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Money and the Professions: Medicine and Law

William F. May

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**THE FUTURE OF CALLINGS—AN INTERDISCIPLINARY
SUMMIT ON THE PUBLIC OBLIGATIONS OF
PROFESSIONALS INTO THE NEXT MILLENNIUM:**

**MONEY AND THE PROFESSIONS:
MEDICINE AND LAW**

William F. May[†]

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I. INTRODUCTION

The distinguished lawyer and educator, Roscoe Pound, wrote that "the term [profession] refers to a group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service it may incidentally be a means of livelihood."¹ Today the monetary rewards for doctoring and lawyering are anything but incidental for most practitioners. This essay is a meditation on money and the professions with a view to what it means to profess in the spirit of public service.

II. SOME POSITIVES ABOUT MONEY

Money is many-faced; and I do not mean the grave and graven images of the Washingtons, the Franklins, the Lincolns, and the Jacksons who gaze somberly out as we handle our bills. Rather, many-faced in that money *performs* variously, importantly, and positively in our lives, and we had better, at the outset, acknowledge that fact. How do we need thee? How do even professionals need thee? Let me count the ways:

A. *Money Feeds*

In all but the world of barter, one needs money to live. We need it to buy our daily bread. Amateurs may do it for love. But a professional, along side all other workers, does it for money; and it would be a species of angelism to deny that fact. Since money feeds, it also supplies an element of stability to the relationship of the professional to client. For if professional services depended entirely on love, then, of course, like love, at least at the emotional level, they would tend to rise and fall, wax and wane. But money supplies a bit of constancy to the relationship. Philanthropy is flighty. Adam Smith knew this when he noted that the fellow who can be counted on to get up at 3:00 a.m. with a sick cow either owns it or is paid to take care of it. Norman Mailer put it similarly when he said, the professional writer is the person who keeps at it,

1. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

even on a bad day. Money keeps us from being hostage to dilettantism; it steadies the attention.

B. Money Rewards and Thus Motivates

Above and beyond the bread it supplies, money is often a marker of worth, especially when the good being sold is not simply a commodity but one's own skill. It certainly is no perfect marker of worth. But even those professionals whom the marketplace usually underpays, such as teachers and members of the clergy, look to salary reviews within their institutions as indicators of the value placed on their performance.

C. Money Connects Us to the Stranger

Families, friends, and neighbors meet in enclosed spaces—in the house, the church, and the synagogue; but the marketplace puts us out into the open; it puts us in contact with the stranger. From the seventeenth century forward, professionals—the doctor and the lawyer—put out their shingles on the street. The sign signaled that one is making available one's skill not simply to the enclosed world of friends, relatives, and neighbors, but to the stranger.

Money, in a sense, is ecumenical; it breaks out beyond the boundaries of the parochial. The pressures today for free trade express yet again the inherently expansive nature of the market. It transcends even national boundaries as it opens out toward the faraway, the strange.

D. Money Talks

Money also talks; whether it barks out commands or it sweet-talks. Either way, it mobilizes and organizes resources and talent. Money is not inert. Since it feeds, powerfully motivates, overcomes barriers, and—as we say—opens doors, it is remarkably fluid; it moves easily and moves other things easily; it lubricates and keeps the world moving. It is dynamic, seizing on the inventive, the novel. It also lets one adapt rapidly to change, readjusting and reconfiguring the world.

Distinguishing different types of civil societies, Montesquieu noted that the aspiration to honor and excellence supplies the spring to action in an aristocratic society, whereas fear of the tyrant

makes a despotic society tick.² Clearly, the spring to action in a commercial society tends to be money that supplies us with the objects of our desiring and gratifies our self-interest. So the pictures on the face of money may be grave and engraved—Washington and Lincoln—but money itself is dynamic and protean, so much so that when we celebrate it, we can border on the blasphemous, as we refer to the almighty dollar.

But that thought moves us toward the dark side of money, so dark and deep, that Scripture once referred to the love of money as the root of all evil.³ If not the root of all evil, money certainly fertilizes the roots. While money feeds, motivates, breaks down barriers, commands and organizes, it can also vulgarize, distract, corrupt, distort, and exclude. It can vulgarize, distract and corrupt professionals as they offer their services; it can distort the services they have to offer, and it can exclude the needy from their services.

III. THE DANGERS OF MONEY

The dangers of money thrive on the complicated double relationship of money and the marketplace to the professions.

A. *The Increased Power of the Professions and the Emergence of the Modern Marketplace*

Their relationship is very intertwined, so plaited that one might argue that the increased power of the professions in the modern world coincides with the emergence of the modern marketplace and with the still later emergence of the winner in the marketplace, the modern, large scale corporation.

I see the connections as follows. Aristotle once referred to the good community, the *polis*, as a community of friends; people with shared interests and goals. Aristotle's ideal *polis* was quite small, small enough to be a community of names and to engage everyone (well, not everyone—not women, not slaves) in civic responsibilities. The city remained relatively small until the eighteenth century. This cameo scale let people relate chiefly within the framework of family, neighbors, and friends. From the

2. See BARON MONTESQUIEU, SPIRIT OF THE LAWS, IN THE PHILOSOPHY OF FREEDOM 47, 47-52 (Samuel B. Rudolph ed., 1993).

3. See 1 *Timothy* 6:10.

eighteenth century forward, the West and particularly the United States increasingly shifted from a community of neighbors to a society of strangers.⁴

How do persons in that setting connect? Mostly, not through shared interests, but through *cash* that temporarily connects people who otherwise do not share common interests. Professionals belong to that platoon of paid strangers who partly substitute for the families, neighbors and friends who provided services in earlier societies.

Aging patients now look to the physician and nurse as the fixed stars in their lives, their children in distant cities. Disputes, which once were resolved through the mediations of friends and relatives and neighbors acquainted over a lifetime with the parties to the conflict, now end up in the courts. Further, the parties to the dispute and those who will manage the proceedings do not know the principals in other connections, so one needs strict rules of evidence and paper trails to reach a judgment in a particular case. Litigation perforce flourishes in a society of strangers; trained experts handle the proceedings and preside fatefully over outcomes. Precisely because the doctor-patient relationship today chiefly connects strangers linked by money and because it points toward a desperately hoped-for favorable outcome, the relationship is increasingly less stable and, thus today, sometimes erupts into enmity. The patient resorts angrily to the courts which in their own right and turn are controlled by strangers to both parties; strangers attempt to bring closure to the disputes between strangers with money at issue at most points.

Further, the corporation has been the winner in the modern marketplace and thus able to command disproportionately the talent of lawyers, accountants, and engineers who work either directly for corporations or for those outside professional firms that serve exclusively their wants and needs.⁵

4. In Dallas, where I live, the house with attached garage completes the process. I drive home along an alley, flick the garage door opener to avoid getting out of the car, park inside, and then flick the garage door shut and enter the kitchen. If kids are out in front yards playing, if neighbors are out mowing, I wouldn't know it. We live in a society of strangers, sometimes friendly strangers, but, still strangers.

5. See generally DEREK BOK, *THE COST OF TALENT* (1993) (describing the details on the flocking of professions to corporations).

B. *The Dual Identity of a Professional*

While the professions and the marketplace (and money) are intertwined today, the professional has a complicating second identity. The professional has one foot in the marketplace. She is paid for her work. That distinguishes her from the amateur. But, at the same time, the professional has a commitment that transcends the marketplace.

The least satisfactory way of expressing that transcendence is to point to the aristocratic origins of the professional in the West. "Having a profession" provided a social location in life for the second, third, and fourth sons of aristocrats who, in a society committed to primogeniture, could not inherit portions of the estate that went exclusively to the eldest son, and yet who, as children of the aristocracy, should not have to work for a living and thus submit to the vulgarities of the marketplace. Thus the professions—law, civil service, the church, the military, and medicine—provided the great families with an honorable social location for their surplus gentlemen.

The aristocratic ethic of *noblesse oblige* deserves some criticism. It smacked of the condescension of the superior toward the inferior; it bent low with benevolence, and it operated within the closed circle of the old boys' network.

But it also deserves some praise. It avoided the pretensions of the more recent ethic of the self-made man or woman. It did not suffer from the illusions of those who think of themselves as self-created. Instead, it acknowledged that one has largely received what one is, a receiving that generates obligations to others. Whereas, the marketplace runs on the dynamism of buying and selling, the aristocratic ethic at its best acknowledged the social lubricant of receiving and therefore giving. It inspired an ethic of gratitude in the moral life.

Further, the aristocratic ethic encouraged some sense of independence in relation to the client. One did not wholly depend upon the client for one's living or for one's sense of one's worth. One belonged, prior to all contractual relations, to the moral traditions of the family and the law. That identity placed some restraints upon what one was willing to do for the client in exchange for his money.

But these very substantial positives in the aristocratic ethic tended to fade, leaving behind only a self-serving trace of the ethic

in guild prohibitions—until the 1970s—against advertising. A ghost of the aristocratic origins of the professions showed up in the complaints that:

1. *Money Vulgarizes*

However, the courts, beginning with the Virginia decision in the 1970s,⁶ prohibited professional guilds from banning advertising on the grounds that such prohibitions violated monopolistic price fixing.⁷ The cost of professional services had been rising much faster than the rate of inflation. Thus the professions, while invoking an ethic superior to the marketplace, in effect, behaved in a fashion morally inferior to the marketplace. The courts understandably wanted to put a stop to this hypocrisy.

Still, rampant advertising does make one wince. Money vulgarizes: two root canals for the price of one until the end of the month; Radial Keratotomy at \$1250 an eye, with \$500 off for the two procedures if you make your decision before you leave our seminar room; if you need help on your traffic ticket, just dial 9-GOTCHA, credit cards accepted.

Recoiling from all this, professionals daintily hand over the task of collecting money from patients and clients to their office staffs so as not to brush up too close to money. But the polite conventions of professional billing do not fool. Professional schools increasingly require courses in business management; they do not enroll as many students in courses on professional ethics. Further, the recruits for the professions today hardly enter them with aristocratic pedigree. The professions no longer serve as the parking place for the younger sons of aristocrats, but as the social escalator that carries sons and daughters upward from the working and middle classes—those often without clear public identities and without resource, who need to earn their entire living from their profession. Thus the modern professional has both feet planted in the marketplace. The question grows more acute. Does he or she have any further identity that transcends the cash nexus? Is the professional simply a combination of technician plus entrepreneur; someone who sells a skill in the law, medicine, accounting,

6. See *Hirschkop v. Virginia State Bar*, 604 F.2d 840, 843-44 (8th Cir. 1979) (citing *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977)).

7. See, e.g., *Hirschkop*, 604 F.2d at 843-44.

engineering, or theology? Or is the professional something more? That is the question of double identity that lies behind the topic, “money and the professions.”

Roscoe Pound, the great jurist, answered the question by invoking, not the aristocratic tradition, but the old religious term, a “calling.” In an oft-quoted line, he said, “The term [profession] refers to a group . . . pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of public service is the primary purpose.”⁸

Pound refers to a profession as a calling, and he links a calling with the pursuit of the common good. The religious tradition of the West made this connection in its Scriptures and so did the seventeenth century Puritan, William Perkins, influential on the American scene. He defined a calling as that to which God has appointed us to serve the common good.⁹ So conceived, all lines of work, but especially those callings that serve goods basic to our common life, such as law, medicine, and religion, ought to contribute to the common good.

However, in our time the notion of a calling has tended to deteriorate into a career. A career refers to that wherein I invest myself, on the basis of PSAT, SAT, GRE, LSAT, and MCAT scores, in the pursuit of my own private goals. Etymologically, a career derives from the same root as a car. A car is an automobile, literally, a self-driven vehicle through life, in and through which I enter into the public thoroughfares but for the purpose of reaching my own private destination.

But if a profession is a calling to serve a public good and not simply a vehicle for serving my own private, careerist aims for money and fame, we are prepared to identify a second danger and temptation of money, more serious than the first.

2. *Money Distracts*

Money distracts, as well as vulgarizes. Philosophers have distinguished between the goods internal to a practice—such as the arts of lawyering, healing, and preaching—and the goods external

8. POUND, *supra* note 1, at 5.

9. See William Perkins, *William Perkins on Callings*, in PURITAN POLITICAL IDEAS, 1558-1794 35, 36 (Edmund S. Morgan, ed. 1965).

to a practice—such as the fame or fortune which a practice may generate. If the careerist is a physician, lawyer, or preacher, only for the money, she has lost that single-mindedness, that purity of heart, which allows all else to burn away as the practice shines through. The love of money and fame distracts; it focuses attention elsewhere.

In Kingsley Amis' 1954 novel, *Lucky Jim*, a college history professor answers his phone, saying, "History here."¹⁰ What a wonderful line! Better than "Historian here" or "Dr. Toynbee here." "History here" points to the activity, pure and simple, not to the office or to the attainment of the person. Isn't that what a distressed patient wants when he calls the doctor about a baffling symptom? "Healing here." Isn't that what the distressed client or parishioner needs, when calling the lawyer or the priest? "Sanctuary here."

Money *distracts* the professional from what should be his or her single-minded professional purpose, the client's welfare. Justin A. Stanley, past president of the ABA and chair of the ABA Commission on Professionalism noted in the comprehensive report of the Commission that:

[A]ny number of large law firms are now going into business or businesses which they control or manage For example, one firm has set up one investment advisory service, and this functions principally, I guess, to advise clients of the law firm. Another set up a lobbying entity in Washington, D.C. Another firm has invested heavily in real estate development.

Why do they do this? Well they claim to serve their legal clients better by providing ancillary services: sort of a one-stop shopping center. I suspect, however, that they could do just as well for their law clients if they introduced them to competent financial advisors, lobbyists, or investors in real estate. I think that the real reason is money.¹¹

10. KINGSLEY AMIS, *LUCKY JIM* (1954).

11. Justin A. Stanley, *Professionalism and Commercialism*, 50 MONT. L. REV. 1, 9

3. *Money Corrupts*

Eventually, a focus on the goods external to a practice can corrupt the practice itself. The actress interested only in her Nielsen ratings and the advertising revenue it generates repeats the tricks that worked for her last week and at length her show deteriorates into a series of running gags and repeated clichés, corrupting the original good of a theatrical performance.

The specific corruption of money in the case of the professional transaction can be stated as follows: A marketplace—as distinct from a professional—transaction between two self-interested and relatively knowledgeable parties engaged in the act of buying and selling; each party attempts primarily to protect his or her self-interest. The seller does not feel particularly constrained to watch out for the buyer's interests. That's up to the buyer, who, on the basis of comparative shopping and other means, has a way of becoming knowledgeable.

But a basic asymmetry exists in the relation of the professional to her client. The professional possesses knowledge (and the power that knowledge generates), while the troubled client is often too ignorant, powerless, and anxious to watch out for himself. A medical crisis, moreover, usually leaves little time for comparative shopping, even if one knew how to assess the professional's skills. Patients, students, clients, and parishioners cannot readily obey the marketplace warning: *caveat emptor*—buyer beware.

Their lack of knowledge and their neediness require that the professional exchange take place in a *fiduciary* setting of trust that transcends the marketplace assumptions about two wary bargainers. The importance of this trust should determine our view of what the professional has to sell. In a marketplace transaction, the salesperson does not ordinarily feel obliged to calculate my self-interest other than its value to him in clinching a sale. The salesman does his best to serve his self-interest and sell me the car, the refrigerator, whatever. When I enter the showroom, I am a pork chop for the eating. That's part of the game.

But if I visit a physician, I must be able to trust that he or she sells two items, not one. First, the physician, to be sure, sells a

(1989).

procedure. But, second, she must also offer her professional judgment that I need the treatment she offers. The surgeon is not simply in the business of selling hernia jobs, but also the further, cold, detached, disinterested, unclouded judgment that I need that wretched little procedure. Otherwise, the physician abuses disproportionate power and poisons the professional relationship with distrust. Instead of sheltering, she takes advantage of the distressed. She reduces me merely to a profit-opportunity. And, if I find that out, I will resent her for taking advantage of me in my powerlessness.

Herein lies the ground for all professional strictures against conflicts of interest. The professional must be sufficiently distanced from his own interests and that of other clients to serve the client's well-being.

Money does not alone tempt the professional to compromise the interest or welfare of his or her patient or client. The lure of fame or the interests of an institution can also undercut fidelity to the patient. In teaching and research institutions, the physician may be tempted to reduce the patient to teaching material or to recruit the patient for a research protocol not entirely in the patient's best interests. The lawyer in search of fame may find it enticing to push the client's case down a groundbreaking path in the law, a strategy that, however, exposes the client to greater risk. Professional codes enjoin against such breaches in fidelity in the pursuit of fame, tenure, or some institutional goal. However, money, creates far and away the most numerous conflicts of interest corroding professional responsibility.

The basic payment systems for professional services create different temptations for professionals (and the institutions for which they work). The fee-for-service system tempts doctors to overtreat and the prepayment system to undertreat patients.¹² Either way, the patient's best interests can suffer.

Traditional fee-for-service medicine, coupled with a laxly monitoring third-party-payer system, led to the overuse of medical services.¹³ The federal government, through taxes, and insurance companies, through charges to employer plans, eventually

12. See MARC A. RODWIN, *MEDICINE, MONEY, AND MORALS: PHYSICIANS' CONFLICTS OF INTEREST* 56 (1993)

13. See generally *id.*

recovered their costs on whatever they paid doctors or hospitals for treating a particular patient.¹⁴ Doctors enjoyed economic incentives to overtreat. A primary care internist could “increase his or her net income by a factor of almost three by prescribing a wide but not unreasonable set of tests.”¹⁵ Harold S. Luft observed that the use of such tests was “so common as to be almost standard practice; yet some clinicians would argue that few of the tests [were] actually necessary.”¹⁶ The temptation compounds inasmuch as physicians had “a financial stake in 25 to 80% of ancillary medical facilities depending on the region and the kind of facility.”¹⁷ Further, a study by a consulting firm, ABT Associates, found that, “doctors who performed and charged for their own radiological tests prescribed such tests at least four times as often and charged higher fees than did doctors who referred their patients to radiologists.”¹⁸ These various financial incentives do not of themselves produce shoddy treatment or overtreatment, but they load the field of practice with temptations.

Money can also corrupt the medical exchange by creating incentives for insufficient treatment under prepayment systems. Under a capitalization system, insurance companies, and other

14. *See id.* at 18.

15. *Id.* at 55 (quoting Harold S. Luft, *Economic Incentives and Clinical Decisions*, in *THE NEW HEALTH CARE FOR PROFIT: DOCTORS AND HOSPITALS IN A COMPETITIVE ENVIRONMENT* 110 (Bradford Gray, ed. 1983)).

16. *Id.* (quoting Luft, *supra* note 15, at 110). Under fee for service practice, related financial incentives to physicians could either slant decisions about the treatment of patients or increase worrisomely the number of tests and procedures ordered. *See id.* at 56. Financial incentives to physicians include:

- Receiving kickbacks for referrals to hospitals, specialists, clinical laboratories and medical suppliers;
- Earning income by referring patients to medical facilities in which physicians themselves have invested, a practice which, in effect, constitutes self-referral;
- Dispensing drugs and selling medical products;
- Selling medical practices to hospitals and more recently to HMOs;
- Receiving payments from hospitals in the course of being recruited to a particular practice; and
- Receiving gifts from medical suppliers.

See id.

17. *See id.* at 17.

18. David E. Rosenbaum, *Economic Outlaw: American Health Care*, N.Y. TIMES, Oct. 26, 1993, at A1.

institutional providers (and sometimes the physicians affiliated with them) profit from the difference between the annual amount received and the actual expenses incurred in the care of a patient. This time, money tempts providers to do, not too much, but too little. The aforementioned primary care internist, who, under fee for service, made more money by ordering tests and procedures, now serves as gatekeeper, with the possibility of making more money, certainly for the system and perhaps for himself, by holding down the patient's access to tests, procedures, medications, specialists, or hospitalizations. Once again, money does not inevitably corrupt, but it sorely tempts and pressures caregivers.

Managed care firms have resorted to a number of devices to keep up the pressure on physicians: regular report cards on the physician's rate of ordering prescriptions, referrals to specialists, and utilization of services; a profile comparing the doctor's performance with that of peers; built-in financial incentives for doctors to keep their costs low; and so-called gag rules, which prohibit physicians from disclosing to patients alternative treatments or additional treatments not covered by their health care plan and which, in some cases, also hide from patients the financial rewards physicians enjoy for keeping down costs.

Some big health insurers, operating under a capitalization reimbursement system, initially recruited doctors into contracts with them by paying doctors something close to "usual and customary fees" for services. But, in the course of time, the insurers (such as Aetna U.S. Healthcare, one of the nation's biggest insurers) shifted the basis of payouts to physicians to "the lowest available fees," often set by bargain rate HMOs.¹⁹ The California Blue Cross, for example, cut payments to doctors from 1994 to 1998 by as much as forty to fifty percent for some procedures.²⁰ Insurers have justified these cuts on the grounds of rising costs (new technologies, and an aging population) unaccompanied by rising income because employers refuse to increase their prepayments for health care coverage. Diminishing profits for the insurers have led them to reduce their payouts to physicians; the rapid merger of various competing insurers have given the

19. See Milt Freudenheim, *Insurers Tighten Rules and Reduce Fees for Doctors*, N.Y. TIMES, June 28, 1998, at 1.

20. See *id.*

remaining ones increased leverage over doctors to do so, since they control the supply of patients.

Doctors found themselves facing a financial squeeze, and other squeezes as well:

[E]ven though insurers have the final say over whether a treatment is necessary, many contracts now hold the doctors, not the health plans, liable in malpractice suits over denial of care, which have soared lately. On top of that, doctors must frequently give up the right to sue the health plan if it refuses to pay for a service.²¹

Irony abounds. For decades, doctors looked to Washington, D.C. as the single threat to their freedom to practice as they pleased. They celebrated the free enterprise system as their natural ally against Washington. But the marketplace eventually yielded corporate health care institutions, which initially offered doctors a supply of patients at customary and usual rates of compensation. Thus, birds flew into the cages but at length found their ration of seed reduced, their songs scripted, and penalties in place either way; sometimes punished if they sing according to script and punished if they refuse to.

The legal, like the medical, profession has prohibited practices that violate the interests of the client. It has especially enforced prohibitions against conflicts of interest that arise when lawyers and their firms serve two clients with conflicting interests. But the profession has been much less scrupulous about protecting a client's financial interests from the pecuniary interests of lawyers themselves. Temptations multiply. Lawyers can pad billable hours, string out a lawsuit to increase billable hours; engage in more expensive research than necessary; expand the list of witnesses to be interrogated; and extend discovery proceedings endlessly. The normal controls of marketplace supply and demand have not succeeded in regulating fees. Increases in the per capita number of doctors and lawyers have not driven down fees; they have risen rather than declined.

Derek Bok, in *The Cost of Talent*, remarked that "the most

21. *Id.*

promising remedy by far . . . is more aggressive bargaining by corporations over the fees they will pay their outside lawyers.”²² That remedy, of course, does not solve the problem of less powerful and efficient clients who do not enjoy the bargaining position of corporations. Further, some of the strategies whereby lawyers drive up their prices—for example, protracted discovery proceedings—perversely work. They may hike up the costs of legal services for the opposition so high as to drive the opposing party out of the case. In that event, the client may have gotten his money’s worth. He wins the case. But the legal system as a whole loses. The quality of justice is strained. Contingency fee cases also provide lawyers with opportunities to fiddle their clients. Unsuspecting clients do not know enough about their chances of winning, or the amount of time their case may require, to protect their own interest in setting the percentage for a contingency fee. As Bok wryly noted, “most plaintiffs do not know enough whether they have a strong case, and rare is the lawyer who will inform them (and agree to a lower percentage of the take).”²³ A payment system based exclusively on winning creates temptations for lawyers to exploit their clients; even worse, it pressures lawyers to abuse opposing parties and to tarnish the legal system as a whole—“when lawyers get paid only if they win, the incentives to behave unprofessionally, if that is what it takes to succeed, are very strong.”²⁴ When money corrupts, it leaves a trace of poison in the whole system.

4. *Money Distorts*

Money distorts, as well as corrupts, the professional relationship. That assertion requires us to identify a second way in which the professional exchange differs from a marketplace transaction.

In addition to its disinterestedness, the professional exchange should be, when circumstances require, transformational—not merely transactional. The practitioner in the helping professions must orient herself, not simply to the client’s self-perceived wants, but to the client’s deeper needs.

22. BOK, *supra* note 5, at 153.

23. *Id.* at 140.

24. *Id.* at 142.

The patient suffering from insomnia often wants simply the quick fix of a pill. But if the physician goes after the root of the problem, she may have to help the patient transform the habits that led, in the first instance, to the symptom of sleeplessness. The physician is slothful if she dutifully jumps to acute care but neglects preventive medicine.

Similarly, the effective lawyer needs to offer not simply wizardry as a litigant in the courtroom, but effective counseling that keeps the client out of the courtroom in the first place. That often requires what Anthony Kronman, Dean of Yale Law School, has called, "practical wisdom."²⁵ The professional may need to edge out beyond a bare marketplace transaction, in which one simply sells the customer what he or she wants, and, rather, engage in changing a course of action or a pattern of life. No one should underestimate the difficulties of doing so. As J. Pierpoint Morgan said to Mr. Root, "I don't want a lawyer to tell me what I can't do. I want him to tell me how I can do what I want to do." The powerful client would often turn the lawyer through money into a tool of his will, pure and simple. The old rule that the lawyer owes her client "zeal" plays into this deferential role. The Kutak Commission, in its efforts at reform, argued that lawyers owe their clients "diligence," a much more temperate term morally than zeal. In so doing, the conscientious lawyer may need to distinguish between what the client can get away with legally and what is wise.

Once again, the basic payment system and the flow of money can variously pressure, distort, and repress the transformational element in the professional exchange. Most of the incentives in conventional fee-for-service medicine favor acute care, at the expense of preventive, rehabilitative, long-term, and terminal care; they favor physical, at the expense of mental health care. The physician who hands the patient what he wants—the sleeping pill—gets him out of the office faster. Her office costs for a secretary and a nurse are roughly the same, whether she handles more or fewer patients. The temptations are great to become an artful people mover—to question the patient about his deeper problem takes time. What gives with your Atlas syndrome that you cannot let go of the world for seven hours, or with your perfectionist

25. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 20 (1993).

tendencies that make you lie in bed at night reliving painfully the gaffes of the previous day or worrying about the overload of duties that fills the morrow? The transformation of habits demands effective counseling and teaching of the patient, and teaching is slow boring through hard wood. The fee-for-service reward system has undercompensated those engaged in primary care and overcompensated those engaged in piece-work medicine. Money distorted and skewed the medical goods delivered.

In general, a prepayment, as distinct from a fee-for-service system helps shift the emphasis in care away from acute to preventative medicine. Early preemptive care spares providers the huge expense of acute interventions at a later date. Accordingly, HMOs created financial incentives for patients to come in for regular physical examination and, through education, to become sophisticated about self-care. The HMOs have made progress in improving preventative medicine. However, their efforts to save money have not led to comparable reforms in mental health and rehabilitative medicine. They have cut back on care of the mentally ill and shortened hospital stays for acute care treatment without, in some cases, investing adequately in follow-up care.

Money has skewed and distorted the elaboration and delivery of legal services. Some areas of the law have developed recently and rapidly, generously fertilized by money; other fields have lain underdeveloped or have developed but tardily because their monetary rewards were few. Lawyers flocked to and developed the golden fields of contract law, property, and corporate law. Until recently, the money was not there for practitioners in the fields of family law, environmental law, and product liability.

Money, however, influenced the development of the law far more broadly and pervasively than its ability to attract lawyers to one field or another of practice. As noted earlier, most professions, but especially the legal profession, expanded in power with the growth of our cities and the merchant class. This coincident growth of the legal profession with commerce affected the relative balance of power in the nineteenth century between the several players—lawyers, judges, and legislators—who shape and produce outcomes under the law.²⁶ The expansion of

26. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 140-159 (1977).

commerce also changed the territorial boundaries (and the significance) of the various fields of legal practice themselves, and it profoundly redefined the conception of justice in which the rule of law finds its grounding.²⁷

Following a long period in which merchants saw the law as the obstacle to the changes that the burgeoning commercial classes required, merchants between 1790 and 1820 looked to the law as an instrument of change.²⁸ However, to aid and abet the growth of commerce, merchants looked not to legislators or jurors but to judges to bring about a hospitable legal environment.²⁹ In some respects, that alliance seems surprising. Eager for change, merchants, it would seem, would look to legislators, whose business it is to make new law, rather than to judges whose task it is largely to interpret and apply a huge body of received common law. However, legislatures, acting out of populist sentiment, might too readily throw up obstacles to commerce or enact laws too local and parochial to encourage the spread of commerce beyond a region. Thus, merchants looked less to volatile legislators than to the courts to provide a uniform and predictable body of enabling rules.³⁰ Further, they appealed to the courts, especially to the courts located in port cities to offer decisions hospitable to commerce across state and national boundaries.³¹

In the nineteenth century, the power of judges also expanded at the expense of juries.³² The expansion of judicial power included: (1) the designation of special cases reserved to judges alone; (2) the setting aside of jury verdicts harmful to commerce or the awarding of new trials for verdicts contrary to the weight of evidence; and (3) the restriction of juries to questions of fact, reserving questions of the law exclusively to judges.³³

But the increased confidence of merchants in decisions being issued from the courts required a profound change in the very status of the common law tradition and the role of the judges as custodians of the tradition.³⁴ In the hands of the judges, the

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.* at 142.

34. *See id.* at 140-59.

common law no longer simply reflected and conserved traditional customs and practices rooted in the natural law. Rather the tradition, as creatively interpreted by judges, took on the character of legislation—that which is in part newly made, not already in place.³⁵ The interests of merchants also led to changes in the scope and relative importance of various fields of legal practice, particularly contract law relative to family law.³⁶ Before the nineteenth century, a large portion of work took place within the family, either directly through the domestic putting out system or indirectly through the apprenticeship system.³⁷ The relationship of the master to apprentice chiefly defined the roles and reciprocal duties of superiors to subordinates in the workplace.³⁸ Since, the master served as *in loco parentis* to the apprentice and the apprentice assumed quasi-filial duties to the master, family law in large part covered the workplace.³⁹

With the full emergence of the market economy and the factory system, contract law expanded at the expense of family law.⁴⁰ In the setting of the family, the very nature of the relationship substantively defines the duties of parent to child, child to parent. In the nineteenth century, a purely contractual, monetary relation defines the relations of employers/employees and sellers/customers.⁴¹ It is the consent of parties alone—the contract—that determines the obligations of each to the other.

Consequently, standards of procedure, rather than substantive justice, determine the rule of law in the marketplace. The law does not substantively rest on the very nature of the relation of father to son, master to apprentice. The law can look only to the agreements into which parties enter. It can review only such procedural questions as to whether coercion or fraud

35. *See id.* Much later, of course, the very success of the eventual transformation of the legal system into a body of law hospitable to commerce led in the twentieth century to a deep suspicion of an activist bench. Neither lawyers, unqualifiedly committed to the adversary system, nor conservative legislators wanted judges altering a legal system friendly to commerce which they helped create.

36. *See generally id.*

37. *See generally id.*

38. *See generally id.*

39. *See generally id.*

40. *See generally id.*

41. *See generally id.*

contaminated the agreement and then see to it that both parties honor the agreement whatever its substantive content. The law cannot go back behind the contract to pose substantive questions as to whether the wage agreed to was a just wage, the price agreed to was a fair price. A contract cannot be waived because an agreed upon price is exorbitant nor can a wage agreement be thrown out because it falls below a living wage. On the contrary, such appeals to substantive justice would, in a market system, undermine the rule of law; that is, they would surely disrupt the free flow of market exchanges under the iron law of supply and demand. Further, such traditional substantive standards lost their grounding in natural law; they would seem merely to rationalize arbitrary, subjective, groundless interference in an arena in which contractual consent alone creates enforceable duties. An activist bench would have no higher ground for intervention.

The point of this brief narrative is not nostalgia. It is simply to show that the marketplace is not simply a sea in which the legal profession is awash. Lawyers helped create the sea. The law is not simply a profession whose commitment to disinterested and transformational exchanges has weakened to the degree that lawyers, like all other professions, also must hustle in a market driven world of interested transactions. Lawyers have distinctively contributed to the creation of the marketplace world by remaking the law itself. The reduction of justice to procedural justice alone tossed out those substantive constraints on self-interest implied by the notion of a just wage and a just price. Employers simply contract with employees; and the contract alone wholly defines the employers' responsibility. Thus, lawyers, who themselves experienced the transformation of their lives through an apprenticeship system that helped give them their professional identity, have mightily helped both the employers and the society at large shed its transformational duties.

5. *Money Excludes*

Further, money excludes; that is, it sets up barriers, even as it breaks many down. Money opens doors, but usually only to those who have it. Those who can't get into the marketplace don't get the good. That arrangement works out acceptably enough in the purchase of optional commodities—like a Walkman, a tie, or a scarf. But professionals presumably generate and offer not

optional commodities, but fundamental goods—crucial to human security and flourishing: physicians generate the good of medicine, crucial to life; lawyers, the good of equality before the law, crucial to justice; the military and the police, the good of defense and protection, crucial to security; the clergy, the good of spiritual flourishing. Since these goods are fundamental, not optional commodities, something has gone deeply awry when they do not reach all. Without the good of medicine, for example, people suffer a triple deprivation: the misery of the illness, the desperation of no treatment, and the cruel proof on the part of the society that they do not really belong. The untreated ill become strangers in their own land. So even while money leaps over and seeps under boundaries and enclaves, it also excludes.

Some defenders of current legal practice argue that we should rely on the marketplace alone to distribute legal services through the varying arrangements of fee-for-services, retainer fees, salaries (for in house counsel), and contingency-fee payments. The device of contingency fees extends legal services to the modestly fixed and the poor because it requires no up-front money from the client. These varied arrangements obviate the need, so the argument goes, either for a societal commitment to a third-party-payment system extending legal services to the poor or for a professional commitment to *pro bono publico* service.

The contingency-fee system, of course, has generated criticism, especially from doctors (and corporations) who look longingly at Great Britain, which has altogether banned contingency fee arrangements and indeed requires the loser to pay the lawyer's fees for the winner in a court case.

Coming from the opposite direction, other critics of contingency fees argue that the device does not satisfactorily solve the need to distribute legal services widely and fairly.

Contingency fees, as a device for providing universal access to the good of legal care, fail at five points:

1. Current law bans the resort to contingency fees in family law (divorce and custody cases) thus leaving many people too poor to secure legal services in these areas. Yet lifting the ban against contingency fees in family law would generate other problems, such as tempting lawyers to go for more money and thus exacerbate already inflamed

- domestic disputes.
2. Current law also bans contingency fees in criminal cases. Even without the ban, the results in such cases would not often or appropriately convert into a schedule of contingency payments.
 3. Contingency payments do not calibrate readily with most civil suits except for personal injury cases and thus might tend to generate or pull complaints in that direction.
 4. A contingency-reward system tends to discourage lawyers from taking cases in which the payoff will not be large (thus denying justice to clients whose potential recovery for damages may be small in the lawyer's eyes but fateful for the client) or from taking cases in which the client's cause, from the lawyer's perspective, is not a sure thing (thus denying to citizens recourse to the law in cases that fall in the vast territory of the gray).
 5. A contingency-fee system does not provide adequate coverage to resourceless people who may not need a full court press in the court room, but who simply need a timely letter from a lawyer to get a bully to back off.

For these five reasons, one cannot expect the contingency-fee system to meet the needs for distributive justice. One needs a greater societal commitment to fund public interest law and a greater professional commitment to pro bono publico work.

So much on the subject of money as it vulgarizes, distracts, corrupts, distorts, and excludes in the medical and legal professions. The discussion so far has concentrated largely on the losses imposed upon clients and patients and the society at large when the professional exchange diminishes altogether to a commercial transaction. What of the loss to professionals themselves?

IV. THE SOUL OF THE PROFESSIONS

What is the good internal to the practice of medicine and law, which professionals forfeit to the degree that they yield obsessively to the enticements and hazards of the marketplace and increasingly work for the modern winner in the marketplace, the large organization?

The goods internal to the practices of doctoring and lawyering

are the arts of doctoring and lawyering. Neither is adequately described as an applied science. When one interprets and organizes either profession simply as an applied science, one loses the soul of the activity.

A. *Medicine*

The claim that medicine is an art can be advanced weakly and provisionally or strongly and intrinsically. In its weaker form, one claims that medicine is an art only temporarily in the sense that it is a not-yet-perfected science. Once medicine is fully perfected as a science, then one can straightforwardly apply the relevant general principle of the science to the case of the particular patient which falls wholly within the orbit of the principle. When practitioners claim medicine as an art only provisionally, they sound rather apologetic, as though they want simply to protect a place for themselves and their slender store of experience in turf increasingly occupied by scientists or by the managers of the huge warehouses of knowledge and equipment located in tertiary care centers. So understood, such practitioners resemble a traditional society that struggles and defers as best it can the inevitable day of its takeover by modernity.

In its stronger form, one claims healing as an art, not merely provisionally but intrinsically. It is an art, and it will remain an art. A scientist traffics in universals and therefore abstractions from the particular. To achieve its generalization, a scientific hypothesis must prescind from the complexity of the universe; it selects out for description a particular set of recurrent phenomena, isolated from all the variables in which they might be embedded, and seeks to arrive at a generalization that covers the phenomena under scrutiny. Science reduces water to the abstract formula of H_2O . The poet Yeats complained, "I liked a little seaweed in my definition of water." The artist offers not universals, but a concrete universe—Lear's universe, Antigone's world, and Michelangelo's Pieta.

Healing is an art because the patient to whom it is directed does not illustrate a general scientific principle into which the patient disappears without significant remainder. The patient is a full-bodied person with her own history and universe, seaweed and all. Her diabetes may, more or less, illustrate a generalization about a particular disease. But the host cannot be tidily abstracted

from the disease or the disease from the host.

Diagnosing the disease and discerning the person; treating the disease and helping the person face her disease requires knowing the patient, her habits, her world, her pressures and strains. These are complex undertakings that surely draw on science but which must be artfully marshaled by the physician who would heal rather than merely treat and who would help discern, mend, and make whole the universe which presents itself in the person of each patient rather than prescind from that universe in order to handle a detail that fits under an abstract generalization.

The institutional pressures today favor interpreting medicine as a retailable, applied science. The reduction of medicine to an applied science fits conveniently into the current corporatization of health care. If doctoring is merely an applied science, then one can diagnose, treat, and heal at a distance, the very considerable distance of an 800 number, with a case manager at the other end of the phone and with a recipe book in hand. The doctor becomes retailer and dispenser of interventions authorized elsewhere.

But, as a psychiatrist remarked to me: every thoughtful psychiatrist knows that the better you get to know a patient, the more difficult it is to classify him under one of the diseases listed in the DSM-IV. The patient does not conveniently disappear without remainder into the scientist's universal. The doctor surely uses science, but healing also requires practical wisdom in bringing science artfully to bear on the patient's universe. That is what doctoring is about.

Such doctoring takes time; whereas the name of the new art in managed care is saving time.⁴² The art of moving people rapidly through a system is certainly an art. Walt Disney was its twentieth century master. Disney's theme parks are an expensive piece of finite space with their chronic, core costs. One makes money therefore by moving people through them efficiently and happily.⁴³ After I offered some of these remarks in the course of grand

42. As one waggish doctor put it, "Discharge patients, sicker quicker."

43. I belong to a golf club that has surely learned its lesson from Disney. The corporation that owns and runs the club has kept trees to minimum. Why? Trees block golf shots; trees that shed leaves, make balls hard to find; thus trees slow up the game. Increase the trees, and golf scores would be higher, players less happy, the playing time longer, and the course unable to support as many members and thus yield as large profits to the owners of the club.

rounds at a distinguished teaching hospital, my hosts reported that the hospital had invited in as consultants just a few weeks earlier two experts from the Disney Corporation. Learning how to hustle people happily through a system is surely the name of a profitable game, if not perhaps an art. We already talk somewhat inelegantly of the commodification and the corporatization of health care; increasingly, the end game is its Disneyfication.

B. *The Law*

A parallel loss of the art occurs in the law. Dean Anthony T. Kronman argues, in *The Lost Lawyer: Failing Ideals of the Legal Profession*, that the traditional ideal of the lawyer-statesman required “the attainment of a wisdom that lies beyond technique—a wisdom about human beings and their tangled affairs that anyone who wishes to provide real deliberative counsel must possess.”⁴⁴ He holds that the *virtue* of practical wisdom which the lawyers needs in respecting the particularities of a case, distinguishes the practitioner’s art from some variety of applied social science.⁴⁵ However, scientific realism (and its dominant heirs in legal education today—the law-and-economics school and critical realism) has supported “an ideal of legal science that is antagonistic to the common law tradition and to the claims of practical wisdom which that tradition has always honored.”⁴⁶ The ideal of legal science dominates scholarship today and increasingly, in Kronman’s judgment, will dominate the classroom.⁴⁷ Kronman writes:

There are others, of course, who think that the aim of legal education is the cultivation of practical wisdom. But their numbers are declining and the authority of their position weakens year by year. The future lies with their adversaries, with those who want to make law teaching an adjunct of legal scholarship and to define its goals in similar terms.⁴⁸

44. KRONMAN, *supra* note 25, at 2.

45. *See id.* at 165-270.

46. *Id.* at 267.

47. *See generally id.*

48. *See id.* at 269.

Kronman does not expect to see a reversal of these tendencies as the best and the brightest of the young graduates of law schools make their way into the large firms or into the in-house staffs of corporations.⁴⁹ Increases in the size of firms, the establishment of branch offices, the intense specialization of skills, the dehumanizing length of the workday, and the increasingly hierarchical, rather than collegial, organization of the great firms have combined to produce an environment in the law comparable to that of corporate medicine.⁵⁰ The generalist disappears; the great firms function like tertiary care health centers that bring highly specialized information to bear in acute crisis. Relations to clients become more distanced and episodic rather than continuing and deep-going. Advice is technical, instrumental, and oriented to preset goals; it cannot respond to the client's deeper needs. Kronman writes:

Deliberative advice—advice about ends a client ought to choose, as opposed to the means for reaching ends already chosen—presupposes a familiarity with the client's past and a breadth of understanding of his or her present situation, which the movement toward a more transactional and specialized form of law practice has gone along way toward destroying in the country's largest firms. As a result, lawyers in these firms are today less often called upon to give advice that requires real prudence as distinct from technical knowledge.⁵¹

Nor can we expect judges today to preserve the tradition of practical wisdom that the law schools and the huge firms have largely abandoned. To mention only two major obstacles: judges face huge caseloads today, and they have to rely increasingly on clerks to write up their opinions in some dizzying, Disney-like effort to keep the cases moving through the system.

In varying ways, Kronman believes, the courts, law schools, and

49. *See generally id.*

50. *See generally id.*

51. *See id.* at 290.

law firms today fail to encourage and sustain the art of lawyering and the practical wisdom that its high practice requires.⁵² Nor is he optimistic about the capacity of any of these institutions, as currently structured, to restore that ideal.⁵³ However, his pessimism does not lead him to silence the call to practice the ideal; and he recognizes the possibility that in less-driven, modest, small-scale settings for practice it may be possible to bear witness to the ideal.⁵⁴

Why then care about the ideal? Why not treat our professions merely as a means to a livelihood? Why not go with the flow? Why take seriously Roscoe Pound's insistence that the primary purpose of a profession is "the pursuit of [a] learned art in the spirit of public service?"⁵⁵

V. CONCLUSION

This essay closes with just two reasons for insisting on the public duties of professionals, whatever their circumstance. First, by going to a university and eventually acquiring their professional degrees, young people in a society like ours pass through the gateway into the ruling class. Traditional societies transmitted power largely on the basis of blood, their rulers inherited their power. But we transmit power chiefly on the basis of knowledge, largely acquired at a university. That's why parents—rich or poor, successful or drifting—worry about whether their children will get into good universities. Through education, the young will acquire their power base in life; as power wielders, in effect, they will rule, and the task of rulers, if they stick to their proper goal, is the pursuit of the common good.⁵⁶

Second, the power that professionals acquire at a university is not a power that they have picked up on their own. No one can go through a university and think of himself/herself simply as a solo

52. See generally *id.*

53. See generally *id.*

54. See generally *id.*

55. POUND, *supra* note 1, at 5.

56. Aristotle once noted severely that the specific corruption of the tyranny is the wielding of public power for one's own private purposes. The modern careerist, in pursuing exclusively his own private goals, may not engage in the tyrant's melodramatic sins of commission, but he cumulatively and relentlessly defects from his duties to the common good through his sins of omission.

entrepreneur gathering up a private stockpile of knowledge to be sold on the market to the highest bidder. No one taking a seat at a guild meeting can think of himself or herself as a self-made man or woman. A huge company of people have contributed to the shaping of professionals as they zigzag their way through college and professional schools: the janitors who clean the johns; the help in the kitchen; the secretaries who make the operation hum; the administrators who wrestle with the institution's problems; the faculty who share with students what they know; the vast research traditions of each of the disciplines that set the table for that sharing; and the patients and clients who lay their bodies and souls on the line, letting young professionals practice on them in the course of perfecting their art. And behind all that, the public moneys and the gifts that support the enterprise, so much so that tuition money usually pays for only a fraction of the education. When physicians and lawyers and others treat education as a merely private asset, they systematically distort and obscure the social origins of knowledge and therefore the power that that knowledge places within their grasp and the end that that power ought to serve—the nation's flourishing.

I have not come to my last sentences cavalierly to dismiss or condemn the role of money as it feeds, motivates, energizes, mobilizes talent, and in, part, as it distributes goods. Money is a useful but unruly servant. We ought not let its unruliness distract us from our commitment to what patients and clients have reason in our common tradition to hope for: healing here; sanctuary here.