
February 2012

Situating Multidisciplinary Practice Within Social History: A Systemic Analysis of Inter-Professional Competition

George C. Nnona

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Nnona, George C. (2006) "Situating Multidisciplinary Practice Within Social History: A Systemic Analysis of Inter-Professional Competition," *St. John's Law Review*. Vol. 80 : No. 3 , Article 2.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol80/iss3/2>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

SITUATING MULTIDISCIPLINARY PRACTICE WITHIN SOCIAL HISTORY: A SYSTEMIC ANALYSIS OF INTER- PROFESSIONAL COMPETITION

GEORGE C. NNONA[†]

INTRODUCTION	850
I. BACKGROUND	853
A. <i>The Basics of the Phenomenon</i>	853
B. <i>Key Models</i>	857
II. THE SYSTEM, ITS NATURE, AND RELEVANCE.....	862
III. MDP AND THE SOURCES OF SYSTEM DISTURBANCE.....	867
A. <i>Relevant Sources of System Disturbance in the MDP Context</i>	867
1. Change in the Bases of Social Legitimacy	867
2. Changes in Technology	873
3. Political Adjustments, Constitutional or Legislative Measures	876
B. <i>How System Disturbances Engendered the Legal Profession's Weakened Position and Its Loosened Grip on Its Professional Jurisdiction that Ultimately Became Manifest in the Struggle Over MDP</i>	877

[†] Associate Professor, Roger Williams University School of Law. This article has benefited from discussions of the subject matter with Professors William Alford, Colleen Murphy, David Wilkins, and Detlev Vagts, for which I am very grateful. Professor Frederick Schauer was instrumental to my commencement of the broader project of which this article forms but an aspect, and I remain grateful for his assistance. The article has also benefited from contributions by participants at the Harvard Law School Graduate Colloquia series, where some of the ideas were first presented, especially Professors John Coates, Frank Michelman, Hal Scott, and Anne-Marie Slaughter, all of whom I owe a debt of gratitude. I am indebted to Virginia Wise, lecturer in law for legal research at Harvard Law School, and Thelma Dziallo, research librarian at the Roger Williams University School of Law, for facilitating my research on the subject. I also thank Dean David Logan of the Roger Williams University School of Law for a summer research grant from the school's funds to facilitate the completion of this article. All errors in the article are mine alone.

- 1. The Historical Adaptability of the Accounting Profession to System Disturbances.....877
- 2. The Legal Profession’s Different Attitude to System Disturbances and Its Effect on Its Competitiveness Relative to the Accounting Profession881
- IV. TOOLS AND METHODS OF JURISDICTIONAL CONTESTS..... 887
 - A. *The Tools and Methods Described* 887
 - B. *The Accounting Profession and the Tools of Jurisdictional Content* 890
 - C. *The Tools of Jurisdictional Contest Deployed Against the Legal Profession*..... 895
- V. THE ARENAS OF INTER-PROFESSIONAL COMPETITION 904
 - A. *The Workplace* 904
 - B. *The Arena of Public Opinion* 907
 - C. *The Legal Arena* 910
 - D. *The Arenas of Jurisdictional Contest in the Context of MDP* 911
- CONCLUSION..... 919

INTRODUCTION

Imagine that medical doctors were involved in a turf war with robotic engineers over a new revolutionary procedure in medicine—a procedure involving the non-invasive use of intense-energy sources such as radiation or extreme cold to perform bloodless surgery. Imagine further that in this struggle, medical doctors find themselves on the losing end, being displaced by robotics engineers who control the robots that administer such intense energy sources to patients. To what might analysts attribute the displacement of medical doctors by robotics engineers in this struggle—a displacement that would have robotics engineers performing operations ordinarily assumed to be within the professional jurisdiction of medical doctors?¹ Some

¹ This hypothetical is, in fact, not far-fetched. See George C. Nnona, *Multidisciplinary Practice Under the World Trade Organization’s Services Regime*, 16 *IND. INT’L & COMP. L. REV.* 73, 73 n.1 (2005) (referencing Harbour Fraser Hodder, *Bloodless Revolution*, *HARV. MAG.*, Nov.–Dec. 2000, at 36).

[D]evelopments in Magnetic Resonance Imaging (MRI) now hold clear prospects of dispensing with the surgeon’s scalpal in the bloodless execution of delicate surgery, using only high-energy sources dispensed in a precision, non-invasive way. This has brought issues of turf war between different specialties and disciplines to the fore. Such a technology threatens

analysts would no doubt attribute such a result to scheming by robotics engineers to usurp the more lucrative functions of medical doctors in the area of complex surgery. Others may even attribute it to collusion between the legislature and lobbyists working for medical engineering firms who have an interest in seeing robotics engineers—their cronies—ascend the commanding heights of the medical field. Some may even go as far as attributing the displacement of doctors to sheer professional envy by robotics engineers, pedestrian as this may seem.

None of the foregoing explanations for the professional ascendancy of the robotics engineer would necessarily be false. Indeed, all of them may be true or contain elements of the truth. Yet these reasons, whether standing individually or taken together, would provide too austere and simplified a picture of the struggle between robotics engineers and medical doctors. They would thus be inadequate as an explanation of the causes and outcome of the struggle. A closer look will reveal the shortcomings of these reasons to be, in large part, their non-immersion in the proper social, historical, and even scientific context. They are linear and atomistic in character. Being atomistic and ahistorical, they do not go far enough in capturing the complex contextual issues and other multifarious factors and problems that shaped and determined the struggle between both professions and the final results.² Yet precisely such

the surgeon with replacement by the specialty traditionally in charge of radioactive and related energy sources, i.e., the radiologist. The radiologist is, in turn, threatened by other non-medical disciplines that are generally as knowledgeable in this and other relevant areas. The latter includes robotics, which could actually be deployed to displace both surgeon and radiologist in the administration of high-energy precision beams, thus ultimately enthroning the robotics engineer, computer scientist and related fields at the head of precision surgery.

Id. (citations omitted). Medicine would then have become fundamentally restructured both as between the specialties within medicine and as between medicine and non-medical specialties. See Hodder, *supra*, at 47 (quoting a leading MRI researcher's speculation that "the divisions between specialists will be washed away").

² Such explanations would miss, for instance, the character of the knowledge systems of the robotics engineer vis-à-vis medicine and other professions competing for control over the new professional jurisdiction of high-energy surgery; the pressures on robotic engineers from surrounding (i.e., related) professions which may have been threatening the robotics engineers' traditional functions, thus forcing the latter to expand towards other professional territory, as well as past mistakes of

explanations were advanced to account for the recent struggles between the legal profession and the accounting profession, as made manifest in the debates over multidisciplinary practice.³ The primary aim of this paper is to challenge this dominant linear and atomistic presentation of the struggles between the accounting and legal professions over multidisciplinary practice ("MDP"), by providing an alternative, holistic account that situates the MDP phenomenon within relevant sociological and historical context. This account focuses on the dynamics of the inter-professional system and the historical development of both professions within that system to explain the relative weakness of the legal profession and its susceptibility to defeat in the inter-professional struggle which MDP represents. Such an account provides a full and fair view of the phenomenon by integrating a multiplicity of factors and actors in a manner that necessarily yields a wide and fresh perspective. Such an alternative account is valuable, not just intrinsically as a historical or theoretical matter, but also to the policy maker of the future who is intent on getting a good grasp on the fundamentals in this area.

This paper is divided into five parts excluding the introduction and conclusion. Part I provides the basic background information concerning MDP and the recent debates surrounding it. In doing so, it also provides greater detail about the shortcomings in the current understanding of the animating factors and causes of MDP, and the objective of this article in

the medical profession which may have made it susceptible to the challenge later posed by robotic engineers. Indeed, such linear explanations would miss other relevant historical and contextual factors necessary for a robust, holistic account of the struggle between both professions.

³ The term "multidisciplinary practice" or "MDP" may be defined as joint professional practice by lawyers and members of other professions where their professional activities in pursuit of such practice involve the offer of legal services to the public. Depending on the context, the term may also mean the professional grouping or entity under which or through which such joint practice is undertaken, i.e. a multidisciplinary partnership. The term MDP will be used in this article in these two senses only, even though it can also encompass joint practice by persons belonging to two or more professions, none of whom is a lawyer. MDP must be distinguished from a situation involving an individual with dual professional qualifications who is licensed to practice law as well as other professions. Model Rule 5.7, dealing with a lawyer's responsibilities regarding law-related (ancillary) services, substantially governs such a professional, as distinct from MDP, which primarily implicates Model Rule 5.4. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4, 5.7 (2004) (regulating the partnering of lawyers with nonlawyers and the provision of law-related services, respectively).

addressing those shortcomings. Part II introduces the system of professions, the basic framework for the analysis herein—a system in which the imperatives of natural selection are as real as they are in any ecosystem; where only the most nimble and responsive professions survive. This system provides the context in which this paper's alternative account of MDP is situated. Part III discusses the sources of disturbance within this system and their relationship to the MDP question, showing how these system disturbances engender inter-professional competition of the type represented by the struggle over MDP. Part IV discusses the tools and methods of jurisdictional competition within the system of professions and their manifestation in the MDP context. Part V presents the different loci of inter-professional competition and shows why, given the system disturbances implicated in the MDP context, it was both necessary and possible for accountancy to mount a contest for jurisdiction in response to those disturbances, and how it chose the methods and successive loci for its campaign, culminating in the recent debates over MDP.

I. BACKGROUND

A. *The Basics of the Phenomenon*

MDP has been the subject of intense debate among scholars of the legal profession in recent times.⁴ The range and intensity of the debate underscores the important questions of professional autonomy and integrity implicated by MDP. At the center of the debate is whether Rule 5.4 of the American Bar Association (ABA) Model Rules of Professional Conduct⁵ should be amended to permit the sharing of fees between lawyers and non-lawyers.⁶

⁴ See Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 281 (2000) (stating that “[t]he debate surrounding MDPs has suffered from an excess of rhetorical robustness” and offering competing critiques of MDP from prominent legal ethic academics).

⁵ MODEL RULES OF PROF'L CONDUCT R. 5.4 (2004).

⁶ Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1116–17 (2000); see also COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, BACKGROUND PAPER ON MULTIDISCIPLINARY PRACTICE: ISSUES AND DEVELOPMENTS Part III (1999), <http://www.abanet.org/cpr/mdp/multicomreport0199.html> (calling the provisions of

Rule 5.4 effectively disallows partnerships between lawyers and non-lawyers by, inter alia, prohibiting the sharing of professional fees between them.⁷ While this provision goes beyond MDP, in the sense that it also prevents passive investment by non-lawyers in law practices, it constitutes the primary bulwark against multidisciplinary practice.⁸

The proponents of MDP have primarily been accountants.⁹ In the 1980s, accountants launched a global quest for what may be called the role of quarterback in the field of professional services, especially such professional services as are pertinent to finance and industry. This quest has particularly involved the move to offer consulting services in areas as varied as systems engineering and litigation support.¹⁰ With regard to legal services offered through MDPs, accountants were able to make the most progress in countries of the civil law tradition, where the legal profession tends traditionally to be very fragmented and therefore relatively weak.¹¹ Some of the progress made by accountants occurred in the context of initial regulatory uncertainty regarding the status of MDP, as was the case in Spain before the 2001 review of the relevant legislation to permit lawyers to form MDPs with members of liberal professions that are not incompatible with the practice of law.¹² Whatever the

Model Rule 5.4 “[o]f particular importance to the issue of multidisciplinary practice”).

⁷ MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2004).

⁸ See Green, *supra* note 6, at 1117 (“[T]hose who oppose multidisciplinary practice rally under the banner of core values” purportedly protected by Model Rule 5.4.); Anthony J. Luppino, *Multidisciplinary Business Planning Firms: Expanding the Regulatory Tent Without Creating a Circus*, 35 SETON HALL L. REV. 109, 158 (2004) (stating that it “makes sense that Rule 5.4 was the focal point of the ABA’s Commission on Multidisciplinary Practice”).

⁹ HAMISH ADAMSON, *FREE MOVEMENT OF LAWYERS*, 145–46, 155 (Butterworths Tolley 1998); see also Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 MINN. L. REV. 1097, 1097 (2000) (“[T]he Big 5 accounting firms have mounted a frontal assault on the legal profession . . .”).

¹⁰ See Laurel S. Terry, *A Primer on MDPS: Should the “No” Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 881 (1999) (litigation support); Cassel Bryan-Low, *Accounting Firms Are Still Consulting*, WALL ST. J., Sept. 23, 2002, at C1 (litigation support, systems design).

¹¹ Notable in this wise are France—which as late as 1970 had about six branches of the legal profession—and Spain. See ADAMSON, *supra* note 9, at 14–16, 25–26.

¹² Article 29 of General Act of the Spanish Legal Profession (*Estatuto General de la Abogacía Española*) 1982, as approved by Royal Decree 658/2001 of 22 June, 2001.

reason behind their initial success in propagating MDP abroad, that success became a significant factor in the MDP debates within the U.S., since it was often referred to by MDP proponents as indicative of the inexorable shape of future professional practice.¹³

Underscoring the importance of the MDP question, the ABA in 1998 established a commission (the "Commission") to explore the issue and assist the legal profession in charting a course.¹⁴ The Commission held wide-ranging consultations with various groups including consumer advocacy groups, leaders and members of other professions, academics, and representatives of bar associations both within the U.S. and abroad.¹⁵ In its July 2000 report, the Commission came out in favor of amending Rule 5.4 to permit MDP.¹⁶ The Commission's work formally came to an end after this recommendation was rejected by the ABA House of Delegates in July 2000.¹⁷ Although the Commission's

Regarding Spain, it has been asserted that "although there are in theory bans on MDPs, they exist *de facto*." See ADAMSON, *supra* note 9, at 157. This underscored the fact that MDP was neither expressly permitted nor prohibited in Spain under the *Estatuto General de la Abogacía Española* 1982 (the first General Act of the Spanish Legal Profession as approved by Royal Decree 2090/1982 (24 July)). For a somewhat loose description of the previous position in Spain, see Ramon Mullerat, *Report on Multidisciplinary Practices in Europe*, April 19, 1999, paragraph IV(3), available at <http://www.abanet.org/cpr/mullerat1.html> (visited on April 5, 2000.). I am grateful to Maria Isabel Köpcke Tinturé of the Spanish Bar, Barcelona, and Farina Rabbi of Gibson Dunn and Crutcher LLP, New York, for translation assistance with Spanish language material.

¹³ Bernard Wolfman, testifying before the ABA MDP Commission, captured this European dimension when he noted that "[m]uch has been made of the presence of non-lawyer controlled MDPs in Europe. The impression given is that they are a great success, serving the public interest and with benefit to all." See Bernard Wolfman, *Testimony Before the ABA Commission on Multidisciplinary Practice* (Feb. 12, 2000), <http://www.abanet.org/cpr/wolfman4.html>.

¹⁴ The details of the proceedings of the Commission are available on the ABA website. See *About the Commission*, http://www.abanet.org/cpr/mdp/mdp_abt_commission.html (last visited July 20, 2006).

¹⁵ See Daly, *supra* note 4, at 223 (describing the "fulsome record" based on open hearings, written comments, and "an active Internet site on which it posted a comprehensive bibliography on MDPs," various Commission papers, and summaries of the witness testimony).

¹⁶ See *COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES* (2000), <http://www.abanet.org/cpr/mdp/mdpfinalrep2000.html>.

¹⁷ See *HOUSE OF DELEGATES, AM. BAR. ASS'N, RESOLUTION 10F*, <http://www.abanet.org/cpr/mdp/mdprecom10f.html> (last visited Sept. 20, 2006), which affirmed that "the sharing of legal fees with non-lawyers and the ownership and control of the practice of law by non-lawyers are inconsistent with the core values of the legal

work formally ended in 2000, the issues raised were by no means disposed of. State bar authorities, through several state MDP committees and task forces, continued to debate the issue hotly, as did academicians and other commentators.¹⁸ The Enron Corporation accounting scandals in late 2001, as well as subsequent accounting scandals in 2002, implicated major accounting firms in circumstances which indicated that non-audit services offered to audit clients through MDPs or related arrangements were deleterious to accountants' professional integrity.¹⁹ The scandals led to an overarching impairment of the profession's credibility.²⁰ Following this damage to accountants' credibility, the activities of the bar authorities tapered, with

profession." The House of Delegates voted at the same meeting to disband the Commission, Greg Casey & Carol A. Needham, *Consensus Across Multiple Divides: An Empirical Study of Outlooks Underlying Lawyers' Attitudes on Multidisciplinary Practice*, 32 LOY. U. CHI. L.J. 617, 619 n.13 (2001), rather than defer the matter for further consideration as it had done in tabling a similar recommendation at the previous year's meeting, HOUSE OF DELEGATES, AM. BAR ASS'N, RESOLUTION ON REVISED VERSION OF THE FLORIDA BAR RECOMMENDATION, <http://www.abanet.org/cpr/mdp/flbarrec.html> (last visited Sept. 19, 2006); Daly, *supra* note 4, at 279–80; L. Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10F*, 36 WAKE FOREST L. REV. 133, 142–43 (2001).

¹⁸ Regarding the activities of state bar authorities, see *infra* note 21. Regarding commentators, see, for example, Casey & Needham, *supra* note 17, at 619–20 (noting that since the ABA's rejection of the recommendation, a variety of academic conferences on the issue have been held, and “[m]any commentators . . . see the MDP issue as one whose final resolution has not yet become clear”); John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach To Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 89 (2000) (positing that “the American legal profession must abandon its past practices of self-interest and accommodate the provision of legal services in a multidisciplinary practice setting”); John H. Matheson & Peter D. Favorite, *Multidisciplinary Practice and the Future of the Legal Profession: Considering a Role for Independent Directors*, 32 LOY. U. CHI. L.J. 577, 578, 595–605 (2001) (claiming that “in practical terms, the revolution in legal services known as ‘MDP’ is already here” and outlining arguments for and against MDP reform); Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 410–15 (2004) (“[A] growing constituency both within and outside the bar believes that in the long run, lawyers’ best response to these competitors will often be to join, not fight [MDPs].”).

¹⁹ See Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work)*, 35 CONN. L. REV. 915, 928–36, 952–54 (2003) (chronicling four major corporate accounting scandals and describing how the growth of non-audit services provided by major accounting firms was curbed after the scandals).

²⁰ See Patricia A. McCoy, *Realigning Auditor's Incentives*, 35 CONN. L. REV. 989, 991 (2003) (blaming lost credibility in audit opinions for the crumbling public confidence in the markets after the 2002 financial scandals).

many of them coming out decidedly against MDP, including some states that had previously shown a favorable attitude towards MDP.²¹

B. Key Models

The ABA MDP Commission produced several important reports and background documents.²² The commission proposed

²¹ As of July 6, 2000, forty-four states and the District of Columbia had appointed committees or task forces to consider the MDP issue and make recommendations. See COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, REPORT BASED UPON INFORMATION AVAILABLE TO THE COMMISSION AS OF JULY 6, 2000, <http://www.abanet.org/cpr/mdp/mdpstats.html>. Of these states, Arizona, Colorado, and Minnesota had taken favorable steps towards approving pro-MDP reports issued by the committees. See *id.* In four other states (Maine, Oregon, South Carolina, and South Dakota) and the District of Columbia, pro-MDP reports had been submitted but the bar authorities had taken limited or no steps towards approval. See *id.* Almost a year later as of June 2001, the number of jurisdictions where the committees or task forces had approved MDP had risen to twelve, namely: Arizona, Colorado, Georgia, Indiana, Maine, Minnesota, North Carolina, South Carolina, South Dakota, Utah, Wyoming, and the District of Columbia. See Am. Bar Ass'n., MDP Information—June 26, 2001 (on file with St. John's Law Review). Of these, the bar in three jurisdictions (Arizona, Colorado, and Utah) had gone beyond mere approval of pro-MDP reports and taken steps towards the actualization of MDP; specifically, they had drafted new rules permitting MDP or, for Utah, had actually petitioned the court for amendments to the rules. See *id.* As of April 2, 2003, after the Enron corporation scandals, the number of jurisdictions in which state committees or other responsible authorities had taken some steps towards the ultimate approval of MDP had dropped to seven (California, Colorado, Georgia, Maine, North Carolina, South Dakota, and the District of Columbia), while authorities in twenty-five states had rejected MDP and the remaining states were at various stages of disinterest or indecision. See Status of Multidisciplinary Studies by State (And Some Local Bars), Apr. 2, 2003, http://www.abanet.org/cpr/mdp/mdp-state_action.html. Updated information on the status of MDP in the various states as of January 2005 shows progressive disengagement from MDP. Of the six states with pro-MDP positions as of April 2, 2003, activities on the issues are practically dormant in Georgia, North Carolina, and South Dakota. In Georgia, the committee report that recommended MDP has not been placed before the relevant authorities, and in North Carolina no action is currently pending. See MDP Information—Jan. 18, 2005, http://www.abanet.org/cpr/mdp_state_summ.html. In South Dakota, the first step towards implementing the pro-MDP recommendation of the committee remains defining the practice of law, unchanged since 2003. See *id.* California and Colorado maintain a pro-MDP stance with committees working on rules to implement MDP. In Maine, the pro-MDP recommendation is for lawyer-controlled MDPs, not the fully-integrated practice that is the real focus of the MDP debate. See *id.*

²² The first report, with recommendation and appendices, was released in August 1999. COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, MDP REPORT, <http://www.abanet.org/cpr/mdpreport.html> (last visited Sept. 20, 2006). The final recommendation followed in July 2000. ABA, Final Recommendation,

five models of MDP as a framework for conceptualizing the forms that MDP might take, and these models became the focal point of analysis by commentators on MDP.²³ The most important of these are models 2–5, which evince progressive liberalization of the regime for MDP from the Command and Control Model (Model 2) under which non-lawyers can only be partners under the suzerainty of lawyers, to the fully integrated Model (Model 5) under which all partners would be equal.²⁴ Model 5 came with the possibility that lawyers, being fewer than non-lawyers in accounting firms of the Big 4 type,²⁵ would become a dominated

<http://www.abanet.org/cpr/mdp/mdpfinalrep2000.html> (last visited July 20, 2006). There is a related set of background papers explaining salient aspects of the commission's work. COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, REPORTER'S NOTES, <http://www.abanet.org/cpr/mdpappendixc.html> (last visited July 20, 2006); COMM'N ON MULTIDISCIPLINARY PRACTICE, BACKGROUND PAPER ON MULTIDISCIPLINARY PRACTICE: ISSUES AND DEVELOPMENTS, *supra* note 6; AM. BAR ASS'N, HYPOTHETICALS AND MODELS, <http://www.abanet.org/cpr/mdp/multicomhypos.html> (last visited July 20, 2006); COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, POSTSCRIPT TO FEB. 2000 MIDYEAR MEETING, <http://www.abanet.org/cpr/mdp/postscript.html> (last visited July 20, 2006); COMM'N ON MULTIDISCIPLINARY PRACTICE, AM. BAR ASS'N, UPDATED BACKGROUND AND INFORMATIONAL REPORT AND REQUEST FOR COMMENTS, <http://www.abanet.org/cpr/mdp/febmdp.html> (last visited July 20, 2006).

²³ See AM. BAR ASS'N, HYPOTHETICALS AND MODELS, *supra* note 22; see also Mary C. Daly, *Monopolist, Aristocrat, or Entrepreneur? A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France, Germany, and the United Kingdom After the Disintegration of Andersen Legal*, 80 WASH. U. L.Q. 589, 593–99 (2002) (discussing the five models and noting their widespread use).

²⁴ See AM. BAR ASS'N, HYPOTHETICALS AND MODELS, *supra* note 22.

²⁵ The term "Big 4" is an adaptation of the term "Big 5" which traditionally referred to the major accounting firms (PriceWaterhouseCoopers, Ernst & Young, Deloitte & Touche, KPMG, and Arthur Andersen) that dominated global accounting practice. H. Beau Baez III, *The Rush to the Goblin Market: The Blurring of Quill's Two Nexus Tests*, 29 SEATTLE U. L. REV. 581, 627 n.282 (2006). These firms constitute in large part the directing will and mind of the accounting profession, with overwhelming influence over the accountancy field. See AM. ASSEMBLY, THE FUTURE OF THE ACCOUNTING PROFESSION: AUDITOR CONCENTRATION 5–8 (2005), available at http://www.americanassembly.org/programs.dir/report_file.dir/AUDIT_report_report_file_report_final.pdf (detailing the increasing concentration and influence of the Big 4). See generally GOV'T ACCOUNTABILITY OFFICE, PUBLIC ACCOUNTING FIRMS: MANDATED STUDY ON CONSOLIDATION AND COMPETITION (2003), available at <http://www.gao.gov/new.items/d03864.pdf> (same). They are as such rightly perceived as spearheading the global quest of the profession for MDP. See Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625, 1635–38 (2000) (outlining the major accounting firms' initial forays into MDP). With the effective demise of Arthur Andersen's auditing practice in 2002 in the wake of the Enron Corporation accounting scandals and the firm's conviction for obstruction of justice by the United States District Court for the

minority in such firms or firms modeled after them. Model 5 proved to be the most scary to lawyers, and for many vociferous but despondent MDP opponents the key question ceased to be whether to permit MDP at all through one of the intermediate models (2–4) but rather how to ensure that Model 5 did not become the order of the day.²⁶ The legal profession was seemingly overwhelmed by the coordinated assault launched by accountants and other MDP proponents on the structures that have kept the profession independent of control by non-lawyers.²⁷ Despondency was apparent in the legal profession's response and the profession seemed willing to capitulate to the wishes of the pro-MDP lobby if only minimal guarantees could be granted it.²⁸ In meeting the challenges of MDP as a threat from the accounting profession, the legal profession thus operated from a

Southern District of Texas, *United States v. Arthur Andersen, L.L.P.*, 374 F.3d 281, 284 (5th Cir. 2004), *rev'd*, 544 U.S. 696 (2005), it is becoming common for people to speak of the "Big 4" instead of the "Big 5." Though the term "Big 4" has not fully caught on, it will sometimes be used in this paper to denote the national accounting firms that dominate accounting practice locally and globally. The older term "Big 5" will still be used when referring to this class of firms in historical contexts where the term "Big 4" would prove inapt or misleading.

²⁶ See Daly, *supra* note 4, at 226 (noting that MDP opponents prefer Model 1).

²⁷ See Wolfram, *supra* note 25, at 1638 (quoting big-firm lawyers' "platitudes of resignation" about the emergence of legal practice by the Big 5).

²⁸ In his February 12, 2000 testimony before the MDP Commission, Bernard Wolfman, a staunch opponent of MDP, expressed this apprehension when he declared thus:

My principal concern with your Report goes not to the omissions I have just noted or to any particular difference in choice of words, but to the more fundamental question of management and control of the firm that directly or indirectly owns and controls a law practice. I and others have expressed a willingness to see the traditional rules changed that now, as in the past, prohibit fee sharing with non-lawyers, indeed changes that would sanction the formation of MDPs with lawyers and non-lawyers in partnership with each other, to perform legal and non-legal personal services, *provided that the lawyers retain financial and managerial control*. Your Report, however, would permit any non-lawyer controlled personal service firm, PricewaterhouseCoopers (PwC), for example, to buy, own, and control Paul Sax's firm (Orrick, Herrington & Sutcliffe) or even Bob Mundheim's firm (Shearman & Sterling), and would permit Ernst & Young (E&Y) to arrange for *de jure* ownership of what now may be only *de facto* ownership of McKee Nelson Ernst & Young. Pip-squeak though the McKee firm is, mid-sized though Orrick is, and large though S&S is, they would be mere drops in the buckets of PwC and E&Y.

Wolfman, *supra* note 13; see also Fox, *supra* note 9, at 1113 (commenting on how few lawyers are willing to oppose the assault from the accounting profession).

weakened and fragile position.²⁹ This paper offers an explanation that accounts for this position of relative weakness. It accounts for the weakness by locating MDP, its origins and animating factors within social history. The paper effectively argues that the evolution and historical development of both professions have conditioned them differently in a way that explains their subsequent positions relative to each other, and makes predictable the relative weakness of the legal profession in the struggle for professional ascendancy that the MDP debate represents.

Different theories have been proffered to account for MDP. The most pervasive account is that it is the product of a concerted campaign by other professional groups, especially accountants, to penetrate and usurp the market for legal services on account of declining margins and rising risks within their own more mature markets.³⁰ This account is given particularly in relation to audit services, because of the decline of the audit (attest) function as a significant source of revenue for accounting firms.³¹ Though simple, this account is by no means completely misconceived, and it is indeed possible to attempt its substantiation.³² Yet allowing this simple account of the MDP phenomenon to remain the dominant account belies the complexity and nuances of the phenomenon and thus misrepresents its true character—much like an explanation that

²⁹ This was so in both Europe and the United States. See ADAMSON, *supra* note 9, at 157. In the United States, there are very few opponents of MDP who are not retired or active practitioners. See Wolfram, *supra* note 25, at 1625–26 n.4 (“Shockingly little has been written in opposition to MDP, and almost all of it has flowed from a single practitioner’s pen.”). A preponderance of academic lawyers writing on the subject are pro-MDP or at best indifferent to the outcome of the debate. See *id.* at 1635 (commenting on the reticence of anti-MDP lawyers in identifying themselves as such). This situation led a notable MDP opponent, Lawrence Fox, to declare that he writes “with a heavy heart. The number of lawyers willing to stand up and be counted on the survival of our profession is far too few to respond to the brute forces of economic hegemony.” Fox, *supra* note 9, at 1113.

³⁰ See, e.g., Fox, *supra* note 9, at 1098.

³¹ *Id.*; COMM’N ON MULTIDISCIPLINARY PRACTICE, BACKGROUND PAPER ON MULTIDISCIPLINARY PRACTICE: ISSUES AND DEVELOPMENTS, *supra* note 6, at Part II.

³² See, e.g., COLIN BOYD, THE TRANSFORMATION OF THE ACCOUNTING PROFESSION: THE HISTORY BEHIND THE BIG FIVE ACCOUNTING FIRMS DIVERSIFYING INTO LAW, SPECIAL COMM. OF THE INT’L PRACTICE OF LAW, CANADIAN BAR ASSOC., 8–17 (1999), available at <http://www.commerce.usask.ca/faculty/boyd/mpacc801/FinalCBAReport.htm> (reviewing the long decline of auditing and ensuing growth of other lines of business).

accounts for the dominance of robotics engineers over medical doctors in new areas of complex surgery by reference to mere professional envy.³³ In focusing on the trajectories of the legal and accounting professions' historical development and the relative weakness of the former as a function of its own trajectory, this paper provides an alternative to the simple account of MDP that is currently pervasive. In so doing, it adopts a different conceptual framework that enables a holistic, integrated perspective of the phenomenon—a perspective grounded in the underlying historical realities in their proper context.

Such an integrated account of the phenomenon is essential not just for purely conceptual or historical reasons, fundamental as these reasons certainly are. In addition, such an account may inform policy makers in this area in the future. As stated previously, the Enron and subsequent accounting scandals of 2002 marked the end of the push by the accounting profession for an expanded professional territory as represented by the struggle over MDP.³⁴ The MDP debate was not, however, laid to rest as a result, as it subsequently continued to attract attention from commentators,³⁵ an attention that is likely to receive a fillip in the future in the light of section 201 of the Sarbanes-Oxley Act of

³³ See *supra* notes 1–2 and accompanying text.

³⁴ Jay S. Zimmerman & Matthew J. Kelly, *MDPs May Be Dead After Enron/Andersen, but Subsidiary Businesses Thrive*, 29 LAW & SOC. INQUIRY 639, 642–43 (2004) (“Some observers contend that the lessons of Enron and Andersen only reinforce the conclusion that MDPs are, once and for all, dead.”).

³⁵ For pro-MDP comments made since the Enron scandals, see, for example, Robert Lennon *MDP's Executioners*, AM. LAW., Mar. 2002, at 18 (questioning the link between MDP and the Enron/Arthur Andersen scandals and advocating for continued professional convergence on grounds of efficiency and client service); see also Susan Poser, *Main Street Multidisciplinary Practice Firms: Laboratories for the Future*, 37 U. MICH. J.L. REFORM 95, 97 (2003) (advocating continued MDP development only for small firms and solo practitioners); Cf. Sydney M. Cone III, *MDPs After Enron/Anderson: Five Years Later: Reconsidering the Original ABA Report on MDP*, 29 LAW & SOC. INQUIRY 597, 609–10 (2004) (concluding that licensing of MDPs is still possible, but only if “serious groundwork” were “to prepare the way”). For comments critical of MDP, see Bernard Wolfman, *Auditors: Stick to Your Auditing*, TAX NOTES, July 8, 2002, at 1. Focusing on the exception under Section 201(a) of the Sarbanes-Oxley Act of 2002, 15 U.S.C.A. § 78j–1 (Supp. 2006), that allows accounting firms to perform tax services for the same audit client if the client’s audit committee approves so in advance, Wolfman implicitly recognizes that the gates have not been completely shut against accountants on the MDP issue and makes a case for reinforced prohibition of MDP involving accountants and other professions. *Id.*

2002.³⁶ This provision considerably constrains MDP but does not completely eliminate it from the professional repertoire of accountants, providing instead key exemptions that permit it.³⁷ The prospect of renewed inter-professional skirmishes over MDP, with the attendant need to further inform policy makers about the nature of the phenomenon, provides a subsidiary justification for the alternative account of MDP attempted in this paper, quite apart from the fundamental conceptual or theoretical necessity of a more complete treatment of the MDP phenomenon. These justifications jointly invite a presentation of MDP in terms that transcend the pedestrian encrustations with which much of the earlier treatments of the subject have been burdened.³⁸

II. THE SYSTEM, ITS NATURE, AND RELEVANCE

Andrew Abbott articulates a single system of professions in

³⁶ 15 U.S.C.A. § 78j-1 (Supp. 2006).

³⁷ Section 201(b) of the Act is particularly germane since it gives the Public Company Accounting Oversight Board broad exemption powers to free an accounting firm from the strictures of the section on a case by case basis. See *id.* In addition, under Section 201(a) the audit committee of a company may approve the provision of tax services to the company by an accounting firm, concurrently with audit services. See *id.* To the extent that tax is an area of practice for lawyers, this potentially implicates the very same old questions occasioned by MDP in the pre-Enron debates.

³⁸ Because MDP is a subject with immense practical significance, most of the writing on MDP has been merely pragmatic at best, and casual or partisan at worst. For pragmatic articles, see, for instance, the range of symposium articles appearing in the twentieth volume of the *Pace Law Review*, 20 *PACE L. REV.* 1-92 (1999), and in the eighty-fourth volume of the *Minnesota Law Review*, 84 *MINN. L. REV.* 1083-1654 (2000), with the exception of the relatively well-rounded piece by Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 *MINN. L. REV.* 1469 (2000). For a rather narrow market-oriented analysis, see Daniel Fischel's *Multidisciplinary Practice*, a paper presented at the Harvard Law School Seminar in Law and Economics on March 21, 2000, and subsequently published in the *Business Lawyer*. Daniel R. Fischel, *Multidisciplinary Practice*, 55 *BUS. LAW.* 951 (2000). For rather casual or overly simplified accounts of the MDP phenomenon, see, for instance, Talha A. Zobiair, *Multidisciplinary Practices—Firms of the Future*, and Jack F. Dunbar, *Multidisciplinary Practice Translated Means "Let's Kill All the Lawyers,"* opposing articles published side-by-side in 79 *MICH. B. J.* 64 (2000); BOYD, *supra* note 32, and Michael Trebilcock & Lilla Csorgo, *Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective*, 24 *DALHOUSIE L.J.* 1 (2001). The Trebilcock & Csorgo piece is a revised version of an August 1999 study performed by the authors for the Big 5 accounting firms in Canada under the auspices of Charles River Associates, Toronto. See Michael Trebilcock & Lilla Csorgo, *Multi-Disciplinary Professional Practices: A Consumer Welfare Perspective*, Aug. 4, 1999, <http://www.abanet.org/cpr/canada.html>.

which all professions are inter-linked.³⁹ Within this system, stimuli (i.e., sources of system disturbance), whether originating internally or externally, generate disturbances that reverberate throughout the system, affecting several professional groups.⁴⁰ Within this system, equilibrium is elusive, given the constant inter-professional struggle for jurisdiction and the vastness of the inter-linked professional terrain.⁴¹ Abbott attempts a reconciliation of the historical continuity of professional appearances with the day-to-day discontinuities of professional reality, his aim being to show professions growing, splitting, joining, adapting and dying. For him,

[t]he professions . . . make up an interdependent system. In this system, each profession has its activities under various kinds of jurisdiction. Sometimes it has full control, sometimes control subordinate to another group. Jurisdictional boundaries are perpetually in dispute, both in local practice and in national claims. It is the history of jurisdictional disputes that is the real, the determining history of the professions.

. . . .

. . . Professions develop when jurisdictions become vacant, which may happen because they are newly created or because an earlier tenant has left them altogether or lost its firm grip on them. If an already existing profession takes over a vacant jurisdiction, it may in turn vacate another of its jurisdictions or retain merely supervisory control of it. Thus events propagate backwards in some sense, with jurisdictional vacancies, rather than the professions themselves, having much of the initiative.⁴²

³⁹ See ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 86–91 (1988) (theorizing professions as an interdependent system). Abbott's thesis is considered to be among the most ambitious in the literature on the sociology of professions and has received wide application, and will therefore be leveraged upon in this article. Regarding the success of Abbott's approach, see, for instance, RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 213 n.39 (1999) (lauding the contributions made to the study of the legal profession by non-lawyer sociologists such as Abbott), and *LAWYERS IN SOCIETY: AN OVERVIEW* 10 (Richard L. Abel & Philip S.C. Lewis eds., 1995) (calling Abbott's work an "ambitious revision of sociological theories of the professions").

⁴⁰ See ABBOTT, *supra* note 39, at 86, 91–98.

⁴¹ *Id.* at 91.

⁴² *Id.* at 2–3.

Abbott's model is a vacancy model, in which vacancies and not participants precipitate action.⁴³ But at least three important differences exist. The first is that unlike a strict vacancy model, the participants in the system of professions do take initiatives to create vacancies and do not necessarily wait for vacancies to occur.⁴⁴ Second, the system itself can internally absorb the shocks and movements that result from the creation of a vacancy. In a strict vacancy model, such shock and movement continues until absorbed from outside the model, as would happen when a totally new member from outside the model moves in to occupy a vacancy, thereby eliminating any space for further movement.⁴⁵ Third, the effect of disturbances and vacancies in the system is not uniform throughout. Such disturbances have a more substantial impact in the vicinity of its origin and on those professions within that vicinity, progressively dissipating as they move farther afield until ultimately absorbed completely by the system or from outside.

This model is useful because it centralizes interprofessional competition—a factor given prominence in the MDP debate—and constructs a theory of professionalism around it. It employs inter-professional competition as a tool for articulating the different dimensions of the professions—their definition, structure, social organization, regulatory scheme, training (knowledge generation and dissemination), etc. While clearly distinctive in its focus on professions *inter se* (as distinct from the more pervasive focus on professions vis-à-vis the state, capital or clients), the model easily dovetails into the concept of autonomy and control of work as the animating idea of professionalism—something highlighted as fundamental by other theorists of the professions.⁴⁶ Its implications can thus be drawn out and

⁴³ *See id.* at 88.

⁴⁴ *See id.* at 89.

⁴⁵ *See id.* at 88–89.

⁴⁶ *See* KEITH M. MACDONALD, *THE SOCIOLOGY OF THE PROFESSIONS* 73–74, 163 (1995); ELIOT FREIDSON, *PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY* 114–115, 126 (1994). These theorists highlight a profession's capacity to control the terms and conditions of its work and be autonomous in the sense of self-regulation as key to its professional standing. As a corollary, they focus on the relationship between professions on the one hand and the state or other non-professional actors (such as clients and the owners of capital) on the other hand, these being the sources of threats to the autonomy and independence of the professions. They generally ignore the relationship between one profession and another as a defining feature of the professional terrain. This is where Abbott's

assessed either on its own terms or in terms of the workplace control theory.

Within the system of professions, the potential sources of system disturbance are multiple. Major sources include technological change, organizational change (such as the introduction of routine incorporation of business in the nineteenth century as a basic means of harnessing capital),⁴⁷ and the rise of social movements (which can be arbitrary in their location and focus as in the temperance movement's seizure of the problem of alcoholism from doctors and other professionals).⁴⁸ One of the more fundamental sources of system disturbance is cultural change, such as transformations in the organization of knowledge—its increased quantity and complexity; change in socially legitimating values; and the rise of universities as centers of professional training.⁴⁹ Subsidiary sources include an expansion in an existing market and the development of new knowledge by a profession, as with the late eighteenth century advances in anatomy and physiology made by the lowly surgeons at a time when the venerated physicians were preeminent as a distinct profession in the medical field.⁵⁰ These sources of system disturbance can overlap, as in the development of American

approach significantly differs, since inter-professional competition is made central in his conception of the professional terrain. Magali Larson's theory accounts for the profession in terms of its intrinsic inclination towards a project of closure or monopoly of occupational markets as a means of attaining social mobility for its members. See MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS*, at xvii (1977). For Larson, professionalization is "an attempt to translate one order of scarce resources—special knowledge and skills—into another—social and economic rewards." *Id.* Clearly implicit in this framework is the idea of control of work and its organization, though this is subsumed under market monopolization, which is one of the pillars of Larson's framework. Power, the locus of its exercise (the workplace), and the ends thereof (workplace control) cannot be separated from her analysis. See *id.* at xvii, 66. Larson's focus, for our purposes in this essay, is therefore not materially different from MacDonald's and Freidson's.

⁴⁷ See ABBOTT, *supra* note 39, at 92, 94, 146.

⁴⁸ See *id.* at 149–50.

⁴⁹ See *id.* at 177.

⁵⁰ See W. J. READER, *PROFESSIONAL MEN: THE RISE OF THE PROFESSIONAL CLASSES IN 19TH CENTURY ENGLAND* 32–33, 37–42 (1966) (discussing how surgeons overcame their origins as craftsmen in the "rough and bloody business" of operating without anesthesia). Before the nineteenth century, surgery was a distinct profession from physic, and practitioners of the latter—the physicians—had a more elevated social standing generally, though this standing had less to do with the superiority of their substantive know-how than with their age-long entrenchment in powerful social and political circles. *Id.* at 39–40.

medicine in the late nineteenth century based on the new knowledge of science-based medicine, which was itself part of a broader technological, scientific, and cultural transformation with its roots in Europe.⁵¹

A major effect of system disturbances is to create vacancies in the system, which professions then compete to occupy. Such vacancies may not necessarily be new in the sense of being a novel jurisdiction over a novel type of work, but could rather result from the dislodgment of an existing occupant from its settled jurisdiction over an existing type of work. In this wise, system disturbances provide opportunities for professions to actively usurp one another's jurisdiction.⁵² System disturbances provide such opportunities by weakening the current occupant of a professional jurisdiction or by strengthening another profession to a position where it can stake a claim in that jurisdiction, even if the current occupant is not weakened.⁵³

The system of professions is therefore no different from an ecosystem in which professions are forever coming into existence, developing, mutating, surviving, or going into extinction or diminution, depending on how they respond and adapt to the environment. In this system, the imperatives of natural selection are as real as anywhere else. Only the most nimble and responsive professions are selected to dominate their jurisdictions and propagate their knowledge systems into the future. To observe the reality of the system, we need look no further than the clergy. With a jurisdiction as expansive as any ever known in the history of professions, the clergy once exercised dominant roles in everything from education to adjudication.⁵⁴ At its height, it was almost coterminous with the state itself.⁵⁵ Though by no means the focus of this paper, the

⁵¹ See John J. Beer & W. David Lewis, *Aspects of the Professionalization of Science*, in THE PROFESSIONS IN AMERICA 110, 110–15 (Kenneth S. Lynn ed., 1965) (describing the "second scientific revolution" of the late nineteenth century and its cross-pollination in Europe and the United States).

⁵² See ABBOTT, *supra* note 39, at 87, 89.

⁵³ See *id.* at 89–91.

⁵⁴ See PAUL BRAND, THE ORIGINS OF THE ENGLISH LEGAL PROFESSION 151–52 (1992) (positing that in thirteenth century Christendom, "practising canon lawyers would normally be in minor orders rather than laymen").

⁵⁵ See, e.g., NORMAN F. CANTOR, THE CIVILIZATION OF THE MIDDLE AGES 419–21 (1994) (comparing the papal monarchy of 1199 to other European kings and states and discussing the role of Pope Innocent III in levying taxes, supporting armies, and administering a large bureaucracy).

process by which it lost suzerainty over its vast jurisdiction and thence the capacity to propagate itself meaningfully, is implicit in the analysis below.

III. MDP AND THE SOURCES OF SYSTEM DISTURBANCE

The legal profession faced a jurisdictional threat in the context of the debate over MDP, perhaps not in terms of substantive content of work, but in the more fundamental sense of work place control. Before the Enron scandals de-fanged the accounting profession, the legal profession was clearly on the defensive, as indicated by the frail tenor of the arguments made in opposition to MDP vis-à-vis the proponents of MDP and the tenor of their arguments.⁵⁶ It is thus apposite to inquire into the sources and nature of the relevant system disturbances, and how they engendered the legal profession's weakened position—its loosened grip on its professional jurisdiction.

A. *Relevant Sources of System Disturbance in the MDP Context*

1. Change in the Bases of Social Legitimacy

Perhaps the most clearly noticeable source of system disturbance is the change in the values that legitimize professions and their activities in American society. A cultural reorientation, this change has seen the displacement of erstwhile criteria of legitimacy in the professions, such as the character-traits of the lawyer-statesman (civic-mindedness, virtue, etc.)⁵⁷ and family connections,⁵⁸ by values broadly aligned with

⁵⁶ Compare Wolfman, *supra* note 13 (opposing MDP, but only to the extent that it would threaten the ability of lawyers to “retain financial and managerial control”) with Peter C. Kostant, *Breeding Better Watchdogs: Multidisciplinary Partnerships in Corporate Legal Practice*, 84 MINN. L. REV. 1213, 1213 n.1 (2000) (“The canard that lawyers somehow lose their professional objectivity when they share profits with nonlawyers has effectively been disposed of by leading commentators in professional responsibility.”).

⁵⁷ Anthony Kronman refers to the lawyer who embodies these character traits as the lawyer-statesman, the epitome of nineteenth century professionalism. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 11–52 (1993) (describing, and then chronicling the demise of, the lawyer-statesman ideal).

⁵⁸ While there is de jure no preference in America based on birth or descent, there has been, and still is, a de facto social hierarchy, albeit not as apparent as in parts of old Europe. See Janny Scott & David Leonhardt, *Class in America: Shadowy Lines That Still Divide*, N.Y. TIMES, May 15, 2005, at A1 (beginning a series of

economic liberalism. In place of the erstwhile values, efficiency in its various hues now stands as most dominant, proclaiming the priority of competition over patronage.⁵⁹ Thus, professions that hold up efficiency as an ideal over and above others attain a correspondingly high degree of legitimacy in the eyes of the market.⁶⁰ Such professions notably include banking, accounting, and other professions exclusively or largely focused on financial services. This is not surprising given that such professions have come to define their ideals in line with the uncompromising dictates of capital in whose heartland such professions operate. Their enhanced legitimacy and concomitant increase in power and status in the marketplace facilitate, perhaps even engender, their quest for more expansive professional jurisdictions. The legal profession has come to be a target of choice in this quest for expanded jurisdiction for reasons that will become apparent in parts IV and V of this article.⁶¹

articles on the state of social and economic class, a "powerful force in American life" that nonetheless "tends to go unexamined, if acknowledged at all").

⁵⁹ "The major shift in legitimation in the professions has thus been a shift from a reliance on social origins and character values to a reliance on scientization or rationalization of technique and on efficiency of service." ABBOTT, *supra* note 39, at 195. Abbott also states that "organizational efficiency . . . had become, by the third quarter of [the twentieth] century, a central value in the social-structural legitimation of American professions." *Id.* at 193.

⁶⁰ *See id.* at 194 (identifying educational administrators, business managers, social service administrators, and administrative psychiatrists as professionals who gained legitimacy from their reputations for efficiency). The "market" is used here to denote, in a more specific way, constituencies more likely to be persuaded by efficiency as an overarching value.

⁶¹ While the accounting profession has become the poster profession for this expanded quest, other professions operating in this financial heartland are not without their own, albeit more limited, ambitions. Daniel R. Fischel has written that:

Lawyers offer services that, in certain areas, duplicate those offered by other professionals. Lawyers or accountants can offer tax advice; lawyers or investment bankers can structure defensive tactics in response to a tender offer; lawyers or financial planners can provide estate planning services; lawyers or other investigators can marshal facts from corporate employees in response to a regulatory investigation.

Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 5 (1998); *see also* DAVID B. WILKINS, EVERYDAY PRACTICE IS THE TROUBLING CASE: CONFRONTING CONTEXT IN LEGAL ETHICS, IN EVERYDAY PRACTICES AND TROUBLE CASES 68, 87-88 (Austin Sarat, et al. eds., 1998) (emphasizing that "[c]orporate lawyers have always provided a complex mix of business and legal advice to their clients," just as other professionals, notably accountants, investment bankers and management consultants have "stepped up their efforts to compete with lawyers" in advising multinational corporations concerning their global operations). Implicit in

The normal route to an expanded professional jurisdiction or territory is the hostile or peaceful acquisition of the target territory.⁶² Since peaceful usurpation of the legal profession's jurisdiction was not feasible given the stringent regulations governing the legal profession, particularly Model Rule 5.4,⁶³ the jurisdictional quest by accountants and allied interests had to commence by way of a pitch for the removal or fundamental adjustment of the regulatory framework that undergirds the legal profession. The debate over MDP represents, for MDP proponents, an attempt to make a case for a policy shift in the regulation of the legal profession towards the relaxation of the strictures that impede the stake they seek in the legal profession's jurisdiction.⁶⁴

It is noteworthy that efficiency as a pervasive cultural value is a second-order value in the context of the MDP debate and debates about the legal profession generally. This means that efficiency as a value is only procedural in nature, not substantive; it relates only to the *modus operandi* for achieving existing objectives encapsulated in more primary social values, some of which are indeed embodied in the precepts of the legal profession. Thus, the proponents of MDP largely argue that the objectives sought to be attained by the legal profession can be attained more efficiently, using practice structures that permit greater synthesis of services in the context of different types of professionals working in tandem towards defined client objectives.⁶⁵ Alternatively, they argue that without impeding or enhancing such values, efficiency can be attained in several respects in the provision of legal services.⁶⁶ They do not make

the foregoing is the correct notion that some of the incursion is mutual as between law and the other professions, especially at the boundaries of the various professional jurisdictions, with regard to new areas of work where no profession as yet has a clear-cut exclusive claim.

⁶² See ABBOTT, *supra* note 39, at 89–90 (introducing the dynamics of jurisdictional change in his modified vacancy model).

⁶³ MODEL RULES OF PROF'L CONDUCT R. 5.4 (2004).

⁶⁴ For arguments by proponents of MDP, see *supra* note 35.

⁶⁵ See, e.g., Robert A. Stein, *Multidisciplinary Practice: Prohibit or Regulate?*, 84 MINN. L. REV. 1529, 1530–31 (2000) (describing pro-MDP arguments as based on client needs for "comprehensive, multi-professional advice" in "a packaged manner").

⁶⁶ See, e.g., Dzienkowski & Peroni, *supra* note 18, at 90 (arguing that a narrowly-tailored, efficient model of regulation of MDPs would satisfy client demand for MDP services while preserving the legal profession's core values); Wolfram, *supra* note 25, at 1625–27, 1653 (arguing that, despite "[t]he tag-line of 'core values'

the more fundamental argument that the legal profession's values, such as client advocacy as a means of substantive justice, should be replaced.⁶⁷ That such arguments are not made is not necessarily evidence of the acceptance of such substantive values by the other professions. Rather, it indicates the other professions' awareness of the political expediency of not making

[having] been endlessly flung about," lawyers, business, and clients could all benefit from expanded MDP, requiring mere "appropriate regulation of (only) real and not imaginary risks").

⁶⁷ Arguments of this nature, however, have been made, questioning the value of the lawyers' advocacy model in some respects, but not in absolute terms. Robert Gordon, noting that the lawyer's liberal advocacy ideal is one of the prongs of political independence of lawyers from state control, chides its capacity to destroy the legal framework when unmediated through other mechanisms, the most notable of which are "schizoid" lawyering and "purposive" lawyering. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 19-24 (1988). See generally, William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978) (critically examining Positivist Advocacy, Purposivism, and Ritualist Advocacy). Related arguments have also been made in the more specific context of the MDP debate. See, e.g., Kostant, *supra* note 56, at 1215-19 (2000) (asserting that the lawyer's advocacy model has failed the gatekeeping role of policing corporate clients and positing that the higher capacity of lawyers in MDPs for "whistle-blowing" would "force virtually all transactional lawyers . . . [to] better assist[] corporate clients with legal compliance."); see also Peter C. Kostant, *Paradigm Regained: How Competition from Accounting Firms May Help Corporate Attorneys To Recapture the Ethical High Ground*, 20 PACE L. REV. 43, 47, 59-66 (1999) (arguing that the duty of strict confidentiality exercised exclusively by lawyers in law firms is often unnecessary or even counterproductive to the welfare of their corporate clients and advocating the more nuanced use of confidentiality via MDPs). These arguments, however, come from within the legal profession generally and may be seen not as an aspect of the general cultural move towards efficiency, but rather as a distinct—even if subsidiary—source of system disturbance by itself, reflecting more specifically the absence of consensus between the academic and practice sides of the legal profession, thus resulting in the profession's weakened control of its jurisdiction. When such arguments issue from a discrete group within the profession, such as the ABA tax session or groups of doubly qualified professionals such as Attorney-CPAs, this is evidence yet of another source of system disturbance—the differentiation of a profession towards distinct subgroups whose primary focus is not just a sub-set of the broader, basic objective of the general profession, but is rather one fundamentally at variance—in some respects at least—with the objective of the general profession. As the territory of the profession expands to cover wider and more varied groups, their interests can thus exert a centrifugal force on the profession's cohesiveness. That arguments questioning the more substantive values of the legal profession have not generally been made by other professions intent on the de-prescription of MDPs is evidence of the relatively abiding legitimacy of such values within the broader American society. In this context it becomes more prudent for MDP proponents to limit their critique of the legal profession to one of form or procedure—efficiency—while leaving the profession's substantive values undisturbed and retaining nonetheless the potential to attain their ultimate objective of jurisdictional usurpation.

them, since such arguments are likely to elicit heightened resistance from elements within the legal profession who may feel threatened by the subversion of the ethical norms of their profession. Instead of such arguments, it seems more prudent to focus on an established value like efficiency and portray it as being quite compatible with these other substantive values. This is akin to using diplomacy in furtherance of war efforts. For those opposed to MDP, the converse has been the case. The approach has been to insist that the subsidiary values of the legal profession, which undergird broader values like client advocacy,⁶⁸ are incompatible with that of efficiency, at least when efficiency takes the form of practice structures such as MDP.⁶⁹ In essence, MDP opponents argue that they are mutually exclusive and that the portrayal of both as being compatible is merely a ruse to get the nose of the MDP camel under the tent. More moderate opponents insist on lawyer-controlled MDPs as a means of attenuating the risks of ethical erosion.⁷⁰ In so doing, however, they bare the crux of the whole matter, namely, control of work and its organization.⁷¹

⁶⁸ It is possible to state the animating values of the legal profession at varying levels of generality. The more generally stated, the less amenable to subversion it is. Conversely, however, the more general the statement, the more amenable it is to adoption and use—rather than subversion—by other professions. Thus one can state the animating value as justice, this being the most general level, at which the value becomes almost totally immune from attack given the overriding legitimacy of justice as a concept throughout the ages. Below this one can state fair trial as the animating value. This is also a very strong value amenable to limited challenge, although it limits the lawyer's jurisdiction to litigation. Below this we can state advocacy as the animating value. Though this covers the lawyer's role in litigation as well as other contexts where he champions clients' interests, the general acceptability of this value is much weaker and therefore capable of some challenge. See, e.g., Simon, *supra* note 67, at 30 ("Conventional morality frowns at the ethics of advocacy."). Perhaps at this level the animating values become amenable to alternate presentation. For instance, dispute prevention and resolution could be stated as a dominant value because prevention of disputes through conformity with law and elimination of ambiguities in transactions is a purpose—if not the only purpose—of legal work not related to litigation.

⁶⁹ See Fox, *supra* note 9, at 1099–1104 (characterizing as the sole value of the Big 5 a pursuit of business success that "threatens to destroy the foundation of professional independence, loyalty and confidentiality" that the "priesthood" of American lawyers provides the public).

⁷⁰ E.g., Wolfman, *supra* note 13.

⁷¹ *Id.* Patrick F. McCartan, then Managing Partner for the law firm of Jones, Day, Reavis & Pogue, expressed related, and indeed more expansive, misgivings regarding the Model 5 MDP, in which lawyers are controlled by non-lawyers. See CPR, Submission by Patrick F. McCartan to the Commission on Multidisciplinary

It is not surprising that the arguments of MDP opponents come up short in mass appeal against arguments anchored on efficiency, as seen, for instance, in the broad grass-root support garnered by MDP proponents.⁷² The history of industrial societies since the late 19th century has been one of efficient rationalization of production.⁷³ Efficiency as a credo thus evokes and commands a broad intellectual appeal that has remained ascendant for almost two centuries. The rise of the big corporation and the perceived inequities of the market have led to a relatively nascent call for the modulation of efficiency by other values.⁷⁴ This challenge, while ascendant, has by no means displaced efficiency as an organizing principle of socio-economic regulation.

Practice, Apr. 1, 1999, <http://www.abanet.org/cpr/mccartan.html>.

⁷² The ABA MDP Commission heard extensive testimony from consumers and consumer advocacy groups supporting MDP, which they saw as capable of delivering high quality legal services in innovative ways at low cost. See, for instance, Written Remarks of the Consumer Alliance, Mar. 31, 1999, <http://www.abanet.org/cpr/consumer.html>, a joint statement by a coalition of sixteen consumer advocacy groups. A broader alliance of thirty-seven consumer groups endorsed a similar position at a time when it was becoming apparent that the ABA House of Delegates would not favor MDP, at least in its radical forms. See Letter from The Consumer Alliance to the Commission on Multidisciplinary Practice, Apr. 6, 2000, <http://www.abanet.org/cpr/consumer3.html>; see also Letter to the Commission on Multidisciplinary Practice, Mar. 14, 2000, <http://www.abanet.org/cpr/mdpsmallbusiness.html> (submitting views on behalf of fifty-one small business outfits under the umbrella of the Small Business Alliance); Statement of Theodore Debro, President of Consumers for Affordable and Reliable Services of Alabama, Before the ABA Commission on Multidisciplinary Practice, Feb. 12, 2000, <http://www.abanet.org/cpr/debro2.html> (arguing that MDP can help extend legal services to low and middle income populations); Written Remarks of Lora H. Weber, Pres. and Exec. Dir., Consumers Alliance of the Southeast, Mar. 11, 1999, <http://www.abanet.org/cpr/weber1.html> (discussing how individual and small business consumers can benefit from a relaxation of the MDP rules); Oral Testimony of Wayne Moore, Dir., The Legal Advocacy Group for the Am. Ass'n of Retired Persons (AARP), Mar. 11, 1999, <http://www.abanet.org/cpr/moore1.html>.

⁷³ See Maureen Straub Kordesh, *"I Will Build My House with Sticks": The Splintering of Property Interests Under the Fifth Amendment May Be Hazardous to Private Property*, 20 HARV. ENVTL. L. REV. 397, 399-403 (1996) (defining rationalization of production as "the reduction of the production process to its most efficient units" and describing it as "possibly the greatest triumph of industrialization").

⁷⁴ See generally SOCIAL INEQUALITY: VALUES, GROWTH, AND THE STATE (Andrés Solimano, ed., 1998) (exploring equality and distributive justice as countervailing values to the dominant free-market ethos).

2. Changes in Technology

Another source of system disturbance in the context of MDP is technology. In this regard, advances in information technology have led to the commodification and routinization of certain aspects of legal knowledge, thereby disturbing accepted settlements between the legal profession and other groups within the system of professions and revealing weaknesses in the legal profession's control of its jurisdiction—weaknesses that other professions are necessarily drawn to explore. Commodified knowledge is turned into homogenized products or commodities that can be purchased and used off the shelf, while routinization renders erstwhile high-level work amenable to routine performance by less-skilled persons or even machines. For example, there are now computer programs that provide basic legal forms and accompanying instructions to consumers, in areas ranging from the preparation of wills to the drafting of basic divorce documents, thereby commodifying and routinizing aspects of the lawyer's professional jurisdiction.⁷⁵ Such developments imply greater access by other professions to the jurisdiction of the lawyer, bringing these professions closer to the law and creating opportunities for exploration of synergies or complete usurpation of one profession's jurisdiction by another. This is because it becomes almost meaningless for any professional group to claim exclusive knowledge and capabilities over areas of knowledge that have undergone commodification or routinization, since the knowledge involved would almost always cease to be very special or esoteric.

The most significant effect of this sort of technological advances is indirect and psychological rather than substantive. Such technologies tend to call into question the very nature of

⁷⁵ In the celebrated case of *Unauthorized Practice of Law Committee v. Parsons Technology Inc.*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *1, *6 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956, 956 (5th Cir. 1999), the United States District Court for the Northern District of Texas, Dallas Division, found the defendant software company liable for unauthorized practice of law for selling Quicken Family Lawyer, a computer program containing templates and instructions for more than 100 legal forms ranging from employment agreements to wills. The injunction against the sale of the software was subsequently vacated by the Fifth Circuit following an amendment to the unauthorized practice statute by the Texas legislature to allow the sale of such software with appropriate caveats. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956, 956 (5th Cir. 1999).

professional knowledge and the professions that embody it. They draw attention to the apparent dispensability of the profession and its structures, even if not the animating ideals. Why, for instance, should Quicken software—which guides clients in the preparation of legal documents—not be upgraded ultimately to a level where it can take over far more fundamental legal tasks? Overlapping with values such as efficiency, such technological advances foster an intellectual disposition receptive to a culture of progressive work rationalization.

Beyond this broad cultural effect is, of course, the direct effect of new technologies on discrete aspects of the professions. Apart from eliminating portions of professional work, it can alter perspectives, give new possibilities to old arguments, diminish the luster of appealing ideas, and in so doing contribute to the empowerment of nascent proto-professional groups. For instance, one of the arguments of MDP opponents has been that MDP would engender intolerable conflicts of interest as the resultant professional service firms, with their enormous sizes, take on multifarious tasks for an increasing web of clients with cross-cutting interests.⁷⁶ A response to this concern has been to argue that the value of the rules on imputation of conflict⁷⁷ is minimal, given the lack of contact between partners and staff in the several, far-flung offices of such firms.⁷⁸ With no such contact, it is argued, the opportunity for one member to transfer information to another between such offices is considerably attenuated. Yet it is not difficult to perceive that developments in information technology that permit the sharing of information and ideas on a hitherto unknown scale, through huge databases reaching across states, exacerbate the danger of information exchange—wittingly or otherwise—between members in such far-flung offices. So also does the ease of instantaneous

⁷⁶ James C. Moore, *Lawyers and Accountants: Is the Delivery of Legal Services Through the Multidisciplinary Practice in the Best Interests of Clients and the Public?*, 20 PACE L. REV. 33, 39 (1999).

⁷⁷ MODEL RULES OF PROF'L CONDUCT R. 1.7–1.10 (2004) (outlining circumstances where lawyers are ethically barred from representing multiple clients with competing interests). Model Rule 1.10 governs the imputation of conflicts of interest, which is particularly relevant in a large-firm setting. See *id.*, R. 1.10.

⁷⁸ Cf. Geoffrey C. Hazard, Jr., *Foreword: The Future of the Profession*, 84 MINN. L. REV. 1083, 1089–90 (2000) (noting that certain large law firms prosper despite the strict rules on conflicts of interest and that insulating information within firms is a feasible option).

information exchange through routine e-mail and instant messaging. In this context of proliferating technology, the besieged rule of conflict imputation becomes considerably revitalized.

While the processes of technology-driven commodification and routinization have affected the knowledge base and psychological profile of all professions, its impact and the degree to which it impels them to seek other territories varies from profession to profession. The development of various accounting software is having a more corrosive effect on the bookkeeping and auditing dimensions of accounting, both of which are becoming more steadily commodified,⁷⁹ than does the development of diagnostic software on medical practice.⁸⁰ In this wise, such corrosive technologies may actually be said to be direct—even if subsidiary—sources of system disturbance, since they impel a search by the affected professions for new jurisdictions to replace disappearing ones. It is, however, arguable that such technologies create new opportunities for work as they close others, an example being the new opportunities in systems consulting opened up for accountants in the wake of mass computerization.⁸¹ But the relative rates of closure and creation of opportunities for each profession have not been definitively established. Conceptually, though, it is plausible that the rates would vary with each profession depending on the size of their existing jurisdiction and the nature of their professional knowledge. Professions like law, medicine, and the clergy, with jurisdictions that extend to personal problems, tend to have not only an extensive jurisdiction, but also more resilient knowledge bases, to the extent that their professional knowledge manifests itself not only in formal knowledge, but equally in general insight of a sort unamenable to easy rationalization.⁸² Where a

⁷⁹ See generally Conrad S. Ciccotello, et al., *Will Consult for Food! Rethinking Barriers to Professional Entry in the Information Age*, AM. BUS. L.J., June 22, 2003, at 905 (exploring the effects of technology on the commodification of professions, including accounting).

⁸⁰ See Chris Gaither, *What Your Doctor Doesn't Know Could Kill You*, BOSTON GLOBE, July 14, 2002 (Magazine), at 12 (reporting on the symbiotic relationship of doctors and medical diagnostic software).

⁸¹ See Cassel Bryan-Low, *Auditors Sill Perform Nonaudit Services*, WALL ST. J., Apr. 3, 2002, at C1 (reporting that in 2000 General Electric paid KPMG \$38.9 million for non-audit related technology consulting services).

⁸² Kronman wrote that the ideal lawyer-statesman's expertise should consist of not just substantive knowledge, but also, more importantly, character traits such as

profession's jurisdiction is narrow, based on highly formal knowledge of the sort tractable to artificial intelligence, or both, the possibility of commodification and routinization becomes high, and concomitantly the need to take remedial action to protect and preserve the profession becomes heightened. Professional survival may in these circumstances critically depend on the capacity to seek out new professional territories. Accounting appears to be such a profession, given the major constituency it serves—business—and the rather formal nature of its traditional functions and expertise. So also is pharmacy where a major aspect of the jurisdiction—clinical pharmacy—is vulnerable to the ready computerization of dose response, drug interaction, and other esoteric pharmacological knowledge.⁸³ The same goes for areas of engineering and design, where computer aided design is a major form of routinization.⁸⁴ Commodification and routinization, more so the latter, thus impel accounting to seek out new professional territories—something that the circumstances of the profession's origin and history have conditioned it to do particularly well, as apparent from the discussion below.

3. Political Adjustments, Constitutional, or Legislative Measures

Political adjustments, which often take the form of constitutional or legislative measures, can cause upheavals in the system of professions, upsetting accepted settlements over existing jurisdictions or creating new vacancies, thereby initiating jurisdictional contests between professional groups intent on exploiting the emergent opportunities. The enactment of the Joint Stock Companies Registration, Incorporation and

prudence, deliberation, imagination and related modes of insight. See KRONMAN, *supra* note 57, at 1-3, 68-74.

⁸³ For an account of the automation of the medication administration process from pharmacy order transmission to drug dispensing, see Richard R. Rogoski, *Building a Safety Net*, HEALTH MGMT. TECH., Aug. 2006, at 12. For a description of efforts by pharmacists nationwide to expand their authority over patient counseling and prescription modification, see Robert Berner, *Health Care: Pharmacists Are Starting To Move In on Doctors' Turf*, WALL ST. J., Jan. 28, 1999, at B1.

⁸⁴ See, e.g., William M. Bulkeley, *3D Printers Reshape World of Copying*, WALL ST. J., Aug. 3, 2006, at B1 (reporting how emerging computer aided design software will allow even children to design their own toys).

Regulation Act of 1844⁸⁵ in England and the Federal Income Tax Act of 1913⁸⁶ in the United States are examples of such measures. The former triggered the rash formation of corporations in England and the resultant epidemic of bankruptcies that followed,⁸⁷ thus creating a bankruptcy jurisdiction that English accountants ultimately succeeded in occupying. The latter created the vast tax jurisdiction over which accountants, lawyers, and specialized tax advisors continue to squabble.

B. How System Disturbances Engendered the Legal Profession's Weakened Position and Its Loosened Grip on Its Professional Jurisdiction that Ultimately Became Manifest in the Struggle over MDP

1. The Historical Adaptability of the Accounting Profession to System Disturbances

Generally, most professions have tended to be reactionary in the face of system changes, but a few, notably accounting, appear proactive. This proactivity is the result of peculiar historical factors. A relatively recent profession whose teeth were cut on bankruptcy work, accounting emerged as a profession aided significantly by the foibles of 19th century British insolvency and corporate law.⁸⁸ English corporate law in particular had in its nascent state, in the wake of the liberalization introduced by the Joint Stock Companies Registration, Incorporation and Regulation Act of 1844⁸⁹ and the Limited Liability Act of 1855,⁹⁰ engendered rash activities in the formation of joint stock companies and dealings in transferable stock, with the (now

⁸⁵ Joint Stock Companies Registration, Incorporation and Regulation Act, 1844, 7 & 8 Vict., c. 110 (Eng.).

⁸⁶ Federal Income Tax Act, ch. 16, sec. 2, 38 Stat. 114 (1913).

⁸⁷ See VANESSA FINCH, *CORPORATE INSOLVENCY LAW: PERSPECTIVES AND PRINCIPLES* 10 (2004 ed.) (2002) (attributing the development of corporate bankruptcy law and the "depersonalization of business and credit" to the emergence of the company in nineteenth-century Britain).

⁸⁸ See JOHN L. CAREY, *THE RISE OF THE ACCOUNTING PROFESSION: FROM TECHNICIAN TO PROFESSIONAL 1896-1936* 17-19 (1969).

⁸⁹ Joint Stock Companies Registration, Incorporation and Regulation Act, 1844, 7 & 8 Vict., c. 110 (Eng.).

⁹⁰ Limited Liability Act, 1855, 18 & 19 Vict., c. 133, § 7 (Eng.).

predictable) result of rampant bankruptcies.⁹¹ Insolvency law in the shape of the Bankruptcy Act of 1861⁹² gave a similar and commensurate fillip to bankruptcy work by encouraging voluntary bankruptcies as an avenue for troubled debtors to obtain relief from their liabilities.⁹³ The need for receivers with knowledge of aspects of business law and financial practice led stock brokers, (failed) merchants, lawyers, bankers, and just about anyone with some knowledge of financial affairs to undertake the function of winding up the bankrupt's affairs and drawing up his statement of affairs.⁹⁴ It was this motley, poorly-esteemed group⁹⁵ that ultimately metamorphosed into the accounting profession in England, of which the American profession may be said to be a progeny.⁹⁶

⁹¹ See MACDONALD, *supra* note 46, at 191-92. Since the early growth of accounting in Britain came before the introduction of limited liability of corporations by the Limited Liability Act of 1855, most corporate bankruptcies had the effect of reaching the assets of the individual stockholders. Thus, many of the bankruptcies would have been for individuals as well as the corporations themselves. FINCH, *supra* note 87, at 10. For an account of the advent of limited liability in England, see generally BISHOP CARLETON HUNT, *THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND 1800-1867* 116-17 (1936).

⁹² Bankruptcy Act, 1861, 24 & 25 Vict., c. 134, § 1 (Eng.).

⁹³ See FINCH, *supra* note 87, at 10-11 (discussing the evolution of bankruptcy law in 19th century Britain).

⁹⁴ MACDONALD, *supra* note 46, at 191-92. See also DEREK MATTHEWS, MALCOLM ANDERSON & JOHN RICHARD EDWARDS, *THE PRIESTHOOD OF INDUSTRY: THE RISE OF THE PROFESSIONAL ACCOUNTANT IN BRITISH MANAGEMENT* 93 (1998), referring to the "oft-quoted remark that the accountancy profession 'was born through bankruptcies, fed on failures and fraud, grew on liquidations and graduated through audits.'" The authors note the possibility that the centrality of bankruptcy work to late-nineteenth-century accountants may have been overstated. *Id.* at 95. That suggestion, however, is weak both in the manner it is stated (suggested) and in terms of the evidence adduced in its support. For additional endorsement of the primacy of bankruptcy work to Victorian accountants, see CAREY, *supra* note 88, at 18.

⁹⁵ Macdonald reports one of the founders of the English profession, Ernest Cooper, as having written thus concerning the state of accounting when he started work in 1864:

We may disregard the then current jibes, that if an accountant were required he would be found at the bar of the nearest tavern to the Bankruptcy Court in Basinghall Street, and that an accountant was a man who had failed in everything else . . . but an accountant was regarded as associated with and dependent upon insolvency, and I well remember that to be seen talking to or having your office visited by an accountant was to be avoided, especially in the stressful times of 1866.

MACDONALD, *supra* note 46, at 191.

⁹⁶ Carey chronicles the seeding of America by British accountants in the late 19th century. See CAREY, *supra* note 88, at 21-30.

The ready adaptability of English managers to the demands of the corporate form meant, however, that bankruptcy as a steady source of business was soon at an end, thus depriving the fledgling accounting profession of its mainstay and forcing it to adapt. Thus began a cycle of adaptation to changing scenarios and negotiation of the impact of disparate system disturbances that has seen accounting emerge as a virtuoso performer in the theater of professions, with a versatile taste for work and a near-infinite capacity for redefinition and evolution in pursuit of further professional jurisdictions wherever such may be found, whether across inter-professional or international boundaries. Following on the heels of bankruptcy work came the audit function as a mainstay of professional expertise. This was followed by successive diversification to other areas of expertise, each of increasing importance in its heyday: cost accounting, tax, management consulting, and systems consulting; a significant segment of these areas being jurisdictions wrested from other professions.⁹⁷ Cost accounting was, for instance, originally the province of industrial engineers, or at the least a distinct specialty not dominated by accountants until much later.⁹⁸ Complementing these major jurisdictions were smaller interests in areas as varied as human resources, real estate advisory services, management education, and immigration compliance. With an appetite reminiscent of a hyena's, the accounting profession acquired a capacity for taking on multifarious tasks and subjecting them effectively to its exacting procedures. If there is anything common to all of its jurisdictions—the essence of its genius—it may well not be the capacity for executing each area of work, but rather the very philosophy that any area of work is amenable to its methodology—a methodology that comprises its approach to staff recruitment, training,

⁹⁷ For a chronicle of the foray of accountants into different functions since Victorian times, see MATTHEWS ET AL., *supra* note 94, at ch. 4. That historical account reveals little, however, of the inter-professional dimensions of accountancy's acquisition of these new functions.

⁹⁸ Carey notes aspects of the early struggle in the United States for jurisdiction over cost accounting between the manager of works or industrial engineer, on the one hand, and the public accountant, on the other. See CAREY, *supra* note 88, at 147–48. He also discusses how the National Association of Cost Accountants was formed as an independent association in 1919 after the American Institute of Accountants, viewing the area as somewhat tangential to the province of the public accountant, declined to create a cost accounting section of its own. *Id.* at 311.

incentivization, socialization, and overall culture.⁹⁹ This philosophy became then a sort of core competence—in the sense articulated by Prahalad and Hamel¹⁰⁰—which enabled it to move from jurisdiction to jurisdiction in response to system disturbances. A nomad of sorts, it could absorb shock by taking on or creating new vacancies in far-flung professional climes in a way that more sedentary and comfortable professions could not.

Perhaps the greatest aspect—the nucleus properly so called—of this core competence lies in the capacity to anticipate and shape change, aptly called change management. A pervasive industry belief, this theory loosely posits that change can be

⁹⁹ It may be objected that this methodology is partial to the Big 4 firms. But that would not go to much issue, given that the Big 4 effectively dominate the accounting profession presently, shaping policies directly and otherwise and representing the standard organizational structure towards which smaller firms and practitioners generally aspire. See *supra* note 25 and accompanying text. That aside, accounting historically was not as integrated as it is today, with dominance being diffused between many more firms than the few dominant firms of today.

¹⁰⁰ See C.K. Prahalad & Gary Hamel, *The Core Competence of the Corporation*, HARV. BUS. REV., May–June 1990, at 79, 80–83. Tracking the performance of several corporations over the years, the authors in this seminal work posit that the true source of competitive and strategic advantage no longer lies in the competitive quality or price of discrete products. *Id.* at 81. Rather, it lies in the capacity to identify competencies that lie across the several units of a corporation and blend these into a distinct, inimitable source of products uniquely dependent on such competencies. See *id.* at 82–83. A truly competitive modern corporation would be a portfolio of such competencies rather than a portfolio of businesses. See *id.* at 86. Protecting these competencies and leveraging on them, such corporations will be able to continuously evolve in line with the demands of the market. *Id.* at 87. Thus, Honda, by focusing not on cars or motorcycles, but rather on the capacity to design engines and power-trains using resources from across various of its divisions, is able to maintain a leadership in the fast changing world of cars, lawn mowers, generators, etc. *Id.* at 83. Similarly, “Canon’s core competencies in optics, imaging, and microprocessor controls have” been the source of its dominance in seemingly diverse markets such as photocopiers, laser printers, cameras, and image scanners, even when its research and development budget was a fraction of Xerox’s. *Id.* Core competencies are therefore:

the collective learning in the organization, especially how to coordinate diverse production skills and integrate multiple streams of technologies. . . .
 . . . [I]t is also about the organization of work and the delivery of value. Among Sony’s competencies is miniaturization. To bring miniaturization to its products, Sony must ensure that technologists, engineers, and marketers have a shared understanding of customer needs and of technological possibilities. The force of core competence is felt as decisively in services as in manufacturing. . . .

Core competence is communication, involvement, and a deep commitment to working across organizational boundaries. It involves many levels of people and all functions.

Id. at 82.

anticipated and shaped to advantage, since often it cannot be stopped. In its strong form, it posits that the future could be created through articulated generation of change: One does not necessarily have to wait for the waves in order to surf; one can make waves for oneself. Such a mindset then sees opportunity in every system disturbance, the aim being to tap in and exploit it. The core competence of the profession ceases to be any particular sort of work or clientele, but rather versatility in the deployment of its methodology along various axes of expertise. Areas of work and their peculiarities become fleeting chapters in the saga of a resilient methodology, which sees its opportunities in the perpetual shifts and upheavals of the professional ecosystem. The quest for MDP represents the latest chapter in the march of this core competence. In this latest quest, the legal profession—long secure in the exclusiveness of its large professional territory—was the unfortunate target of this resilient methodology. Unaccustomed to such challenges, the legal profession's resistance was feeble and ineffective against an adversary with a honed capacity for inter-professional insurgency.

2. The Legal Profession's Different Attitude to System Disturbances and Its Effect on Its Competitiveness Relative to the Accounting Profession

An exculpating argument is often made for the legal profession in the context of the expanded and increasingly sturdy jurisdiction of accounting. In this regard, it is argued that much of the strength of the Big 5 came from its expansion abroad, and that the nature of legal knowledge and legal work makes the legal profession unamenable to expansions of the sort witnessed in the accounting field, which saw the emergence of the behemoth firms that now spearhead accounting's professional project.¹⁰¹ Those who tow this line argue that the variegated nature of the law and its nuances in various countries and among various peoples preclude the sort of domestic and international

¹⁰¹ See Gary A. Munneke, *Lawyers, Accountants, and the Battle To Own Professional Services*, 20 PACE L. REV. 73, 74–75 (1999) (“[T]he nature of accounting practice has fostered the development of a handful of powerful industry-dominating accounting firms. These firms have been able to cross state and national boundaries to provide services to clients much more easily than law firms constrained by local practice and ethics rules”) (internal footnote omitted).

expansion witnessed in accounting, since no common rules and standards can be articulated for consistent application by firms across these diverse settings.¹⁰² Accordingly, a commentator on professional issues, comparing accountants and lawyers in the context of MDP, stated thus:

Accountants, on the other hand, have always enjoyed a national or even international scope to their practice. While laws differ from state to state, numbers and bookkeeping practices do not; generally accepted accounting principles ("GAAP") mean that an accountant in California can audit the books of a company or individual in her own state, New York, or Singapore.¹⁰³

As appealing as this argument appears on the surface, it does not reflect the reality of accounting practice or theory. The accounting profession has no standards applicable in all places, even with regard to the very formalized attest (audit) function. Accounting and auditing standards—including the so-called generally accepted accounting standards ("GAAP")—vary from country to country in key respects.¹⁰⁴ The rules for income recognition, depreciation, and provisions (i.e. reserves) for bad debts, to name a few, vary considerably between countries—and even between states within the United States¹⁰⁵—as do audit

¹⁰² Regarding the international context, such international expansion has generally gone hand-in-hand with inter-professional expansion. This is because in many countries the United States or British accounting firm has met little resistance from other local professions, including law, which it has had little problem in co-opting and dominating. This has been the case with France for instance, where the Big 5 floated large law firms that dominate transactional law work, in respect of which many French conseil juridiques (transactional lawyers) have been effectively co-opted by the Big 5. *See* Report of the New York State Bar Association Special Committee on the Law Governing Firm Structure and Operation, Preserving the Core Values of the American Legal System: The Place of Multidisciplinary Practice in the Law Governing Lawyers 199–207 (2000), available at http://www.law.cornell.edu/ethics/mdp2.htm#chapt9_2 (reviewing the expansion of the Big 5 in France since 1992).

¹⁰³ Munneke, *supra* note 101, at 74.

¹⁰⁴ *See* DAVID R. HERWITZ & MATTHEW J. BARRETT, MATERIALS ON ACCOUNTING FOR LAWYERS 161–63 (3d ed., 2001).

¹⁰⁵ This follows from the prerogative of the different states to regulate the professions and their standards, including the accounting profession. For registrants under the Federal securities laws, this variation is largely of little practical relevance, since the standards become unified because of the overriding prerogative of a single national agency—the Securities and Exchange Commission (SEC)—over securities and the financial statements so crucial to the operation of the securities market. *See* Sec. Exch. Comm., The Investor's Advocate: How the SEC Protects

requirements. This is further compounded by the fact that these rules are often susceptible to multiple interpretations and thus implicate a fair amount of judgment in their application.¹⁰⁶ “Different taxation systems, economic conditions, political processes and cultural traditions contribute to a diversity in accounting practices between nations in matters such as inventory valuation, depreciation, consolidations, and disclosure requirements.”¹⁰⁷ The articulation of common accounting standards applicable across borders is thus only a recent and as yet incomplete initiative of the International Accounting Standards Board (“IASB”).¹⁰⁸

Indeed, if diversity in laws and legal practice were the root causes of the legal profession’s erstwhile provinciality, one

Investors, Maintains Market Integrity, and Facilitates Capital Formation, <http://www.sec.gov/about/whatwedo.shtml> (last visited Aug. 27, 2006) (“[The SEC] is the primary overseer and regulator of the U.S. securities markets . . .”). In exercise of its prerogative, the SEC has historically chosen to defer in matters of accounting standards to the authority of the Financial Accounting Standards Board (“FASB”), a private body originally designated by the Council of the American Institute of Certified Public Accountants (AICPA) for that purpose. See FIN. ACCOUNTING STANDARDS BD., FACTS ABOUT FASB 1-2 (2005), http://www.fasb.org/facts/facts_about_fasb.pdf. This arrangement was significantly affected, however, by the climate of distrust and outrage towards accounting practice in the wake of the Enron Corporation accounting scandals, see *supra* notes 19-20 and accompanying text, and the subsequent enactment of the Sarbanes-Oxley Act of 2002, which established by section 101 thereof the Public Company Accounting Oversight Board to oversee auditing standards and related matters. See Pub. L. No. 107-204, § 101, 116 Stat. 745, 750-753 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). It is noteworthy, though, that section 103(c) mandates that the Board cooperate with professional accounting groups in the process of setting auditing and related standards. See *id.* § 103(c). This is reinforced by the provisions of section 108(b), which expressly authorize the SEC to recognize as generally accepted the accounting principles established by certain private bodies, which ostensibly include the FASB. See *id.* § 108(b).

¹⁰⁶ What, for instance, merits classification as an extraordinary loss, given the significant advantage that the classification of a loss as such could confer on a corporation and its managers? If a loss results through an occurrence (say tornadoes) that is roughly predictable by the denizens of a locale to occur once every five years, though without warning at unspecified times, does such a loss qualify as extraordinary? What if the occurrence repeats itself every two, three or four years? Where lies the threshold? On the general imprecision and indeterminacy of GAAP, as well as discretion in the treatment of loss in long-lived assets, see HERWITZ & BARRETT, *supra* note 104, at 167-68, 852-56.

¹⁰⁷ *Id.* at 161.

¹⁰⁸ See A Roadmap for Convergence Between IFRSs and US GAAP—2006-2008: Memorandum of Understanding between the FASB and the IASB (Feb. 27, 2006), http://www.fasb.org/mou_02-27-06.pdf (summarizing efforts from 2006 to 2008 by the FASB and IASB to harmonize their respective accounting standards).

wonders what significant change could have occurred in the interim to eliminate such diversity and make way for the sudden interest of lawyers and law firms in an expanded global reach, as manifest in the relatively recent bloom of multinational law firms with practices spanning several countries.¹⁰⁹ Certainly not globalization and the relatively sparse pieces of uniform model legislation and conventions produced in discrete areas like arbitration, conflict of laws, and international sales through the instrumentality of agencies such as the United Nations Center for International Trade Law ("UNCITRAL")¹¹⁰ and International Institute for the Unification of Private Law ("UNIDROIT"). The bulk of international transactions are as yet unaffected by these instruments, not just because of the limited areas tackled to date but also on account of the limited number of states interested in the project of unification,¹¹¹ and the often varied modes and range of implementation in the states that show such interest.

In essence, accounting knowledge and practice are as varied across jurisdictions as legal knowledge and practice, so that the root cause of the differences in firm size and geographical reach between both professions have to be sought elsewhere. It would appear in this regard that necessity has truly been the mother of invention. As with a few other professions, the legal profession in the United States never sought to expand its jurisdiction radically, there being no direct pressure for it to do so.¹¹² It was

¹⁰⁹ On the recent growth of transnational law practice and large law firms, see Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 *N.W. J. INT'L L. & BUS.* 487, 492 (2003); see also Richard L. Abel, *Transnational Law Practice*, 44 *CASE W. RES. L. REV.* 737, 738 (1994). Transnational practice is not new, however. The pioneering transnational law firm Coudert Brothers opened its Paris office in 1879. Jonathan D. Glater, *Law Firm That Opened Borders Is Closing up Shop*, *N.Y. TIMES*, Aug. 30, 2005, at C1. What is novel is the rate of growth. Abel, *supra*, at 738.

¹¹⁰ *E.g.*, UNCITRAL Model Law on Electronic Signatures, Dec. 12, 2001, available at <http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf>.

¹¹¹ For instance, UNIDROIT, established originally in 1926 as an auxiliary organ of the League of Nations, UNIDROIT, About UNIDROIT, <http://www.unidroit.org/english/presentation/main.htm> (last visited Aug. 28, 2006), has only sixty member countries. UNIDROIT, Membership, <http://www.unidroit.org/english/members/main.htm> (last visited Aug. 28, 2006). In addition, it has produced only ten conventions and one model law, in overlapping areas of private law, especially international sales. UNIDROIT, UNIDROIT Conventions, <http://www.unidroit.org/english/conventions/c-main.htm> (last visited Aug. 28, 2006) and UNIDROIT, UNIDROIT Model Laws, <http://www.unidroit.org/english/modellaws/main.htm> (last visited July 21, 2006).

¹¹² See ABBOTT, *supra* note 39, at 249 (noting the inability of the American legal

essentially content with its traditional jurisdiction as augmented incrementally by non-revolutionary progression. It could even be said to have been complacent in the assumed security of an extensive and bountiful professional jurisdiction. True, there were expansions such as the late nineteenth century move by law firms into areas of corporate and allied work quite distinct from the affairs of individuals with which lawyers were previously preoccupied.¹¹³ But these were evolutionary in nature, not revolutionary responses to major system disturbances in quest of radically new professional jurisdictions. They were natural progressions in the same type of work rather than radical expansion and transformation of jurisdiction of the sort witnessed in accounting, which, like the British empire, can be described in the ringing words of Eamon de Valera as a “domain created in a moment of world absent-mindedness.”¹¹⁴ For while law and other professions¹¹⁵ basked in the glory of their status and pedigree,¹¹⁶ accounting quietly but

profession to meet the existing demand for its services in the period from 1880 to 1930).

¹¹³ See *id.* at 248 (large reorganizations and bond issues, tax planning, antitrust).

¹¹⁴ DICTIONARY OF QUOTABLE DEFINITIONS 60 (E. Brussell ed. 1988) (1970).

¹¹⁵ The medical profession’s relative provincialism vis-à-vis accounting is further evidence that the impetus for accounting’s jurisdictional expansion does not lie in the alleged ubiquity of common accounting standards and knowledge. For if any system of knowledge can be taken as standardized relative to other professions, it should be that of human medicine. Most ailments effectively yield to the same diagnostic techniques and therapies around the globe, yet medicine never developed a major international focus, see MACDONALD, *supra* note 46, at 77–93 (comparing the varying histories and ultimate structures of medical organization in England, the United States, France, and Germany, respectively), apart from a few non-governmental or humanitarian organizations working across borders, see, e.g., Am. Med. Ass’n, International Organizations, <http://www.ama-assn.org/ama/pub/category/3345.html> (last visited Aug. 28, 2006) (providing links to several international medical and relief organizations). Like law, medicine’s domestic jurisdiction was huge and comfortable.

¹¹⁶ Much as accountants would like to pass their profession off as an ancient one, the reality of its recent emergence into the professional class is without doubt in the literature on professions. The air of deep antiquity about the profession is therefore more than half bogus, since like other modern professions, it is a Victorian invention. Thus, accounting has traditionally sought to acquire professional standing by association with the ancient professions, especially law. Carey reports, for instance, that “[b]eing coupled [in the mid-1920s] with lawyers as the only practitioners eligible to practice before the Board [of Tax Appeals] was a prestige symbol of which the CPAs were extremely proud. It was, in fact, the first official recognition of certified public accountants as a class by an agency of the federal government.” CAREY, *supra* note 88, at 222–23 (date reference added).

quickly achieved its expanded jurisdiction.

The forces and circumstances that compelled the accounting profession to seek an expanded international jurisdiction are largely the same ones that compelled it to seek an expanded domestic jurisdiction. Both jurisdictions constitute two sides of the same coin, and the indifference of the legal profession towards an expanded international jurisdiction¹¹⁷ was informed by the same considerations as its indifference to other emergent domestic jurisdictions or aspects thereof.¹¹⁸ This nonchalant attitude left the legal profession weakened relative to accounting

¹¹⁷ Despite the recent moves of some law firms into international practice, the profession's latent indifference may still be seen in its uneven embrace of globalization. While some firms are prepared to accept short-term lower profitability in their overseas offices for the sake of long-term growth, see, for example, Alison Frankel, *Who's Going Global?*, *AM. LAW.*, Nov. 2000 (quoting the managing partner of Skadden, Arps, Slate, Meagher & Flom as saying that firm's time horizon for overseas office profitability is ten to twenty years), other firms with expansive international practices often complain of the more immediate toll. For instance, profits that may prove adequate by the standards of the overseas locality in which they were earned may, upon translation to the dollar, appear relatively depressed, with the result that the domestic office may be subsidizing the partners in the foreign office. See Tony Williams, *The Empire Strikes Back*, *AM. LAW.*, Feb. 2006 at 87 (pointing out that the high financial returns of the top New York firms paradoxically can act as barriers to investment internationally and even domestically). Even today some of the most profitable firms in the U.S. legal scene have relatively limited or no international footprint. See generally *Big Profits at Smaller Firms*, *AM. LAW.*, June 2006, at 143 (ranking Wachtell, Lipton, Rosen, and Katz, whose sole office is in New York, and Cravath, Swaine, and Moore, with only one overseas office, first and third, respectively, among American law firms in profits per partner). The net result is that many law firm executives consider niche operations that focus on the local market as good business strategy, even though this may in the long term be strategically unhealthy for the broader legal profession, and perhaps even for these specific firms themselves. See Ashish Nanda, *Competition Between the Professions: Law Firms vs. Accounting Firms*, *HARV. BUS. SCH. CASE* N9-899-301, June 20, 1999, at 5 (reporting on the lethargy of law firms in venturing into the foreign legal market because of concerns over profits).

¹¹⁸ The argument that the legal profession has been comfortable with its extensive local jurisdiction may be taken as one tending towards indictment of the profession for its professional monopoly. While the present writer does not believe that monopoly is an absolute necessity of professional life, it bears mentioning that such a monopoly is not necessarily a factor in the legal profession's international lethargy. Indeed, the accounting profession also held such a monopoly in its professional heartland: financial audits. The relative difference, then, would lie not in the existence of a monopoly, but in the nature of the areas under the jurisdiction of neighboring or similarly placed professions. If its existing area proves suboptimal, a profession would be constrained to seek greener pastures, irrespective of the monopoly. The big difference between accounting and other professions with similar suboptimal jurisdictions is that accounting has been historically conditioned to hunt down new jurisdictions.

by rendering it less experienced in the nuances of jurisdictional challenges.

In sum, accounting has grown strong through the years by responding to system disturbances, which it was compelled to negotiate and explore for opportunities on account of its austere professional jurisdiction. These responses progressively strengthened accounting vis-à-vis other professions, such as law, whose development has not historically necessitated the assumption of such challenges.

IV. TOOLS AND METHODS OF JURISDICTIONAL CONTESTS

A. *The Tools and Methods Described*

When jurisdictional vacancies in the system of professions occur or when one profession is out to create and occupy a vacancy, the potential occupant adopts one of several mechanisms to contest for, and press its claim to, the new jurisdiction or territory. These mechanisms are basically standard rhetoric of cognitive competence.¹¹⁹ One such rhetorical device includes what philosophers call reduction, by which one profession asserts that the intellectual contents and requirements of a claimed professional jurisdiction are essentially reducible to that already perfected by it in an area which it already occupies, so that the claimed jurisdiction is properly and ideally within its competence.¹²⁰ Such rhetoric also encompasses a device whereby the claimant asserts that even though the diagnosis of a problem by one profession is defensible, that profession's treatment, i.e., solution, is inefficacious or inadequate, thus necessitating the introduction of the claimant's own treatment.¹²¹

Of the various forms of rhetoric, reduction appears to be the most pervasive and resilient. It permits, for instance, a problem such as inattentiveness in children, previously recognized as being within the jurisdiction of teachers or social workers, to be recharacterized as the disease of hyperactivity, and hence to be brought within the jurisdiction of the medical profession.¹²²

¹¹⁹ See ABBOTT, *supra* note 39, at 98.

¹²⁰ *Id.*

¹²¹ *Id.* at 100.

¹²² *Id.* at 98.

Similarly, the allocation of production costs is reduced to questions of accounting rather than production management, and hence within the accountant's jurisdiction instead of the production or industrial engineer's.¹²³

The capacity of a profession to effectively use the method of reduction is, however, closely related to the degree of abstraction to which its general organizing principles are amenable. This follows from the central principle of Abbott's theory: that knowledge—abstract knowledge—is the “currency” of jurisdictional competition. “Many occupations fight for turf, but only professions expand their cognitive dominion by using abstract knowledge to annex new areas, to define them as their own proper work.”¹²⁴

In this wise, Abbott distinguishes between two types of abstraction: abstraction as lack of content and abstraction as positive formalism. Abstraction as lack of content is loose, usually implying absence of specific content and a concomitant generality of application.¹²⁵ Abstraction as positive formalism is more rigorous, implying increasing formalization of ideas underlying a specific area of expertise.¹²⁶ The two are linked in a continuum, since increasing formalization leads ultimately to high-level general ideas that lack in specificity and are thus amenable to application across several areas of work.¹²⁷

¹²³ Cf. CAREY, *supra* note 88, at 147–48 (relating turf battles between industrial engineers and accountants in the early twentieth century).

¹²⁴ See ABBOTT, *supra* note 39, at 102. This harks back to the question of how to define the professions. Do we define them in terms of the length of training involved in becoming a professional, their social status, the public character of their calling, or their capacity for self-regulation and independence? Many sociologists accept the autonomy from external control, in the sense of self-regulation, to be the primary defining characteristic of professions. For Abbott, however, the place of knowledge as the currency of inter-professional competition explains why abstract knowledge is the foundation of an effective definition of professions. Thus he defines professions—admittedly loosely—as “exclusive occupational groups applying somewhat abstract knowledge to particular cases.” *Id.* at 8. Abbot's approach can be reconciled with those who posit, *supra* note 46, that control of work and occupational autonomy constitute the defining characteristics of a profession. In this regard, control of knowledge through abstraction could be said to be a primary means by which professions attain control of their work; in essence, a means to an end rather than an end in itself, the end being the control of work.

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See *id.* at 104.

Formalization, therefore, can be the avenue to the elimination of specific content.

When the appropriate point in the continuum is chosen, with optimal degrees of concrete content and formalization, abstraction secures and strengthens a profession's jurisdiction by taking its knowledge system to an equilibrium point where it is capable of application to several areas of work without being too abstract in the sense of lack of content or vagueness.¹²⁸ As the case of the clergy has demonstrated, beyond this equilibrium point abstraction becomes so general that, even though capable of application to several areas, its potency is dissipated and lost, since the connection between so general an organizing idea and the analysis and treatment of the problems in a specific area becomes tenuous. It is thus possible for the clergy, for example, to argue that every problem has a divine explanation and that prayer is the treatment. Divine governance of human problems as an organizing idea, with prayer as the recommended treatment, potentially brings within the professional jurisdiction of the clergy all human problems. But the connection between the organizing idea and recommended treatment—divine governance and prayer, respectively—on the one hand, and any resultant solution on the other hand, is always tenuous and incapable of ready demonstration. When a human problem has been solved, it is not easy to show that the solution was a result of the treatment the clergy had recommended on the strength of its organizing idea or abstraction. Hence the weak jurisdiction of the clergy over the several problems to which they have sought over the centuries to apply their highly developed organizing ideas, from physical ailments to alcoholism and criminal recidivism.¹²⁹ The converse is also the case, as too little abstraction can weaken a jurisdiction. "Expert action without any formalization is perceived by clients as craft knowledge, lacking the special legitimacy that is supplied by the connection of abstractions with general values."¹³⁰

It bears mentioning that abstraction, in the sense used here, broadly applies to a pyramidal body of knowledge, atop which sits the chief principle of the profession, the other principles forming

¹²⁸ *See id.*

¹²⁹ *See id.* at 37, 100.

¹³⁰ *Id.*

a system related to and supporting the chief principle. The overarching organizing idea is embodied in the chief principle, but the full paraphernalia of abstractions are the ideas underlying the profession's diagnoses, inferences, and treatment of clients' problems in its area of jurisdiction. Treatment alone without this paraphernalia, even if effective, is mere craft knowledge.¹³¹ As significantly, a chief abstraction by itself, without the full paraphernalia, would be no more than a philosophical construct with no applicability in the professional realm.

B. The Accounting Profession and the Tools of Jurisdictional Content

The applicability of Abbott's framework to the MDP question can be explored by using accountants—the principal proponents of MDP—as our model. MDP is, as between lawyers and accountants, a question of jurisdictional expansion by the latter into the professional heartland of the former, including litigation.¹³²

The principal theory underpinning accounting as a body of knowledge appears to have been in perpetual flux, or at best hazy, since its early days as a collective of practitioners from various disciplinary backgrounds when bankruptcy work was its mainstay;¹³³ it has never been clear or fixed. And while the same philosophical or methodological problems that have given lawyers immense angst¹³⁴ are deeply embedded in accounting's

¹³¹ *Id.*

¹³² *Peoplefeeders, Inc. v. Commissioner*, 77 T.C.M. (CCH) 1349 (1999), is evidence of a nascent push for this heartland of the lawyers' jurisdiction. According to Bernard Wolfman, it "may be the first case in which the taxpayer was represented by a lawyer in a Big Five firm." Bernard Wolfman, Testimony Before the ABA Commission on Multidisciplinary Practice (Mar. 12, 1999), <http://www.abanet.org/cpr/wolfman1.html>.

¹³³ See CAREY, *supra* note 88, at 17–19 (discussing the development of auditing as a profession during the Industrial Revolution in England).

¹³⁴ This comes from the school of thought that legal questions are at their root, political, philosophical, economic, or otherwise, so that legal questions ultimately resolve into these other disciplines. Richard Posner in particular has articulated this view. Posner makes a broad point concerning the decline of law as an autonomous discipline, a discipline without any distinctive method to impart to aspiring lawyers. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 424–33, 437 (1990). Posner's focus here is on the epistemology and general methodology of the profession, especially its academic branch in its traditional mode, and the profession's lack of a core, distinct and autonomous approach. See *id.* The

practice and organizing theories (to the extent that any such theory can be said to exist) this has never presented a major psychological or pragmatic problem for the accountant.

This lack of a substantive organizing theory is tied to the variegated nature of the work to which accountants have laid claim since the early days of the profession and the relative speed with which they have done so. With little other than expediency and opportunity driving its early forays, it was not feasible to derive any form of coherent and consistent organizing ideas at the substantive level. The connection between the earlier bankruptcy work and subsequent audit work is, apart from the basic dealings with business figures, conceptually tenuous. At its earliest stages, bankruptcy work involved merely drawing up the statement of affairs of the bankrupt—a largely ministerial function with little discretionary or advisory dimension—while auditing work involved investigative work of a sort that required a greater measure of discretion and judgment.

In approaching its various functions over the years, accounting has drawn unreservedly on a wide array of disciplines, so much so that it can easily be said to have no disciplinary integrity itself.¹³⁵ Law, bookkeeping, statistics, and economics provide the foundations upon which accounting expertise rests.¹³⁶ None of these is in any sense the professional domain of accounting. Yet,

[i]f accountancy was to establish its credentials as a knowledge-based occupation, it was necessary to assemble, define and isolate a particular cognitive domain to which it could restrict access. This was quite problematic. . . .

implication drawn however and made clearer in subsequent works, such as RICHARD A. POSNER, *OVERCOMING LAW* 15 (1995), is that this absence of an autonomous approach goes with a loss of professional autonomy at the level of the profession's organization and work. One may accept the epistemological and general methodological point made by Posner without accepting that it implies the loss of professional autonomy in the work place. Few professions if any are methodologically distinct. Medicine may be said to be nothing other than the confluence of other more basic sciences. Accounting is even worse, being a cornucopia of everything from basic bookkeeping (the nearest thing to a core methodology) to law and business management. If epistemological and methodological integrity were the benchmark for professional survival, perhaps no profession would be left standing.

¹³⁵ See AHMED BELKAOUI, *THE COMING CRISIS IN ACCOUNTING* 24–25 (1989) (listing the internal deficiencies of the “incomplete profession” of accounting).

¹³⁶ A.D. BARTON, *THE ANATOMY OF ACCOUNTING* 5–8 (2d ed. 1977).

....
... [P]rofessional practice came to entail an **esoteric collection of areas of knowledge**, rather than a basis in esoteric knowledge. In recent years attempts have been made to establish *theories* or conceptual frameworks for financial accounting, but it is clear... that they have been less than wholly successful.¹³⁷

The accountants' claim therefore ultimately had to rest on the theory that they were the only profession who could handle these areas of knowledge jointly, by combining the expertise in these fields simultaneously.¹³⁸

This 'theory' is of course conceptually undistinctive and unconvincing, given that it is amenable to being claimed by just about any other occupational group that dabbles into diverse disciplines. For, almost every other occupational group draws ideas from various sources, the difference being that professions tend, beyond this, to have an intellectual domain that provides the fulcrum around which their expertise revolves, encapsulating the core principle of the professional enterprise.

Although necessary for intellectual prestige, an organizing theory of the type lacked by accounting is not a desideratum of effective acquisition or occupation of professional jurisdictions. Essentially, the abstraction necessary to legitimize a claim to a professional jurisdiction is not coterminous with this sort of theoretical framework. Indeed, many of the best claimants to the possession of such theoretical frameworks, including philosophy and economics, lack a professional jurisdiction.

Paradoxically, an argument can be made that the existence of such a rigorous framework is antithetical to the enterprise of the professions in the sense that such rigor does not admit expansive application to varying circumstances or areas of work as our analytical approach presumes. At best, such a rigorous framework could be said to restrict a discipline to a point in the continuum between formalization and lack of content that

¹³⁷ See MACDONALD, *supra* note 46, at 201.

¹³⁸ Whatever the shortcomings of this position as a theory, it certainly has a credible factual ring about it. It makes accounting seem inherently interdisciplinary, "genetically" predisposed to the assumption of various functions in several arenas of work. See, e.g., Robert Bruce, *Back to Basics*, ACCOUNTANCY, Feb. 1999, at 50 (asserting that accountants historically have thrived by expanding their roles and now "cover a . . . mass of other disciplines").

provides a basis for only a very limited and narrow—even if secure—jurisdiction.

Thus, there is no doubt that economics can provide solutions to problems of resource allocation, but its jurisdiction is limited to a narrow sphere where its rigorous postulates are applicable to high-level, relatively generic problems. To maintain its intellectual rigor, it must lean on several assumptions that make it not amenable directly to the muddled intricacies of individualized problems at the household or firm level.¹³⁹ For instance, it is of little use for a household beset with a budget deficit to learn from the economist that, if the demand level remains stable and there is a long-term fall in interest rates, prices will fall as capital becomes more cheaply available to producers. Quite apart from its conditional character, this otherwise rigorous advice is too generalized to be of much use in solving the household's problem in the circumstances. What it needs instead is a less-stylized set of propositions that are valid, not generally, but in the context of the peculiarities of the household's individual circumstances. To address real-life individual problems—an essence of a profession—an intellectual field must lose some of its rigor to be able to proceed to that optimal point in the continuum where its ideas can encompass a broad range of problems without being so loose or general that they become bereft of content. This is the level at which bankers, financial planners, and others dealing with individualized resource creation and allocation aspire to operate.¹⁴⁰

Following from the foregoing, the abstractions used by accounting in its jurisdictional quests have been simpler, including the academically unconvincing theory about being the only utility infielder covering several portions of the professional field. At its very nascent stage, when the accounting profession was an all-comers' affair, no more justification was required than that the basic function of gathering the bankrupt's assets and preparing a statement thereof could be performed by the group. Indeed, it could be said to have been an open area of work to

¹³⁹ Cf. BELKAOU, *supra* note 135, at 171 (contrasting formal accounting knowledge propagated by academic theorists and “working knowledge” more suitable to everyday demands of clients).

¹⁴⁰ See ABBOTT, *supra* note 39, at 104 (explaining that in finance and other areas, professions will tend to settle into “an optimal level of abstraction that lies between the extremely general and the extremely concrete”).

which every manner of profession from lawyers to bankers and merchants laid claim, each extending its own erstwhile abstractions.

The need for an appropriate abstraction emerged when bankruptcy work dried up as a result of improved management techniques by businessmen, and the group had to seek additional turf. This additional turf presented itself in the form of the audit function, a prophylactic treatment for bankruptcy. This new jurisdiction was claimed through a variant of the reduction rhetoric which Abbott refers to as the gradient argument.¹⁴¹ This involves a claim by a group that since it handles the extreme version of a problem (in this case business failure—bankruptcy), it is inherently equipped to handle less extreme forms of the problem (in this case the prevention of business failure—annual audits). Indeed, this is a common approach that lawyers themselves have used to lay claim to new areas like mediation and arbitration. We see in this initial move by accountants a tendency towards a general, expansive business jurisdiction.

While the claim to bankruptcy and audit jurisdiction were laid by English accounting, it is of direct relevance to American accounting, the latter being an erstwhile apprentice, if not a progeny, of the former.¹⁴² The growth of American industry in the last decades of the 19th century had not been matched by an appropriate growth in accounting practice, following substantially from the general intolerance of the American states to professions before the last decades of that century.¹⁴³ The state certification in accounting that was ultimately provided by legislation saw the establishment of professionals who were inadequately equipped in terms of experience and organization to handle the sprawling work generated by large American corporations.¹⁴⁴ Thus constrained, the nascent American profession turned directly towards the United Kingdom, from where a number of accountants crossed to the US to establish several of the firms that subsequently became industry leaders locally and globally.¹⁴⁵ The nexus created between the

¹⁴¹ *Id.* at 101.

¹⁴² See CAREY, *supra* note 88, at 6 (describing the importation of chartered accountants as England began investing in American industries).

¹⁴³ MACDONALD, *supra* note 46, at 202.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 202-03.

accounting profession in both countries was not simply a matter of expertise exchange. Beyond this, it meant that the professional project and aspirations of the old world practitioners were transplanted to the fertile soil of the new world where they took root, tapped into the fresh resources, and flourished. This was the context for the next major jurisdictional push.

C. *The Tools of Jurisdictional Contest Deployed Against the Legal Profession*

The new federal tax legislation of the early 20th century created a clear vacancy in the system of professions.¹⁴⁶ Like any vacancy, this one was located within an immediate neighborhood in the system—the immediate neighborhood inhabited by law, accounting, banking, finance, and related disciplines¹⁴⁷—although, like every system disturbance, the legislation creating this vacancy had a reverberating effect throughout the system. This disturbance had its source in organizational change—a change in the structure and organization of government revenue.

The major potential claimants to this new jurisdiction were naturally those in whose immediate neighborhood the vacancy was created. A second class of potential claimants was a totally new profession—say tax advisors—formed specifically with this vacancy in mind, much in the same manner as early accounting had arisen in response to an expansive vacancy in British bankruptcy.¹⁴⁸ Of this pool of potential claimants, lawyers, a pre-eminent group with an already expansive jurisdiction, sought to cream off the top of the jurisdiction, to the extent that they saw it as worthwhile,¹⁴⁹ focusing their energies on the fundamental interpretive style and jurisprudence underlying the various statutory provisions, and giving advice when the language of the

¹⁴⁶ The new pieces of tax legislation were notably the short-lived Corporations Excise Tax Law of 1909 and the subsequent Income Tax Act of 1913. See *generally* CAREY, *supra* note 88, at 64–71 (discussing the creation of this legislation).

¹⁴⁷ An instructive account of the early involvement and struggles of the nascent accounting profession for recognition and identity is given by Carey. *Id.* at 36–52. The profession's early efforts in the taxation area, some of which were regarded condescendingly by government and lawyers, are also detailed. See *id.* at 64–71.

¹⁴⁸ See *generally* RICHARD BROWN, *A HISTORY OF ACCOUNTING AND ACCOUNTANTS* 240–46 (Augustus M. Kelley 1968) (1905) (chronicling the organizing efforts of accountants in late nineteenth-century Britain).

¹⁴⁹ Concerning tax practice immediately after the enabling federal legislation, Carey writes: "Most lawyers felt that the income tax was a job for the accountants. Later . . . the opinion of the Bar on this point changed!" CAREY, *supra* note 88, at 70.

statutes or related financial accounting concepts proved ambiguous or otherwise failed to convey the proper meaning and full scope of the law.¹⁵⁰

It was not difficult to expand the legal profession's cognitive system to cover this dimension of new territory. It was indeed natural since this dimension substantially involves disputes, which constitute the natural domain of the lawyer. Cases or dispute processing is the lawyer's chief abstraction, stated at an appropriate level in the continuum of abstraction as formalization and abstraction as loss of content, a level at which it provides a flexible capacity to capture new work without being so vague as to lose the ready link between the abstraction and the ultimate solutions proffered for client problems.¹⁵¹ Cases—whether past, present or prospective¹⁵²—constitute the domain of the lawyer. This nexus between taxation and dispute competency was not lost on the public, hence the intuitive gravitation to lawyers for tax work at that time—a time when many members of the public did not recognize or identify accounting as a professional field.¹⁵³

¹⁵⁰ See Wolfman, *supra* note 132.

¹⁵¹ It is, of course, possible to state the lawyer's chief abstraction at a higher level, e.g. the pursuit of justice. But this approach, though capable of extending the lawyer's jurisdiction much farther—for most if not all aspects of human life and society implicate the question of justice—also attenuates the link between thought (abstraction) and solution, leading to a weakening of the expanded jurisdiction which thus becomes open to usurpation by contending professions. What justice means in a particular context is often a value judgment shaped by myriad factors peculiar to the circumstances and a claim to deliver justice or oversee its delivery is inherently difficult to fulfill. Framed in those terms, the lawyer's treatment of clients' problems would often seem to have little linkage to the animating abstraction—justice. The lawyer would then begin to approximate the clergy in terms of the absence of an observable nexus between the animating principle, the treatment suggested and the results (solution) obtained for the client. See *supra* text accompanying notes 128–29. We can all readily recognize situations that implicate issues of justice. The problem lies first in fixing things to the satisfaction of all parties, and beyond that, in doing so in a manner that evinces the solution to be the result of design rather than chance.

¹⁵² Present cases are encompassed by the field of litigation and related mechanisms of ex post dispute settlement. Prospective cases are encompassed by the field of transactional work, which is often based on ex ante prediction of what the courts—or less often the legislature and executive—would do were the case to be brought to their attention. Past cases constitute an amalgam of spent samples in both litigation and transactional engagements, used chiefly as a resource.

¹⁵³ Concerning the public image of accountants in the early part of the 20th century, Carey writes:

The members of the American Association of Public Accountants had a

Accountants readily moved into that portion of the new territory most conducive to their technical knowledge, even though their chief abstraction—combined knowledge of multiple disciplines—was conceptually capable of grounding a foray into the area occupied by lawyers. Such forays were to come later under different circumstances.¹⁵⁴ Accountants had extensive professional experience with the basic financial accounting concepts infused into the federal tax legislation, and this enabled them to give tax advice, largely addressing questions of financial analysis and the operation of relevant accounting concepts.¹⁵⁵ Beyond conceiving of themselves as utility infielders, accountants were beginning in the early twentieth century to refurbish their chief abstraction, and project themselves as the profession of business administration and, even more broadly, as “general business advisors.”¹⁵⁶ In essence, they staked a claim through this rhetorical tool to the broader area of business advising, of which most tax work could readily be conceived to be an aspect. In adopting this rhetoric, they latched onto an imaginative and culturally viable vehicle for jurisdictional expansion. In an era when corporate America was bringing under its suzerainty an ever-increasing number of activities, some of which were previously under the direct oversight of government,¹⁵⁷ a profession could ride far afield on the wings of such an animating idea.

compulsive desire for recognition. This was natural and understandable. They knew that they had skills which were useful to the community . . . The Association members were impatient for wider opportunities for service in the United States, and for the public respect which they felt was due them as experts in a field which deserved, even if it had not yet attained, the title of “profession.”

Yet in the view of most of the public they were indistinguishable from bookkeepers . . . This feeling persisted for a long time.

CAREY, *supra* note 88, at 45–46.

¹⁵⁴ See, e.g., Wolfman, *supra* note 132 (noting the recent trend of Big 5 firms’ giving tax advice in complex transactional matters).

¹⁵⁵ See *id.*

¹⁵⁶ See, e.g., Arthur Andersen, *The Accountant’s Function as Business Advisor*, 41 J. ACCT. 17, 17–19 (1926) (promoting a [then] new, expansive scope for accountants); ABBOTT, *supra* note 39, at 371 n.32 (citing *id.*).

¹⁵⁷ See, e.g., Allen Kaufman, *Assembling America’s Private Arsenal for Democracy, 1920–1961*, 26 BUS. ECON. HIST. 252, 255–56 (1997) (“At the turn of the century, the War Department oversaw government arsenals that designed and manufactured diverse military products . . . However, . . . [i]n [World War I]’s aftermath, . . . an inchoate private arsenal system became recognizable . . .”).

On the origins of U.S. tax practice and the initial division of the jurisdiction between lawyers and accountants, Wolfman states:

Tax law is a funny thing. I think it fair to say that most CPAs know something about the federal income tax; many if not most lawyers do not. Especially in smaller communities lawyers retain accountants for their own tax needs and they refer their clients to them. In the past they often did not themselves retain tax lawyers nor refer their clients to them because there were none nearby. . . . How did this happen? In the beginning, in 1909 when Congress enacted the corporate income tax and in 1913 when it enacted the individual income tax, accountants had hands-on professional experience with the financial accounting concepts of income, expenses, depreciation, capitalization, cash and accrual basis, and the like. Most lawyers did not. Moreover, Congress had much earlier provided in 5 U.S.C. [§] 500 that both CPAs and lawyers are authorized to represent taxpayers in matters before the Internal Revenue Service. That remains the law, and it preempts any state law to the contrary. After the Tax Court was created, it authorized all lawyers to represent taxpayers before it, and all other persons as well, not limited to accountants, but the nonlawyers would have to pass an exam to qualify.

Soon after 1913, particularly after we entered World War I, the tax law grew in size and complexity. . . . Indeed, definitions and principles long familiar to accountants were turned on their head under the income tax, and often for good reason. And soon it became clear that a fair and sensible tax system could not always be based on a literal or wooden reading of the words of the statute. Judicially created doctrines, many originating in the Supreme Court's opinions of the '20s and '30s, provided the fundamental interpretive style and jurisprudence which to this day overlay the thousands of pages and the many volumes that comprise the Internal Revenue Code and the Treasury Regulations.¹⁵⁸

This statement, in addition to capturing important facets of the cognitive biases and jurisdictional postures of both professions, illuminates key dimensions of the early struggle. First is the fact that the new tax legislation gave audience in the tax court to accountants.¹⁵⁹ Yet this aspect of their jurisdiction

¹⁵⁸ Wolfman, *supra* note 132, at paragraphs 7 & 8.

¹⁵⁹ *Id.*

has notoriously been abandoned until very lately.¹⁶⁰ Why was litigation before the tax court not espoused by accountants until recently?

One reason could be that the returns from such litigation were not sufficiently impressive to merit their attention. This, however, is contradicted by the fact that accountants attended to far more routine and less rewarding dimensions of tax work, such as tax return preparation.¹⁶¹ Another reason could be that they lacked the technical expertise. Such a limitation, however, can be transcended in several ways, including adjusting accounting education.

It appears more plausible that, notwithstanding the formal right of audience before the court, the profession lacked social and cultural legitimacy in relation to such work. Absent such legitimacy, no profession can do work for the public at large, except perhaps for the government from which it derives its formal rights or as an ancillary aspect of a broader engagement that is properly within its domain. Such legitimacy, of course, comes through the rhetoric employed by a profession to justify its connection and suzerainty over the areas of work to which it lays claim.¹⁶² There was nothing in the profession's organizing abstractions—utility infielders, business administrators, or general business advisors—to ground a credible case in the public's mind about the efficacy of its solutions in the field of litigation.¹⁶³

¹⁶⁰ See *supra* note 132 and accompanying text (discussing *Peoplefeeders, Inc. v. Comm'r*, 77 T.C.M. (CCH) 1349, 1349, 1353 (1999)).

¹⁶¹ See Wolfman, *supra* note 132.

¹⁶² See ABBOTT, *supra* note 39, at 184–85 (expounding on the role of legitimacy in the system of professions).

¹⁶³ Business was not conceived of at this time as having much to do with the courts, and even business lawyers generally eschewed litigation as a primary means of processing business disputes. See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 976–77 (1997) (recounting how commercial lawyers in the early twentieth century promoted arbitration as an essential means of speedy conflict resolution). Abstractions, to ground a profession's claim to a jurisdiction, must strike the right chord on the keys of legitimacy. It must be properly located in the context of prevailing sources of social legitimacy. In addition to finding that equilibrium point in the continuum of formalization and loss of content, it must resonate with the values that convey social legitimacy at the relevant time, which values may even vary with each area of work. Business, and related notions of efficiency, though an ascendant value, was not one that had much appeal in the realm of litigation.

A second point worthy of note in Wolfman's statement was the substantive lack of tax knowledge by most lawyers. This apparently facilitated the accountants' assumption of the limited tax jurisdiction they sought at that time.¹⁶⁴ Such lack of knowledge is, however, not definitive in itself, since knowledge gaps of such a nature can easily be bridged, provided there is an incentive to do so. Lawyers' lack of tax knowledge, to the extent that such knowledge comprised the substantive aspects of financial analysis and operations that accountants commanded, is broadly consistent with a disinclination towards claiming an aspect of the new tax jurisdiction that promised sub-optimal returns for the investment in time and efforts required. Contributing to that disinclination was the fact that the same process of industrial expansion that brought British accountants to the U.S. had expanded lawyers' commercial practices immensely, leading to the emergence in late nineteenth and early twentieth centuries of corporate law firms largely serving industry. Equally significant was the emergence of the regulatory state, which required legal talent in diverse ways at different levels. Even in smaller cities and communities where such industrialization may not have become pronounced, there appeared to have been more legal work generally than there were lawyers to handle them.¹⁶⁵ As such, we find that during this period lawyers were unwilling to invest time and energy in mastering the substantive knowledge necessary for staking a claim in and occupying the accountants' portion of the new jurisdiction.¹⁶⁶ Having willingly conceded this aspect of tax practice to accountants, we find lawyers to have been more concerned with their immediate and established jurisdiction over other forms of work, readily referring such tax matters to accountants as Wolfman reports. Yet, lawyers' chief abstraction—dispute processing—was capable of grounding a claim to the whole of the new tax jurisdiction, including those aspects handled by accountants. Disputes are fundamental to

¹⁶⁴ See Wolfman, *supra* note 132.

¹⁶⁵ Abbott documents studies showing the general paucity of lawyers both in America and England (but more so the former) in the period between 1880 and 1940 and concludes that potential legal work in the U.S. greatly surpassed the concurrent increase in the number of lawyers. See *id.* at 248-49.

¹⁶⁶ See Wolfman, *supra* note 132 (discussing the different tax areas that lawyers and accountants have claimed, some by "mutual choice").

society and human interaction, and many issues can be characterized as involving directly or indirectly the resolution of disputes, more so in the context of taxation which involves oft-contested claims by the state against private property. The whole gamut of work, from tax assessment and computation to tax payment and penalties, can be viewed as one big set of disputes. This view was not lost on the public, as apparent in its ready preference then for lawyers as tax advisors.

In a nutshell, accountants extended their reach into portions of the new tax jurisdiction through the application of a basic tool of jurisdictional contest—the rhetorical device of reduction:¹⁶⁷ The intellectual content and requirement of the portion of the new tax jurisdiction they sought was, they argued, essentially reducible to skills they had already perfected in the area of financial statement preparation and audit which they controlled. This extension worked in part because lawyers, as the most capable claimants to the tax jurisdiction, were not interested at this time in staking a claim over the portion of the jurisdiction sought by accountants.

Lawyers chose to focus on those aspects of the new tax jurisdiction least amenable to routinization and commodification—those aspects demanding a measure of judgment ideal for professional engagement. These aspects continue to be the most lucrative portions of the tax jurisdiction, and MDP is in part an attempt by accountants to extend their reach into these most fertile parts of the tax territory. Concerning accountants' capacity in these areas of taxation, Wolfman states:

The accountants lacked the fundamental legal education and training that were essential for a practitioner if he were to come to grips with more than the income tax basics, with the judicially imposed, pervasive statutory glosses, with legislative history and purpose, and with an understanding of judicial precedent, particularly in a system in which court decisions both governed and conflicted.¹⁶⁸

MDP can be seen as an attempt to transcend this limitation and appropriate the riches of this professional territory, as a strategic step towards an expanded jurisdiction ultimately coterminous with the lawyer's broader jurisdiction. In this wise,

¹⁶⁷ See *supra* text accompanying notes 120–23.

¹⁶⁸ Wolfman, *supra* note 132.

the gradient¹⁶⁹ argument as a tool of jurisdictional acquisition comes to mind: By trying to get a hold on tax litigation through a new-found love for such work, accountants essentially sought to make a statement concerning their capacity to handle the most extreme cases in the arena of taxation. Following logically from this came a claim for joint suzerainty over those other aspects of tax where lawyers have traditionally held sway, these being ostensibly less extreme than litigation in terms of required skills, and therefore amenable to the gradient argument that accountants, having handled litigation, can also handle them. Beyond the accountants' claim to an expanded tax jurisdiction is the claim to a general, common jurisdiction with lawyers, which can similarly be advanced using the same gradient argument. This broader claim is further grounded in the enhanced legitimacy of the values implicated by the general business advisor abstraction; that legitimacy being in tandem with the rise of efficiency as a pervasive, societal value, since business is the home turf of efficiency.

The "law is a business" movement so visible among market-oriented economic analysts of law¹⁷⁰ is evidence of the reach or potential reach of the accountants' abstraction. Here at last, the advancing forces of accounting meet and merge with the capitulating vanguard of the law. It is arguable of course that the organization of an area as a business, even if amenable to the "business advisor" abstraction, is not tantamount to usurpation of the area professionally through a claim to do the work of the erstwhile occupants of that area. Thus, if accountants can better organize engineering practice through their business model, that is not the same as accountants claiming to be able to do substantive engineering work, and as it is with engineering, so it is also with law.

Such an argument, however, misses the point that, unlike engineers, lawyers and accountants inhabit the same neighborhood within the system of professions, such that it is easier for accounting, in its expansionist mode, to usurp the law's jurisdiction. Even more fundamental is the response that

¹⁶⁹ *Supra* note 141 and accompanying text.

¹⁷⁰ *See, e.g.,* POSNER, *supra* note 39, at 289 ("Law is fast becoming a business . . ."); *id.* at 190-92 (approving a new legal professionalism based on rationalization, competition, and specialization); Fischel, *supra* note 38, at 951-57 (defending MDPs by analyzing law in market terms).

settlements resolving jurisdictional contests in the system of professions can take several forms, including the total usurpation of workaday duties of one profession by another. Other forms of settlement include arrangements whereby the vanquishing profession takes the vanquished under its wings and assumes any of several types of supervisory roles over it, such as that assumed by physicians over pharmacy and nursing.¹⁷¹ (The nursing profession envisaged by Florence Nightingale did not presume nurses' oversight by medical doctors—it was supposed to be a freestanding profession with administrative oversight of the hospital and the treatment of disease.)¹⁷²

The resultant structures of MDP, as represented by models 2–5 proposed by the ABA Commission on Multidisciplinary Practice,¹⁷³ are but variants of one type of jurisdictional settlement—a jurisdictional settlement that results in a shared territory. It merits emphasis in this regard that jurisdictional settlements do not necessarily have to result into a relation of victor and vanquished. Contests can be stalemated, resulting in shared territory or other forms of arrangement.

It bears mentioning that accountants have more lately made a pitch for the unified information jurisdiction based on computers.¹⁷⁴ This is a jurisdiction it currently contests primarily with information scientists and consultants specializing in business systems. While this contest is tangential to the law's jurisdiction, it does hold implications for law.¹⁷⁵ Computers constitute the ultimate integrated information system, capable of commodifying vast expanses of knowledge and

¹⁷¹ See ABBOTT, *supra* note 39, at 71 (describing the “subordination” type of settlement between supervisory and subordinate professions).

¹⁷² See *id.*; see also 2 M. ADELAIDE NUTTING & LAVINA L. DOCK, *A HISTORY OF NURSING 178–83* (G.P. Putnam's Sons 1937) (1907) (chronicling the implementation of Nightingale's progressive vision for nursing education and practice and commenting on the ensuing resistance of many doctors).

¹⁷³ See *supra* text accompanying notes 23–26.

¹⁷⁴ See Bryan-Low, *supra* note 10 (reporting how the accounting industry in the post-Enron regulatory environment is re-organizing to maintain “a large chunk of [its] consulting activity—most notably, units that custom design and install large-scale, financial-related computer systems”).

¹⁷⁵ See Paddy Gormley, *Partners Caught in Computer Squeeze*, *FIN. TIMES.*, Oct. 27, 1998, at 19 (discussing how legal information systems threaten existing legal business models); Richard Susskind, *Professions Are Likely To Fly by Wire*, *FIN. TIMES.*, Mar. 19, 1999, at 4 (explaining how internet technology and consumer demand will result in multi-disciplinary “professional e-guidance systems” providing online accounting, finance, legal, and business and management services).

bringing under common control large swathes of uncommodified knowledge. Thus, a claim to general control over an integrated information jurisdiction, if successful, provides substantial inroad into the core of several other professions.¹⁷⁶ Accountants' intellectual basis for such a claim is thin, reflecting largely their existing abstraction as utility infielders. Yet, information scientists, focusing on the computer itself as an instrument, do not have a case as strong as one would intuitively think. For, the strongest jurisdictions are not those obtained by abstractions focusing on an object (the computer) or organization, but rather those focusing on activities and processes (the services in demand and their ever-evolving peculiarities). Unlike jurisdictions based on activities and processes, those based on objects or organizations often vanish when the objects or organizations vanish or undergo substantial modification.¹⁷⁷ Accountants' claim to this jurisdiction is focused on activities and processes—information gathering and use—rather than the object.

V. THE ARENAS OF INTER-PROFESSIONAL COMPETITION

There is no unified locus of inter-professional competition. Inter-professional contests are in fact executed in three distinct arenas: the workplace, the public arena, and the legal arena,¹⁷⁸ as discussed below.

A. *The Workplace*

By workplace is meant the actual place where a profession solves the problems of clients.¹⁷⁹ This is narrower than a profession's jurisdiction, the latter being the profession's entitlement to perform a particular range of work. Analogizing to a law court, a profession's workplace is similar to the courthouse where the judge works, while its jurisdiction is analogous to the range of causes or issues that a court is recognized as being empowered to entertain and pronounce upon. The workplace need not be a single place, though. For the medical profession, for instance, the workplace encompasses not just hospitals or clinics, but also research institutes, clients'

¹⁷⁶ See Ciccotello, *supra* note 79, at 905-06.

¹⁷⁷ See ABBOTT, *supra* note 39, at 99.

¹⁷⁸ *Id.* at 59-60.

¹⁷⁹ See *id.* at 59-60, 64.

homes, and just about any place where medical services may be rendered to patients or clients. The workplace is thus a wide expanse with opportunities for interlopers to operate clandestinely.

The workplace usually provides the starting place for jurisdictional contests. It is here that professions or occupations intent on usurping a jurisdiction, whether already occupied by another group or just vacant, often commence their bid. Where the jurisdiction is a vacant one, they do so by moving in as deeply as they can until confronted by another profession similarly intent on penetrating the same jurisdiction, at which point a settlement is reached or the contest continues along the lines of a competition for an already occupied jurisdiction.¹⁸⁰ Thus, accountants, lawyers, and tax advisers descended on the new tax domain created in the wake of the federal tax legislation of the early twentieth century.¹⁸¹ The jurisdictions eventually became delimited and settled with the different groups occupying distinctive niches, while still engaging one another competitively along the boundaries of the established niches.¹⁸²

Where the targeted jurisdiction is already occupied, the strategy is to work around the fringes of that jurisdiction, attempting to show a *de facto* capacity to accomplish the tasks on which effective occupation of that jurisdiction is premised. The current occupant of the jurisdiction usually meets this attempt with claims of quackery and charlatanism against the usurpers, and a concomitant attempt to stop the workplace activities of the usurpers.¹⁸³

But the professional workplace is not the well demarcated, even ground that it is represented to be in popular imagination and professional rhetoric. The actual reality is less settled, with the workplace being dotted with grey areas, nooks, and crannies.

¹⁸⁰ See *id.* at 69–79, 90 (explaining settlements and the propagation of disturbances through a system of professions).

¹⁸¹ See *supra* notes 146–48, 158–71 and accompanying text; see also CAREY, *supra* note 88, at 213–27 (describing the impact of the “burgeoning tax practice” in the early twentieth century on expansion of professional jurisdictions).

¹⁸² See Wolfman, *supra* note 132 (discussing the “workable, common understanding” of the tax jurisdictional divisions among the professions and the recent breakdown of that tenuous arrangement).

¹⁸³ See, e.g., Ronald L. Numbers, *The Fall and Rise of the American Medical Profession*, in *THE PROFESSIONS IN AMERICAN HISTORY* 56, 59–64 (Nathan O. Hatch ed., 1988) (documenting attempts by doctors to marginalize their rivals in terms of “quacks” and “cults”).

Thus, there are always openings within the workplace of any profession, which usurpers can surreptitiously exploit. For instance, many established professions, in their upward push for status and recognition, tend to leave behind an under-served area of relatively less prestigious work.¹⁸⁴ This is more so if entry to the profession is artificially restricted in order to control for overproduction of professionals, or the growth rate of demand for the profession's services outstrips the rate of increase in the production of professionals.¹⁸⁵ This leaves a veritable opportunity for another profession to anchor its claims in the workplace, by attending to the under-served area. This was the case with English physicians, who had focused on the middle and upper classes, leaving a swath of unfulfilled demand that provided a fertile ground for the growth of their competitors, the early surgeons and apothecaries.¹⁸⁶ By the end of the 19th century these nascent groups were able to successfully establish a claim to a shared medical jurisdiction.¹⁸⁷

Aside from such an under-served area, the reality of the workplace involves several other factors that make it a natural starting point for jurisdictional competitions. A profession may have been able to extend its jurisdiction widely by leveraging on the services of a subordinate group over which it has intellectual supervision. Such a subordinate group, using its effective knowledge of workplace practices as a base, could, however, make a bid for independent occupation of the jurisdiction. Paralegals, with their nascent organizations, constitute a potential group in this wise vis-à-vis lawyers as the superordinate profession.¹⁸⁸ More broadly, the workplace is a

¹⁸⁴ See ABBOTT, *supra* note 39, at 91 (explaining how apothecaries, homeopaths, osteopaths, and chiropractors used this method to achieve professional status).

¹⁸⁵ See *id.* at 249 (noting how from 1880 to 1930 the American legal profession did not expand sufficiently to meet the unmet demand for its services).

¹⁸⁶ See READER, *supra* note 50, at 31-33, 39-43 (indicating how the lowly apothecaries—the professional ancestors of the modern general practitioner—and the denigrated surgeons, by refining their knowledge base and attending to neglected, under-served segments of the physicians' jurisdiction, worked themselves into mainstream medicine to a position of parity and ultimate unification with the prestigious physicians).

¹⁸⁷ See MACDONALD, *supra* note 46, at 77.

¹⁸⁸ Richard Posner has noted, for instance, the growth of the paralegal field as evidence of the specialization and rationalization that he considers key aspects of true professionalism. See POSNER, *supra* note 39, at 191; see also Munneke, *supra* note 101, at 80-81 (noting the immediacy of paralegals' quest for formal recognition).

natural place for starting such contests because it is the point at which any group becomes really acquainted with the demands of a jurisdiction, a profession's capacity for its work being a primary basis of jurisdictional legitimacy. It is also the place, among the three primary arenas of contest, most amenable to surreptitious and stealthy penetration. A direct attack in the arena of public opinion or the legal arena cannot go unnoticed for any appreciable time, and would likely elicit a concerted response of a sort that may dislodge the new contestant before it has any foothold whatsoever in the new territory.

B. The Arena of Public Opinion

The arena of public opinion is usually the second port of call in a profession's quest to wrest jurisdiction from another. Following the establishment of a foothold in the workplace through the actual performance of work, there is usually an attempt by the newcomer to structure public opinion in favor of its approach to diagnosis and treatment of the problems with which the claimed jurisdiction is involved.¹⁸⁹ This implicates the deployment of its chief abstraction to show that the claimed jurisdiction is naturally appurtenant to other jurisdictions over which it already has an established claim—that its intellectual approaches provide a better rationalization of, and solutions to, the societal problems dealt with in the claimed jurisdiction. This is an attempt to show that, overall, it is as good, if not better, an occupant of the claimed territory as the current occupant.

The process leverages heavily on the prevailing dominant values of social legitimacy, given that an abstraction needs to be in tune with such values in order to strike the correct chord with the public. In a sedate environment, where an overly sober and genteel disposition is the currency of legitimacy, the claimant would try to show that its thinking and methods emphasize this as much as, if not more than, the competing profession. This was a method deployed by virtually all professions in the 19th century, in quest of enhanced social standing and legitimacy.

to practice aspects of the law for which they have already shown some proficiency in the workplace, and the willingness of the California legislature to consider a bill authorizing them to do so to a limited degree).

¹⁸⁹ See ABBOTT, *supra* note 39, at 59–60 (defining and explaining the public opinion arena).

In a world where bonhomie and non-conformism are indicia of intellectual legitimacy, the claimant would attempt to show that its animating ideas are in tandem with such a disposition. This was apparent in the boom in information technology and "dotcom" enterprises witnessed in the recent past, when new-age enterprises came to be seen as intrinsically iconoclastic in dress, organization, and overall culture, dispensing with erstwhile corporate hierarchies and managerial styles.¹⁹⁰ Hitherto tangential modes of thinking came to be valued as sources of innovation and competitive advantage, and avant-gardism became discernible as a dominant criterion of legitimacy in the new economy. This shift, which had chief executives appearing in T-shirts and the like to pose for featured pieces in major magazines,¹⁹¹ proclaimed avant-gardism as an intellectual disposition to be a dominant value, so that all indicia of avant-gardism came to be valued as a result. Firms, and through them professions, sought to espouse these indicia—such as casual dressing, flexible work hours, and flexible command structures—in order to legitimize themselves in the new dispensation as capable of creative thinking.¹⁹²

¹⁹⁰ See, e.g., Steve Lohr, *Outlook on the Workplace: At Google, Cube Culture Has New Rules*, N.Y. TIMES, Dec. 5, 2005, at C8 (describing the quirky work environment and employee perks at Google headquarters); William C. Taylor & Polly LaBarre, Essay, *How Pixar Adds a New School of Thought to Disney*, N.Y. TIMES, Jan. 29, 2006, at 33 (stating that Pixar's revolutionary approach to the workplace "defies many familiar, and dysfunctional, industry conventions").

¹⁹¹ See, e.g., Cover Image, *Apple; Yes, Steve, You Fixed It. Congrats! Now What's Act Two?*, BUS. WK., July 31, 2000 (showing Apple Chief Executive Steven Jobs posing casually with a mock turtleneck and jeans and his hands in his pockets); Cf. Cover Image, *Can We Trust Google With Our Secrets?*, TIME, Feb. 20, 2006 (showing Google co-founders Sergey Brin and Larry Page posing in T-shirts).

¹⁹² See, e.g., Margaret Daisley, *A Space Odyssey*, AM. LAW., June 2001, at 88 (describing law firms that show their commitment to creativity, innovation, and collaboration through non-traditional office design and décor); Nancy Feig, *Conservative Dressing Is Back, But Did It Ever Leave?*, COMMUNITY BANKER, May 2004, at 58 (noting that many professional offices relaxed dress codes in response to the informal work environments offered by internet startups). Avant-gardism and non-conformism as indicia of legitimacy are not of recent vintage. In fields like architecture, art, music, and mathematics, the avant-gardist iconoclast, his intellectual disposition expressed in ways akin to the modern day "dotcom" entrepreneurs, has for long been common. The "madness" of Wolfgang Beethoven and Van Gogh and the quirky disposition of Nikola Tesla come to mind here. They broadly epitomize the legitimacy of the geek in several areas of expertise. One should note, though, that beyond the talent and intellect deployed by these individuals, many of the disciplines with which they were involved—or the aspects of those disciplines to which they devoted themselves—generally did not involve

Looking back at the history of the American legal profession, this analysis provides a rationalization for the now-derided precepts of Langdellian formalism. In the new age of science, in which the scientific method was becoming an index of legitimacy—almost to the exclusion of other methods—Langdellian formalism represented a bold attempt to reinforce, if not construct, the intellectual foundations of the American legal profession.¹⁹³ For Christopher Langdell, law as a discipline was a science like any other, dealing with social realities capable of dissection, analysis, and rationalization in a manner yielding a coherent, structured body of doctrine.¹⁹⁴ Having emerged from Jacksonian era deprofessionalization in the not-distant past, the profession was to a large measure a new one, attempting to gain a foothold in the arena of public opinion.¹⁹⁵ In this wise, Langdellian formalism was an attempt at putting the profession on firmer footing by bringing its ideas within the framework of the scientific method as a dominant source of social legitimacy. That this approach to the law later became discredited¹⁹⁶—as all approaches tend ultimately to be—does not diminish the significance of this dimension.

With the advent of mass literacy and the mass media, the public arena has come to play an increasingly significant role in the resolution of inter-professional jurisdictional disputes, particularly in common law countries where the state has generally been less active in professional regulation when compared to countries of the civil law tradition.¹⁹⁷ The internet

attention to specific human beings and their individual problems, in the sense in which professions do. What is therefore novel is the broad extension of these indicia of legitimacy to the professions, a traditionally sedate group.

¹⁹³ See KRONMAN, *supra* note 57, at 170–74 (explaining how Landgell sought to professionalize the practice of law through a systematic, scientific-based foundation for legal education); LARSON, *supra* note 46, at 171 (examining Langdell's scientific approach to the law).

¹⁹⁴ LARSON, *supra* note 46, at 171; see also KRONMAN, *supra* note 57, at 170–74.

¹⁹⁵ See Maxwell H. Bloomfield, *Law: The Development of a Profession*, in THE PROFESSIONS IN AMERICAN HISTORY 35–38 (Nathan O. Hatch ed., 1988) (describing the arc of American legal history from the early to mid-nineteenth century).

¹⁹⁶ See, e.g., KRONMAN, *supra* note 57, at 188–94, 202 (delineating critiques of Langdell's approach by Jerome Frank, Harold Lasswell, and Myres McDougal).

¹⁹⁷ See ABBOTT, *supra* note 39, at 60 (contrasting the extensive regulation of professional obligations in continental countries with the lesser government influence on professions in the United States); see generally ADAMSON, *supra* note 9, at 7–11 (explaining the common law and civil law legal systems in Europe and describing the nature of legal professions in European countries).

promises to take this even further by attenuating the problems of collective action through the facilitated interaction of an expanded group of citizens over a wider space. Symptomatic of this is the active public response in the not-too-distant past to developments in the professional services sub-sector.¹⁹⁸

C. *The Legal Arena*

The third locus of inter-professional competition is the legal arena.¹⁹⁹ Here, usually in the final stage of a jurisdictional struggle, the usurping profession approaches the legislature or other law-making authority (including the courts and administrative agencies as subsidiary or indirect sources of law) for formal recognition.²⁰⁰ Such recognition can come in various forms, including licensure, approval for purposes of government payments, or a monopoly over the claimed jurisdiction.²⁰¹ In this regard, the profession leverages on its demonstrated capacity to handle the demands of the workplace as well as on its public acceptance, both functions of its previous struggles in the arenas of the workplace and public opinion.

Psychology provides an example here. It commenced its workplace bid for the jurisdiction dominated by early twentieth-century psychiatry by initially focusing on administering tests as a predictive and preventive measure of mental disposition.²⁰² From this humble beginning, it launched a claim for a more expansive role in the diagnosis and treatment of nervous and mental problems, using the universities—a significant segment of public opinion—as a forum for articulating its position.²⁰³ Eventually, it sought recognition in the legal arena, obtaining approval for third party payments, and ultimately, government

¹⁹⁸ See ABA, Final Recommendation, *supra* note 22, at n.49 (referencing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 842 (1986)) (“[I]n response to a restrictive UPL decision by the state supreme court, the voters in Arizona by a margin of over four to one, voted [in 1962] in favor of a constitutional amendment to permit real estate agents and title insurance companies to prepare legal documents in connection with residential real estate transactions.”) (date notation added). For background on the Arizona UPL events, see Melvin F. Adler, *Are Real Estate Agents Entitled To Practice a Little Law?*, 4 ARIZ. L. REV. 188 (1963).

¹⁹⁹ ABBOTT, *supra* note 39, at 59.

²⁰⁰ *Id.* at 62–63.

²⁰¹ *Id.* at 59, 62.

²⁰² *Id.* at 302.

²⁰³ *Id.* at 311.

recognition as independent providers of services in the jurisdiction of mental ailments.²⁰⁴

D. The Arenas of Jurisdictional Contest in the Context of MDP

With regard to accountants as the paradigmatic contestants for the lawyers' professional jurisdiction, we can observe the use of arenas of jurisdictional contest in the context of the MDP debate. As indicated previously, accounting from its early beginnings has had an eclectic appetite for work.²⁰⁵ It was almost inevitable, given its origins and jurisdictional proximity to the law, that it would test the boundaries of the latter's workplace at some point in time. The new jurisdiction created by the federal tax legislation of the early twentieth century was occupied primarily by the accountant, lawyer, and enrolled agent, each with its own niche.²⁰⁶ The lawyer and accountant had the broadest sub-sectors of the jurisdiction, while the enrolled agent maintained a subsidiary jurisdiction qualitatively similar but quantitatively distinct from the accountant's. The accountant focused on giving tax advice largely in connection with questions of financial analysis and the operation of relevant accounting concepts. The lawyer focused on adapting and interpreting the language of the law in the context of harder cases—cases in which financial accounting concepts and the general language of the law did not give a clear meaning of the applicable law and those in which adverse consequences such as litigation were imminent.²⁰⁷ Absent a shared, common understanding of the respective areas of focus for both professions, it was difficult to delimit the boundaries with any precision—a problem still extant and easily perceived in the difficulty of defining “legal practice” or “practice of law” as well as “practice of accounting.”²⁰⁸ Without

²⁰⁴ *Id.* at 311–12.

²⁰⁵ See *supra* notes 95–97 and accompanying text.

²⁰⁶ See *supra* notes 146–50 and accompanying text.

²⁰⁷ See Wolfman, *supra* note 132.

²⁰⁸ See Munneke, *supra* note 101, at 76–77 (discussing the conflicts between lawyers and accountants in defining the scope of their respective professions); Center for Professional Responsibility (“CPR”), Statement of James W. Jones, <http://www.abanet.org/cpr/jones1.html> (last visited July 16, 2006) (describing the “frustratingly illusive” nature of the “practice of law”); see also Fox, *supra* note 9, at 1097 (noting the claim by lawyers practicing within the Big 5 accounting firms that they are not practicing law but are rather practicing tax, ERISA, M&A, etc.). The issue is also reflected in the objection of the American Institute of Certified Public Accountants (AICPA) to the MDP commission’s definition of legal practice, which the

a precise specification of what the "practice of law" means, it is very difficult to challenge another profession for making an incursion into legal practice.

A consensus on the matter appears to have been arrived at initially, as both professions' leaderships attempted for a while to solve this problem through inter-professional agreements, sometimes with the encouragement of the revenue authorities.²⁰⁹ Workplace realities, however, were different from and less structured than formal demarcations, whether embodied in agreements of this nature or in legislative measures. Neat arrangements between both professions' leaderships ultimately dissolved into an entangled mesh of interests.²¹⁰ Competition reasserted itself as an inevitability of the system of professions.

Accountants did a variety of work within the tax area, and in the heat of the workaday demands of the workplace, the major limitations on the type of work done became its availability and the accountants' capacity to do such work. The availability of the

AICPA saw as too broad. See CPR, Letter from Olivia F. Kirtley (July 30, 1999), <http://www.abanet.org/cpr/aicpa2.html> (transmitting the AICPA Board resolution dated July 15, 1999).

²⁰⁹ Cf. U.S. DEP'T OF JUSTICE, COMMENTS ON REPORT OF IRS CHIEF COUNSEL'S ADVISORY COMMITTEE ON RULES OF PROFESSIONAL CONDUCT IN REPRESENTATION OF TAXPAYERS BEFORE IRS (Dec. 10, 1976), reprinted in 241 BNA TAX REPORTER, at 1 (Dec. 14, 1976). The Justice Department criticized the IRS practice of deferring to decisions by the ABA and American Institute of Certified Public Accountants (AICPA) over the settlement of jurisdictional boundaries in the tax area, arguing that antitrust considerations are implicated when the IRS defers to these bodies—private associations—in rulemaking and decisions concerning tax practice. *Id.* On two of the proposed rules, the Justice Department had this comment regarding the IRS committee's approach:

[T]he Committee briefly discussed the problem which arises when a licensed attorney, employed on a full-time basis by a firm of certified public accountants, seeks to represent the firm's clients in IRS proceedings. Although the Committee did not propose a regulation to deal with that situation, it did encourage two private associations to jointly develop dispositive rules.

. . . .
... The Department believes it unnecessary, and inappropriate as a matter of public policy, for the IRS in effect to delegate authority to private associations of competitors to determine conditions under which individuals may practice before the IRS.

Id.

²¹⁰ See CAREY, *supra* note 88, at 225–27 (noting the several rounds of consultation between the ABA and the accounting Institute in the 1930s aimed at delineating the boundaries of the respective jurisdictions in tax matters and reviewing the continuing disputes throughout).

work was considerably related to the cultural legitimacy of the profession's claim over a particular aspect of work.²¹¹ But such legitimacy need not be monolithic. It can be partial, exhibiting a patchwork pattern. Thus, even though accountants, in relation to the portion of the tax jurisdiction occupied by lawyers, had no legitimacy in the broader public arena, they did have legitimacy with important sub-groups like chief financial officers of corporations.²¹²

Workplace realities are thus, to a good degree, impervious to the order of the legal or public arenas. All these arenas mutually interact and shape one another, but the workplace, with its nooks and crannies, is the least amenable to order. The mind of the public has become attached to the stereotype of the doctor or the lawyer—a solo practitioner the boundaries of whose work, workplace, and expertise are clearly delineated. The legal arena is similarly drawn to such stereotypes, often premising its regulation on the archetypal lawyer or doctor and recognizing no divergences. Perhaps these stereotypes are convenient metaphors without which the public and legal arenas would be unduly burdened by details. But they in no wise attenuate the variegated realities of the professional workplace—a place replete with exigencies and compromises that sees nurses and paralegals performing functions formally assigned in the public and legal arenas to doctors and lawyers, respectively.²¹³ It is not surprising, therefore, that the separation of the lawyer's portion of the tax jurisdiction from that of the accountant became an intractable affair. This intractability, however, was a problem only for those who wanted the separation maintained, namely, lawyers.

The rise in status and power of the financial controller or chief financial officer in major corporations accentuated the

²¹¹ See *supra* notes 162–63 and accompanying text.

²¹² See Bruce, *supra* note 138 (mentioning the leading role that accountants have played in their capacity as finance directors).

²¹³ See LAWYERS IN SOCIETY, *supra* note 39, at 5 (noting the increased role of nurses and other paramedical professions in healthcare and referencing a 1986 report by the U.S. Office of Technology Assessment that estimated that nurses could perform 60–80 percent of basic health care); see also Munnneke, *supra* note 101, at 80–81 (noting the immediacy of paralegals' quest for formal recognition to practice aspects of the law for which they have already shown some proficiency in the workplace and the willingness of the Californian legislature to consider a bill authorizing limited practice by them).

expansive nature of the accountant's quest for work. An accountant, the chief financial officer had broad operational powers that often involved the purchase of services from professionals in relation to the several matters within the purview of his office, one of which would normally be taxes.²¹⁴ Intuitively or otherwise, many chief financial officers came to retain accountants for advice on tax issues, using lawyers only selectively for tactical purposes.

With the chief financial officer as a major channel of corporate demand for tax services, the accountant came to gain—in this most lucrative portion of the workplace—acceptance in a very expansive sense. This acceptance dovetailed into most aspects of the lawyer's portion of the shared tax jurisdiction, with the notable exception of high-level litigation. The lawyer's tax jurisdiction, however, especially tax litigation, involved control over the most extreme problems of the tax area. It was therefore imperative, in line with the gradient argument,²¹⁵ that accountants get control of this sub-sector of the jurisdiction, if their claim to the tax jurisdiction—including their own established portion of the territory—was to be free, at least conceptually, from potential usurpation. For whoever controlled the most extreme cases in a jurisdiction had the potential of staking a credible claim for the rest of that jurisdiction. Accountants, therefore, had to stake a more formal claim for an expansive jurisdiction in the legal and public arenas.

Such a claim commenced with the massive recruitment of lawyers into the dominant accounting firms.²¹⁶ This recruitment assumed the workplace acceptance of accountants and their firms as capable of executing the functions of the tax area for which lawyers were being recruited. In essence, the accounting firms recruited lawyers to do work for which, broadly speaking,

²¹⁴ See EUGENT F. MCKENNA, THE MANAGEMENT STYLE OF THE CHIEF ACCOUNTANT 11–13 (1978) (enumerating the myriad duties, and titles, of the "Chief Accountant," including tax management); Michele D. Beardslee, *If Multidisciplinary Partnerships Are Introduced into the United States, What Could or Should Be the Role of General Counsel?*, 9 FORDHAM J. CORP. & FIN. L. 1, 57–58 (2003) ("[T]he CFO is currently the key 'buyer' of services . . ."); Bruce, *supra* note 138 (commenting on CFO-accountants "at the heart of influence in any corporate organization").

²¹⁵ *Supra* notes 141–43 and accompanying text.

²¹⁶ See Fox, *supra* note 9, at 1097. The exact number of lawyers working in accounting firms is unknown, but it clearly runs into the thousands. See *id.* at 1109 (postulating that as of 2000 there were approximately 5,000 lawyers employed in the Big 5 firms as "consultants").

accountants had already established workplace credibility, thus ensuring a stable flow of work from clients. Of course, it was clear to the accountants that the lawyers brought with them a special talent and perspective on tax issues.²¹⁷ This did not dilute the fact, however, that in the workplace—as distinct from the public and legal arenas—accountants had come to be accepted as capable of occupying the expanded tax jurisdiction to such an extent that they themselves were now increasingly being retained by high-level clients and were hiring lawyers only in order to enable them meet those clients' demands. The clients' demands were being met by accountants *qua* accountants, and lawyers were being employed essentially as able surrogates. The lawyers would work internally as lawyers, but their output would be sold to outsiders as those of an accounting firm.

In the most important nook of the workplace—the offices of the chief financial officers of the major corporations—the accountant had become accepted as being capable of completely occupying the whole tax jurisdiction.²¹⁸ In essence, the accountants had already proved their mettle in a critically important niche of the workplace and were thereby enabled to employ lawyers to do work for which lawyers had a better or equal claim in the legal and public arena.

Beyond the special talent and perspective that lawyers brought with them, the recruitment of lawyers into accounting firms also brought a second benefit: it enabled the accounting firms to make an important statement to the public, in both a direct and an indirect sense. In a direct sense, it enabled a formal assertion when occasion demanded that the accounting firms' extensive capabilities actually encompassed the capabilities of a law firm, taking care of course to avoid describing the lawyers employed therein as "lawyers" or "attorneys" but rather as "consultants."²¹⁹ Indirectly, it involved a statement to the public who observe such recruitment that legal practice, at least the tax and financial aspects thereof, was considerably a subset of accounting practice. Either way, such a statement facilitates a quest for the recognition in public opinion of the workplace achievements of accountants.

²¹⁷ *Supra* note 150 and accompanying text.

²¹⁸ *Supra* note 214 and accompanying text.

²¹⁹ Daly, *supra* note 4, at 262.

This quest for public recognition also took other forms, especially because the most relevant sections of the public are those most concerned with the types of tax issues particularly attractive to accountants—corporations and high net-worth individuals. Constant targeted marketing, especially in the professionally liberalized environment of the late 1970s and beyond, ultimately succeeded in sensitizing the relevant constituencies to the accountant's claim to an expansive tax jurisdiction.²²⁰

In the legal arena, accountants had relatively little problem in relation to the expansive tax jurisdiction they sought. They already had a right of audience in the tax court, though they were denied audience in more substantial courts.²²¹ Yet in two respects, they felt the necessity to approach the legal arena. The first was in respect of the evidentiary privileges of communications between tax advisor and client. The extension of such privilege to accountants was canvassed both at the judicial and legislative levels of the legal arena. *United States v. Arthur Young & Co.*²²² perhaps represents the high-water mark of such attempts at the judicial level. There, the court rejected the argument that accountants were entitled to work-product immunity for tax accrual work papers similar to lawyers' immunity under the attorney work-product doctrine.²²³ Congress ultimately granted such protection of confidentiality following immense lobbying with the active support of some consumer groups and enshrined it in title 26, section 7525 of the United States Code.²²⁴ The second and more important respect

²²⁰ See Fox, *supra* note 9, at 1107–08 (describing an advertisement in the New York Times listing auditing and legal services).

²²¹ See *supra* notes 158–59 and accompanying text.

²²² 465 U.S. 805 (1984).

²²³ See *id.* at 807–10, 821. Other cases implicate unsuccessful claims of similar immunities for accountants' tax work papers. In two cases, unsuccessful attempts were made to rely on the taxpayers' Fifth Amendment right against self-incrimination to shield the accountants' work papers from scrutiny by the authorities. See *Fisher v. United States*, 425 U.S. 391, 414 (1976); *Couch v. United States*, 409 U.S. 322, 336 (1973).

²²⁴ 26 U.S.C. § 7525 (2000), amended by Pub. L. 108-357, § 813(a); see COMMERCE CLEARING HOUSE, 1998 TAX LEGISLATION: IRS RESTRUCTURING AND REFORM: LAW, EXPLANATION, AND ANALYSIS ¶ 1141 (1998). There are doubts, however, concerning the reach of the protections afforded under the provisions, given two exceptions in the provision: the privilege may not be asserted in a criminal tax matter before the IRS or a federal court, nor does it apply to any written communication between a tax practitioner and a promoter of tax shelters. See 26

regarding which accountants felt the necessity to approach the legal arena was the attempt to broadly transcend the limitations of their jurisdiction vis-à-vis lawyers by pressing for the legalization of MDP. The MDP debate has been nothing less than a strategic battle fought in the legal arena for the elimination of disabilities placed on accounting (and other less-affected professions) by the laws regulating the practice of law. Given the nature of these laws, however, a frontal assault of the sort employed in Congress over evidentiary privileges²²⁵ was not feasible. With the prerogative of amending the laws lying with fifty separate states, a different approach was called for. Combined with a simultaneous public campaign that saw several consumer groups rallying to the call for MDP,²²⁶ the approach involved a trenchant appeal to Bar administrators, in their capacities as molders of lawyer regulatory regimes, through the influence they exercise on state judiciaries and legislatures as the primary Bar regulators.²²⁷ Cast as they were in terms of efficiency and consumer welfare, these calls and appeals could

U.S.C. §§ 7525(a)(2), 7525(b). Besides, the legislation likely does not reach advice concerning state taxes. Indeed, there is no express provision covering the work-product doctrine, so that doubts exist about the applicability of such doctrine to tax work papers of accountants. *See United States v. Frederick*, 182 F.3d 496, 502 (7th Cir. 1999) (concluding, in dicta, that 26 U.S.C. § 7525 does not protect work product of nonlawyer practitioners such as accountants).

²²⁵ *See supra* notes 222–24 and accompanying text.

²²⁶ *See* Center for Professional Responsibility (“CPR”), Joint Letter from Various Consumer Groups to Members of the ABA MDP Commission (July 15, 1999), <http://www.abanet.org/cpr/consumer2.html> (last visited Sep. 1, 2006). It is instructive to observe how the positions of several consumer advocacy groups on MDP were correlated to the position taken by the AICPA and the major accounting firms. For instance, notwithstanding the MDP Commission’s primary recommendation that MDPs be permitted, the AICPA, among other reasons, rejected the MDP Commission’s report as being too restrictive and thus constituting an impediment to the development of MDP, especially by way of its imposition of lawyers’ ethical rules on all those practicing in MDPs. *See* Letter from Olivia F. Kirtley, *supra* note 208. Subsequently, six consumer advocacy groups issued a joint statement expressing misgivings similar to the AICPA’s, seemingly taking little stock of the bigger point that the ABA MDP Commission had come out firmly in favor of the consumer groups’ long-standing position by recommending the de-proscription of MDPs. *See* Joint Letter from Various Consumer Groups to Members of the ABA MDP Commission, *supra*.

²²⁷ *See* Kimberly E. Frank et. al, *CPAs’ Perceptions of the Emerging Multidisciplinary Accounting/Legal Practice*, 15 ACCT. HORIZONS 35, 36 (2001) (summarizing the quick expansion of the MDP debate into the states, led by the AICPA, despite the ABA rejection of the MDP Commission’s recommendation to change legal ethics rules to allow MDP).

not be overlooked for long by Bar leaders. These calls ultimately led to the broad-based debate on MDP,²²⁸ a debate in which the major accounting firms and the AICPA participated with much fervor and near dominance.

An interesting aspect of the accountants' strategic approach in working both the legal and public arena is the international dimension introduced into the mix. This has generated both formal arguments about the international validity of U.S. regulations prohibiting MDP, in the context of U.S. obligations under the World Trade Organization, as well as less formal arguments focusing on the perceived impact on the U.S. position of the liberalized regulatory regime in parts of Europe.²²⁹ The

²²⁸ During the tenure of Jerome Shestack as ABA president (1997–1998), the ABA established a low-keyed committee to consider the MDP question. Anna Marie Kukec, *A Bit of History—MDP Roots Extend to 1980*, <https://www.abanet.org/barserv/barleader/multihis.html>. That committee produced a report unfavorable to MDP, but it was never issued. *Cf.* Jerome Shestack, *Should the ABA Approve MDP? Part I, A Discussion and Analysis of Multidisciplinary Practice and the Legal Profession*, Symposium Transcript, Oct. 25, 1999, <http://www.nyls.edu/pages/1034.asp> (transcribing remarks by Jerome Shestack in opposition to MDP). When Philip S. Anderson assumed the ABA presidency in 1998, the ABA created in August of that year the more elaborate twelve-person MDP Commission, which then issued its own, pro-MDP report. *See* Kukec, *supra*.

²²⁹ *See* Center for Professional Responsibility (“CPR”), Reporter’s Notes from the ABA Commission on Multidisciplinary Practice § I(A) & nn.8–17 (1999), <http://www.abanet.org/cpr/mdpappendix.html>; CPR, Delos N. Lutton, *Remarks to the ABA Special Commission on Multidisciplinary Practice* (Aug. 8, 1999), <http://www.abanet.org/cpr/lutton.html> (stating that one phenomenon of MDP is its rapid spread in advanced, industrialized countries, such as Germany, France and Spain). Although many countries continue to debate “the legality of some of these moves by consulting firms . . . the growth is real, it persists, and it is affecting clients and their lawyers every day in a growing number of arenas.” *Id.*; *see also* THE LAW AND ETHICS OF LAWYERING, 1047 (Geoffrey C. Hazard et al. eds., 3d ed. 1999) (observing that change in the MDP treatment may come as part of a treaty between the United States and the European Community, implicitly assuming that through the treaty Europe would put pressure on the U.S. to open its borders to MDP); John H. Matheson & Edward S. Adams, *Not “If” but “How”: Reflecting on the ABA Commission’s Recommendations on Multidisciplinary Practice*, 84 MINN. L. REV. 1269, 1300 (2000). Matheson et al. wrote:

These larger accounting firms, taking advantage of the pro-MDP regulatory system overseas, have significant legal practices throughout Europe, with lawyers on staff or attached to the accounting firms through some variety of contractual obligations. In some European markets, these accounting firms are already among the largest providers of legal services for businesses. And this development is not likely to be curbed by the legal profession if it does not alter its regulation; the GATT treaty, which governs most international trade matters, claims jurisdiction over these professions through the World Trade Organization—an organization

tactic of internationalizing the discussion is a novel one and is perhaps as indicative of the future dimensions of jurisdictional contests as it is of the strategic thinking and cross-cutting alliances marshaled by accountants in support of their quest. The Enron corporation scandals have dampened the accountants' quest, but there is no indication that the quest has finally come to an end.²³⁰ What we have may well be a lull in the battle for professional jurisdiction, which the quest for MDP represents. Equilibrium is ultimately elusive within the system of professions. The inter-professional struggle for ascendancy and dominance is—just like death and taxes itself—the only constant element of the system of professions. All settlements are but lulls in this struggle.

CONCLUSION

In their quest for MDP, accountants largely acted out a script dictated by the character of the inter-professional environment, a script that lawyers themselves have had occasion to follow in the past. Lawyers, through the centuries, have competed for jurisdiction with several professions. The legal profession itself has been the victor in many of these conflicts—conflicts which have structured the contours of the profession.²³¹ More recently, the legal profession's competitors have included

historically biased against self-interested regulation.

Id.

²³⁰ See *supra* notes 35–36 and accompanying text.

²³¹ Lawyers have battled with many professions, the jurisdictions of some of the vanquished being so entrenched within the current structures of the profession that we hardly conceive of such jurisdiction as having once being the prerogative of a different occupational group. Good examples are the proctors and advocates of the English ecclesiastical courts, who had a distinct and far more advanced professional structure, including requirements of university education, by the 13th century when the common law lawyers were still a fledgling group. See BRAND, *supra* note 54, at 145, 149–51. More recently, lawyers have silently vanquished arbitrators, many of whom were non-lawyers—the idea of arbitration in its most modern connotation having become entrenched through the activities of an array of individuals, especially engineers and other specialists in industry, who often arbitrated commercial disputes. The ethics codes of various lawyer regulatory bodies now contain for the first time, rules governing arbitral and related services. See CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION § 4.5 (Council of Bars and Law Soc'ys of Eur. 2002) (“The rules governing a lawyer’s relations with the courts apply also to his relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.”). See *generally* CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (ABA & Am. Arbitration Ass’n 2003) (providing ethical guidelines in the form of ten canons).

title companies, insurance companies, and investment banks.²³² MDP, as championed by accountants, is just one form in the endless ebb and flow of this competition.

Perhaps, the more important question is why this particular jurisdictional contest has had to take the form of a debate or struggle over MDP at this time. This is where the theory of professions as an inter-connected system comes into full relief. The quest for MDP is revealed to be not just a random occurrence, but rather a function of two factors: the peculiar conditions of accounting as a young profession within the system of professions, and the peculiar difficulties presented to accounting as the usurping profession by the jurisdiction it sought. MDP is presented, therefore, as a structured response to a structured problem within the broader context of pervasive systemic competition. It may indeed be seen as an historical inevitability, both in the broad sense of being an aspect of pervasive, unending inter-professional competition, and in a narrower sense of being a carefully choreographed response to the pre-existing structure of the legal profession, which structure presented a peculiar defense against jurisdictional usurpation. Against a different adversary and at a different time, the approach adopted by accountants might have been different. In particular, the dominant, socially legitimating values invoked by accountants made MDP an appealing, plausible approach to wresting jurisdiction from lawyers. Efficiency as a dominant socially-legitimizing value, to the extent that MDP is hinged thereon, made MDP a strong platform from which accounting could launch a jurisdictional assault on law.

In a sense, the approach adopted in this paper has involved the mapping of the struggle over MDP into the sociological scholarship on the professions, framing the discourse in social-historical terms. Such a framework reveals the variegated character of the MDP phenomenon: the originating factors, the various loci of the debate or struggle, its various stages, and the possible forms that its resolution could ultimately take. In particular, it reveals the quest for MDP to be a natural result of inter-professional interaction within the system of professions, thus presenting it as more of an inevitability and less of a contingency than it has been made out to be.

²³² ABBOTT, *supra* note 39, at 265.

In taking the above tack regarding the inevitability of the quest for MDP, this paper does not make a normative statement, nor does it mean to convey thereby a sense that the accounting profession would be successful in the long-run in their quest because that quest grows naturally out of the dynamics of the system of professions. The sources of system disturbance are too varied and equilibrium too elusive for anyone to take such a stance with assurance. The paper does no more than try to emphasize by the tack it takes the natural character of the struggle over MDP as part of a natural process within the system of professions, informed by the peculiarities of the contiguous territories that accounting and law occupy within that system.

