns make up the ethical and moral province of the contemporary medical and legal professional.

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[74] Jeffrey P. Bishop, *Death Panels and Medical Mortality* (Oct. 23, 2009) (unpublished Op-Ed, on file with author) ("[F]ear of death animated the production of medical technology, which has resulted in a shift in the cultural frame through which we envision death. This fear of death remains latent in medical technology and even the medical establishment resists admission to finitude. After all, we have spent so much money to stave off death, shouldn't we see a return on the investment in our technology[?]").

[75] Relman, *supra* note 36, at 375.

As noted in Part II, the professions have been historically understood as social institutions that privileged service to patients and clients over self-interest, and which carved-out a social space for professional autonomy to be exercised on behalf of the common good. Yet, these notions are strained in the twenty-first century professional life of an attorney or physician. This tension gives rise to a particular brand of moral distress that I hypothesize is not present in professions less historically understood as "helping" or "serving" in their fundamental orientation. This comparative analysis across other spheres of business and professional activity is just one avenue for future inquiry suggested by this work.

But for those two endeavors with which this Article is concerned – the practice of law and the practice of medicine – one is left to wonder what the future of the practitioner's professional identity might be in the increasingly commercialized world of twenty-first century legal service and health care delivery. Perhaps recognition and recovery of professional service ideals may be more important now than ever. But if legal and medical practitioners are going to successfully address the ethical challenges that accompany the business components of today's professional practice, they need to take seriously the task of creating a culture of professionalism that includes space for relationship-building and for moral dialogue with clients and patients.[76] Moreover, these two professions, often at odds over a variety of tort-related and social issues, might benefit from shared communication across disciplinary boundaries with respect to these common ethical concerns. At the very least, awareness of the particular moral distress encountered by professionals in the businesses of law and medicine is a necessary prerequisite to the evolution of less morally distressing social institutions and professional endeavors.

[76] Perry et al., *supra* note 44, at 461 (reporting on empirical evidence supporting the willingness of lawyers to engage in moral dialogue with their clients).

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