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Foreword: The Profession's Monopoly and Its Core Values

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COLLOQUIUM

**THE LEGAL PROFESSION'S
MONOPOLY ON THE PRACTICE OF LAW**

**FOREWORD:
THE PROFESSION'S MONOPOLY
AND ITS CORE VALUES**

*W. Bradley Wendel**

I.

The position of the organized bar regarding regulation—the bar's *nomos*, as Susan Koniak terms it¹—is stated right up front, in the preamble to the American Bar Association's (ABA) Model Rules of Professional Conduct. The legal profession aspires to be largely self-regulating, but in the American system, it depends on state courts to adopt and enforce the disciplinary rules it constructs.² Self-regulation ensures the independence of the legal profession from dominance by the legislative and executive branches of government.³ There is a *quid pro quo*, however; for the bar to retain its privilege of self-regulation, it must adopt regulations that are “in

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1. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1389 (1992).

2. MODEL RULES OF PROF'L CONDUCT pmbl. para. 10 (2013). The *Restatement (Third) of the Law Governing Lawyers* is clearer on the relationship between the organized bar and regulation by the judiciary: the American Bar Association proposes model rules, which are approved, promulgated, and enforced by state courts—generally the highest court in a state. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000). As a matter of constitutional law, the power to adopt rules for the regulation of the legal profession is inherent in the function of the judiciary. *Id.* § 1 cmt. c. The profession in other common law countries, notably Canada and New Zealand, is self-regulating to a much greater extent than in the United States. See, e.g., DUNCAN WEBB, ETHICS: PROFESSIONAL RESPONSIBILITY AND THE LAWYER 77 (2000); John M. Law, *The Legal Profession and Lawyer Regulation in Canada*, in ALICE WOOLLEY ET AL., LAWYERS' ETHICS AND PROFESSIONAL REGULATION 49 (2008); Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147 (2009). The United Kingdom and Australia, by contrast, have recently undergone comprehensive regulatory reforms driven by their respective parliaments. See, e.g., ANDREW BOON & JENNIFER LEVIN, THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES 109–29 (2008).

3. See MODEL RULES OF PROF'L CONDUCT pmbl. para. 11; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. d (“Self-regulation provides protection of lawyers against political control by the state.”).

the public interest and not in furtherance of parochial or self-interested concerns of the bar.”⁴ As Deborah Rhode, long a critic of the profession’s asserted monopoly on regulatory authority, has quipped, what distinguishes the American bar from a retail grocers’ association is the ability of the former to present self-regulation as a social value.⁵ The bar does not lack arguments in justification of its monopoly, including the traditional appeal to the relationship between regulatory independence and the rule of law. From this perspective, according to a partner at a prominent law firm,

the ethical rules for protecting the professional independence of the bar need to take into account the role of the legal profession as an independent bulwark between individuals or organizations and the political branches of government.⁶

Independence is a social value, in this view, because it permits the client to be completely candid with the lawyer who, in turn, will be in a position to counsel the client on compliance with the law.⁷ On this conception of independence, the legal profession should not be subject to regulation by government agencies, such as the SEC, which “are not in any meaningful way adjudicative entities whose responsibility it is to be impartial and to eschew political direction.”⁸ Protecting the rights of citizens, an essential aspect of the rule of law, therefore requires an independent legal profession.

Difficulties with the traditional defense of the professional monopoly have long been apparent, even before the recent challenges posed by the globalization of the market for legal services and the potentially disruptive effects of information technology. One problem is that the bar seems to worry about only one type of interference with the professional judgment of lawyers. The bar tends to worry very much that the advice given to clients by their lawyers will be skewed by the lawyers’ quite understandable interest in avoiding legal sanctions imposed on them by government regulators.⁹ But this concern relates to only one side of the tacit bargain between society and the legal profession. Lawyers enjoy the privilege of self-regulation so that they can practice *in the public interest* the craft of representing clients within the bounds of the law. In order to act in the public interest, lawyers must also remain independent, to a significant

4. MODEL RULES OF PROF’L CONDUCT pmb1. para. 12.

5. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 143 (2000).

6. Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281, 1281 (2003).

7. In a frequently cited passage, the U.S. Supreme Court described the purpose of the attorney-client privilege similarly, as “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

8. Davis, *supra* note 6, at 1289.

9. See, e.g., Lawrence J. Fox, *The Fallout from Enron: Media Frenzy and Misguided Notions of Public Relations Are No Reason To Abandon Our Commitment to Our Clients*, 2003 U. ILL. L. REV. 1243, 1250–52 (worrying that overzealous SEC regulation of business lawyers will deprive clients of information to which they are entitled).

degree, from the interests of their own clients.¹⁰ The civic republican ideal often associated with the private practice career and writings of Justice Louis D. Brandeis emphasizes the legal profession's mediating role, seeking to balance the interests of various factions to arrive at a socially desirable outcome.¹¹ Thus, lawyers for a powerful corporation may be called upon to "use their influence to discourage their clients from unjust or antisocial projects."¹² This is a far cry from the preoccupation with the interests of clients that one often finds in defense of the profession's monopoly on regulation. It is clear from the bar's response to the SEC's repeated attempts to regulate securities lawyers that these lawyers are not thinking of themselves as wise "lawyer statesmen" who are uniquely positioned to deliberate about what would be best from a public-spirited point of view.¹³ Instead, after each of several repeated episodes of lawyer complicity in massive financial frauds by their clients, lawyers worried not that they were not doing enough to protect the public interest, but that proposed government regulations would turn them into whistleblowers or deputy law enforcement officers.¹⁴ Lawyers have not been observed clamoring for regulatory standards that increase their distance from clients. The bar's own actions belie its assertions concerning the connection between its regulatory monopoly and the public interest.

Another problem with the traditional defense of the regulatory monopoly is that the bar appears to pay only lip service to the problem of access to justice for poor and middle-income people.¹⁵ Outside the context of the right to counsel in felony criminal prosecutions,¹⁶ the law governing lawyers recognizes exclusively negative rights to counsel. That is, there is no positive right to have a lawyer provided and paid for by public funds, and others are prohibited from interfering with the lawyer-client relationship in certain ways.¹⁷ The organized bar readily rallies to defend

10. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 13–14 (1988).

11. *Id.* at 14 (quoting LOUIS D. BRANDEIS, *The Opportunity in the Law* (May 4, 1905), in *BUSINESS—A PROFESSION* 329, 337 (1933)).

12. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 128 (1998).

13. Cf. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 127, 141–43 (1993) (arguing for a conception of legal ethics in which lawyers internalize an attitude of civic-mindedness and endeavor to set aside concerns for the private interests of their clients).

14. See, e.g., Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 108 (2010); Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1270, 1273 (2003).

15. See, e.g., Rebecca Aviel, *Why Civil Gideon Won't Fix Family Law*, 122 YALE L.J. 2106 (2013); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785 (2001).

16. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that the right to counsel applies to all defendants in felony crime cases).

17. A clear example is the anticontact rule, under which attorneys are prohibited from contacting opposing parties who are represented by counsel in the matter. See MODEL RULES OF PROF'L CONDUCT R. 4.2 (2013).

these negative rights, such as the attorney-client privilege, from any conceivable threat.¹⁸ In contrast, it is passive, for the most part, in the face of massive deprivations of the positive right to counsel. To take an obvious example, parents facing a state proceeding seeking to terminate their parental rights do not have a right to publicly funded legal representation, even though the interest in preserving the relationship with one's children is of overwhelming importance—probably more important for most parents than avoiding a thirty-day jail sentence for shoplifting.¹⁹ Similarly, public-benefits claimants may require an attorney to face bureaucratic obstacles or opposition to obtain the benefits to which they are entitled, but the legislative efforts to provide an effective positive right to counsel in public-benefits cases have mostly been laughable.²⁰ In any event, the U.S. Supreme Court has held that there is no constitutional prohibition on requiring civil rights claimants to waive the right to recover attorney's fees as a condition of settlement.²¹ The bar has also remained fairly quiet as business groups seek to intimidate and even defund law school legal clinics providing assistance to people suing for harms such as environmental damage.²² Although some bar leaders, such as the Chief Judge of the New York Court of Appeals, have taken concrete steps to mitigate the problem of access to justice,²³ by and large the legal profession seems unconcerned that its vigorous efforts to enforce its monopoly over the provision of legal services is exacerbating existing social disparities.

The legal profession has always been rhetorically committed to the distinction between a business and a profession²⁴ but has nevertheless accommodated itself to the influences of nonlawyers in some contexts.²⁵ Insurance defense representation is the clearest example. Liability insurers have the contractual right to control the defense of the insured's case,

18. See, e.g., Koniak, *supra* note 1, at 1398–1401 (recounting an example of the bar's resistance to attempts by prosecutors to issue subpoenas to defense lawyers).

19. See Aviel, *supra* note 15, at 2111.

20. See, e.g., Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 334–35 (1985) (upholding a \$10 cap on fees paid to attorneys to obtain death or disability benefits from the Veterans Administration).

21. Evans v. Jeff D., 475 U.S. 717, 719–20 (1986).

22. Accord David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 225, 236–40 (2003).

23. See N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16 (2013); see also Benjamin P. Cooper, *Mandatory Pro Bono Redux: Guest Correspondent's Report from the United States*, 15 LEGAL ETHICS 135, 135, 138–39 (2012) (describing Chief Judge Jonathan Lippman's initiative to require all law students to perform fifty hours of pro bono service as a condition of admission to practice in New York and describing the bar's "level of resistance to this relatively minor change").

24. See Ted Schneyer, "Professionalism" As Pathology: *The ABA's Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities*, 40 FORDHAM URB. L.J. 75, 94–102 (2012). Justice Sandra Day O'Connor famously relied on this distinction in her dissent in a lawyer advertising case. See Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 488–89 (1988) (O'Connor, J., dissenting).

25. See John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995, 3001 (2014) (noting that, despite the bar's resistance to multidisciplinary practices, large law firms have increasingly come to rely on nonlawyers to provide certain types of legal services).

including the hiring, supervision, and termination of counsel; access to confidential client information; and the settlement of the case. Although the insured is, at least, the lawyer's primary client (and, in some states, the sole client), defense lawyers have duties to insurers that may result in liability for malpractice in the event of breach.²⁶ As a result, the traditional model of the attorney-client relationship, with a single client to whom the attorney owes undivided duties of loyalty, breaks down in the insurance-defense context.²⁷ The *Restatement (Third) of the Law Governing Lawyers* includes a curious provision recognizing certain informal methods that have evolved for insurance defense lawyers to deal with conflicts of interest in ways that would be impermissible in other contexts:

Certain practices of designated insurance-defense counsel have become customary and, in any event, involve primarily standardized protection afforded by a regulated entity in recurring situations. Thus a particular practice permissible . . . under this Section [may not be permissible] for a lawyer in noninsurance arrangements with significantly different characteristics.²⁸

The insurance defense problem is the dog that did not bark for the profession's concern about its monopoly, independence, interference by nonlawyers, and core values. Here we have nonlawyers—liability insurers—with their own clear commercial interests, which are opposed in many cases to those of both lawyers and their clients, and yet are permitted to exercise significant control over the conduct of litigation. Moreover, the lawyers who are paid by liability insurers are permitted to fudge the rules on conflicts of interest. Granting that the liability insurance contract is extensively regulated by state law,²⁹ it is still difficult to reconcile the bar's acquiescence in the interference by nonlawyers in the attorney-client relationship in this context with its vehement opposition to the ABA Commission on Ethics 20/20's modest proposals for nonlawyer investments in law firms.³⁰

26. See, e.g., *Paradigm Ins. Co. v. Langerman Law Offices*, 24 P.3d 593, 601–02 (Ariz. 2001); *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Clark*, 152 P.3d 737, 739 (Nev. 2007). For an example of a “single client” case that nevertheless allows a lawsuit by the insurer against defense counsel under an equitable subrogation theory, see *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294, 298–99 (Mich. 1991).

27. See, e.g., Tom Baker, *Liability Insurance Contracts and Defense Lawyers: From Triangles to Tetrahedrons*, 4 CONN. INS. L.J. 101 (1997); Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987); Nancy J. Moore, *The Ethical Duties of Insurance Defense Lawyers: Are Special Solutions Required?*, 4 CONN. INS. L.J. 259 (1997); Thomas D. Morgan, *What Insurance Scholars Should Know About Professional Responsibility*, 4 CONN. INS. L.J. 1 (1997); Ellen Smith Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part I—Excess Exposure Cases*, 78 TEX. L. REV. 599 (2000); Ellen S. Pryor & Charles Silver, *Defense Lawyers' Professional Responsibilities: Part II—Contested Coverage Cases*, 15 GEO. J. LEGAL ETHICS 29 (2001); Douglas R. Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475 (1996); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995).

28. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134 cmt. f (2000).

29. Cf. Kent D. Syverud, *The Duty To Settle*, 76 VA. L. REV. 1113, 1120–21 (1990).

30. See Schneyer, *supra* note 24.

As a fallback argument in support of the professional monopoly, the organized bar often appeals to consumer protection as a policy objective. In contrast with the bar's response to group legal services plans, the argument in these cases is not that nonlawyers will interfere with the professional judgment of lawyers providing legal services. Rather, the fear is that nonlawyers might outcompete lawyers on pricing and induce consumers to entrust the protection of their rights to providers who lack the training and expertise to deal with complicated, sometimes esoteric legal issues. Many states have unauthorized practice of law (UPL) committees that aggressively pursue nonlawyers who attempt to provide legal services, who, in many cases, are addressing the legal needs of low- and middle-income clients.³¹ The apotheosis of UPL prosecutions was the effort by the Texas UPL committee to block the sale of Quicken Family Lawyer, a software product similar to TurboTax, which allows consumers to input information and prepare relatively simple legal documents such as wills, advance healthcare directives, and residential leases.³² Although the legislature quickly overturned the court's decision, the district court's grant of an injunction stood briefly as almost a self-parody of the bar's efforts to restrain competition.³³ Now the bar faces competition not just from software products, but from online providers such as LegalZoom and Rocket Lawyer.³⁴ LegalZoom abruptly pulled the plug on an announced initial public offering in August 2012,³⁵ but its net profit of \$12.1 million in

31. See, e.g., Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (Fla. 1978) (granting an injunction in a UPL action against a former legal secretary who interviewed clients in matrimonial matters and typed their information into legal forms); Prof'l Adjusters, Inc. v. Tandon, 433 N.E.2d 779, 783 (Ind. 1982) (invalidating a statute, on negative inherent power grounds, creating a paraprofession of "certified public adjusters" to assist insureds in making first-party insurance claims). See generally Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibition*, 34 STAN. L. REV. 1 (1981) (contending that, rather than protecting the public interest, the bar's campaign against the unauthorized practice of law has limited access to legal services by poor and middle-income clients).

32. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ. A. 2859H, 1999 WL 47235, at *1-2 (N.D. Tex. Jan. 22, 1999), *vacated and remanded per curiam*, 179 F.3d 956 (5th Cir. 1999).

33. In the discussion of the Quicken Family Lawyer litigation in his casebook, Stephen Gillers begins by assuring students that "[t]he following tale is not a spoof from *The Onion*." STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 647 (9th ed. 2012).

34. See, e.g., *Lowry v. LegalZoom.com, Inc.*, No. 2259, 2012 WL 2953109 (N.D. Ohio July 19, 2012) (dismissing a class action suit for lack of jurisdiction because the Ohio Supreme Court had not held that the activities of LegalZoom violated a state UPL statute); *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053 (W.D. Mo. 2011) (denying, in part, LegalZoom's motion for summary judgment in a class action filed by consumers asserting that LegalZoom violated a Missouri UPL statute); Pa. Bar Ass'n *Unauthorized Practice of Law Comm.*, Formal Op. 2010-01 (2010) (holding that LegalZoom and similar services violated Pennsylvania's UPL statute unless the services were provided by lawyers who were admitted to practice in Pennsylvania). The Missouri class action subsequently settled. See Samson Habte, *Class Action Against LegalZoom Isn't Valid Unless State High Court Finds UPL Violation*, 28 LWS. MAN. ON PROF. CONDUCT (ABA/BNA) 468 (2012).

35. See *LegalZoom Delays IPO*, L.A. BIZ (Aug. 3, 2012, 12:32 PM), <http://www.bizjournals.com/losangeles/news/2012/08/03/legalzoom-delays-ipo.html>.

the preceding year³⁶ is fairly strong evidence that consumer demand exists for lower-cost alternatives to traditional models of providing legal services. American lawyers might be casting nervous glances across the Atlantic, noting that concerns about consumer protection and access to justice motivated comprehensive *legislative* regulatory reform of the legal profession in England and Wales.³⁷

The cases of LegalZoom and Quicken Family Lawyer also reveal that one motivation for the reassertion of the values of professionalism and independence is the disruptive effects of technology. While the legal profession may not yet be facing the kind of existential threat that has revolutionized the recorded music industry, information technology has affected many traditional methods by which lawyers provided services to clients. The most obvious, at least to practicing lawyers, is 24/7 connectivity with clients and other lawyers, with the accompanying expectations of immediate responses to requests for information. The ABA Commission on Ethics 20/20 amended a comment to the competence rule to specify that lawyers should “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”³⁸ The Commission did not, however, provide some useful guidance to lawyers struggling to understand what competent representation requires when they are answering questions from clients on their smartphones, without the benefit of research, or even much time for reflection.³⁹ The Commission on Ethics 20/20 did acknowledge the risk that electronic communication and data storage technology could pose to the confidentiality of client information,⁴⁰ but again declined to provide specific guidance—perhaps wisely in this instance, given the frequency with which technological change occurs and the variety of threats to data security. For example, a report by the New York City Bar highlighted a case in which a two-person law firm defending a Marine accused of involvement in a massacre of civilians in Haditha, Iraq, was hacked by an online activist group.⁴¹ The firm had stored documents online with a

36. *Id.*

37. See, e.g., John Flood, *Will There Be Fallout from Clementi? The Repercussions for the Legal Profession After the Legal Services Act 2007*, 2012 MICH. ST. L. REV. 537, 537–47 (discussing the so-called Clementi report, DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: FINAL REPORT (2004)).

38. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2013).

39. In fairness to the Commission on Ethics 20/20, what is required by reasonable care is a question for state tort law, but to the extent the disciplinary rule on competence overlaps with the law of malpractice, the ABA's guidance would have been useful.

40. AM. BAR ASS'N, COMM. ON ETHICS 20/20, REPORT TO THE HOUSE OF DELEGATES (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf.

41. See N.Y.C. BAR ASS'N, COMM. ON SMALL LAW FIRMS, THE CLOUD AND THE SMALL LAW FIRM: BUSINESS, ETHICS AND PRIVILEGE CONSIDERATIONS 10 n.10 (2013), available at <http://www2.nycbar.org/pdf/report/uploads/20072378-TheCloudandtheSmallLawFirm.pdf>; see also Martha Neil, *Unaware 'Anonymous' Existed Until Friday, Partner of Hacked Law Firm Is Now Fielding FBI Phone Calls*, A.B.A. J. (Feb. 6, 2013, 3:02 PM), http://www.abajournal.com/news/article/unaware_that_anonymous_hacking_group_existed_until_friday_law_firm_partner/.

Google service, and the attack resulted in the disclosure of three gigabytes of private data, including emails between the firm and its clients.⁴² Model Rule 1.6 on confidentiality was recently amended to clarify that, in addition to tort and agency law duties to ensure the confidentiality of client information, lawyers have obligations also under the disciplinary rules.⁴³ How many lawyers can confidently say they use the best available techniques for securing their client data? As these sorts of cases continue to occur, the profession will undoubtedly adapt to new technologies, whether it wants to or not.

For every tradition-minded lawyer worried about the erosion of the legal profession's monopoly due to the encroaching effects of technology, services provided by nonlawyer businesspeople, and the values of the marketplace, there are innovative, entrepreneurial lawyers seeking new ways to deliver services to clients in an efficient manner that is consistent with the profession's core values. A certain reifying tendency is common in critical discussions of the profession's monopoly, including the tendency to assume that there is more that unites lawyers than divides them. As John Heinz and Edward Laumann demonstrated and subsequently (with new coauthors) reconfirmed, the practicing bar is strikingly differentiated by client identity, area of specialization, practice setting, and socioeconomic status.⁴⁴ For example, a plaintiff's personal-injury lawyer handling routine auto accident and premises liability cases may physically practice law a few blocks from an in-house lawyer for Goldman Sachs, but there is almost certainly a huge gulf between these lawyers in terms of ethno-religious background, undergraduate and legal education, political affiliation, and of course, income. The bar has likely become more differentiated in recent years. Maybe scholars would be better off if we no longer talked about *the profession*, but analyzed regulatory and ethical issues as they apply to differentiated *professions*. On the other hand, it may be that something of importance will be lost if we abandon the unified profession as an analytical category. That "something" is what makes the legal profession different in a normatively significant way—its core values. Too often the notion of core values is invoked in a question-begging way, or strategically, as a way

42. *Id.*

43. MODEL RULES OF PROF'L CONDUCT R. 1.6(c). A comment to the rule gives a more detailed analysis of the duties of lawyers regarding electronically stored client information:

Factors to be considered in determining the reasonableness of the lawyer's efforts [to safeguard confidential information] include the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).

Id. R. 1.6 cmt. 18.

44. See generally JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 6–16 (rev. ed. 1994); JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005).

of fending off competition.⁴⁵ But as the saying goes, just because you're paranoid, it doesn't mean they aren't after you. The profession may have core values that are worth preserving, even if the appeal to core values is sometimes a rhetorical makeweight. The most fundamental question that emerges in the context of the rapidly evolving market for legal services is, what makes lawyers worthy of special concern, i.e., what justifies their monopoly? This is not an empirical question but a normative one; it is about the values that make the legal profession distinctive.

A consideration is not a value, let alone a core value, unless it provides reasons for others to take a positive practical stance toward it—in other words, to approve of, support, and care about something.⁴⁶ This may mean participating in practices that have the effect of sustaining the thing that is valued.⁴⁷ Stated less abstractly, if something is said to be a core value of the legal profession, someone other than lawyers must care about it and wish for it to be preserved. It may turn out that a purported core value of the profession, such as a nearly absolute duty of confidentiality, is actually less important to clients than lawyers believe.⁴⁸ But there may be something about the role performed by the legal profession in society that is normatively significant from the point of view of society as a whole, not only from the self-interested perspective of lawyers. Two decades ago, the MacCrate report attempted to define the core values around which the legal profession is organized.⁴⁹ Despite the apparent fragmentation of the legal profession into numerous subgroups and specialized practice areas, the report argued that ethical lawyering in any context could be understood as responding to four fundamental values: (1) competence; (2) promoting justice, fairness, and morality; (3) improving the profession and its self-governance; and (4) one's own professional development.⁵⁰ Values (3) and (4) are parasitic on the first two; that is, one cannot say what counts as individual or collective improvement without a standard of excellence by which improvement may be measured. Thus, the profession's core values according to the MacCrate report are competent representation of clients and the promotion of the social values of justice, fairness, and morality. More recently the Carnegie report concluded, "Law schools fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills."⁵¹ Once again, moral and social values

45. See, e.g., W. Bradley Wendel, *In Search of Core Values*, 16 LEGAL ETHICS 350 (2014).

46. See, e.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993) (defending the expressive theory of value).

47. JOSEPH RAZ, *THE PRACTICE OF VALUE* (R. Jay Wallace ed., 2003).

48. See generally Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998) (arguing that nearly absolute confidentiality is more valuable to lawyers than clients).

49. AM. BAR ASS'N, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* (1992).

50. *Id.* at 140–41.

51. WILLIAM M. SULLIVAN ET AL., *THE CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 6* (2007).

are held out as core concerns of the profession. But despite the prominence of *talk* about moral and social values in professional self-study reports, it is difficult to come up with examples of concrete steps taken by leading institutions within the legal profession, such as the ABA, state and local bar associations, the judiciary, and the legal academy, which are directly aimed at increasing the responsibility of lawyers for promoting justice, fairness, and morality. Mandatory pro bono and clinical education are a start, but providing legal services to low-income clients is only a part of what is meant by social justice.⁵² More to the point, the bar's most vigorous defense of its independence generally occurs in cases where other institutions seek to hold lawyers responsible for promoting injustice. The controversy over the SEC's proposed Sarbanes-Oxley regulations occurred in the wake of financial accounting scandals, implicating the professional advice and assistance of elite lawyers.⁵³ The full extent of lawyer participation in the misconduct underlying the 2007 global financial crisis has yet to be revealed, but it is a safe bet that if there are calls for additional regulation of the legal profession, the organized bar will be opposed.

Scholars who assert that a core value of the legal profession is the promotion of justice and morality have in mind lawyers like Louis Brandeis, who saw themselves almost as Platonic guardians of the public interest. In a frequently recounted episode, Brandeis once told his client, a large manufacturing firm, that its employees' demands for higher wages were justified.⁵⁴ The conditions under which lawyers could effectively serve as the conscience of their clients, particularly large corporations, are generally believed to no longer exist. One reason, mentioned in many of the articles in the Colloquium, is the increasing power of in-house legal departments.⁵⁵ Not only have in-house counsel exerted tremendous pressure for cost containment, but they have assigned work to be performed by outside counsel on a matter-by-matter basis, so that retained lawyers now provide fairly narrow, technical assistance. It is hard to see how much moral advising can occur in the context of discrete, transactional relationships between outside lawyers and corporate clients. In-house lawyers may have more opportunities to provide moral advice to clients, but their dependence on one client, their employer, may make it even more difficult to offer detached, independent counseling.⁵⁶

Gillian Hadfield, commenting on the Brandeis story, highlights the distinction between a robust conception of client counseling and the kind of

52. See, e.g., RHODE, *supra* note 5, at 203–06; Russell G. Pearce, *MacCrate's Missed Opportunity: The MacCrate Report's Failure To Advance Professional Values*, 23 PACE L. REV. 575, 579–82 (2003).

53. Koniak, *supra* note 14, at 1239–42.

54. See, e.g., David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 722–23 (1988).

55. See, e.g., Dzienkowski, *supra* note 25. See generally THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 112–23 (2010); Ben W. Heineman, Jr., *The Rise of the General Counsel*, HARV. BUS. REV. BLOG NETWORK (Sept. 27, 2012, 1:00 PM), <http://blogs.hbr.org/2012/09/the-rise-of-the-general-counsel/>.

56. Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1335 (2006).

highly technical legal services requiring expertise in economics and finance that now typify large law-firm practice:

This is not to say there is no role for lawyers to act as an ethical breakwater when advising corporations about whether to facilitate Chinese government censorship of Internet search results, to manipulate their books to defraud investors and employee pension funds, or to resist fair settlement of employment discrimination claims. But it is to say that these normative considerations are of a fundamentally different character from the economic considerations, which dominate the work of the majority of lawyers today, of how to structure the delivery of Internet services in a country that lacks both physical and market infrastructure, how to design financial instruments that better diversify risk, or how to structure a more competitive employee benefits package to improve retention.⁵⁷

Herein lies the dilemma: if the core value of the legal profession, which justifies its monopoly over the provision of legal services, is concern for justice and morality, and there is little market demand for services directed, at least in part, at the realization of justice and morality, then the market and professional core values will work at cross-purposes.

II.

This preliminary discussion provides some background for the themes animating the articles presented at the Colloquium at Fordham Law School on October 18, 2013. One common theme among many of the conference presentations is that the profession may be losing its de facto monopoly over the provision of legal services, even as the official proponents of the professional *nomos*—i.e., courts and bar associations—continue to maintain that they are the only institutions competent to regulate lawyers. Professional regulators may be closing the corral gate long after the horses have run away. As William Henderson argues, “[T]he legal profession is becoming a subset of a larger legal industry that is increasingly populated by nonlawyers, technologists, and entrepreneurs.”⁵⁸ The American profession is under further pressure due to the globalization of the market for legal services.⁵⁹ Now, large multinational business clients can select lawyers in the United Kingdom, Australia, or elsewhere who are just as capable as American lawyers at providing the services required by transnational corporations, but who operate with fewer restrictions on capital structures and can therefore practice more efficiently. Finally, information technology enables the “unbundling” of legal services into discrete tasks and creates the infrastructure necessary for the domestic and global outsourcing of legal services, including the practice of so-called virtual law firms comprised of lawyers in different U.S. states and around

57. Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1704 (2008).

58. William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 462 (2013).

59. See generally William D. Henderson, *The Globalization of the Legal Profession*, 14 IND. J. GLOBAL LEGAL STUD. 1 (2007).

the world. *New York Times* columnist Tom Friedman has written that “anything that can be digitized can be outsourced to either the smartest or the cheapest producer, or both.”⁶⁰ The ability to digitize information has allowed firms to decompose or “unbundle” legal services into component parts, and find more efficient ways of handling some of the more routine tasks that traditionally have been performed by lawyers.⁶¹ A litigated matter or deal is composed of subtasks, some of which require highly specialized training, skills, and judgment, but others of which are simply commodity work. Coding documents for electronic discovery, for example, is highly routine and standardized.⁶² If legal matters can be broken down into subtasks, clients may begin to demand (as many clients already have) that lawyers charge prices for routine tasks that are set in a competitive market with many potential service providers.⁶³

If nonlawyers are involved in the provision of what traditionally have been considered legal services, there may be a risk that their involvement will compromise some of the core values of the legal profession. This is an argument often raised against third-party financing of legal services, the topic of the first two articles discussed at the Colloquium, and one of the subissues considered by the ABA Commission on Ethics 20/20.⁶⁴ Over half of U.S. states have now relaxed common law prohibitions on champerty and maintenance, allowing nonparties to provide financial assistance to a litigant in exchange for a right to share in the proceeds of the lawsuit.⁶⁵ The Working Group on Alternative Litigation Finance considered the ethical issues for lawyers that may arise in connection with the representation of a client making use of alternative litigation financing, concluded that the risks are manageable, and prepared a white paper analyzing the legal issues.⁶⁶ One of the issues left unresolved in the white paper is the extent to which a third party may exercise control over decisionmaking connected with an ongoing litigated matter. The High Court of Australia, in *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.*, commonly known as *Fostif*, was willing to permit an outside investor to

60. MORGAN, *supra* note 55, at 90–91 (quoting THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 13–14 (2005)).

61. See Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137 (2010).

62. This is not to say that judgment is not involved in designing systems for managing electronic document review. And, if professional judgment is involved, there may be significant ethical issues in the use of new technologies to handle what were formerly tasks firmly committed to the legal profession. See Dana Remus, *The Uncertain Promise of Predictive Coding*, 99 IOWA L. REV. (forthcoming 2014).

63. See RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 27–33, 100–05 (2010).

64. AM. BAR ASS'N, COMM'N ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES (2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informatio_nal_report.authcheckdam.pdf.

65. For an overview of the current state of champerty and maintenance law in the United States, see Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011).

66. AM. BAR ASS'N, *supra* note 64. I served as co-reporter, with Professor Sebok, to the working group.

exercise considerable control over the conduct of litigation, including the selection of counsel and the decision of whether to settle.⁶⁷ A court in the United States would be highly unlikely to go as far as *Fostif*, but it remains uncertain how much control a litigation financier could exercise. As noted above, U.S. law is quite comfortable with a significant degree of control in the hands of liability insurers. Should third-party litigation funding companies be permitted to exercise control to the same extent? Anthony Sebok considers this question by focusing on the professional value allegedly threatened by third-party control, i.e., independence.⁶⁸ To say lawyers are independent, of course, merely raises the question, “independent from what?” and the answer has been, at different times and given by different lawyers and scholars, independent from the state, from courts, from the legislative and executive branches, from financial considerations, and from the interests of clients. Professor Sebok usefully approaches this question by asking what it is that lawyers provide to clients that nonlawyers cannot (or do not) provide. Given the value of client autonomy, the bar has the burden of articulating something that lawyers provide to clients that clients may not, on their own volition, choose to give up. In her article, also considering alternative litigation financing, Michele DeStefano approaches the issue from an empirical angle, based on interviews with general counsels at large American business corporations.⁶⁹ She finds a significant demand by corporate clients for compliance advisors who were often insulated from oversight by the general counsel’s office. These officers may be practicing attorneys, but often are not. Professor DeStefano analogizes claim funding to corporate compliance advising, because both may involve the provision of legal advice by nonlawyers. If both are demanded by sophisticated entity clients (often with in-house legal counsel), one might reasonably conclude that the bar’s monopoly is disserving at least one sector of clients.

As the ABA Commission on Ethics 20/20 was holding hearings and deliberating, some observers wondered why alternative litigation financing was within the Commission’s mandate, which was to consider the need for changes to the Model Rules in light of globalization and information technology.⁷⁰ The answer is a certain amount of concern that “the British [and to a lesser extent, the Aussies] are coming!” Taking a page from the book of regulatory competition scholars,⁷¹ some American lawyers and

67. See *Campbells Cash & Carry Pty Ltd. v Fostif Pty Ltd.* [2006] HCA 41 (Austl.).

68. Anthony J. Sebok, *What Do We Talk About When We Talk About Control?*, 82 *FORDHAM L. REV.* 2939, 2940 (2014).

69. Michele DeStefano, *Compliance and Claim Funding: Testing the Borders of Lawyers’ Monopoly and the Unauthorized Practice of Law*, 82 *FORDHAM L. REV.* 2961, 2963 (2014).

70. See ABA COMM’N ON ETHICS 20/20, INTRODUCTION AND OVERVIEW (2012), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf.

71. See, e.g., John Armour, Brian R. Cheffins & David A. Skeel, Jr., *Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons from the United Kingdom*, 55 *VAND. L. REV.* 1699 (2002); Lucian A. Bebchuk, *Federalism and the*

academics believe that different regulatory regimes may offer a competitive advantage to non-U.S. law firms. Tom Morgan, for example, warns: “If American lawyers ignore the fact that their direct competitors play by different rules, they will have only themselves to blame when clients take advantage of these changes and seek the same or better professional services at lower cost elsewhere.”⁷² Australian lawyers, for example, are permitted to practice in publicly held law firms, perhaps giving them an edge accessing capital, which they can use to their competitive advantage if it enables them to provide the same services to clients at lower cost relative to other large-firm competitors.⁷³ If lawyers from other jurisdictions are going to eat our competitive lunches because American lawyers are hobbled by overly restrictive rules of professional conduct, perhaps the rules should be modified to reduce this competitive disadvantage. In the background of the regulatory-competition debate lies a prior issue that is sometimes underappreciated. That issue concerns the identity of the “direct competitors” to which Morgan alludes. Within the domestic market, competitors to lawyers are perceived to be accountants and consultants, investment bankers in the corporate client sector, and such relatively local and small-scale service providers as solo and small-firm accountants and real estate brokers in the individual client sector.⁷⁴ From a comparative perspective, it can be surprisingly difficult to define the occupational group in other countries that corresponds to the American legal profession. In Japan, for example, the licensed-lawyer (*bengoshi*) profession is strikingly small, but there are numerous allied occupational groups such as judicial scriveners, patent and tax agents, and law-trained corporate employees, which provide the type of legal services that would be the exclusive domain of American lawyers.⁷⁵ Out-of-court legal advising in connection with litigation may be performed by judicial scriveners in Japan, while giving advice to business corporations on compliance with law is largely the province of law-trained quasi-lawyers

Corporation: The Desirable Limits on State Competition in Corporate Law, 105 HARV. L. REV. 1435 (1992); Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003); Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD J. ECON. POL'Y 212 (2005).

72. MORGAN, *supra* note 55, at 90.

73. See Peter Lattman, *Slater & Gordon: The World's First Publicly Traded Law Firm*, WALL ST. J. (May 22, 2007, 9:19 AM), <http://blogs.wsj.com/law/2007/05/22/slater-gordon-the-worlds-first-publicly-traded-law-firm/>.

74. The differentiation of client groups into the corporate and individual client sectors or “hemispheres” is from HEINZ & LAUMANN, *supra* note 44, at 127–36.

75. See, e.g., Kahei Rokumoto, *The Present State of Japanese Practicing Attorneys: On the Way to Full Professionalization?*, in 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD 160 (Richard L. Abel & Philip S.C. Lewis eds., 1988); see also Dan Fenno Henderson, *Abstract of Japanese Lawyers: Types and Roles in the Legal Profession*, 3 LAW & SOC'Y REV. 411 (1969); Richard S. Miller, *Apples vs. Persimmons—Let's Stop Drawing Inappropriate Comparisons Between the Legal Professions in Japan and the United States*, 17 VICT. U. WELLINGTON L. REV. 201 (1987).

who have not passed the bar exam or graduated from the Legal Training and Research Institute (LTRI).⁷⁶

Laurel Terry's contribution to this Colloquium accordingly considers the scope of the legal profession's monopoly in other countries.⁷⁷ She challenges the conventional wisdom that lawyers outside the United States have a monopoly only over courtroom advocacy (as in the case of *bengoshi* in Japan and barristers in England and Wales, with some qualifications), with an open competitive field outside the courtroom. The story on the ground is much more complicated than the conventional wisdom suggests, and a great deal remains unknown. At the very least, one should be skeptical of lawyer-equivalent titles and look functionally at which occupational group is performing certain tasks, regardless of what title is used.

Carole Silver considers the globalization of legal *education* in her article.⁷⁸ Lawyers are producers in the market for legal services, so law schools must be understood as being part of a market for producers of producers. If there is competition in the market for legal services, then presumably educational institutions might compete to produce lawyers (or nonlegal service providers) to meet the needs of clients. Law schools in the United States compete to attract applicants from overseas, and as Silver demonstrates, the American model of legal education has been remarkably influential internationally. But the open question has been whether the ABA would recognize legal education obtained outside the United States as satisfying the education prerequisite for bar admission. Once again, Australia is noteworthy for its entrepreneurial energy in the global market for legal services, with the Australian Law Council seeking to qualify its country's graduates pursuing admission to practice in the United States. In 2012, however, the ABA's Special Committee on Foreign Law School Accreditation unanimously voted not to pursue further the possibility of accrediting law schools located outside U.S. territory.⁷⁹ In light of the difficulties facing many U.S. law schools, including precipitously declining enrollments and a tight job market for recent graduates,⁸⁰ the ABA's reluctance to open up the American job market to competition from foreign-trained lawyers is perhaps understandable. Silver's and Terry's arguments, taken together, is that antitrust and free trade norms in an increasingly global marketplace will continue to exert pressures on producers (lawyers) and producers of producers (law schools) regardless of the inaction of the

76. Rokumoto, *supra* note 75, at 164; Isaac Shapiro & Michael K. Young, *The Role of Law and Lawyers in Japan and the United States*, 7 MICH. Y.B. INT'L LEGAL STUD. 25, 31 (1985).

77. Laurel S. Terry, *Putting the Legal Profession's Monopoly on the Practice of Law in a Global Context*, 82 FORDHAM L. REV. 2903, 2904 (2014).

78. Carole Silver, *Globalization and the Monopoly of ABA-Approved Law Schools: Missed Opportunities or Dodged Bullets?*, 82 FORDHAM L. REV. 2869, 2869 (2014).

79. *Id.* at 2890–91. Schools affected by this decision included, in addition to the Australian law schools, the relatively recently established Peking School of Transnational Law, which offers a U.S.-style legal education in Shenzhen, China.

80. See generally BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012).

organized bar, which may find itself in the position of merely rearranging deck chairs on the *Titanic* while the bar crashes into the iceberg of globalization.

A similarly disruptive effect—this time, of technology—was the theme of an article by Benjamin Barton and another coauthored by John McGinnis and Russell Pearce.⁸¹ To put these articles in context, consider the claim made by Richard Susskind, that the legal profession is undergoing a transformation from providing a mostly “bespoke” product. That is, from custom-crafted, one-off, highly labor-intensive services tailored to the needs of a particular client with respect to a particular matter, toward an increasingly standardized product that can be delivered more efficiently using process, technology, and automation.⁸² The move toward the delivery of more commoditized products is being driven by clients, who are not willing to pay Saville Row prices when they can obtain a product off-the-rack that suits their needs (even if it is not custom tailored). Where there is demand for a product or service, someone is likely to provide it, and the last decade has seen significant growth among firms providing legal support, electronic discovery and due diligence support, and legal process outsourcing (LPO) services.⁸³ Professor Barton’s article identifies a dynamic that occurs in any market in which a disruptive technology is introduced.⁸⁴ As work that was previously performed on a custom basis is challenged by mass-produced, cheaper, standardized substitutes, legacy producers who cannot compete on price hunker down and defend their model of bespoke production. At first, this is a successful strategy, as the new entrants take only the segment of the market in which consumers are highly price sensitive and not primarily concerned about quality. As Professors McGinnis and Pearce note, some “superstar” producers of customized products will even be able to command a premium for their services.⁸⁵ But look out! Eventually the low-cost producers figure out a way to provide high-quality goods or services, and do so in the more efficient manner they have pioneered. When this happens, the dinosaur firms are unable to compete on price or quality, so they attempt to use influence and lobbying to defend their turf.⁸⁶ The emerging discipline of legal analytics, enabled by significant advances in machine intelligence (think of Watson, the *Jeopardy*-playing computer developed by IBM), has enabled lawyers to do better than ever at conducting discovery, predicting

81. Benjamin H. Barton, *The Lawyer’s Monopoly—What Goes and What Stays*, 82 FORDHAM L. REV. 3067 (2014); John O. McGinnis & Russell G. Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041 (2014).

82. See SUSSKIND, *supra* note 63, at 29–32.

83. See Henderson, *supra* note 58, at 482–87.

84. See Barton, *supra* note 81, at 3084 (discussing CLAYTON CHRISTENSEN, *THE INNOVATOR’S DILEMMA: THE REVOLUTIONARY BOOK THAT WILL CHANGE THE WAY YOU DO BUSINESS* (2011)).

85. See McGinnis & Pearce, *supra* note 81, at 3054.

86. See *id.* at 3042 (“The surest way for lawyers to retain the market power of old is to use bar regulation to delay and obstruct the use of machine intelligence.”).

the results of litigation (and therefore facilitating settlement), and enabling lawyers to improve document drafting by using a database of benchmark contracts.⁸⁷ These articles thus tell a regulatory-capture story familiar from public-choice theory.⁸⁸

Because the antonym of a captured regulatory agency is one that acts in the public interest, seemingly marginal issues, such as the regulation of the unauthorized practice of law, present important normative matters concerning the nature of the public interest in the regulation of the legal profession. The profession must appeal to public values in order to justify its monopoly, but as Laurel Rigertas argues, it tends to focus too narrowly on some values to the exclusion of others.⁸⁹ There is no doubt that regulation can be justified as a means of ensuring the quality of some product or service; the Food and Drug Administration, for example, legitimately prescribes standards for the labeling of pharmaceuticals, because most consumers are not sufficiently knowledgeable about medicine and the formulation of drugs to know of the associated risks. Similarly, professional regulators can require that would-be lawyers graduate from law school and pass the bar exam, because prospective clients have no other way of knowing whether someone who holds herself out as a provider of legal services is competent. But overbroad regulation may interfere with consumer choice. Products liability law, for example, tries to avoid the imposition of safety standards that mandate a particular risk-versus-utility tradeoff if there are consumers for whom it would be rational to forego the benefit of a safety feature.⁹⁰ Every first-year torts student learns the Hand formula, $B < PL$, indicating that there is a duty to take some safety precaution only when doing so would cost less than the expected accident costs if the precaution were not taken multiplied by the probability of the accident occurring.⁹¹ Applying this analysis to the legal profession's monopoly, suppose there were some nonlawyer or software product that could do a pretty good job preparing a divorce petition in a relatively

87. *See id.* at 3045–46.

88. *See, e.g.,* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167 (1990).

89. *See* Laurel A. Rigertas, *The Legal Profession's Monopoly: Failing To Protect Consumers*, 82 FORDHAM L. REV. 2683, 2694 (2014).

90. *See, e.g.,* *Linegar v. Armour of Am.*, 909 F.2d 1150, 1154–55 (8th Cir. 1990) (holding that body armor for police officers was not defective in design for failing to include side protection, because the vest in question permitted greater mobility and was not as hot for the wearer); *Scarangella v. Thomas Built Buses, Inc.*, 717 N.E.2d 679, 683–84 (N.Y. 1999) (concluding that a school bus was not defective due to the lack of a backup alarm, because a reasonable school district might conclude that the annoyance of the alarm was not worth tolerating given other means of avoiding danger).

91. *See* *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). I take no position here on the long-running debate over whether economic cost-benefit analysis exhausts the reasonable-care inquiry, as Judge Richard Posner contends. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 29–34 (1972) (discussing whether negligence is economically inefficient behavior or whether the Hand formula is merely a useful but incomplete heuristic, illustrating the impact of regulation on consumer choice).

uncomplicated situation.⁹² Hypothetically, imagine that there was a 5 percent chance that a consumer who used the nonlawyer would suffer a \$10,000 loss caused by negligence, and that a consumer who instead retained a fully licensed lawyer would have only a 1 percent likelihood of experiencing a loss due to negligence. When would a risk-neutral consumer opt for the lawyer? The answer is when the price differential between services provided by a lawyer and nonlawyer is less than \$400, which is the savings in the expected cost of errors due to negligence. In terms of reduction in error costs, it is worth it to spend \$300 more on a lawyer, but not to spend \$500 more. Fully informed consumers ought to be able to make this type of purchasing decision, and they could if professional regulation were aimed at reducing information costs, rather than eliminating competition from nonlawyers entirely.

Along these lines, another theme that emerged in the Colloquium is that the claim by the profession to a legitimate monopoly over the provision of legal services rests on empirically unsupported premises. Consider the consumer protection rationale. A district court accepted the bar's proffered justification for enforcing UPL restrictions against LegalZoom—namely, that if nonlawyers are permitted to provide legal services, “there is a clear risk of the public being served in legal matters by ‘incompetent or unreliable persons.’”⁹³ Deborah Rhode has long argued that the profession has, at best, only anecdotal evidence for this claim,⁹⁴ and her recent research shows that relatively few complaints come to state UPL regulators from consumers who have been harmed by poor quality services.⁹⁵ As Leslie Levin shows in her contribution to this Colloquium, there is evidence that clients represented by lawyers get better results in litigated disputes than clients who are unrepresented, but what little evidence is available suggests that lawyers do not do better than representatives with no legal training.⁹⁶ Citing a study by Herbert Kritzer, she observes that formal legal training is less important than experience with both the subject matter and the players involved in the process.⁹⁷ Contrary to the “myth of omniscience,”⁹⁸ it may be the case that professional expertise is highly differentiated. Merely being admitted to practice law does not guarantee

92. Consider the recently enacted rule in Washington State permitting the provision of certain services by limited license legal technicians, discussed *infra* notes 108–10 and accompanying text.

93. *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1064 (W.D. Mo. 2011) (quoting *Hulse v. Criger*, 247 S.W.2d 855, 858 (Mo. 1952)).

94. See, e.g., Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 J. INST. STUDY LEGAL ETHICS 197, 204–06 (1996).

95. Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 FORDHAM L. REV. 2587, 2598 (2014).

96. Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority of Lawyers*, 82 FORDHAM L. REV. 2611, 2619, 2621 (2014).

97. *Id.* at 2620.

98. HEINZ & LAUMANN, *supra* note 44, at 12.

one's competence at any particular task, let alone one's comparative advantage over nonlawyer professionals at performing that task.⁹⁹

The next set of articles considers the professional monopoly and core values debate in the context of the failure of the ABA Commission on Ethics 20/20 to submit even a very limited alternative business structures (ABS) reform to the House of Delegates. The Commission may be faulted for not seeking to innovate in the area of law-practice structures, but it may also be forgiven for not wanting to relive the experience of the acrimonious debate over multidisciplinary practices (MDPs) from over a decade ago.¹⁰⁰ As John Dzienkowski's article shows, however, regardless of what regulators do, some innovation is bound to be the product of pressure from corporate clients to reduce the costs of legal services.¹⁰¹ He discusses six different companies that have been formed to offer corporate consumers of legal services alternatives to large law firms. Some, like Clearspire and VLP Law Group, are merely law firms reengineered for greater efficiency, for example, by eschewing fancy downtown office space for remote locations or lawyers who work at home. Others, such as Paragon and AxiomLaw, provide, among other things, solutions to short-term staffing crunches by making lawyers available on a project-by-project basis. It is not yet clear how "disruptive" these new models of law firm organization will be, as they represent mostly marginal tinkering with existing models. Yet, they appear not to have attracted the kind of concerted opposition that doomed the ABS and MDP proposals. Moreover, one gets the impression that corporate clients will be able to use their economic clout and the expertise of in-house counsel's offices to get whatever they want from their outside providers of legal services. As Dzienkowski notes, despite the ABA's resistance to allowing even limited experiments with alternative practice structures, "corporate clients have increasingly relied upon the

99. The Gillers casebook includes an excerpt from *Professional Adjusters, Inc. v. Tandon*, 433 N.E.2d 779 (Ind. 1982), which involved an attempt by the Indiana legislature to create a licensed paraprofession called certified public adjusters to assist the insured in dealing with their insurance companies (who were represented by their own adjusters, who were nonlawyer employees). Gillers rightly says in a note following the case: "I'd wager that trained (and licensed) insurance adjusters are as good as, if not better than, most lawyers at interpreting property insurance contracts." GILLERS, *supra* note 33, at 643. It is an empirical question, but it does seem intuitively plausible that familiarity with insurance contracts and the practices of various insurers is a far more important determinant of competence than possessing a license to practice law. Consider by analogy the relationship between frequency of performing a procedure and error rates in surgery. See Atul Gawande, *No Mistake*, NEW YORKER, Mar. 30, 1998, at 77 (reporting that, in contrast with a baseline failure rate of 10 to 15 percent in hernia repair operations, a small medical center in Canada achieves a 1 percent failure rate at half the cost, because all the surgeons in the medical center do nothing but hernia operations).

100. For thoughtful analyses of the debate, see Nathan M. Crystal, *Core Values: False and True*, 70 FORDHAM L. REV. 747 (2001); Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1155-57 (2000); James W. Jones & Bayless Manning, *Getting at the Root of Core Values: A "Radical" Proposal To Extend the Model Rules to Changing Forms of Legal Practice*, 84 MINN. L. REV. 1159, 1159-60 n.2 (2000).

101. Dzienkowski, *supra* note 25, at 2999.

nonlawyer-controlled delivery of certain types of legal services.”¹⁰² Middle-income consumers have no equivalent leverage in the market. Deborah Rhode and Lucy Ricca accordingly consider the situation of relatively unsophisticated consumers of legal services in the individual-client hemisphere.¹⁰³ They recommend a regulatory approach that aims directly at consumer protection and quality assurance.¹⁰⁴ In the immigration area, for example, consumers are often victimized by nonlawyers who call themselves notaries, seeking to capitalize on consumer confusion with the prestige of the legitimate civil law profession of *notario*.¹⁰⁵ This type of fraud could be controlled to some extent by expanding licensing for qualified nonlawyer immigration advocates, as is presently done in Australia, Canada, and the United Kingdom.¹⁰⁶ Jessica Dixon Weaver, however, questions the conventional wisdom that nonlawyer-provided legal assistance, including filing forms in matrimonial cases, will improve access to justice without harming pro se litigants.¹⁰⁷

The penultimate panel continued this theme of the effects of fragmentation of the legal profession and, consequently, the decentralization of regulation. Jack Sahl’s article comes at the issue from two different directions.¹⁰⁸ First, he looks at a limited move toward what has been called a “driver’s license” model of state regulation, in which a new applicant will be admitted to practice in a particular state, but then will be permitted to practice in any other state, just as my New York driver’s license entitles me to drive in Texas. The Commission on Ethics 20/20 considered and rejected a proposal modeled on Colorado’s rule permitting lawyers admitted in other states to practice in Colorado as long as they do not establish an office in the state.¹⁰⁹ Sahl describes a resolution by the Conference of Chief Justices aimed at making it easier for the spouses of military service members to become admitted to practice without taking the bar exam. He advocates for extending similar rights to other moving lawyers, and, wisely given the failure of the driver’s license proposal in the Commission on Ethics 20/20, advocates state-by-state action on this reform. The subject of the second half of Sahl’s article is more radical, and was the subject of a great deal of discussion at the Colloquium: the rule recently adopted by the Washington Supreme Court permitting practice by limited

102. *Id.* at 2998–99.

103. Rhode & Ricca, *supra* note 95.

104. *Id.*

105. See Alan Obye, *ABA Conducts First ‘School’ on Policing Unauthorized Practice of Law*, 29 *Laws. Man. on Prof. Conduct (ABA/BNA)* 632 (2013).

106. Rhode & Ricca, *supra* note 95, at 2608–09.

107. Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts To Provide Access to Justice in Family Courts*, 82 *FORDHAM L. REV.* 2705, 2743–44 (2014).

108. Jack P. Sahl, *Cracks in the Profession’s Monopoly Armor*, 82 *FORDHAM L. REV.* 2635, 2637–38 (2014).

109. See James Geoffrey Durham, *Is the ABA Ready for the Driver’s License Rule? Ethics 20/20 Commission Flirts with an Expanded Multijurisdictional Practice Rule*, *PROB. & PROP.*, Nov./Dec. 2011, at 54–55.

license legal technicians (LLTs).¹¹⁰ Unlike familiar allied professionals like paralegals and nurse practitioners, LLTs can operate without being under the supervision of a lawyer admitted to practice in Washington State. Many LLTs are expected to practice in the domestic relations area, in which there are significant unmet needs for legal services.¹¹¹ The Washington experiment bears watching to see whether LLTs can deliver competent legal services at a lower cost than lawyers—that is, whether it is Weaver or Rhode and Ricca whose hypothesis is supported by the empirical evidence.

One theme of regulatory reform has been a critique of the assumption by the ABA and state courts that there should be a one-size-fits-all approach to regulation. For example, conflict-of-interest rules do not differentiate between large and small law firms, even though relatively rigid rules may impose significantly higher costs on large firms, particularly those with multinational operations.¹¹² Proposals for reform often treat the two hemispheres of legal practice in isolation from each other, seeking (broadly speaking) further access to justice in the individual-client hemisphere and client autonomy in the corporate-client hemisphere. Dana Remus's article questions the conventional wisdom that professional regulation ought to vary by context and, in particular, whether fragmented approaches to regulation may exacerbate problems caused by the interaction between lawyers in the different hemispheres of practice.¹¹³ Her article seeks to hold onto something in the concept of "lawyer" that transcends the particular areas in which lawyers might practice. In other words, what are the core values that constitute the legal profession, or what *normatively speaking* separates lawyers from nonlawyer providers of legal services? The answer sounds like a tautology, but in fact has content: the legal profession is committed to the values underlying the legal system, which may not reduce to the values of nonclients, such as efficiency and autonomy. Lawyers must provide competent services, even if clients may desire to spend less on them, and they must remain independent from the ends of clients, even if clients would prefer to have more control over their legal service providers. Professor Remus's article accordingly cautions regulatory reformers not to lose sight of what makes lawyers distinctive in a market they share with accountants, consultants, information-technology specialists, and even machines.¹¹⁴

Finally, the last two articles consider law as information, and ask what rights citizens have to receive it. Bridgette Dunlap criticizes the efforts of the United States to promote the rule of law in developing countries for

110. See *In re* Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1005, slip op. at 1 (Wash. June 15, 2012).

111. Sahl, *supra* note 108.

112. See Bruce A. Green, *Ethics Reform from "MDP" to "20/20": Some Cautionary Reflections*, 2009 J. PROF. LAW. 1, 7 (2010).

113. See Dana Remus, *Hemispheres Apart, a Profession Connected*, 82 FORDHAM L. REV. 2665, 2674–79 (2014).

114. See *id.*

being excessively lawyer centric.¹¹⁵ Suppose the United States succeeds in also exporting its unified legal profession and zealous enforcement of UPL—the result will not be to the benefit of disempowered citizens. “The model that the United States seeks to export has proven, at home and abroad, to concentrate power in the hands of those with the money and power to access judicial systems.”¹¹⁶ The rule of law is not the same thing as democracy, let alone a well-functioning democracy characterized by accountability, transparency, and lack of corruption. Picking up again on the theme of access versus quality, Dunlap makes the important point that full participation in society requires a threshold level of legal knowledge, but the organized bar’s focus on providing quality services has led to the perception that law is the exclusive domain of lawyers.¹¹⁷ In the domestic context, Renee Newman Knake argues that many regulations impede the flow of legal information. These regulations may be constitutionally questionable, particularly after the U.S. Supreme Court invalidated a Vermont statute that prohibited the sale of drug-prescribing information by doctors¹¹⁸ and the Virginia Supreme Court vacated professional discipline against a lawyer who had blogged about his cases, revealing client information in the process.¹¹⁹ If legal information receives the same level of protection as political or artistic speech, a number of settled doctrines may have to be reconsidered under the First Amendment.¹²⁰ There is already a substantial body of constitutional case law on attorney advertising and solicitation, to which a recent Second Circuit case is a valuable addition,¹²¹ but what other areas of lawyer regulation might be affected? Knake proposes a distinction between regulations that wholly foreclose a particular avenue of distribution and those that are aimed at competence, confidentiality, or other ends short of prohibition on communications.¹²² Interestingly, she regards the fee-splitting rule, supporting bans on nonlawyer ownership interests in law firms, as potentially vulnerable to a constitutional challenge.¹²³ It is true that the core concern of the rule, at least traditionally, was with communication—namely, the impermissible solicitation of clients using “runners” or “cappers.”¹²⁴ Not only has the

115. Bridgette Dunlap, *Anyone Can “Think Like a Lawyer”*: *How the Lawyers’ Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States*, 82 FORDHAM L. REV. 2817, 2817–18 (2014).

116. *Id.* at 2821.

117. *Id.* at 2820.

118. *Sorrell v. IMS Health*, 131 S. Ct. 2667 (2011).

119. *See Hunter v. Va. State Bar*, 744 S.E.2d 611 (Va. 2013); Renee Newman Knake, *Legal Information, the Consumer Law Market, and the First Amendment*, 82 FORDHAM L. REV. 2843, 2856–57 (2014).

120. Knake, *supra* note 119, at 2854 (discussing John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49 (1996)).

121. *Alexander v. Cahill*, 598 F.3d 79, 88–100 (2d Cir. 2010) (invalidating many provisions of the amended New York advertising rules under the commercial speech test articulated in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980)).

122. Knake, *supra* note 119, at 2855.

123. *See id.* at 2859–65; *see also* MODEL RULES OF PROF’L CONDUCT R. 5.4(a) (2013).

124. *See* CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* §§ 9.2.4, 16.5 (1986); *see also* *Brown v. Grimes*, 120 Cal. Rptr. 3d 893, 909 (Ct. App. 2011); *McIntosh v. Mills*, 17 Cal.

Court held that solicitation may be fairly aggressively regulated by states,¹²⁵ but it is a stretch to read the First Amendment as reaching the capital structure of law firms. Perhaps this kind of outside-the-box thinking is what is needed to shake up the profession's complacency about its monopoly over legal services.

Rptr. 3d 66, 73–75 (Ct. App. 2004); *Danzig v. Danzig*, 904 P.2d 312, 314 (Wash. Ct. App. 1995). The rule seems to be litigated most frequently today in the context of referral arrangements. *See, e.g.*, *Son v. Margolius*, 709 A.2d 112 (Md. 1998); *In re Lock*, Commission No. 2010PR00164 (Hearing Bd. of the Ill. Attorney Registration & Disciplinary Comm. July 17, 2012), *aff'd*, Commission No. 2010PR00164 (Review Bd. of the Ill. Attorney Registration & Disciplinary Comm. Aug. 1, 2013).

125. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 618 (1995).