An Unlikely Knight in Economic Armor: Law and Economics in Defense of Professional Ideals

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I. PROFESSIONAL IDEALS, ETHICS, AND ECONOMICS

Multidisciplinary practice—the ability of lawyers engaged in the practice of law to combine and share profits with non-lawyers—has been described as the most important issue facing the legal profession in the past 100 years.[1] Professional ideals have played a key role in the debate. Opponents argue that multidisciplinary practice poses a threat to the core values and ideals of the legal profession and thus should be highly regulated or even disallowed altogether.[2] Some proponents respond that multidisciplinary practice does not compromise professional ideals and hence should be allowed.[3] Others contend that professional ideals constitute a part of the problem. They should therefore be abolished and in any event should not constitute a reason for disallowing or restricting multidisciplinary practices.[4]

Professional ideals also play a significant role in debates over the changing nature of legal practice—the transformation from a profession to a business,[5] and the organization of law firms.[6] Those who lament the decline of traditional practice values, the rise of commercialism and the emergence of a business culture in the bar often express their concerns in terms of a demise of professionalism and professional ideals. Scholars who

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[1] *See* ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE, UPDATED BACKGROUND PAPER ON MULTIDISCIPLINARY PRACTICE: ISSUES AND DEVELOPMENTS (1999) [hereinafter ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE, BACKGROUND PAPER]; ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE, FINAL REPORT TO THE ABA HOUSE OF DELEGATES (1999) [hereinafter ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE, FINAL REPORT].

[2] PRESERVING THE CORE VALUES OF THE AMERICAN LEGAL PROFESSION: THE PLACE OF MULTIDISCIPLINARY PRACTICE IN THE LAW GOVERNING LAWYERS, REPORT OF THE NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE ON THE LAW GOVERNING FIRM STRUCTURE AND OPERATION (2000) [hereinafter NEW YORK STATE BAR ASSOCIATION REPORT].

[3] *See, e.g.*, ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE, FINAL REPORT, *supra* note 1.

[4] RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 185-211 (1999); Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998) [hereinafter Fischel, *Lawyers and Confidentiality*]; Daniel R. Fischel, *Multidisciplinary Practice* (March 21, 2000) (unpublished manuscript on file with the Olin Center for Law, Economics and Business, Harvard Law School) [hereinafter Fischel, *Multidisciplinary Practice*].

[5] AMERICAN BAR ASSOCIATION, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 1 (1986); Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960, in* LAWYERS' IDEALS / LAWYERS' PRACTICES 144, 145 (Robert L. Nelson et al. eds., 1992).

[6] Ronald J. Daniels, *The Law Firm as an Efficient Community*, 37 MCGILL L.J. 801 (1992); David B. Wilkins & Mitu G. Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998).

celebrate the same trends as desirable changes similarly frame their arguments in terms of professionalism and professional ideals.

Scholars of the legal profession have recently begun to study and acknowledge the practical and theoretical importance of professional ideals as a means of exploring legal practice.[7] Professional ideals are a set of ideas and visions of lawyering and lawyers' roles that purport to explain the practice of law through an exploration of ideal principles of practice. Professional ideals capture the core beliefs and aspirations of the bar, its commitments and goals, as well as its standards and ethical codes of conduct.[8] Of course, reality has a way of falling short of the ideal. It is nevertheless through its ideal functioning that legal practice must be understood for that is how it is supposed to function and that is how lawyers publicly claim that it attempts to function.[9]

While professional ideals define and guide professional conduct they are by no means a coherent set of ideas. Rather, they consist of multiple, even conflicting, visions of what constitutes proper behavior by lawyers. Indeed, American legal practice is characterized by a diverse set of ideals: the principle of zealous advocacy—the idea of lawyers as devoted agents, adversarial knights dedicated to pursuing their clients' goals—and the related ideal of lawyers' loyalty to their clients manifested in the doctrines of confidentiality and conflicts of interest;[10] the officer of the court ideal,

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[7] Important contributions to the study of the professional ideals of legal practice include Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 29 WIS. L. REV. 29 (1978) [hereinafter Simon, *Ideology of Advocacy*]; and David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990). *See also* DAVID LUBAN, LAWYERS AND JUSTICE (1988); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998) [hereinafter SIMON, PRACTICE OF JUSTICE]; David B. Wilkins, *Everyday Practice is the Troubling Case: Confronting Context in Legal Ethics*, *in* EVERYDAY PRACTICE AND TROUBLE CASES (A. Sarat et al. eds., 1998). In particular, see LAWYERS' IDEALS / LAWYERS' PRACTICES: TRANSFORMATION IN THE AMERICAN LEGAL PROFESSION (Robert L. Nelson et al. eds., 1992) and ETHICS IN PRACTICE LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION (Deborah L. Rhode ed., 2000).

[8] While professional ideals capture the ethical code of the profession, they are not synonymous with the Model Rules of Professional Conduct. The Model Rules are a set of principles promulgated by the American Bar Association, whereas professional ideals are not necessarily the exclusive domain of one authorized collective voice. Furthermore, the Model Rules are a codification of ideas binding as law where adopted by the various states, whereas professional ideals are social norms not backed by a centralized enforcement mechanism. That is, professional ideals should be conceived of as a broader set of principles that may or may not parallel the Model Rules at any given point in time.

[9] Joseph Raz uses a similar ideal-actual dichotomy to analyze the exercise of authority. Joseph Raz, *Authority and Justification*, 14 PHIL. & PUB. AFF. 3, 15 (1985).

[10] On zealous advocacy and loyalty, see MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975) [hereinafter FREEDMAN, LAWYERS' ETHICS]; Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) [hereinafter Freedman, *Professional*

which defines the role of lawyers in terms of commitments to the fair administration of justice and the equitable resolution of disputes;[11] the public intellectual ideal which entrusts with lawyers the responsibility of public leadership both directly as members of the legislature, judicial and executive bodies and indirectly as vehicles for public discourse through the courts;[12] the independence ideal, which calls upon lawyers to advise their clients according to the best of their professional judgment irrespective of the lawyers' own interests or the clients' expectations and demands;[13] and the equal access and equal protection ideal that builds on the fundamental nature of legal rights as a means of individual and group self-realization, and aims to guarantee legal access to the underrepresented, poor, and oppressed segments of society.[14]

The scholarship of professional ideals has evolved around a distinction between the *internal* and *external* operation of ideals. The *internal operation* school studies how professional ideals guide and define legal practice. It concentrates on the effects of ideals on lawyers as a group and as individuals. One branch of the internal operation school studies the interaction between professional ideals and other kinds of ideals.[15] Some argue that professional ideals alone should not define how legal practice is supposed to function.[16] Lawyers do not stop being human beings upon entering the legal profession, and common morality, or everyday ideals, should continue to guide their professional conduct and even govern their

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Responsibility]; and Simon, *Ideology of Advocacy*, *supra* note 7. On confidentiality, see Fischel, *Lawyers and Confidentiality*, *supra* note 4; Geoffrey C. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1069-91 (1978). On conflicts of interest, see Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965 (1997); Nancy J. Moore, *What Doctors Can Learn From Lawyers About Conflicts of Interest*, 81 B.U. L. REV. (2001).

[11] *See, e.g.*, SIMON, PRACTICE OF JUSTICE, *supra* note 7; James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court"*, 48 BUFF. L. REV. 349 (2000); Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989); Gordon, *The Independence of Lawyers*, *supra* note 7.

[12] *See* ANTHONY T. KRONMAN, THE LOST LAWYER: THE FALLING IDEALS OF THE LEGAL PROFESSION (1993); THE NEW HIGH PRIESTS—LAWYERS IN POST-CIVIL WAR AMERICA (Gerard W. Gawalt ed., 1984).

[13] *See* Fischel, *Multidisciplinary Practice*, *supra* note 4; Gordon, *supra* note 7; Paul Gonson, *Some Observations on the Independence of Lawyers*, 63 BROOK. L. REV. 685 (1997).

[14] *See, e.g.*, CAUSE LAWYERING—POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY (Austin Sarat & Stuart Scheingold eds., 1998).

[15] *See* Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975) (discussing the tension between professional ideals or, role morality, and everyday ideals or common morality); *see also* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS (David Luban ed., 1984).

[16] ARTHUR I. APPLBAUM, ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE (1999).

practice where it conflicts with professional ideals.[17] Others insist that professional ideals should exclusively govern the conduct of lawyers and force lawyers' neutrality with regard to other moral considerations.[18] Another branch attempts to expose and examine the values underlying professional ideals. Because ideals define how legal practice is supposed to function and serve as an internal guide to lawyers' professional conduct, it is important to understand what constitutes professional ideals, how they are formed and enforced, and what goals and values they endorse.[19]

The *external operation* school studies the effects of professional ideals outside of the legal profession on non-lawyers such as clients, other professions, and the public. The external operation school explores the role of ideals as a public claim about how legal practice attempts to function. It asserts that professional ideals not only define, internally, the practice of law for lawyers but also serve as a form of public communication, a commitment of the professionalism of the bar to clients and the general public. Ideals thus provide the public with a standard with which it can evaluate the work of lawyers. In contrast, many have commented that the external role of ideals opens the door for manipulation of the public by lawyers. The bar might assert ideals it does not adhere to in order to justify

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[17] *See* LUBAN, *supra* note 7; SIMON, PRACTICE OF JUSTICE, *supra* note 7.

[18] Stephen L. Pepper, *The Lawyer's Amoral Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613. For an earlier defense of the adversary system and the zealous advocacy and loyalty ideals, see FREEDMAN, LAWYERS' ETHICS, *supra* note 10; Freedman, *Professional Responsibility*, *supra* note 10; *but see* John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966).

[19] Anthony Kronman's THE LOST LAWYER: THE FALLING IDEALS OF THE LEGAL PROFESSION, *supra* note 12, sparked a fierce debate over the interdependence of professional ideals and values. Kronman celebrates the lawyer-statesman ideal (and then mourns its demise), an ideal inherently related to the value of political fraternity. Many critics have challenged the lawyer-statesman ideal on the ground that it endorsed political fraternity. *See, e.g.*, Mark Neal Aaronson, *Dark Night of the Soul: A Review of Anthony T. Kronman's* The Lawyer: Failing Ideals of the Legal Profession, 45 HASTINGS L.J. 1379 (1994); Anthony V. Alfieri, *Legal Education and Practice: Denaturalizing the Lawyer-Statesman*, 93 MICH. L. REV. 1204 (1995); Kenneth Anderson, *Review Essay: A New Class of Lawyers: The Therapeutic as Rights Talk*, 96 COLUM. L. REV. 1062, 1085-88 (1996) (book review); Peter Margulies, *Review Essay: Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139 (1995); Carrie Menkel-Meadow, *Symposium on the 21st Century Lawyer: Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994); *see also* Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577 (1993) (analyzing the interplay between professional ideals and religious identity); William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991) (studying the tension between clients' autonomy and clients' best interests); David B. Wilkins, *Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995) (exploring the tension between the zealous advocacy ideal and racial identity).

its status and privileges, taking advantage of the fact that unsophisticated clients may not be able to call its bluff.[20]

Until recently, one voice has been conspicuously missing from this growing body of scholarship. The absence of serious "law and economics" inquiries into the subject matter was somewhat puzzling given the kind of arguments raised by both proponents and supporters of professional ideals: on the one hand, ideals are cast as a force working against market pressures assisting lawyers to adhere to standards of professionalism in light of increasingly threatening business constraints;[21] and on the other hand, ideals are critiqued as a tool at the hands of professionals aimed at increasing lawyers' self-interest at the expense of their clients and the public.[22]

"Law and economics" scholars have, for the most part, stayed clear of the legal profession field.[23] Such self-restraint is highly uncharacteristic. Economic analysis has been applied to many fields of legal study and, indeed, of human behavior.[24] The reluctance of "law and economic" scholars to explore topics concerning the legal profession is twofold. First, economists are highly suspect of the idea of professions and professionalism. "The overthrow of the medieval guild system was an indispensable early step in the rise of freedom in the Western world," wrote Milton Friedman.[25] Professions are nothing more than "conspiracies against the laity,"[26] whose dominant functions are to serve their own interests by controlling the markets for their services. A key feature of

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[20] *See* RICHARD L. ABEL, AMERICAN LAWYERS (1989); JEROLD S. AUERBACH, UNEQUAL JUSTICE—LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); MAGALI S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977).

[21] *See, e.g.*, New YORK STATE BAR ASSOCIATION REPORT, *supra* note 2.

[22] ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE, BACKGROUND PAPER, *supra* note 1; ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE, FINAL REPORT, *supra* note 1.

[23] For "law and economics" contributions to the scholarship of the legal profession, see Peter B. Pashigian, *The Market for Lawyers: The Determination of the Demand for and the Supply of Lawyers*, 20 J.L. & ECON. 53 (1977) and Sherwin Rosen, *The Market for Lawyers*, 35 J.L. & ECON. 215 (1992). For analyses of the demand side for legal services, see Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869 (1990) and Reinier Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53 (1986). For discussions of the supply side for legal services, see MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM (1991); JERRY VAN HOY, FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES 1-50 (1997); Daniels, *supra* note 6; and Wilkins & Gulati, *supra* note 6.

[24] *See generally*, GARY S. BECKER, AN ECONOMIC APPROACH TO HUMAN BEHAVIOR (1976). For a general review of "law and economics" literature, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (5th ed. 1998); *see also* ROBERT COOTER, THE STRATEGIC CONSTITUTION (2000).

[25] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 137, 148 (2d ed. 1982).

[26] BERNARD G. SHAW, THE DOCTOR'S DILEMMA 11 (1932).

professionalism—self-regulation through licensing measures—constitutes a social cost because it is a tool in the hands of the professional guild to erect barriers to entry, creating a monopoly position at the expense of the rest of the public.[27] Professions are thus a prima facie suspect category because their purpose is to gain control over their respective occupations, erect barriers to enter through licensing, reduce the supply of professionals and thus secure uncompetitive rents at the expense of the public. This basic insight holds as much force today as it did when it was first published by Friedman. Beyond that, economists seem to have little to say on the subject of professions and professionalism.

Second, "law and economics" scholars have been reluctant to study the behavior of lawyers because they view it as a derivative of the demand for legal services. The study of the conduct of lawyers, *e.g.*, whether to enter legal practice, what areas of law to specialize in or how many hours a day should be dedicated to law practice, is in economic terms an inquiry into the supply side of legal services. Following the fundamental economic maxim that "supply follows demand," economists conjure that the supply of legal services will follow clients' demand for it.[28] That is, there is little analytic interest in studying the behavior of individual lawyers or law firms. Instead, economists choose to focus on clients' decision-making processes as to whether to sue or to settle a case, assuming that if clients choose to pursue legal actions, lawyers' supply will follow suit.[29] It is worth noting that this approach conforms to the classical-positivist understanding of the client-attorney relationship characterized by zealous advocacy and non-accountability: the client is the ultimate decision-maker responsible for the goals and the lawyer is a service provider responsible for the means.[30] Since lawyers are not responsible for the underlying decision-making regarding legal matters, there is no particular reason to focus on their behavior. Instead, economic analysis of the legal profession has focused on subjects other than the conduct of lawyers, such as the organization of law firms and fee arrangements.[31]

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[27] FRIEDMAN, *supra* note 25, at 148.

[28] *See, e.g.*, Pashigian, *supra* note 23; Sherwin Rosen, *The Market for Lawyers*, *supra* note 23.

[29] *See, e.g.*, Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) [hereinafter Shavell, *Fundamental Divergence*]; Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333 (1982) [hereinafter Shavell, *Social Versus Private Incentive*].

[30] Simon, *Ideology of Advocacy*, *supra* note 7.

[31] For an economic analysis of the organization of law firms, see GALANTER & PALAY, *supra* note 23; Wilkins & Gulati, *supra* note 6. For an economic analysis of fee arrangements, see Patricia M. Danzon, *Contingent Fees for Personal Injury Litigation*, 14 BELL J. ECON. 213 (1983); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. LEGAL

To be sure, economic analysis acknowledges, the possibility of agency problems in the client-attorney relationship. This recognition indeed constitutes another reason for economists' lack of interest in the field. The important decision-making juncture is the client, and the client-attorney relationship is treated as a second-order agency problem, a mere application of the well-explored economic field of agency.[32]

Given this general lack of interest by "law and economics" scholars in the legal profession field, the recent contributions of first-rate "law and economics" scholars to the study of professional ideals provided a rare opportunity to benefit from economic insight.[33] Quite dramatically joining forces with external operation critics,[34] Richard Posner argues that professional ideals are a tool lawyers use to sustain a public belief in the practice of law as a profession, a belief that serves the interest of lawyers at the expense of clients and the general public. Posner also asserts that Professional ideals are a technique of maintaining "professional mystique"—a belief in professional knowledge and expertise that is not necessarily supported by an actual possession of specialized knowledge.[35] Such a belief allows lawyers to control the market for legal services, impose restrictions on competition, and consequently extract monopolistic rents.[36] Moreover, professional ideals are the opposite of real professionalism: ideals create and foster secrecy about the actions of

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STUD. 503 (1996); Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. LEGAL STUD. 279 (1997).

[32] For applications of economic agency theory to law, see DOUGLAS G. BAIRD, GAME THEORY AND THE LAW (1994); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

[33] The two scholars are Judge Richard A. Posner and Daniel R. Fischel. RICHARD POSNER, *supra* note 4, at 185-211; Fischel, *Lawyers and Confidentiality*, *supra* note 4; Fischel, *Multidisciplinary Practice*, *supra* note 4.

[34] A critical stand against professional ideals unites those on the left of the political spectrum such as Richard Abel and Magali Larson, *supra* note 20, with those on the right, such as Milton Friedman, *supra* note 25, and Richard Posner, *supra* note 4.

[35] Judge Posner has noted that:

> The key to an occupation's being classified as a profession, is not the actual possession of specialized, socially valuable knowledge; it is the *belief* that some group has such knowledge. For it is the belief that enables the group to claim professional status, with the opportunities for obtaining exclusive privileges. The belief need not be true, need not even be positively correlated with the amount of specialized, socially valuable knowledge that the group possesses.

POSNER, *supra* note 4, at 187.

See also Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579 (1992); Fischel, *Lawyers and Confidentiality*, *supra* note 4; Fischel, *Multidisciplinary Practice*, *supra* note 4; Macey & Miller, *supra* note 10.

[36] POSNER, *supra* note 4, at 201; *see also* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 180-183 (1958).

professionals, secrecy that in turn diminishes the quality of professional decision-making.[37] The growth of real professional methods based on true specialized knowledge would foster the disenchantment of ideals as activities become demystified and transparent.[38] Others have noted that professional ideals represent "a naked exercise of guild power, serving the interests of lawyers at the expense of clients and the general public."[39]

Daniel Fischel conducts a more detailed analysis of two particular professional ideals—confidentiality and independence—arguing that both should be abolished on the grounds that they primarily serve the self-interest of the bar by increasing the demand for legal services and providing lawyers with an excuse to limit competition.[40]

The "law and economics" critique of the internal operation school is just as fierce. It completely denies the existence of such an operation by rejecting the basic assumption of the internal school—that professional ideals have any substantial effects on the conduct of the legal profession. Richard Posner asserts that there is no necessary connection between "good" professional ideals that govern the conduct of lawyers and "bad" professional mystique that is used to mislead the public.[41] In his study of confidentiality, Daniel Fischel fails to identify any ways in which professional ideals affect the behavior of lawyers. Fischel asserts that the main effect of confidentiality is to benefit lawyers by increasing the demand for legal services.[42] In essence, observing that the bar promulgates and enforces ideals, and that ideals serve the self-interest of the bar, the Posner-Fischel position argues that professional ideals are created because they serve the interests of the bar and that ideals serve no additional purpose except for the self-interest of the bar.

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[37] Joseph Stiglitz has argued that "[s]mart people are more likely to do stupid things when they close themselves off from the outside criticism and advice. If there is one thing I have learned in government, it is that *openness is most essential in those realms where expertise seems to matter most.*" Joseph Stiglitz, *The Insider: What I Learned at the World Economic Crisis*, NEW REPUBLIC, Apr. 24, 2000, at 56, 60 (emphasis added).

[38] It is important to note that economists do not critique professionalism—the application of a specialized body of knowledge to an activity of importance to society. Rather, it is the practical manipulation of claims of professionalism by the profession to secure private benefits to which economists object. It is the abuse of professionalism, the pretense of effective self-regulation that economists challenge.

[39] Macey & Miller, *supra* note 10, at 966; *see also* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); Stephen Gillers, *Can a Good Lawyer be a Bad Person?*, 84 MICH. L. REV. 1011 (1986); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985).

[40] Fischel, *Lawyers and Confidentiality*, *supra* note 4; Fischel, *Multidisciplinary Practice*, *supra* note 4.

[41] POSNER, *supra* note 4, at 185-211.

[42] Fischel, *Lawyers and Confidentiality*, *supra* note 4.

In *Capitalism and Freedom*, his classic critique of professions, Milton Friedman has repeatedly warned against an unsupported condemnation of professionalism.[43] It is never enough, noted Friedman, to speculate about the existence of a justification favoring or disfavoring professionalism. Instead, it is necessary to set up a balance sheet of the advantages and disadvantages in the light of liberal principles.[44] To be sure, Friedman supported a general presumption against licensure schemes protecting professions but conceded that there are some justifications given for professionalism that the liberal will have to recognize. These advantages, concluded Friedman, always have to be weighed against the disadvantages.[45]

Unfortunately, it seems that Posner and Fischel have forgotten this important warning. In essence, the Posner-Fischel critique of the external operation of ideals asserts that ideals impose a social cost and yield no social benefits. By encouraging a belief in professional mystique, ideals allow lawyers to erect barriers to entry, restrict competition for legal services, and extract monopolistic rents.[46] Moreover, some ideals, such as the confidentiality and loyalty ideals, directly increase the demand for legal services.[47] The Posner-Fischel critique of the internal operation of ideals—maintaining that professional ideals have insignificant and ambiguous effects on lawyers' conduct except for increasing the self-interest of the legal profession—amounts to arguing that ideals yield no social benefits. Read together, the external and internal critiques mean that professional ideals impose social costs and yield no social benefits and are therefore, in general, socially undesirable. The Posner-Fischel critique, however, does not offer a comprehensive cost-benefit analysis of professional ideals in support of its claim. At best, the Posner-Fischel critique amounts to a demonstration of social costs associated with professional ideals and an assumption about the lack of any social benefits, hardly a convincing economic argument.

Specifically, the Posner-Fischel critique suffers from three fundamental flaws. First, Posner and Fischel fail to develop a systematic analysis of the costs and benefits associated with professional ideals. Their failure is not a coincidence. It is rooted in the economic maxim that "supply follows demand." An analysis of the effects of professional ideals on the behavior of lawyers will have to be grounded in a comprehensive study of lawyers' conduct, the supply side of legal services. Such an

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[43] FRIEDMAN, *supra* note 25, at 137, 148.

[44] *Id.*

[45] *Id.* at 145, 147.

[46] *See supra* notes 4, 20 and accompanying text.

[47] POSNER, *supra* note 4; Fischel, *Lawyers and Confidentiality*, *supra* note 4.

undertaking will examine the incentives of lawyers to practice law and, among other considerations, will explore the effects of professional ideals on lawyers. Posner and Fischel, however, believe that the supply of legal services is primarily determined by clients' demand. Because the demand for legal services by clients will determine the supply by lawyers, Posner and Fischel choose to focus on the effects of professional ideals on clients—the external effect of ideals. To Posner and Fischel it makes little sense to examine the internal operations of ideals on lawyers because even if such effects exist, they are assumed to have a marginal effect on lawyers and on the supply of legal services, which is determined by clients' demand. Consequently, Posner and Fischel fail to follow Friedman's advice and neglect to develop a systematic analysis of the costs and benefits of professional ideals.

While perhaps understandable given their general beliefs about supply and demand, Posner and Fischel's failure to conduct a cost-benefit analysis of lawyers' conduct, including the effects of professional ideals, is nonetheless a mistake. The market for legal services features a unique characteristic that casts a serious doubt over the application of the general "supply follows demand" maxim: lawyers play a significant role in determining the demand for their own services. To an extent, lawyers determine the demand for legal services in two ways. Lawyers play an active role in the creation of laws and regulations through legislatures, *e.g.*, drafting legislation and leading lobbying efforts, and through the judicial system, *e.g.*, litigating cases that establish binding precedents, which in turn create a demand for legal services as clients attempt to understand the regulatory demands and comply with them. Moreover, clients often require the assistance of lawyers in identifying their need for legal services, *e.g.*, when clients are not certain whether particular regulations apply to them, and in determining what kind of legal services they require, *e.g.*, how to comply with such regulations.

In other words, in the market for legal services it makes little sense to assume that supply follows demand. The reality is more complex because lawyers exercise a significant influence over clients' demand for their services. The market for legal services thus merits an independent supply-side study, which includes an analysis of the effects of professional ideals on lawyers.[48] Therefore, a general belief in the "supply follows demand"

[48] Economists usually assume that consumers' preferences and tastes are exogenous to the market and are not affected by the producers. In other words, the consumers' demand (based on their preferences) is given and the market sets an equilibrium over quantities and prices. In that sense, "supply follows demand." In the market for legal services, however, lawyers have a role in determining and shaping clients' preferences and tastes for legal services.

maxim should not substitute for an inquiry into the effect of professional ideals on the behavior of lawyers, and should not justify an assumption that ideals yield no social benefits.

It is important to note that Posner and Fischel's mistake is supported not only by basic economic reasoning, but also by the traditional-positivist understanding of legal practice.[49] The traditional position asserts that clients are solely responsible for the goals of legal practice while lawyers only provide the means. Lawyers are forbidden from exercising control over the ends of their services, or in economic terms, influencing the demand of clients for their services. Scholars of the legal profession have exposed both the theoretical and practical flaws of this account, showing that the client-attorney relationship allocates, or should allocate, different roles to the lawyer intrusting her with greater responsibility and accountability to the end results of the client.[50]

Second, Posner and Fischel simply assume that professional ideals do not influence the conduct of lawyers. Observing that the bar promulgates and enforces ideals, and that ideals serve the self-interest of the bar, the Posner-Fischel position argues that professional ideals are created because they serve the interests of the bar, and that ideals serve no additional purpose except for professional self-interest. This line of reasoning is, however, nonsensical. It assumes that lawyers, like all other economic agents, act rationally in accordance with their self-interest. Hence, lawyers are assumed to promulgate and enforce ideals if ideals serve their interests. This, however, is an assumption and not a conclusion. One cannot assume that professional ideals are promulgated because they increase the self-interest of the bar and then, based on this assumption, conclude that ideals are promulgated because they promote self-interest.

Furthermore, the Posner-Fischel assumption about ideals explains why ideals are promulgated and enforced, but it fails to account for how ideals affect lawyers, clients, and the public once created. If ideals are created and enforced because they serve lawyers' interests, they indeed impose a social cost. But ideals may also have socially beneficial effects. The Posner-Fischel critique thus consists of a set of assumptions: it assumes a *causal link* between self-interest and professional ideals—that ideals are promulgated and enforced because they increase lawyers' self-interest; and it assumes the *totality of self-interest*—that ideals have no beneficial social effects. Interestingly enough, the claim is not supported by empirical evidence. No doubt professional ideals often enhance

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[49] Simon, *Ideology of Advocacy*, *supra* note 7.

[50] *Id.*; Gordon, *supra* note 7; William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991).

lawyers' self-interest and increase the demand for legal services at the expense of clients and the general public. But, as Milton Friedman reminds us, professional ideals may also have additional beneficial social effects. Posner and Fischel do not prove their argument regarding the causality and totality of lawyers' self-interest as the sole rationale underlying professional ideals. Rather, they assume it to be true. It is nothing more than a speculation, which may or may not hold true.

Posner and Fischel's failure to comprehensively examine the supply side of legal services, including the effects of professional ideals on the conduct of lawyers and their assumption that such ideals have no effects, lead them to recommend an across-the-board abolishment of professional ideals. This conclusion, as I demonstrate in parts two and three of this article, is unsupported by economic reasoning. In some areas of legal practice, professional ideals yield social benefits that outweigh their social costs and are therefore socially desirable.

Third, the flaws in Posner and Fischel's argument have an additional drawback that goes beyond the particulars of their mistaken policy recommendation. The Posner-Fischel position focuses on the external operation of ideals, and fails to address the internal operation of ideals. By leaving out a key relevant component of the subject matter—a component that is particularly important to scholars of legal ethics—Posner and Fischel miss an opportunity to make an insightful contribution to the study of professional ideals. This outcome is regrettable because of the relevance of economic reasoning to the debate over professional ideals, the decline of professionalism and rise of commercialism in the American bar.

More importantly, however, this outcome is regrettable because it further adds to the already existing poor relationship between ethicists and economists decreasing the likelihood of a meaningful dialogue between the two schools of thought. It strengthens the false belief among ethicists that economists fail to understand and appreciate the complexities of practical and professional ethics. An economic account that dismisses and disregards the idea of the internal operation of ideals plays to the hands of those ethicists that argue that economics has nothing to contribute to the study of applied ethics. In his classic address, *On Economics and Ethics*, Amartya Sen laments the growing gap between economics and ethics, a gap he believes not only leads to a diminished understanding of particular subject matters that could benefit from a sophisticated ethical and economic interdisciplinary study, but also diminishes the strength and sophistication of both economics and ethics by allowing them to remain segregate and depriving both fields of the benefits of mutual challenges.[51]

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[51] AMARTYA SEN, ON ETHICS AND ECONOMICS (1987) [hereinafter SEN, ETHICS &

Unfortunately, the Posner-Fischel simplistic account is yet another example of the gap Sen is warning against. The field of the legal profession, battling difficult questions of ethics and economics, could benefit from a meaningful ethical-economic interdisciplinary approach.[52]

The remainder of this article attempts to correct the flaws in the Posner-Fischel position. Part two of this article rejects the general "supply follows demand" maxim in the context of the market for legal services and develops a model of legal practice, which studies the incentives of lawyers to practice law and incorporates the effects of professional ideals on the conduct of lawyers as individuals and as a group. The model yields two significant results. First, independent of the effects of professional ideals, the model identifies a fundamental divergence between the private and social incentives to practice law. It demonstrates that there is no necessary connection between the private and social incentives: in different practice areas lawyers may have over or under incentives to practice law. Because the private incentives of lawyers to practice law do not generally conform to the social incentives, if the market for legal services is left unregulated, there will be over-supply of legal services in some areas of law practice and under-supply in others. Consequently, social intervention is generally required in order to regulate lawyers' conduct and correct for the divergence between the private and social incentive to practice law. The inherent need for social intervention in the market for legal services turns out to be crucial to the understanding of the internal operation of professional ideals because ideals constitute an important means of regulating lawyers' conduct.

Second, the model tends to lend support to Posner and Fischel's critique of professional ideals. In the model, professional ideals have an inconclusive effect on lawyers' conduct, supporting the assumption that professional ideals do not play a significant role in internally defining and guiding the conduct of the profession. Moreover, the model illustrates that ideals generate no social benefits while imposing social costs, supporting the Posner-Fischel position that professional ideals are socially undesirable.

Part three of this article studies social intervention in the practice of law. It first explores the two key features of social intervention in legal practice—supply-side intervention and self-regulation. Regulation of legal practice has traditionally attempted to affect the supply of legal services rather than its demand; that is, it tried to control lawyers' provision of legal services rather than clients' demand for it. The rationale for limiting social

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ECONOMICS].

[52] This is particularly regrettable given the recent developments in economic literature of social norms that allow for a sophisticated understanding of the internal operation of professional ideals. *See infra* notes 83-92 and accompanying text.

intervention to supply-side intervention has been twofold. Lawyers not only produce legal services but also create demand for it by participating in legislation and the creation of case law. In addition, lawyers possess asymmetric information such as the quality of the claim, the probability of winning and of settling, and the value of the claim that allows them to influence their clients' demand for legal services. Regulation of lawyers thus simultaneously affects the supply and demand for legal services.

Asymmetric information also explains the second characteristic of traditional social intervention—self-regulation. Because clients are sometimes not able to identify the need for legal services and cannot *ex ante* and oftentimes *ex post* evaluate the quality of such service, the legal profession and the public enter into an implicit contract. Lawyers guarantee the quality of their services and in return are allowed to regulate their own practices in a non-competitive manner that yields monopolistic rents. In other words, lawyers are supposed to promulgate and enforce norms that guarantee the quality of legal services. In return, the state grants the bar autonomy and promises to backup the profession's non-competitive self-regulation norms with its own power and laws.

The thrust of the argument in part three is that professional ideals form the basis for an effective method of supply-side self-regulation of legal practice.[53] Social norms are the mechanism by which professional ideals internally operate on the legal profession. Social norms thus constitute a social benefit professional ideals yield, one that needs to be balanced against the social cost ideals impose, before a conclusion as to the desirability of professional ideals can be reached. Moreover, the role ideals play in self-regulation also sheds new light on their external operation: professional ideals facilitate the implicit contract between the profession and the public by specifying the terms of the agreement and thus representing an additional source of social benefit. The social benefit ideals yield is inherently dependent on their self-interest characteristic. Lawyers promulgate and enforce ideals-based social norms because they guarantee non-competitive rents. Nevertheless, ideals-based social norms also simultaneously guarantee the quality of legal services and hence constitute a social benefit. The implicit social contract guarantees lawyers a private rent in exchange for self-regulation. Professional ideals—a form of self-regulation—do not cause or bring about self-interest.

The article concludes that the Posner-Fischel critique of professional ideals is unfounded and misguided. A comprehensive economic analysis of legal practice reveals that, contrary to the Posner-Fischel position, professional ideals do in fact create social benefits. Whether ideals are

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[53] *See infra* notes 124-47 and accompanying text.

desirable in a particular context, *i.e.*, whether the benefits they yield outweigh the costs they impose, depends on the circumstances.

II. THE ECONOMICS OF LEGAL PRACTICE: AN ECONOMIC ACCOUNT OF THE INTERNAL OPERATION OF PROFESSIONAL IDEALS

Why do people choose to become lawyers? How do lawyers select practice areas? How do lawyers decide how many hours a day to practice law? "Law and economics" employs incentive analysis to address these questions.[54] This analysis studies the private incentives of lawyers to practice law.[55] Lawyers' private incentives are determined by the private costs and benefits legal practice entails. The private benefits of legal practice are compared to the private costs and lawyers are assumed to practice law if the benefits outweigh the costs.[56]

Are there too many lawyers in society? Is there too much litigation? Incentive analysis studies social incentives in an attempt to address these questions by identifying the costs and benefits of law practice from a social point of view. Social benefits and costs are defined as the aggregate of all net private benefits or costs in society created by legal practice. "All" means that the social benefit or cost includes both direct benefits or costs to those who engage in legal practice and indirect benefits or costs, *i.e.*, positive or negative externalities conferred on third parties. For example, winning an important case before the Supreme Court creates a direct private benefit for the prevailing party and her lawyer, while the precedent created also benefits other members of society. "Net" means that the social

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[54] Contrasting private costs and social costs and benefits has been used to study the appropriate amount of litigation. *See* Louis Kaplow, *Private Versus Social Costs in Bringing Suit*, 15 J. LEGAL STUD. 371 (1986); Peter S. Menell, *A Note on Private Versus Social Incentives to Sue in a Costly Legal System*, 12 J. LEGAL STUD. 41 (1983); A. Mitchell Polinsky & Daniel L. Rubinfeld, *The Welfare Implications of Costly Litigation for the Level of Liability*, 17 J. LEGAL STUD. 151 (1988); Susan Rose-Ackerman & Mark Geistfeld, *The Divergence Between Social and Private Incentives to Sue: A Comment on Shavell, Menell, and Kaplow*, 16 J. LEGAL STUD. 483 (1987); Shavell, *Fundamental Divergence*, *supra* note 29; Shavell, *Social Versus Private Incentive*, *supra* note 29; Kathryn E. Spier, *A Note on the Divergence Between the Private and the Social Motive to Settle Under a Negligence Rule*, 26 J. LEGAL STUD. 613 (1997). Using a similar framework, this section investigates the appropriate level of legal practice in society.

[55] To be sure, "private" here means the incentive of lawyers to practice law as contrasted with the "social" collective incentive of the entire society to practice law.

[56] The decision of whether to "practice law" is interpreted here to mean whether to undertake an additional unit of legal practice, *i.e.*, whether to represent a new client, take a new assignment, or even show up for work in a law firm in the morning. In other words, the question investigated here is whether to continue to practice law, as opposed to whether to enter the practice. Many lawyers, *i.e.*, individuals who are licensed to practice law, do not in fact practice law. When critics complain about the excessive number of lawyers in society, they refer to the excessive practice of law rather than to the nominal number of lawyers.

benefit or cost does not include transfers. No social benefit is created when the gain to one party is the same as the loss for another.

Finally, the analysis contrasts the private and social benefits of legal practice and compares them to the private and social costs of practice in order to determine whether the level of legal practice is socially appropriate.

Utilizing incentive analysis, this section of the article develops a model of legal practice. Because lawyers' behavior is determined by a cost-benefit analysis, all effects in the model are measured in terms of costs and benefits. If professional ideals affect lawyers' conduct, such influence would be measured as either a private cost or a private benefit.

A. Lawyers' Private Benefits Versus Social Benefits: The Insignificant and Ambiguous Effect of Professional Ideals on Lawyers' Conduct

The private benefit of legal practice is the payment lawyers expect to receive in exchange for providing legal services. The source of such a payment varies. Solo practitioners, for instance, receive payments directly from their clients. Associates working in law firms or for in-house legal departments receive a salary from their employers. Sometimes lawyers receive a payment not from their clients, but from a third party.[57] Regardless of the source, lawyers' private benefits consist of payments in connection with the provision of legal services. The form of the payment also varies. It may be a pecuniary payment or its equivalent. A payment may also take a non-pecuniary form such as an increase in a lawyer's professional reputation or sense of professional satisfaction derived from the representation of certain clients or goals.[58]

The effect of professional ideals on the private benefit of legal practice is ambiguous. The external operation of ideals, whether based on lawyers' actual specialized knowledge, or on a myth of such knowledge,

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[57] For example, according to the British Rule of fee shifting, the losing party pays the legal expenses of both parties. *See* Ronald Braeutigam et al., *An Economic Analysis of Alternative Fee Shifting Systems*, 47 LAW & CONTEMP. PROBS. 173, 174 (1984); James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225 (1995); Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?* 3 J.L. ECON. & ORG. 143 (1987); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982). Alternatively, the state may pay lawyers for the representation of indigent clients.

[58] While the source and form of the payment lawyers expect to receive varies, it is important to note the implicit assumption made here regarding lawyers' behavior: lawyers pursue their self-interest.

helps sustain a public belief in legal practice as a profession.[59] This belief is the basis of the implicit social contract that allows lawyers to restrict competition for their services and extract non-competitive rents from their clients. Professional ideals, therefore, increase lawyers' benefits from practicing law.[60] The internal operation of professional ideals has a second unclear effect on lawyers' private benefit. Litigators, for example, who follow the zealous representation ideal may derive a private benefit from winning a case knowing they served their clients successfully. In contrast, the officer of the court ideal may decrease the private benefit in a case where litigators feel that their client prevailed unjustly. It is important to note that in most cases the external operation of ideals, increasing the pecuniary payments of lawyers seems to be the dominant form of private benefit rendering the latter effect of the internal operation of professional ideals not only ambiguous, but rather marginal.[61]

The social benefits of legal practice consist of the social value of the legal services lawyers provide: dispute resolution, social coordination, and public policy.[62] First, lawyers create social value by the *ex ante* prevention of potential conflicts through the creation of legal rights. Lawyers represent interest groups and various causes in advocating and debating legislation; they draft proposed laws and participate in the process of passing legislation and regulations. Lawyers participate in implementing laws through the creation and operation of administrative agencies such as the Social Security Administration, the Internal Revenue Service, the Securities and Exchange Commission, and other federal and state agencies. Once legal rights are created, lawyers add to the social value by educating and informing lay clients about compliance with the law. For example, tax lawyers help people to comply with the requirements of the various tax codes and regulations, and corporate lawyers assist their clients in complying with the law in operating their businesses.

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[59] *See supra* notes 33-40 and accompanying text. If this belief is based on real knowledge it is justified, whereas if it is based on professional mystique it is not. Either way, professional ideals help establish public belief in the profession.

[60] *See* Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998) [hereinafter Ellickson, *Law and Economics*] (arguing that group norms usually increase the well being of the group).

[61] Some lawyers, however, do rely on non-pecuniary payments to compensate for low pecuniary payments, for example, public interest, pro bono, and cause lawyers. Even in the pro bono context, however, where lawyers do not usually receive a pecuniary payment, it is not clear at all that the bar is motivated solely by notions of professionalism. Arguably, pro bono cases are often undertaken in order to train inexperienced associates or because of the publicity and reputational effects of the case.

[62] Micro-level examination of legal practice is still very lacking. *See* Richard H. Sander, *Elevating the Debate on Lawyers and Economic Growth*, 17 LAW & SOC. INQUIRY 659, 664 (1992).

In addition, lawyers create social value by the *ex post* resolution of conflicts through the enforcement of rights.[63] Lawyers represent clients before courts and administrative agencies. Lawyers also conduct settlement negotiations and represent parties in arbitration, mediation, and other alternative dispute resolution mechanisms. To be sure, additional actors other than lawyers pursue these social values. For example, non-lawyer legislators play a part in the *ex ante* prevention of conflicts by enacting laws and the police play a role in *ex post* enforcement of rights. The claim here is not that only lawyers create social value, but rather that they contribute to it in unique ways or in a more efficient manner.

Second, beyond conflict prevention and resolution, lawyers create social value through social coordination. A functioning legal system and a viable legal profession are recognized as preconditions for an efficient and effective market economy.[64] Lawyers reduce uncertainty through the enforcement of contracts that allow for investments and encourage innovation.[65] They facilitate commerce by allowing parties to overcome commitment problems and protect their reliance interests. Lawyers also reduce transaction costs by introducing legal structures that facilitate efficient business making, such as default rules in contract and corporate law.[66] Lawyers also play an important role in allowing clients to transact in areas that are subject to substantial regulation such as environmental issues, health-care, and intellectual property.

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[63] Mancur Olson, *Do Lawyers Impair Economic Growth?*, 17 LAW & SOC. INQUIRY 625, 629 (1992); *see also* JEREMY BENTHAM, THE THEORY OF LEGISLATION (1931). Conflicts are prevented by the enforcement of property rights broadly construed to include not only real property rights, but also elements of tort and criminal law. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Louis De Alessi, *The Economics of Property Rights: A Review of the Evidence*, 2 RES. L. & ECON. 1 (1980).

[64] *See* J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 1-21 (1999); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999); William P. Alford, *Tasseled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers*, THE CHINA QUARTERLY 22 (1995); Jane Kaufman Winn & Tang-chi Yeh, *Advocating Democracy: The Role of Lawyers in Taiwan's Political Transformation*, 20 LAW & SOC. INQUIRY 561 (1995).

[65] Olson, *supra* note 63, at 630; *see also* RICHARD CRASWELL & ALAN SCHWARTZ, FOUNDATIONS OF CONTRACT LAW (1994); ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW (1979); Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683 (1986).

[66] *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984) (giving an account of value creation by lawyers operating as transaction cost engineers). On default rules and gap filling in contract law, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). For gap filling in the corporate context, see Lucian A. Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820 (1989), and Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 28 STAN. L. REV. 271 (1986).

Third, lawyers pursue public policies through the legal system that create social value. Some policies define and protect core public values and liberties such as the guarantee of representation to indigent criminal defendants,[67] or the more popular notion of the "day in court." Some preserve notions such as fair play as with the representation of small interests in class actions.[68] Lawyers often advocate causes and policies in the name of particular interest groups as with the representation of social movements and social causes, such as civil rights.[69]

Finally, lawyers create social value by contributing to a more efficient operation of the legal system as a whole by facilitating the dispute resolution, social coordination, and public policy functions through the creation of precedents, the development of accuracy enhancing mechanisms, and a commitment to the reduction of errors.[70]

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[67] The representation of indigent criminal defendants sends a signal to the public that the legal system protects the rights of the accused, and public respect in the legal system is enhanced. *See* LLOYD L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES (1977); *see also* FREEDMAN, LAWYERS' ETHICS, *supra* note 10.

[68] For an account of the value created by the plaintiff's attorney, see John C. Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); *see also* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994).

[69] For a general discussion on rights claiming, see CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237-249 (1989); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 146-65, 249-52 (1991). On representing others, see Simon, *Ideology of Advocacy*, *supra* note 7. On lawyers as creators of social value, see Wilkins & Gulati, *supra* note 6; *see generally* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998). For an applied analysis, see WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 1-13, 51-85 (1996).

[70] While the microeconomic literature on the work lawyers do is rather poor, the scholarship of the legal system is quite developed. For a discussion of the positive externality created by precedents through litigation, see William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979); William M. Landes & Richard A. Posner, *Legal Precedent in a Theoretical and Empirical Analysis*, J.L. & ECON. 249 (1976); *see also* Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605 (1995); Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63 (1989); Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 93 (1989). For an analysis of accuracy in the legal system, see Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279 (1986); Louis Kaplow, *A Model of the Optimal Complexity of Legal Rules*, 11 J.L. ECON. & ORG. 150 (1995); Louis Kaplow & Steven Shavell, *Accuracy in the Assessment of Damages*, 39 J.L. & ECON. 191 (1996); Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1 (1994); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994). For an account of the reduction of error, see Anthony I. Ogus, *Information, Error Costs and Regulation*, 12 INT'L REV. LAW & ECON. 411 (1992); I. P. L. P'ng, *Optimal Subsidies and*

The effect of professional ideals on the social benefit is ambiguous. While ideals define how legal practice is supposed to function, they do not necessarily correspond to the social benefit. Rather, some ideals are based on allowing clients to pursue their private interests, which may or may not coincide with the social benefit. The zealous advocacy ideal explicitly ranks clients' private benefits above the social benefit. Arguably, lawyers are supposed to assist their clients in achieving their goals even if such goals inflict a social loss. The public service ideal, on the other hand, seems to correspond to the social good as it guides lawyers to advise their clients against actions that impose negative externalities on other parties, and suggests that lawyers refrain from assisting clients in the pursuit of such goals.

B. The Divergence Between Private and Social Benefits

The comparison between private and social benefits yields an ambiguous result. There is no necessary connection between the private benefits lawyers derive from legal practice and the social benefits such a practice creates. It may be that the social benefits exceed the private benefits, or it may be that the opposite holds true.

First, note that the private benefit to lawyers' is usually a transfer, which does not constitute a social benefit. When clients incur the private benefits of lawyers (that is, when clients pay lawyers for their services), lawyers' private benefit is a transfer from a social point of view. A monetary payment a lawyer receives from her client in exchange for filing a suit, for example, is a transfer. However, the private benefit to lawyers may also consist of positive externalities not incurred by the client. Such a private benefit does constitute social value. Planning and executing a complex transaction may increase a lawyer's human capital by adding to her expertise and knowledge, as well as enhancing her reputation. Winning a landmark case, which brings about a change in the law, may increase a lawyer's sense of professional satisfaction.

Second, in an adversarial legal system that relies on private enforcement mechanisms,[71] clients usually bear the cost of lawyers' private

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Damages in the Presence of Judicial Error, 6 INT'L REV. L. & ECON. 101 (1986); A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J.L. ECON. & ORG. 99 (1989); Eric Rasmusen, *Predictable and Unpredictable Error in Tort Awards: The Effect of Plaintiff Self-Selection and Signaling*, 15 INT'L REV. L. & ECON. 323 (1995).

[71] With the exception of criminal law, private parties initiate suits and are responsible for investigating and presenting evidence to the court. For a discussion of privately motivated systems of enforcement, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and*

benefits. It seems to follow that the social benefit from legal practice, which includes the private benefit of the clients and the private benefit of the lawyers, must be higher than the private benefit to lawyers. Otherwise, clients will not demand and will certainly not pay for lawyers' services. In other words, it seems that since clients will hire attorneys only if: (1) the clients' private benefits are greater than the clients' private cost, (2) the social benefit is greater than the clients' private benefits,[72] and (3) the clients' private costs equal or are greater than the lawyers' private benefits,[73] then it follows that (4) the social benefit is always greater than the lawyers' private benefits.

This line of reasoning is false. Clearly, the clients' private benefits need to exceed the lawyers' private benefits (a part of the clients' private cost) for clients to hire lawyers. The social benefit, however, is *not* necessarily greater than clients' private benefits. Certain services result in a private benefit to clients while imposing a greater loss on other parties, thus constituting a social loss. That is, while (1) and (3) hold, (2) is false and (4) does not follow.

While lawyers alone engage in legal practice, the practice is inherently tied to the interests and incentives of their clients, who benefit from such practice and incur its costs. In fact, in an adversarial legal system, clients generate all legal practice, at least formally. Lawyers practice law as a service to clients. Every instance of legal practice is on behalf of clients. It is therefore relevant to consider explicitly the clients' private benefits from legal practice.[74]

Oftentimes, the private benefit clients derive from legal practice is a transfer. Consider the role of lawyers in representing clients in litigation for monetary relief. The judgment awarded to the plaintiff is, from an economic perspective, a transfer. Other elements of the plaintiff's private benefit, such as reputation, social vindication from trial, and the victim's sense of entitlement, which do not directly correspond to the defendant's loss, may, however, count toward the social benefit. Moreover, the

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Conflict of Interest, 4 J. LEGAL STUD. 47 (1975). For an analysis of publicly oriented systems of enforcement, see A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1 (1999); Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982).

[72] The social benefit consists of the clients' private benefits plus the lawyers' private benefits plus externalities.

[73] Under the American system clients usually bear the cost of their lawyers.

[74] Cause lawyering and class actions initiated by the plaintiffs' bar may constitute an exception, as the lawyer is, for practical purposes, the "client." On cause lawyering, see CAUSE LAWYERING—POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY, *supra* note 14; ESKRIDGE, *supra* note 69. On class actions, see Coffee, *supra* note 68.

litigation may confer positive externalities on third parties not captured by the plaintiff as a private benefit, such as deterrence and precedent.

However, some private benefits a client derives may constitute a social loss. A client may pursue, with the assistance of her lawyer, an action that creates a private benefit for the client while constituting a social loss.[75] For example, *ex ante* legal advice may allow a client to pursue a socially harmful, yet legal, course of action she would not have pursued without such advice. *Ex post* legal advice may allow a client to secure a transfer that affects the otherwise efficient production and investment decisions of another party, or may bring about an inefficient dispute resolution mechanism.[76]

Social value calculus takes account of all private values from legal practice conferred on lawyers, clients, and third parties, and discounts costs inflicted on other parties. Often, the social benefit is a side effect of the private benefit that motivates both lawyers and their clients to engage in legal practice. This is a key feature of legal practice: while lawyers (and their clients) often pursue their own self-interest and private incentives in practicing (and creating a demand for) law, and, furthermore, often impose costs on opposing parties, and negative externalities on society, legal practice simultaneously generates social value. Therefore, despite the fact that legal practice is driven by the self-interest of lawyers (and clients), there is no necessary connection between the private benefit of lawyers (and clients) and the social benefit from legal practice.

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[75] *See* Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 J. LEGAL STUD. 123 (1988); *see also* Louis Kaplow & Steven Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565 (1989); Louis Kaplow & Steven Shavell, *Legal Advice About Acts Already Committed*, 10 INT'L REV. L. & ECON. 149 (1990); Louis Kaplow & Steven Shavell, *Private Versus Socially Optimal Provision of Ex Ante Legal Advice*, 8 J.L. ECON. & ORG. 306 (1992). Kaplow and Shavell offer a comprehensive analysis of legal advice comparing the private incentive of clients to seek legal advice to the social incentive. In their analysis of legal advice, Kaplow and Shavell distinguish between ex ante legal advice and ex post advice once acts have already been committed. The distinction is useful because of their focus on the private decision-making by clients, yet less instructive here where the private decision-maker is, to an extent, a lawyer.

[76] STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987) (critiquing the relative inefficiency of the tort system and arguing in favor of an alternative administrative-based compensation scheme).

C. *Lawyers' Private Costs Versus Social Costs: How Ideals Impose Social Costs*

The private cost of legal practice consists of lawyers' opportunity costs.[77] The social cost of legal practice consists of several elements. First, as mentioned above, legal practice may create social loss through negative externalities imposed by opportunistic clients, who may hire lawyers in order to pursue a course of action that increases their private benefit but creates a social loss. For example, lawyers may advise their clients on issues of tax avoidance, or act as agents of nonproductive competition, which results in the redistribution of wealth and inefficient production and investment decisions.

Second, legal practice generates significant agency costs: lawyers acting against their clients' interests, lawyers colluding with their clients against the interests of third parties, and collusion of clients and third parties against lawyers.[78] Agency problems may be compounded by the fact that clients, their lawyers, and third parties may all experience second order agency problems.[79] Different departments within a corporate entity may advocate different courses of legal action. Partners within a law firm may have different attitudes, practice habits, and approaches as to how to handle various cases and how to run the firm. Moreover, different classes within the firm, such as partners, associates, and temporary employees, may all have different incentives to practice law. From a social standpoint, these agency problems and the costs incurred in addressing them constitute a social loss.

Third, the costs of operating the legal system constitute a social loss. For example, when a lawyer files a lawsuit in court, she imposes an externality because neither she nor her client bears the costs of operating the legal system. Fourth, lawyers divert talent from more productive occupations.[80] The legal profession promises potential lawyers both high

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[77] Assume here that the costs of pursuing a legal education are "sunk" costs. Legal practice has been defined as the decision on whether to provide an additional unit of legal services. *See supra* note 56. One could easily define legal practice as the decision on whether to pursue a legal career by aggregating the costs and benefits of legal practice throughout a lawyer's career, adding the fixed cost of legal education to the aggregate costs.

[78] For a summary of agency problems in the course of legal practice, see George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 279-286 (1998).

[79] *Id.* at 284; *see also* GALANTER & PALAY, *supra* note 23, at 77-138; Wilkins & Gulati, *supra* note 6 (providing an account of agency problems within law firms).

[80] Charles R. Epp, *Do Lawyers Impair Economic Growth?*, 17 LAW & SOC. INQUIRY 585, 594-95 (1992); Stephen P. Magee, *The Optimum Number of Lawyers*, LAW & SOC. INQUIRY 667, 670 (1992).

private benefits and high social esteem. Consequently, many young individuals enter law schools and pursue a legal career as opposed to pursuing a different, more socially productive career.

Fifth, lawyers may create deadweight losses by extracting monopolistic rents from their clients. Lawyers' abilities to extract non-competitive private benefits that create social loss is enabled by their monopoly over the provision of legal services and their relative advantage vis-à-vis her clients with regard to legal knowledge and expertise. Lawyers create legal costs by steering litigation, overestimating or underestimating legal risks that distort efficient decision-making by their clients, and thus create social loss.[81]

Professional ideals directly impact social costs by supporting a public belief in the professional nature of legal practice. This belief in law as a specialized, knowledge-based, occupation justifies the bar's attempts to self-regulate its services and secures non-competitive rents. Professional ideals also help sustain the status and high esteem of the legal profession which attracts young bright individuals to the practice of law and contributes to the divergence of talent from other occupations. The independence ideal adds to the agency social costs. Agency costs are rooted in asymmetric information problems but the ideal, often invoked by opponents of free competition in the market for legal services, increases the costs by restricting efficient legal practice in the name of independence.

The comparison between private and social costs yields an ambiguous result. There is no necessary connection between the private cost of legal practice and the social cost. In fact, there may be no connection at all between the two. It may be that the social cost exceeds the private cost, or it may be that the opposite holds true.

D. Summary

The model of legal practice yields three important results. First, ideals seem to have no influence over lawyers' private costs and only a marginal, ambiguous effect on lawyers' private benefits. Second, professional ideals clearly impose a social cost on clients and the public. Therefore, ideals seem to be socially undesirable. The cost-benefit analysis

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[81] *See* WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991) (providing an account of social waste created by steering litigation); *see also* Donald C. Langevoort & Robert K. Rasmussen, *Skewing the Results: the Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375 (1997) (providing an account of social loss created by overestimation of risks). For a general review of lawyers' impact on the economy and social costs, see Epp, *supra* note 80; Charles R. Epp, *Toward New Research on Lawyers and the Economy*, 17 LAW & SOC. INQUIRY 695 (1992); Magee, *supra* note 80; Olson, *supra* note 63; and Sander, *supra* note 62.

thus seems to support the Posner-Fischel argument against professional ideals.

Third, the model identifies the inherent need for social intervention in legal practice (see Table 1). A potential lawyer will pursue legal practice if the private benefit from it exceeds her private cost. From a social standpoint, legal practice is appropriate if the social benefit exceeds the social cost. As a consequence, a divergence between the social and the private costs and benefits may result in either a tendency toward too little legal practice, or one toward too much legal practice. In other words, the level of legal practice is not generally socially correct because of the differences between the private and the social incentives to practice law.[82] The fundamental divergence means that social intervention may be necessary to correct lawyers under- or over-incentives to practice law.

The three results are related. The zealous advocacy ideal, and others like it, suggest that lawyers serve the interests of their clients. The officer of the court ideal, and similar ideals, imply that lawyers serve the interests of the public. As far as professional ideals deny the existence of the fundamental divergence between the private and the social incentives to practice law, or aid in concealing this divergence from the public, they impose an additional social cost.

Table 1
The Inherent Divergence Between the Private and Social Incentives to Practice Law

	Private Cost < Social Cost (Too Much Legal Practice)	Private Cost > Social Cost (Too Little Legal Practice)
Private Benefit < Social Benefit (Too Little Legal Practice)	**Ambiguous Outcome**	**Too Little Legal Practice**
Private Benefit > Social Benefit (Too Much Legal Practice)	**Too Much Legal Practice**	**Ambiguous Outcome**

[82] This problem is distinct from agency problems and market failures in the market for legal services. Shavell makes this point in his analysis of the incentives to use the legal system. *See* Shavell, *Fundamental Divergence*, *supra* note 29, at 577. For an account that does not recognize the basic elements of the private-social divergence, see Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 FORDHAM L. REV. 275 (1992).

III. SOCIAL INTERVENTION

The fundamental divergence between private and social incentives to practice law may require social intervention.[83] Such regulation may be carried out by four different kinds of norms: law, markets, social norms, and architecture.[84] Law regulates behavior by threatening sanctions if its orders are not obeyed. Markets regulate conduct through the device of price. Social norms—rules that are neither promulgated by an official source nor enforced by the threat of legal sanctions yet regularly complied with—constrain behavior by employing either internalized or externalized sanctions.[85] Architecture—"features of the world—whether made, or found—restrict[s] and enable[s] in a way that directs or affects behavior."[86]

All four sets of constraints may be employed to bring about the regulatory end—an alignment between the private and social incentives to practice law—depending on the circumstances.[87] The alternative means of social intervention are non-exclusive, as regulations may take simultaneous forms. For example, confidentiality is both a social norm rooted in notions of loyalty to clients and zealous representation, and a law norm adopted by many states as binding law in their jurisdictions.[88]

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[83] The fundamental divergence means that the private incentives of lawyers do not generally correspond to the social incentives. Social intervention may not be necessary if private actors can influence the incentives of lawyers. For example, insurance companies may play a role in regulating legal practice. Note that while "social" intervention means intervention on behalf of social interests, it does not necessarily mean state controlled intervention. Other actors, such as bar associations and private interest groups, may compete for control over the regulation of lawyers, arguing for legitimacy in the representation of social incentives.

[84] Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662-72 (1998).

[85] Judge Posner has defined social norms as rules that are "neither promulgated by an official source, such as a court or a legislature, nor enforced by the threat of legal sanctions, yet [are] regularly complied with." Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 365 (1997). For an internalized account of social norms, see Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947 (1997). For an externalized analysis of social norms, see Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997) [hereinafter McAdams, *Regulation of Norms*].

[86] Lessig, *supra* note 84, at 663.

[87] Norms in general are *employed*, not controlled or directed. Laws do control behavior, and sanctions may direct individuals to comply with regulatory ends. Similarly, architecture directs conduct. Once the role of the lawyer and a forum for legal practice is created, such features control conduct within the legal system. Markets, however, operate differently. Their operation can be anticipated and utilized toward achieving the regulatory end, but the social planner, or the state employing them, cannot direct markets to bring about a result. In the same way, social norms may be facilitated and their operation anticipated, but they cannot be directed.

[88] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2000).

The constraint forms are further interdependent in two ways. First, in addition to regulating conduct directly by telling individuals how they ought to behave, the different norms regulate each other and hence affect conduct indirectly. Law, for example, directly regulates conduct through the threat of sanctions. It indirectly regulates behavior by affecting social norms, altering architecture, and constituting and modifying markets. Thus, law is affected and regulated by social norms, architecture, and markets.[89] Law norms directly regulate lawyers' conflicts of interest.[90] Such law norms also affect the attitudes of lawyers and clients toward legal practice (social norms), influence the price of conflict waivers and of legal services (market norms), and lead to the development of new legal mechanisms like firewalls[91] and multidisciplinary practices (architecture norms).[92] Second, the different forms of regulation complement and substitute for each other: excessive levels of litigation may be met by law norms prohibiting or restricting litigation under certain circumstances, by market norms forcing maximum prices that make litigation unprofitable, or by a mix of social and architecture norms discouraging litigious behavior in society and erecting alternative means of dispute resolution.

The inherent need for social intervention in legal practice and the interplay between the different forms of regulation turn out to be constitutive of the beneficial social role of professional ideals. Ideals serve as the underlying rationale and justification of social norms. They are the basis for the promulgation of social norms and contribute to their enforcement. Where social norms are an effective and efficient means of social intervention, ideals yield significant social benefit. In general, therefore, ideals have a dual role. They serve the self-interest of the bar by increasing the private benefit of legal practice and imposing a social cost on clients and the public. However, professional ideals also serve the interests of clients and the public and increase social benefit. A determination as to the desirability of professional ideals can only be made in a particular legal context by balancing the social costs ideals impose

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[89] Lessig, *supra* note 84, at 662-72.

[90] MODEL RULES OF PROF'L CONDUCT R. 1.7 (2000); *see also* Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639 (1981); Macey & Miller, *supra* note 10.

[91] Neil W. Hamilton & Kevin R. Coan, *Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 HOFSTRA L. REV. 57 (1998).

[92] *See generally* ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE, BACKGROUND PAPER, *supra* note 1; ABA COMMISSION ON MULTIDISCIPLINARY PRACTICE, FINAL REPORT, *supra* note 1; NEW YORK STATE BAR ASSOCIATION REPORT, *supra* note 2.

against the benefits they yield. Section A. explores social intervention in legal practice in greater detail, and sets the stage for the analysis of the connection between professional ideals and social norms.

A. The Puzzles of Social Intervention in Legal Practice

Social intervention in legal practice consists of a complex web of interactions between law, markets, social norms, and architecture. The corner stone of social intervention in legal practice has traditionally been law norms.[93] The practice of law is a licensed occupation.[94] One cannot practice law without the permission of the state, which administers licensing procedures (bar examinations), grants licenses to practice law in its jurisdiction, and revokes them (disbarment).[95] Upon admission to a state bar, lawyers are subject to law norms that define the manner, obligations, and entitlements of their practice.[96] Law norms further define the scope of legal practice. Legal practice is prohibited in certain instances; for example, lawyers are often not allowed to represent clients in small-claims courts. Legal practice is mandated in other contexts; for example, defendants are guaranteed legal representation in criminal proceedings that carry certain penalties. Indeed, law norms constitute the bedrock of social intervention in the practice of law.

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[93] The word "law" is used here in two different contexts. It stands for a form of social intervention (as in "law, social norms, markets and architecture"), and is used to describe an occupation (as in "the practice of law"). To avoid confusion, the former usage is hereinafter referred to as law norms.

[94] Had markets been the foundation of legal practice, everyone would be allowed to practice law without a need to obtain a license from the state. *See generally* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000). Had social norms been the basis of legal practice, law would be administered within social groups and practiced by authoritative group members. *See, e.g.*, Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 CARDOZO L. REV. 1613 (1993) (providing a review of the administration of Jewish law by rabbis and the prohibition of legal practice by lawyers).

[95] While admission to the bar is not used in the United States as a strict barrier to enter the practice of law (admission rates vary around sixty to eighty percent), legal systems in the Far East employ such policies. *See* LIU HAN & LI LIN, CHINA: 20 YEARS OF LEGAL SYSTEM DEVELOPMENTS (1998); SANG-HYUN SONG, THE EDUCATION AND TRAINING OF THE LEGAL PROFESSION IN KOREA: PROBLEMS AND PROSPECTS FOR REFORM (1998). Additional certification as a requirement for practice is becoming more popular in the United States itself. *See generally* Buddy O. Herring, *Liability of Board Certified Specialists in Legal Malpractice Action: Is There a Higher Standard?*, 12 GEO. J. LEGAL ETHICS 67 (1998).

[96] These law norms are governed by the ABA Model Code or the Model Rules as adopted by the state, malpractice tort law, and Rule 11 of the Federal Rules of Civil Procedure. Some law norms operate in non-obvious ways. For example, conflict of interest rules may restrict the size of law firms. Firms may be prevented from hiring lateral partners or merging with other law firms because of the imputed disqualification doctrine and the conflict rules. Moreover, partners who wish to represent clients that their firm cannot represent because of conflict rules may decide to leave the firm.

In addition to direct regulation, law norms regulate lawyers' behavior indirectly by influencing other forms of constraint. Traditionally, law norms heavily regulated the market for legal services. Law norms limited certain compensation schemes including contingent fees,[97] they prohibited advertisements[98] and banned referral fees.[99] Law still prohibits claim selling and restricts the supply of services by means of conflict of interest, confidentiality, and multidisciplinary rules.[100] Law norms regulate architecture when alternative means of dispute resolution are formed, such as commercial courts and arbitration panels, which are often supported by the threat of the law's sanctions.[101] Law norms regulate social norms by either supporting or overriding them. For example, Rule 26(a) of the Federal Rules of Civil Procedure orders mandatory disclosure contrary to social norms regarding confidentiality and unrestricted loyalty to clients.[102]

Law norms include both primary regulation and secondary regulation. A law norm is primary when it applies directly to individuals. It is secondary when it authorizes and creates institutions and mechanisms that regulate individuals. Secondary law norms regulate legal practice by creating quasi-legal administrative agencies that regulate the conduct of lawyers that practice under their jurisdiction. The Securities and Exchange Commission, for example, has taken a strong position in attempting to influence the practice of lawyers before it.[103]

To be sure, while law norms dominate social intervention in legal practice, other forms of regulation complement them. The licensing of legal practice, which is a law norm, is accompanied by architecture norms: exclusive forums for legal practice are created (courtrooms and arbitration

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[97] *See* Am. Trial Lawyers Assoc. v. New Jersey Supreme Court, 316 A.2d 19 (N.J. Super. Ct. App. Div. 1974), *aff'd*, 330 A.2d 350 (N.J. 1974); *see also* DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 96-112 (1974).

[98] *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); *see also* LORI B. ANDREWS, BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION (1980); GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1907) (1884).

[99] Referral fees are prohibited as part of a larger theme of unauthorized fee sharing. *See* MODEL RULES OF PROF'L CONDUCT, R. 5.4(a); *see also* BRUCE L. HAY, THE ECONOMICS OF LAWYER REFERRALS (John M. Olin Center for Law, Economics and Business, Working Paper No. 203, 1996); Joseph M. Perillo, *The Law of Lawyers' Contracts is Different*, 67 FORDHAM L. REV. 443 (1998); Geoffrey C. Hazard, *Realities of Referral Fees Here To Stay*, NAT'L L.J., Nov. 16, 1987, at 13-14.

[100] More recently, however, legal practice has been experiencing deregulation. That is, law norms are overturned and substituted by market-norms, including the liberalization of forms of legal compensation, *see supra* note 97, advertisements and forms of multidisciplinary practices, *see supra* notes 1-2 and 98.

[101] *See* ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000).

[102] FED. R. CIV. P. 26(a).

[103] *See* SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978).

institutions), roles are invented (lawyers, judges), and customs emerge (judges appear in robes and gowns, legal forms and professional language are used).[104] Social norms complement law norms in defining the manner of scope of legal practice (professional ethics norms) and so do market norms (confidentiality rules, conflict of interest rules, and anti-multidisciplinary practice rules restrict the size of law firms). Moreover, constraints other than law norms are commonly employed to regulate legal practice. Markets regulate legal practice in various ways. First and foremost, price determines supply and demand for legal practice. Price determines whether lawyers practice law and the extent of such practice,[105] whether clients can purchase legal services as well as the quality of such services,[106] and whether society can achieve the optimal level of legal practice. Markets also determine the structure and organization of law firms,[107] and produce new forms of practice.[108] Of particular interest is the emergence of new market-driven private regulations of legal practice. Insurance companies, for example, play a key role in regulating lawyers' conduct as a prerequisite for covering lawyers against malpractice suits. Architecture norms define legal-roles and legal arenas.[109]

1. Why Only Supply-Side Intervention?

In general, social intervention may take two distinct forms. It may regulate lawyers' supply of legal services or it may regulate clients' demand for it. Most forms of social intervention in legal practice, however, regulate the supply-side; *i.e.*, they constrain lawyers' conduct as opposed to clients' demand. This feature of social intervention in legal practice may seem counterintuitive because, presumably, demand determines supply in the market for legal services: clients seek legal advice or legal representation and lawyers respond by offering their services. Lawyers are not supposed to initiate legal practice: ethical rules, law regulations, and markets all condemn such conduct.[110] Given that demand for legal services

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[104] *See generally* MILNER S. BALL, THE WORD AND THE LAW (1993).

[105] *See supra* notes 28-29, 48 and accompanying text.

[106] *See generally* GARY BELLOW, SELECTED READINGS IN LAW AND POVERTY (1965); Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996).

[107] GALANTER ET AL., *supra* note 23.

[108] ABA, COMMISSION ON MULTIDISCIPLINARY PRACTICE, FINAL REPORT, *supra* note 1.

[109] *See* BALL, *supra* note 104.

[110] *See* FED. R. CIV. P. 11(b)(1) (requiring attorneys to affirm that all representations to a court are without "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"); MODEL RULES OF PROF'L CONDUCT R. 7.3 (2000) (banning solicitation); MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (2000) (banning the use of agents for solicitation).

precedes its supply, the almost exclusively supply-side intervention in legal practice is somewhat puzzling. Social intervention is necessary because of the fundamental divergence between social and private incentives to practice law. The divergence is caused by a discrepancy between private and social costs and benefits. The costs and benefits of lawyers are determined to a large extent by the demand for their services. Consequently, if social intervention is needed, one should expect intervention at the demand-side, which causes the divergence, rather than at the supply-side, which merely reflects it. Moreover, even if supply-side regulation is effective, clients may channel their demand to other markets and find other professionals who would be willing to provide them with comparable services. If demand determines supply, then regulation should attempt to regulate demand.

Suppose a group of entrepreneurs stands to gain a substantial private benefit from building a plant, which will impose high environmental hazards on residents who live next to the plant. The entrepreneurs' potential private gain may translate into demand for legal services. The entrepreneurs will pay lawyers to make the deal. Assume further that from a social perspective the deal is undesirable due to the large externalities imposed on the neighbors. Consequently, there will be too much legal practice as lawyers attempt to assist the entrepreneurs to carry out the project. One would expect social intervention to address the cause of the problem by regulating the entrepreneurs' *demand* for legal services (by prohibiting such transactions) as opposed to its *symptoms*, by regulating lawyers' supply (by restricting legal practice in the relevant area). Even if effective supply-side regulation were possible, the entrepreneurs might turn to other professionals, such as investment bankers or accountants, to assist them with the deal.

And yet traditionally, social intervention in the market for legal services has taken place through the supply-side. First, lawyers do not only provide legal services, but also play an important role in creating law and, hence, the demand for legal services. Lawyers make and interpret the law representing clients. They advise and consult various interest groups with regard to legislation, they litigate cases in an attempt to change the law, setting or reversing precedents,[111] and they give advice that interprets and affects the law. Lawyers also influence the law independent of their clients. Many lawyers are legislators who draft and pass primary and secondary legislation. The legal profession, through its different bar associations, has a strong lobbying position in the political arena. Judges

[111] Clients who are repeat players often litigate for the rules rather than for a particular outcome in a given case. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

make law. Law professors teach, research, and write about law and legislation. In other words, lawyers, on behalf of clients and of their own volition, create and influence law and, hence, the demand for legal services. Regulating lawyers is therefore a way of regulating the demand for legal services.

Second, an important feature of the market for legal services is the information asymmetry between clients and lawyers. Ignorant about the law or its application, individuals are often unaware of their liability under, and responsibility for, particular legal consequences. Even when people are aware that the law applies to their situation, laypersons frequently lack the knowledge to translate their abstract demands for legal services into specific demands on their own. Instead, they have to rely on the superior knowledge of lawyers, as their agents, to make these decisions. In addition, clients are largely unable to evaluate the quality of the services they receive *ex ante* and frequently also *ex post* because there is only a probabilistic, rather than a deterministic, relationship between the quality of legal services and the desired legal outcome.

An individual contemplating drafting a will or giving a gift to a relative may not be aware of the applicable laws that govern such an action. Even if the person realizes that some laws apply, she may not be able to identify the particular laws or understand their particular requirements. She has to depend on a lawyer to explain her legal liabilities under the relevant laws. Upon receiving such advice, the individual may be unable to evaluate its quality *ex ante* or even *ex post*. If the will is challenged, or the gift is taxed substantially, the individual has no way of knowing if her action failed because of the poor quality of the legal advice she received, or because of other factors beyond the lawyer's control. The asymmetric information feature of the market for legal services explains why social intervention is usually carried out through the supply-side. Because lawyers exercise significant influence over their clients, the demand for legal services is determined by its supply. Social intervention is therefore carried out through regulation of the supply-side.[112]

2. Unmasking Self-Regulation

In fact, asymmetric information justifies not only supply-side intervention, but self-regulation. The dual role of lawyers as agents for their clients and as providers of legal services gives rise to substantial

[112] As clients become more sophisticated, regulation of the demand-side should be considered as a meaningful method of social intervention. Corporate clients, often time assisted by in-house legal departments, should not be assumed not to understand the law, and therefore, should not be excluded from responsibility for their actions even absent outside legal representation.

incentive problems because lawyers might be enticed to recommend more or less than the optimal quantity of services.[113] In other words, two important dimensions of the quality of legal service, *i.e.*, the quality of lawyers' advice regarding the clients' need for legal services and the quality of service provision, are not observable for the client. A solution in which clients select a quality level according to their willingness to pay is thus unattainable for two reasons. First, because the quality of services is known only to the lawyers, clients cannot contract based on such information. Second, although clients may be able to evaluate their particular legal needs and the outcomes of the legal services they receive, risk-averse lawyers will not agree to enter into contracts under which payment is linked to results, given the probabilistic relationship of quality and outcomes.[114]

The second-best solution to the irresolvable information asymmetries, and the resulting incentive problems, is an implicit social contract in which the legal profession guarantees the quality of legal services, and in return, the bar is granted effective self-regulation of the behavior of its members.[115] The bar guarantees that lawyers practice law on behalf of and to the benefit of clients in a manner that reflects the current state of specialized knowledge, while treating their own private interests as a secondary concern. Such an arrangement allows clients to develop trust in lawyers and to surrender themselves to legal judgment without perceiving the need to monitor lawyers. This trust and the resulting autonomy are, in turn, of tremendous value to the legal profession. Not only are its members granted societal respect and prestige but also above-average incomes. Thus, in the second-best equilibrium, the legal profession is able to exploit informational rents and earn non-normal profits.

3. The Myth of Law Norms Dominance

The implicit social contract between the lawyers and the public requires that the legal profession, through its bar associations[116] rather than

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[113] Langevoort & Rasmussen, *supra* note 81.

[114] For an analysis of agency problems and the inability of the principal to monitor and evaluate her agents' efforts, see ANDREW MAS-COLELL ET AL., MICROECONOMIC THEORY 477-501 (1995).

[115] Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963).

[116] Every state has an association of lawyers, usually called the state bar association. A majority of states have an "integrated" bar system, meaning that every lawyer who is admitted to practice in the jurisdiction of the state must be a member of the state bar association. In addition, each federal court has its own bar, and a lawyer cannot practice before a particular court without first becoming a member of its bar. Furthermore, there are numerous city and region-wide voluntary associations and the nationwide American Bar Association.

the state or any other official source, promulgate and enforce norms that govern the practice of its members. Indeed, the profession is entrusted with self-regulation because it is believed that due to asymmetric information other forms of constraint such as law norms and market norms will not work effectively. The bar is better positioned to regulate its own members because the state and other private actors do not possess sufficient information to monitor and evaluate the quality of legal practice. The analysis therefore predicts that social norms, *i.e.*, regulation by the bar, would be the dominant form of social intervention and that the bar would take a leading position in regulating lawyers' conduct. As we have seen, however, the bulk of social intervention in legal practice consists of law norms.

To explain the puzzle, one must distinguish between two different roles bar associations occupy. First, bar associations participate in the enforcement of law norms by regulating lawyers' conduct. State bar associations administer the state's bar examination, provide continuing education programs for practicing lawyers, and assist the state courts in regulating and imposing professional discipline on lawyers. In fulfilling such responsibilities, the state bar association acts as a state agency. Its authority and power is derived from the state. The ultimate regulatory power is left with the state. Through law norms, the state licenses lawyers to practice law, and it retains the power to disbar lawyers. The state adopts the binding legal rules of professional conduct within its jurisdiction. In other words, it is law norms, rather than social norms, which bar associations are engaged with in their role as quasi-state agencies.

Second, bar associations also act as voluntary groups of professional members. In this latter role, bar associations draft and promulgate codes of professional responsibility and restatements regarding lawyers' professional conduct, lobby for lawyers' interests, and take an active part in public debates over suggested changes in the practice of law.[117] In their capacity as voluntary interest groups, bar associations do not act as state agencies; they do not depend on the power of the state. To the contrary, they often oppose the state.[118] It is in this capacity as voluntary interest groups that bar associations promulgate and enforce social norms.

The two roles intersect and converge on many levels. For example, consider the quasi-official role of the ABA in evaluating candidates for federal judgeships.[119] From 1953 until recently, the names of candidates

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[117] ABA, COMMISSION ON MULTIDISCIPLINARY PRACTICE, FINAL REPORT, *supra* note 1; NEW YORK STATE BAR ASSOCIATION REPORT, *supra* note 2.

[118] Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1395 (1992).

[119] This is a role recently ended by President George W. Bush. Neil A. Lewis, *White*

for federal judicial positions were given to the ABA in advance for screening. The ABA's standing committee on the federal judiciary conducted interviews that explored the candidates' integrity, professional competence, and judicial temperament, and for every candidate offered ratings of "not qualified," "qualified," or "well qualified."[120] Offering its non-binding evaluations to the Senate Judiciary Committee, the ABA operated as a state agency, and at the same time the ABA had an effect on the conduct of candidates and the entire process.[121]

In fulfilling their role as state-agencies, bar associations regulate conduct through law norms. While operating as voluntary groups, bar associations utilize social norms in order to influence lawyers' behavior. The two means of social intervention, however, are not mutually exclusive. Law norms regulate social norms and social norms regulate law norms. Some norms are both social norms and law norms. Law norms and social norms complement, substitute for, and sometimes contradict each other. The complex web of interdependencies between the two forms of regulation should not blur the fundamental question raised by the dual role of bar associations: which form of regulation reigns supreme? Are law norms at the core of social intervention, authorizing secondary social norm regulation by bar associations who are nothing more than quasi-state agencies? Or do social norms constitute the bedrock of social intervention? The two sets of norms and the two roles of bar associations correspond to two competing entities battling for supremacy of social intervention—the state and the bar.

The state and the bar may have competing interests with regard to social intervention. The traditional understanding of the relationship between the two entities tends to overlook the possible conflict, and assumes both that the bar's role as social norms regulator begins where the state's role as law norms regulator ends, and that the state's law norms are superior to the bar's social norms in case of a conflict.[122] The analysis is

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House Ends Bar Association's Role in Screening Federal Judges, N.Y. TIMES, Mar. 23, 2001, at A13; *see also* Statement of Martha W. Barnett, President, American Bar Association, *at* http://www.abanet.org/media/statement.html (Mar. 19, 2001); Statement of Martha W. Barnett, President, American Bar Association, *at* http://www.abanet.org/media/statement2. html (Mar. 22, 2001).

[120] *See* SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997); THE ABA STANDING COMMITTEE ON FEDERAL JUDICIARY, WHAT IT IS AND HOW IT WORKS (1999), *available at* http://www.abanet.org/poladv/scfedjud.pdf (last visited Sep. 15, 2001).

[121] *See* Jonathan Ringel, *Bush Administration to Decide Role of ABA in Federal Bench Nominations*, AM. LAW. MEDIA, Mar. 19, 2001, *available at* http://www.law.com/ny/stories /01/03/031901a1.shtml (last visited Aug. 1, 2001).

[122] Koniak, *supra* note 118; *see also* TALCOTT PARSONS, *The Professions and Social Structure*, *in* ESSAYS IN SOCIOLOGICAL THEORY 33, 35-37 (rev. ed. 1954).

flawed because it fails to acknowledge the complexity of the dynamic interplay between the different forms of intervention. It assumes a unitary normative vision: an agreement about the regulatory ends—social incentives—and explores how such regulatory ends should be pursued. It ignores the related question of who should regulate the social ends. But the questions are related, and the separation is misleading. *How* to achieve the regulatory end depends on *who* is responsible for regulating. The forms of regulation are dynamic and depend on the identity of the regulator. If the state is the ultimate authority of social intervention, it can employ law norms directly but may experience difficulties utilizing social norms because of conflicts of normative visions with bar associations, which in fact promulgate and enforce social norms. This is particularly troubling in the context of legal practice where asymmetric information problems suggest that the state must rely on self-regulation by bar associations. Similarly, if the bar sets the normative vision and is responsible for social intervention it can employ social norms directly but may encounter an uncooperative state, which might refuse to lend its law norms powers toward the achievement of the regulatory end. Ignoring the question of who should regulate lawyers and assuming a unitary normative vision distorts the analysis of social intervention, falsely portraying the regulatory tools available for the pursuit of the regulatory end.[123] A more accurate account of social intervention should incorporate the power play between the state and the bar.

Social norms and bar associations play an extremely important role in the regulation of lawyers. One should not be misled by the mere fact that the norms governing lawyers' conduct are codified and pronounced law by the states. It does not mean that the state, rather than the bar, is in control of lawyers' regulation.

B. Professional Ideals as Social Norms

Legal scholars have recently discovered social norms, and have started to study the creation, transmission, and enforcement of social norms as well as the pairing of norms with social roles.[124] First generation

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[123] For a thoughtful discussion, see David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

[124] *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW (1991); ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985); George A. Akerlof, *A Theory of Social Custom, of Which Unemployment May Be One Consequence*, 94 Q.J. ECON. 749 (1980); B. Douglas Bernheim, *A Theory of Conformity*, 102 J. POL. ECON. 841 (1994); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989); ROBERT C. ELLICKSON, THE EVOLUTION OF SOCIAL NORMS: A PERSPECTIVE FROM THE LEGAL ACADEMY (Yale Law School Program for Studies in Law, Economics, and Public Policy,

scholarship was motivated by the observation that classical analysis has exaggerated the reach of law and underrated internally enforced norms (socialization), externally enforced norms, and the human pursuit of status.[125] Second generation scholarship studies the interdependence between social norms and law norms.[126] Despite the extensive interest in social norms, the scholarship fails to explore professional ideals as the basis for social norm regulation. Professional ideals constitute social norms. They constitute a form of informal social intervention that builds on lawyers' internalized sense of professional duty and fear of bar associations' and peers' sanctions. Professional ideals-based social norms may be an effective means of social intervention aimed at mitigating the divergence between the private and social incentives to practice law. Ideals, however, may also impose social costs. Indeed, ideals that create social benefit may simultaneously impose social costs and increase lawyers' private benefits. Recognizing the opportunity and danger in using professional ideals requires that the study of ideals as social norms be taken seriously.[127]

Some social norms arise because people seek the esteem of others and develop a preference for esteem.[128] The esteem-based theory assumes that an individual's utility depends in part on the opinion that she perceives others to hold of her. Esteem-based norms are created when (1) there is a consensus within the community about the positive or negative esteem worthiness of engaging in X; (2) there is some risk that others in the community will detect whether one engages in X; and (3) the existence of this consensus and risk detection is well-known within the community. All that is necessary for a consensus to emerge is that people within the community are opinioned and have an opportunity for discussion that allows for an exchange of information and persuasion.[129]

Working Paper No. 230, 1999); Richard Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369 (1999); Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); *see also* Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67 (1987); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. (1995); McAdams, *Regulation of Norms*, *supra* note 85. For an early economic account, see Steven N. S. Cheung, *The Fable of the Bees: An Economic Investigation*, 16 J.L. & ECON. 11 (1973).

[125] Ellickson, *Law and Economics*, *supra* note 60.

[126] Lessig, *supra* note 84.

[127] This article attempts to develop an interpretation of professional ideals that incorporates both economic and ethical concerns. Given the strong bias in the economics literature against ideals, my goal is to suggest an account of professional ideals rather than provide a complete argument.

[128] McAdams, *Regulation of Norms*, *supra* note 85 (referring to "esteem-based theory").

[129] *Id.*

Bar associations are communities within the legal profession that seem to satisfy McAdams' conditions. There is a consensus within the legal community about the positive esteem worthiness of engaging in good practice guided by professional ideals. There is a consensus about the negative esteem worthiness of deviating from such ideal principles. The principles—zealous representation, non-accountability, independence, public service, and commitment to the legal system—were likely to emerge as lawyers had ample opportunities to engage in a meaningful discourse. Bar associations' meetings, journals and law reviews, and alumni meetings all facilitate the plausibility of a consensus. The legal environment guarantees a risk of detection in case of deviation from the ideals. Lawyers work in teams, in firms, and are constantly under the supervision of other lawyers and judges.[130] Finally, bar associations often satisfy the publicity requirement by conveying the status of any member quite effectively to the other members taking advantage of their newsletters, bar journals, conferences, and continuing legal education workshops.

An alternative theory suggests that social norms arise because individuals acquire a preference for conformity to behavioral standards—the consensus—and suffer psychological costs when they fail to conform, whether or not others are aware of the violation.[131] Professor Robert Cooter explains that a "unanimous endorsement" of the consensus occurs when group members face a collective action problem in which there is, for everyone, one optional signal.[132] Uniform signaling takes place because people increase their opportunities for dealings with others by representing themselves as committed, for example, to morality.[133] Most people say that everyone should be truthful, cooperative, reliable, etc.[134] Most people's willingness to say these things constitutes a consensus about conventional morality.[135] Such "unanimous endorsement" leads to internalization.[136]

Cooter's analysis suggests that internalization of ideals-based social norms is likely in the context of bar associations. Given the asymmetric information gap between lawyers and clients, lawyers will increase their private benefits by representing themselves as conforming to professional

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[130] The legal profession prides itself on being self-policing. The Model Rules require every lawyer to report misconduct by other lawyers. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3 (2000).

[131] Cooter, *supra* note 85 (discussing "commitment-based internalization theory").

[132] *Id.* at 954-55.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* at 956-57.

ideals.[137] A consensus will emerge about conventional ideals-based social norms and lawyers will in turn internalize it.[138]

A third theory of social norm creation may be constructed based on Amartya Sen's *Rational Fools* argument.[139] Sen departs from the self-interest assumption (shared by McAdams and Cooter) and develops the concept of commitment, defined "in terms of a person choosing an act [X] . . . that he believes will yield a lower level of personal welfare to him than an alternative that is also available to him."[140] Commitment thus involves a "counterpreferential choice, destroying the crucial assumption that a chosen alternative must be better than . . . the others for the person choosing it."[141] It also "drives a wedge between personal choice and personal welfare," concepts that traditional economic theory equates.[142] Commitment is not appropriate in all contexts, but Sen asserts its relevance in analyzing public good situations:

> [E]conomic theory . . . tends to suggest that people are honest only to the extent that they have economic incentives for being so. This is [the] homo-economicus assumption which is far from being obviously true . . . . No society would be viable without some norms and rules of conduct.[143]

Both McAdams and Cooter attempt to build on Sen's argument but both seem to fall back too quickly to the traditional economic assumptions. Indeed, building on Harsanyi's distinction between "ethical" and "subjective" preferences,[144] Sen suggests a structure of preference ranking according to which individuals ask themselves what type of preference they would like the others in their community to have.[145] Then, on "somewhat Kantian grounds," they consider the case for adopting those preferences themselves behaving as if they had them.[146] One could argue that lawyers who are repeat players have an opportunity on "somewhat Kantian grounds" to adopt ideals-based social norms.[147]

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[137] AUERBACH, *supra* note 20.

[138] Cooter, *supra* note 85, at 956-57.

[139] Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977).

[140] *Id.* at 327.

[141] *Id.* at 328.

[142] *Id.* at 329.

[143] *Id.* at 332 (quoting LEIF JOHANSEN, THE THEORY OF PUBLIC GOODS: MISPLACED EMPHASIS (1976)).

[144] *Id.* at 336-37. *See* J. Harsanyi, *Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 315 (1955).

[145] Sen, *supra* note 139, at 336-37.

[146] *Id.* at 335-341; *see also* T. M. SCANLON, WHAT WE OWE TO EACH OTHER (1998) (contrasting Scanlon's Contractualist moral theory with Sen's idea of commitment).

[147] One may read Gilson, *supra* note 66, as making a similar claim.

1. An Example of Ideals-Based Social Norms: Corporate Civil Litigation

Many legal commentators argue that lawyers have an over-incentive to practice commercial civil litigation.[148] Corporate civil litigation is litigation between large corporations over commercial disputes. The practice is sometimes referred to as strategic litigation because sophisticated corporations who are often repeat players use litigation in a strategic manner as a means of conducting their businesses.[149]

The private benefit to lawyers from practicing corporate litigation is typically very high: large corporations can and do pay substantial fees to their lawyers. The social benefit is, however, usually low. Strategic litigation does not usually decrease uncertainty nor does it reduce conflicts; to the contrary, it often stirs up litigation.[150] Such litigation is often pursued strictly to advance the private interests of corporate clients rather than to promote social causes. Finally, strategic litigation imposes significant costs on the legal system and results in few positive externalities in the form of precedents.[151] The private cost to civil litigators is typically low: strategic corporate clients pay very well and lawyers do not usually have a comparable lucrative alternative source of income. The social cost of strategic litigation is high: both parties impose the operation costs of the judicial system on society, the transfers between the corporations may affect the production decisions of the parties, and corporations externalize their costs by raising prices. Incentive analysis confirms the complaints regarding strategic litigation.

Law norms turn out to be an inappropriate method of addressing the over-incentive of lawyers to practice commercial civil litigation. Law norms may be employed in an attempt to decrease lawyers' private benefits from strategic litigation. They can regulate behavior directly by forbidding lawyers from representing commercial clients in certain proceedings before governmental agencies, or increasing the sanctions imposed on lawyers for

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[148] *See* Lucian A. Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1 (1996); *see also* LUCIAN ARYE BEBCHUK, ON DIVISIBILITY AND CREDITABILITY: THE EFFECTS OF THE DISTRIBUTION OF LITIGATION COSTS OVER TIME ON THE CREDITABILITY OF THREATS TO SUE (John M. Olin Center for Law, Economics and Business, Working Paper No. 190, 1996); Lucian A. Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988); Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J. LEGAL STUD. 173 (1990); Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3 (1990); David Rosenberg & Steven Shavell, *A Model in Which Suits are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985).

[149] Galanter, *supra* note 111.

[150] *See, e.g.*, OLSON, *supra* note 81.

[151] *See supra* notes 77-81 and accompanying text.

engaging in frivolous litigation.[152] Such a measure is ineffective because there is seldom a way to sort out strategic litigation from non-strategic litigation. Law norms can also regulate market norms, for example, by increasing taxation on income generated in strategic litigation practice. In addition, law norms can attempt to increase lawyers' private costs by mandating pro bono work for every hour spent on strategic litigation or by requiring special additional training and certification for such a practice. Such measures, however, also require the ability to separate strategic and non-strategic litigation.

Professional ideals-based social norms may be a more effective method of social-intervention aimed at creating disincentives for strategic litigation practice. The ideal of the lawyer as an officer of the court who is responsible for the integrity of the legal system may prevent lawyers from practicing strategic litigation. Engaging in such a practice in violation of the professional ideal may result in internal and external sanctions, which would decrease lawyers' incentives to practice strategic litigation. Professional ideals may also decrease strategic corporate litigation by reducing lawyers' dependency on their corporate clients, and consequently, their exposure to client pressures to pursue such a practice. The independence ideal calls upon lawyers to maintain independence from their clients. Despite their fiduciary duties to their clients, lawyers should refuse to carry out meritless, yet strategically valuable, legal actions. Lawyers should keep a diversified portfolio of clients and refuse to commit a substantial portion of their practice to one client. The private costs for lawyers committed to professional ideals from violating the independence ideals may discourage their practice of strategic litigation.

Other conflicting ideals may, however, encourage strategic litigation practice. The zealous representation ideal directs lawyers to practice law as partisan advocates under the principle of non-accountability. Such an ideal suggests that lawyers should neither question nor judge the decision-making process of their clients and should hence pursue strategic litigation if so ordered by their clients. Furthermore, market norms undermine the officer of the court and independence ideals. Lawyers and law firms, who refuse to practice strategic litigation, would suffer financial loss because a sophisticated corporation would probably replace them with lawyers who would pursue such litigation. The transformation in the demand for legal services and the growth of competition makes it less likely that firms will be able to influence their clients' decision-making.[153]

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[152] *See* FED. R. CIV. P. 11.

[153] KRONMAN, *supra* note 12; David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARV. L. REV. 458 (1994).

Social intervention analysis suggests a mix of ideals-based social norms, law-regulation of market norms, and law-regulation of the demand-side for strategic litigation, *i.e.*, sanctioning the clients, as the appropriate way of addressing lawyers' over-incentive to practice strategic corporate litigation.

Note that the assertion that ideals may be used to mitigate the fundamental divergence between the private and social incentives to practice law does not entail a denial of the possible social costs associated with ideals. The legal profession may invoke ideals for its own self-serving purposes. For example, the bar may appeal to independence concerns in order to combat proposals regarding multidisciplinary practices.[154] The legal profession may indeed privately benefit from an insincere endorsement of professional ideals. The key issue from a social point of view is whether this social cost is outweighed by the beneficial effects of ideals in mitigating the divergence between the private and social incentives to practice law. In other words, the fact that the profession benefits from professional ideals and the use of such ideals imposes a social cost is not a sufficient reason to oppose ideals because of the benefits they entail in mitigating the fundamental divergence of the private and social incentives to practice law.[155]

2. A Second Example: The District Attorney

Incentive analysis suggests that there should be an under-incentive to practice law as a district attorney. The private benefit of such a practice is relatively low. The payment government lawyers receive in exchange for the legal services they produce is significantly lower than the compensation of non-government lawyers. The social benefit district attorneys create, however, is quite large. It consists of district attorneys' contributions to resolution of conflicts and the public's taste for the fair administration of the criminal justice system. Furthermore, district attorneys' private costs from legal practice—the high alternative payment in the private sector—is higher than the social cost of this practice—the salary costs incurred by the government. Incentive analysis would therefore predict an insufficient number of lawyers practicing as district attorneys.

Ideals-based social norms correct for the under-incentive of lawyers to practice law as district attorneys. The ideal of the lawyer as an officer of the court and the ideal of public service are internalized by lawyers and consequently increase the private benefit of such a practice. Note that

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[154] Fischel, *Lawyers and Confidentiality*, *supra* note 4.

[155] Ellickson endorses the hypothesis that a norm tends to enhance the welfare of the members of a group that adopts it. Ellickson, *Law and Economics*, *supra* note 60.

social norms may succeed where other methods of social intervention may be ineffective. Market norms, for example, suggest that the government would have to offer district attorneys' salaries competitive to those of the private sector in order to prevent them from leaving. Market norms cannot explain why absent a competitive pay district attorneys do not quit their jobs.

CONCLUSION: MONEY-GRABBERS, DO-GOODERS, AND THE LAW

The study of professional ideals reveals a gap which separates "law and economics" proponents and scholars of applied ethics, a disparity created by misunderstandings and even contempt for each other. Economists complain about the nonsensical nature of the ethicists' arguments about professional ideals, whereas ethicists accuse economists of reductionism and shallowness in treating the same concepts. The miscommunication between ethicists and economists is not limited to the domain of law.[156] The legal profession is an example of a broader phenomenon of miscommunication between ethics and economics. Sen has argued extensively about the lack of contact between ethics and economics: "I guess it is a reflection of the way ethics tends to be viewed by economists that statements suspected of being 'meaningless' or 'nonsensical' are promptly taken to be 'ethical'."[157] Sen's critique is particularly relevant at a time of great unrest and transformation in the legal profession.[158] It is most unfortunate that the two camps refuse to engage in a meaningful dialogue. The lack of such a discourse diminishes the collective understanding of the challenges facing the legal profession.

This article demonstrates that "law and economics" has much to learn from applied ethics. A careful examination of the ethical argument about the internal operation of ideals, a position the Posner-Fischel critique does not take seriously, led to the identification of the social benefit professional ideals yield—an effective method of social intervention. This insight

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[156] SEN, ETHICS & ECONOMICS, *supra* note 51.

[157] *Id. at* 31. In his book, Sen is concerned more with what ethics can do for economics than with its converse, concluding "I have tried to argue that the distancing of economics from ethics has impoverished welfare economics, and also weakened the basis of a good deal of descriptive and predictive economics." *Id.* at 78. However, he does argue that ethics can benefit greatly from incorporating the instrumental economic analysis. Sen also believes that the gap between ethics and economics is a rather recent phenomenon. For a historical view of this approach see F. Y. EDGEWORTH, MATHEMATICAL PSYCHICS: AN ESSAY ON THE APPLICATION OF MATHEMATICS TO THE MORAL SCIENCES (C. Kegan Paul & Co. 1881), and HENRY SIDGWICK, THE METHODS OF ETHICS (University of Chicago Press 1962) (1874).

[158] MARY ANN GLENDON, A NATION UNDER LAWYERS (1994); KRONMAN, *supra* note 12; SOL M. LINOWITZ, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY (1994); Solomon, *supra* note 5, at 144.

exposes the lacking nature of the existing "law and economics" account of professional ideals and facilitates a complete cost-benefit analysis of ideals. Importantly, applied ethics improves the economic analysis from within, making it a better argument without necessarily accepting its fundamental assumptions and reasoning. The economic interpretation of the internal operation of professional ideals assumes that lawyers do not take ideals directly into account when practicing law. Even if this assumption is valid, the ethicist account shows that ideals operate on an *internal-collective* level. That is, ideals may not affect lawyers' conduct directly but they serve as the basis for social norms that bar associations in their capacity as voluntary groups can create and enforce. Professional ideals thus operate on the legal profession at a collective level, facilitating the creation of social norms, which operate and constrain lawyers' conduct. The denial of the internal operation of ideals prevents economists from acknowledging the important role ideals may play in mitigating the fundamental divergence between the private and social incentives to practice law.

The ethical account also uncovers the misleading character of the "law and economics" recommendations for social intervention in legal practice. The Posner-Fischel critique of the external operation of ideals asserts that ideals impose a social cost, *i.e.*, they serve the interests of the legal profession at the expense of the general public, and bear no social benefit. Accordingly, "law and economics" scholars recommend deregulating the legal profession: striking down confidentiality rules, modifying the conflict of interests rules, and opening the gate for multidisciplinary practices.[159] Demonstrating the disadvantages of ideals-based social norms is, however, not the same as making a positive argument in favor of market norms. First, the social benefits of social norms have to be balanced against the social costs that social norms inflict. Second, market deregulation is a myth. "Deregulating" the market for legal services means, in fact, substituting ideals-based social norms and law norms for market norms. A complete economic analysis would explore the effect such "deregulation" would have on the behavior of lawyers and its effect on social norms, architecture norms, and market norms. The deep and complex interplay between the different types of constraint merits a careful study. The effects of such "deregulation" must be carefully evaluated before a conclusion can be reached as to its desirability.

Furthermore, the analysis must also examine the effects of market norms. That is, even if social norms and law norms are ineffective and costly, do market norms constitute a superior alternative? How will market

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[159] Fischel, *Lawyers and Confidentiality*, *supra* note 4; Fischel, *Multidisciplinary Practice*, *supra* note 4. *But see* Richard A. Epstein, *The Legal Regulation of Lawyers' Conflicts of Interest*, 60 FORDHAM L. REV. 579 (1992).

norms affect social norms, architecture norms, and law norms? For example, if market norms further weaken social norms and architecture norms, they may lead to under-incentives to practice law. One cannot reach a conclusion without a careful evaluation of the social intervention matrix. Market norms should not be employed until it has been proven that their overall effects are desirable. The "law and economics" recommendation in favor of deregulating the market for legal services is thus premature.

The economic account must also evaluate the effects of deregulation of social norms and law norms and the regulation by market norms on the power struggle between the state and the legal profession. It seems that market norms may weaken both the state and bar associations, and strengthen powerful private corporate interests. A complete economic analysis would identify those who stand to gain and those who will lose from the employment of market norms. A vague argument about the overall efficiency of market norms will not do for two reasons. First, there is an inherent assumption against market norms in the context of legal practice. Asymmetric information problems suggest that employing market norms will lead to non-optimal levels of legal practice.[160] As long as the information asymmetry is not relieved, there seem to be few alternatives to the current arrangement. Any market norms-based competitive approach in such a scenario, as Akerlof has demonstrated,[161] can potentially lead to complete market unraveling, which would leave both clients and the legal profession clearly worse off. Second, even if market norms can achieve the regulatory end, the analysis must identify particular winners and losers. As illustrated above, some instances of legal practice tend to benefit lawyers and their clients while others tend to benefit third parties and the general public. Market norms may skew the current distribution of legal services.

This article also demonstrates that applied ethics has a lot to learn from "law and economics." The cost-benefit analysis sheds an important light on the internal operation of professional ideals. By pointing out the social costs ideals impose, as well as the social benefits they bring about, economic analysis sets the stage for a better ethical understanding of what constitutes professional ideals and what goals and values professional ideals endorse.

Working together, "law and economics" and applied ethics enable a deep understanding of professional ideals and the role of lawyers. Ideals serve, simultaneously, the self-interest of the bar by allowing the profession

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[160] *See supra* notes 113-115 and accompanying text.

[161] George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 89 Q.J. ECON. 488 (1970).

to collect non-competitive rents, and the interests of society at large by leading to the creation of effective norms that safeguard the quality of legal practice. Lawyers are money grabbers but also do-gooders. They pursue legal practice because of the private benefits such practice entails but create through their practice social benefits that profit society as a whole. The economic and ethical collaboration makes possible an appreciation of the dual role of professional ideals, of the opportunities and dangers of ideals.[162]

The transformation of legal practice from a profession into a business and the influence of market pressures and competition on law practice suggest a decline in the influence of professional ideals on the practice of law.[163] Some ethicists argue that the demise of legal ideals is a negative phenomenon, even a crisis.[164] Others reject the crisis thesis and welcome the downfall of traditional legal ideals as an opportunity for the development of new ideals contending that the ideals were either flawed[165] or implausible[166] and hence deserving of challenges and critiques. Economists tend to celebrate the decline, arguing that professional ideals impose social costs and yield no social benefits.[167] This article contrasted the ethical and economic interpretations of ideals and constructed an account of ideals that is grounded in both methodologies. It thus paves the way for the study of the effects of professional ideals in different legal contexts, which will lead to a better understanding of the various crisis claims.

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[162] Louis D. Brandeis, The Opportunity in the Law, Address Before the Harvard Ethical Society (May 4, 1905), *in* 39 AM. L. REV., July-Aug. 1905, at 555. For an interesting early account, see JULIUS H. COHEN, THE LAW—BUSINESS OR PROFESSION? (1919).

[163] KRONMAN, *supra* note 12; Russell Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995). For early discussions of crisis claims see DAVID HOFFMAN, A COURSE OF LEGAL STUDY (2d ed. 1832) and Brandies, *supra* note 162. For a historical view see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 140-59 (1977).

[164] GLENDON, *supra* note 158; KRONMAN, *supra* note 12; LINOWITZ, *supra* note 158.

[165] Aaronson, *supra* note 19; Anderson, *supra* note 19; Michael DeBow, *The Eclipse of the Lawyer-Statesman: Costs and Benefits*, 26 CUMB. L. REV. 859 (1995-1996); Margulies, *supra* note 19; Menkel-Meadow, *supra* note 19; Wilkins, *supra* note 153.

[166] James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 YALE L.J. 1031 (1994); R. George Wright, *Whose Phronesis? Which Phronimoi? A Response to Dean Kronman on Law School Education*, 26 CUMB. L. REV. 817 (1995-1996).

[167] *See* POSNER, *supra* note 4; Fischel, *Lawyers and Confidentiality*, *supra* note 4; Fischel, *Multidisciplinary Practice*, *supra* note 4.