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THE TRANSFORMATION OF THE PROFESSIONAL WORKFORCE

MARION CRAIN*

Is human labor a commodity?[1] The Clayton Antitrust Act of 1914 proclaimed that it is not.[2] Announcing that labor is not a commodity, however, does not make it so. The institution of slavery represented the complete commodification and objectification of human beings and their labor. Other workers appear almost fully commodified—laboring under inhumane and dangerous conditions for minimal wages in poultry processing plants, slaughterhouses, maquiladoras, sweatshops, and recycling operations.[3] Partially commodified workers toil in industrial settings and service industries alike, as automobile workers, steelworkers, coal miners, truck drivers, service employees in fast food restaurants, janitors cleaning offices by night, hotel maids, and domestic workers cleaning rooms by day. Commodification of human beings' labor, it seems, is an inevitable byproduct of advanced capitalism.[4]

Where do professionals fall on this commodification continuum? For professionals, work has historically been a calling that constitutes

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1. I define commodity here as "an element of economic wealth," "something bought and sold." *See* FUNK & WAGNALLS CO., COLLEGE STANDARD DICTIONARY 245 (1943).

2. *See* Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 17 (2000)) (prohibiting application of antitrust laws to union organizing and collective bargaining).

3. *See* Tony Horwitz, *9 to Nowhere: These Six Growth Jobs Are Dull, Dead-End, Sometimes Dangerous*, WALL ST. J., Dec. 1, 1994, at A1.

4. Nona Glazer has made a powerful case that some service sector employers deliberately use decommodification as an alternative profit-maximization strategy. *See* NONA Y. GLAZER, WOMEN'S PAID AND UNPAID LABOR: THE WORK TRANSFER IN HEALTH CARE AND RETAILING (1993). Employers who implement self-service labor processes carried out by consumers and patients effectively decommodify the work formerly done by paid employees. By transferring the work from paid workers to consumers who do it for nothing, employers can pocket the profits. *Id.* at 26. Decommodification is most likely to be utilized where economic markets are contracting. *Id.* at 216.

personal identity and confers a relatively privileged class status, rather than a commodity to be sold on the market.[5] Professionals' work is not commodified, but constitutive; not something from which to escape, but something in which to invest. Professionals' experience of work has been characterized by autonomy and the privilege to self-regulate through peer review and codes of ethics enforced by professional associations. These professional privileges were secured through a social bargain in which expertise acquired through lengthy education and dedicated to public service was exchanged for a market monopoly over the knowledge area in which expertise was asserted. The professions believed that this social bargain immunized them from the influence of capitalism and its pressures to commodify human beings' labor and constrain autonomy in the quest for higher profits. Professionals' monopoly power over knowledge furnished sufficient leverage that legislation or unions to protect against abuses of power by employers seemed superfluous.

The transformation of professional work over the last quarter century suggests, however, that professionals are not immune from the commodification process. The shift from self-employed status to salaried employee status that characterizes most professions in the information economy has fundamentally altered the conditions under which this social bargain was formed. Modern profit-maximizing strategies utilized by corporate employers threaten the autonomy and monopoly over expertise that professionals historically enjoyed, and with them professional class privilege. Professionals who once shunned unions as the antithesis of professionalism are now embracing them, seeking protection from the labor laws against the effects of commodification. The American Medical Association and the American Bar Association now endorse unionization. A spate of organizing by physicians,[6] interns and residents,[7] graduate students,[8] legal ser-

5. *See* MARGARET JANE RADIN, CONTESTED COMMODITIES 105 (1996) (capturing the distinction between the rank and file and professional workers in this way: "[l]aborers play notes, . . . [professionals] play the music"); *see generally* Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000) (discussing the significance of meaningful work to citizenship and human existence).

6. *See* Rick Valliere, *Doctors Are Drawn to Unions By Abuses in Health Care System, Conference Told*, DAILY LAB. REP. (BNA) NO. 189, Sept. 39, 1999, at A-7 (characterizing unionization among physicians as "growing rapidly" in response to the devaluation of medical professionalism by managed care).

7. *See* John P. Furfaro & Maury B. Josephson, *Residents and Students Organizing at Increasing Rate*, N.Y. L.J., Apr. 6, 2001, at 3; *see also* Boston Med. Ctr. Corp., 330 N.L.R.B. 152 (1999) (overturning *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976), and its progeny and finding housestaff at private, nonprofit hospitals covered under the Act, including interns, residents,

vices lawyers,[9] and even administrative law judges[10] has attracted legal and public attention over the last decade.

What forces are prompting professionals in the modern era to turn toward traditional collective resistance strategies? Are unionization and collective bargaining fundamentally incompatible with professionalism? This Article explores these questions. I suggest that collective action by the professions to protect professional autonomy, status, and privilege is not, in fact, a new phenomenon. Historically, the professions avoided commodification by exchanging the collective commodity of their expertise for autonomy at work and monopoly power over their craft. The transformation of the professional class from a self-employed group to salaried employee status renders professionals vulnerable to the traditional strategies by which management has controlled other workers: ideological proletarianization and technical de-skilling. The increasing pressure for profitability and related management strategies designed to contain costs—particularly the use of scientific management and the restructuring of work through bureaucratization—have fundamentally altered the character of professional work. When professional autonomy and expertise is subordinated to management control in the quest for profit maximization, professionals' very identity as professionals is jeopardized. The threat to identity is, I believe, the impetus for the current wave of collective organization. Because professional expertise is collectively owned, it is logical that professionals would return to collective strategies to defend it.

A further area of inquiry is whether unionization is likely to be an effective vehicle for a defense of professional identity and class privilege. Much depends on whether unions can reconceptualize themselves in such a way as to attract professionals, and whether the

and clinical fellows). *But see* Tim Cramm, Note, *Prognosis Negative?: An Analysis of Housestaff Unionization Attitudes in the Wake of* Boston Medical Center, 87 IOWA L. REV. 1601, 1625–26 (2002) (suggesting that growth of organizing among housestaff since *Boston Medical* has been relatively small).

8. *See* New York Univ., 332 N.L.R.B. 1205 (2000) (overturning *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974), and finding graduate assistants, teaching assistants, and research assistants to be covered employees under the Act).

9. *See* Victoria Rivkin, *Legal Services Union Threatens Strike Monday,* N.Y. L.J., Oct. 1, 1999, at 1.

10. Administrative law judges in the Social Security Administration unionized in 1999 by an overwhelming 88 percent majority vote and affiliated with the International Federation of Professional Technicians and Engineers, AFL-CIO. *See* William R. Dorsey, *SSA ALJs Vote to Unionize, formerly located at* http://www.naalj.org/News%20articles/ssa.htm (on file with author).

law can and should flex to accommodate the interests of professionals in collective organization. This Article engages those questions as well. The legal barriers to professional organizing are significant. Although the National Labor Relations Act ("NLRA") explicitly includes professionals within its definition of covered employees for purposes of protection of organizing activities and collective bargaining,[11] it excludes supervisors and managers.[12] Because many professionals supervise or manage others in bureaucratically organized workplaces, there exists a tension between those two categories. Recent Supreme Court cases expand the definition of supervisor and threaten to obliterate the coverage of professionals.[13] I outline an argument for coverage that is grounded in the commodification process itself, looking to the ways in which professional work has been standardized and professionals' autonomy undermined.

Despite the inclusion of professionals in NLRA coverage and the apparent interest of professionals in organizing, a number of scholars have demonstrated that the NLRA and accompanying Board and Court doctrine construing it are a poor fit with collective bargaining on issues of concern to professionals.[14] While pursuing a professional calling is at its core concerned with exercising power to help or serve the public rather than with exercising power over others in a hierarchical workplace structure, the Act limits protection for concerted activities (organizing, bargaining, and economic pressure) to self-interested employee actions directed toward improvement in wages, hours, and working conditions;[15] altruistic concerns or pressure de-

11. *See* 29 U.S.C. § 152(12) (2000) (defining professionals for the purpose of bargaining unit restrictions); 29 U.S.C. § 159(b)(1) (2000) (prohibiting the Board from certifying a unit that includes both professionals and nonprofessionals unless a majority of professionals have voted for inclusion in the unit).

12. *See* 29 U.S.C. § 152(3) (2000); 29 U.S.C. § 152(11) (2000) (excluding and defining supervisors); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (interpreting the NLRA's supervisory exclusion to require the exclusion of managerial employees).

13. *See* NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. 706 (2001) (characterizing nurses as supervisors if they exercise independent, ordinary professional judgment in responsibly directing less-skilled employees to deliver services in the interest of the employer); NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571 (1994) (finding that nurses who used independent judgment to responsibly direct nurses' aides in the interests of patient care were doing so in the employer's interest rather than as a matter of professional obligation, and hence were supervisors).

14. *See, e.g.*, David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining By Professional Employees?*, 99 YALE L.J. 689 (1990) (proposing elimination of the mandatory-permissive subject matter dichotomy in collective bargaining so that professionals' bargaining agendas would not be characterized as permissive).

15. *See* Richard Michael Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Under the National Labor Relations Act*, 89 COLUM. L. REV. 789, 797 (1989).

signed to advance third parties' interests (such as those of patients, clients, students, or claimants) are not protected.[16] Thus, any protection afforded professionals under the Act must be grounded upon professional self-interest rather than the third-party interests of consumers, patients, or clients. The challenge for unions is to reconceptualize themselves in a way that serves both professionals' self-interest and their professional/ethical interests in promoting the public good, against a backdrop of labor law that protects only the former goal.

Part I examines sociological research seeking to define the meaning of a profession, and establishes the social bargain protecting professional autonomy and privilege. Part II assesses the continuing viability of this bargain in the emerging information economy, and outlines the strategies used by corporate management to gain control over professional expertise. Part III analyzes the commodification of labor in two paradigmatic professions, those most studied by sociologists: medicine and law. Part IV discusses the likelihood that professionals will turn toward unions in response to commodification processes, utilizing sociological and industrial relations research as well as actual evidence of organizing activity in the two professions discussed in Part III. Part V describes unions' efforts to appeal to both professionals and to Generation X workers, who share a common ethos of individualism, and offers a blueprint for an alternative unionism borrowed from the motion picture and television unions. Part VI returns to the labor law as the guardian of collective action by workers, theorizing a reconceptualization of professionalism that makes coverage under the NLRA both justifiable and consistent with recent Supreme Court precedent.

My central claim is that professional employees who organize to protect their professional identity are engaged in self-interested action to protect their livelihood and class status, and that the law should support them.[17] The Act explicitly covers professional employ-

16. *See* Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 172–82 (1971) (holding that retirees are not employees covered by the Act, and limiting bargaining obligations over third party concerns to those which vitally affect the terms and conditions of bargaining unit workers' employment).

17. Some may find it difficult to sympathize with this relatively privileged class of workers or to support extension of the labor laws to them. Indeed, most left-leaning labor law scholarship—including my own—has focused on the rights of workers at the bottom of the occupational hierarchy. *See, e.g.*, Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313 (2002) (arguing that unionism has reflected the white experience of class oppression, organizing workers around white identity in occupations dominated by whites, and so proved inadequate to the

ees. Having lost the collective leverage to hold employers to the historical social bargain, professionals (like other workers) need protection through unionization and collective bargaining against commodification. The law's focus in the context of professional organizing should be on whether management profit-maximizing techniques and policies have stripped professionals of key attributes of professional status—particularly autonomy and control over the technical aspects of the labor process itself. To the extent that professionals have become commodified, they lack sufficient independent judgment to be characterized as supervisors and excluded from the labor law's protective umbrella.

I. WHAT IS A PROFESSION? THE SOCIAL BARGAIN CONFERRING PROFESSIONAL STATUS AND PRIVILEGE

Modern societies institutionalize the valuable commodity of scientific knowledge through the concept of professionalism.[18] Professions are conceptualized as occupations characterized by a theoretical knowledge base and skills acquired through extended education and extensive training; the key characteristic of a professional is that she applies this knowledge in a nonroutine fashion using independent discretion and judgment, on a case-by-case basis.[19] Professions traditionally claim the right to structure and regulate the education and

task of dismantling the racial caste system in employment); Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767 (2001) (analyzing court decisions intended to protect individual minority workers whose interests were not prioritized by their unions, and showing how race and sex discrimination were systematically defined as beyond the purview of union concern or the reach of labor laws). My purpose here is twofold: first, understanding how unionization and labor law function when applied to the "exploitation of the elite" may reveal new legal arguments or generate new forms of unionism that might be advantageous for those at the bottom of the hierarchy; and second, the continued viability of the labor movement may depend upon attracting the highly educated, relatively highly paid white collar workers who increasingly dominate the information economy.

18. ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR xii (1988).

19. *Id.* at 7. The National Labor Relations Act and the Fair Labor Standards Act adopt a strikingly similar definition of "professional." In the case of the NLRA, the term is defined for purposes of inclusion in coverage and assignment to appropriate bargaining units. *See* National Labor Relations Act, 29 U.S.C. § 152(12) (2000); *see supra* notes 11 & 12. The FLSA, on the other hand, exempts certain professionals from coverage for overtime wage purposes. *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a)(1) (2000). Nonetheless, both statutes define a professional by reference to the intellectual and varied nature of their work, the consequent need for discretion and judgment in its performance, the incapability of standardizing their output by units of time, and the advanced training in an educational institution that they undergo. *See generally* Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2309–11 (1998) (discussing FLSA exemption for professional employees).

credentialing systems that entitle members to practice. At its core, then, professionalism entails the right to autonomy at work and the collective right to exert exclusive authority over members' professional integrity (the right of peer review). Authority to self-regulate is founded upon the esoteric character of professional knowledge, which in turn makes it difficult for the public to assess performance or for the government to regulate it.[20] The professions thus maintain an economic monopoly over recruitment, training, and credentialing, a political monopoly over areas of expertise, and an administrative monopoly over determining what standards shall apply to practitioners.[21]

The fundamental basis of professionals' claim to occupational privilege and a market monopoly over specialized areas of expertise is meritocratic.[22] The university and its professional training program legitimate the cultural privilege of professionals.[23] The link between professional status and knowledge is reinforced by hierarchies internal to the professions. The more closely a professionals' work is linked to pure knowledge, divorced from public service, the more status she possesses. In American society, the highest status and privileges are reserved for those who work in the purest professional environments, with no or very little client/patient contact. Closest to working with knowledge alone, their work is done primarily with other professionals—for example, surgeons, trial lawyers, and professional consultants.[24]

20. Eve Spangler & Peter M. Lehman, *Lawyering as Work*, *in* PROFESSIONALS AS WORKERS: MENTAL LABOR IN ADVANCED CAPITALISM 63 (Charles Derber ed., 1982) [hereinafter PROFESSIONALS AS WORKERS]; *see also* Eliot Freidson, *Are Professions Necessary?*, *in* THE AUTHORITY OF EXPERTS: STUDIES IN HISTORY AND THEORY 22 (Thomas L. Haskell ed., 1984) [hereinafter THE AUTHORITY OF EXPERTS] (noting that professionals' claim to autonomy at work is founded upon the asserted complexity of the work and the necessity of exercising discretion and judgment on a case-by-case basis).

21. Freidson, *supra* note 20, at 20–21.

22. Magali Sarfatti Larson, *The Production of Expertise and the Constitution of Expert Power*, *in* THE AUTHORITY OF EXPERTS, *supra* note 20, at 28, 43. For a more cynical view on the character of professionalism as a political monopoly over knowledge institutionalized through licensing, see PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 1–29 (1982) (arguing that doctors used their professional status to legitimate social authority and cultural control, to monopolize medical knowledge, and to institutionalize their monopoly through educational and licensing requirements); RICHARD L. ABEL, AMERICAN LAWYERS (1989) (making a similar argument with regard to lawyers).

23. Larson, *supra* note 22, at 53. The university validates not only the individual professional's claim to expertise, but also the overall status of scientific knowledge. *Id.*

24. ABBOTT, *supra* note 18, at 118. However, it is clear that possession of expertise is not the sole determinant of status within professions; they are structured internally along class lines as well. Among professionals who deal with clients, differentiation in wealth and societal status of clients affords vicarious status to those professionals who deal with them: the more prestig-

Society thus grants the professions elevated social status and an implicit right to working conditions that other employees do not enjoy—particularly autonomy, freedom from external authority, the right to work without supervisory constraint, and the right to select work goals and to exercise one's skills consistent with professional ethics and training.[25] In exchange, the professions promise to undergo extended and painstaking professional education and training in order to master the bodies of knowledge reserved to them, and to dedicate themselves unselfishly to society's needs. Professionals are expected to prioritize their patients' and clients' interests above their own, even at the cost of personal risk to health, freedom, or well-being. A 1975 article by Dr. Sanford Marcus, founder of the Union of American Physicians and Dentists, explained the justification for the bargain eloquently in the context of the medical profession:

> The physician as healer has been accorded a place of respect and esteem by the very nature of the service he rendered—personal concern, amelioration of suffering, quasi-mystical intervention in the struggle between life and inevitability of death, these were his stock in trade. There was the tacit acceptance of the fact that he should be accorded a special niche in society, measured both by the honor it accorded him and by a standard of living that was reasonably expected to be somewhat above others whose responsibilities were less than his. His long years of training, hours of service, risk of exposure to disease, shortened earning life-span, attenuated freedom and family life, and devotion to professional self-advancement all seemed to justify a special status. In return, the American medical profession developed a high standard of medical care that was unequaled anywhere in the world, indeed a fair exchange, it would seem.[26]

Any analysis of the professions must, however, take into account the self-interested nature of professionalism. Professional associations, like craft unions, function to secure and maintain a market monopoly over knowledge.[27] The professions are market organizations

ious the client, the more prestige the work done for him has. *Id.* at 122; Spangler & Lehman, *supra* note 20, at 75.

25. Charles Derber, *Professionals As New Workers*, *in* PROFESSIONALS AS WORKERS, *supra* note 20, at 1; Charles Derber, *The Proletarianization of the Professional*, *in* PROFESSIONALS AS WORKERS, *supra* note 20, at 13.

26. GRACE BUDRYS, WHEN DOCTORS JOIN UNIONS 39 (1997) (quoting Sanford A. Marcus, *The Purposes of Unionization in the Medical Profession: The Unionized Profession's Perspective in the United States*, 5 INT'L J. HEALTH SERVICES 37, 37–38 (1975)).

27. The concept of professionalism functions in a way exactly parallel to unionization: by expanding and protecting the power base (in this case, knowledge and social status), professionalism enhances collective mobility up the class ladder. MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 155–56 (1977).

that exercise intellectual and organizational domination over areas of social concern.[28] While professionals frequently do not produce a distinctive commodity separate from their professional services, the intangible goods produced by professionals are inextricably bound to the producer, the professional. Thus, the producer herself must be "produced"—trained and socialized into the profession—to provide distinctive, recognizable services.[29] Professional standards are established by the professions, and monopoly power over the market for them is enforced by the state. Competing products are eliminated; licensure, qualifying exams, and a diploma are the tools by which the monopoly is maintained.[30] In effect, the commodity that professional associations market to society is knowledge itself, and knowledge workers are the delivery system for that commodity.

A further safeguard for the valuable commodity of professional knowledge is the holistic way in which the professions define the professional enterprise. The essence of professional work is that neither professional products nor professional services can be broken down into component parts and standardized; commodification of individual professionals is the antithesis of professionalism.[31] Technological advances—particularly those that enhance the spread of information—exacerbate the threat of commodification because they increase the potential that professional knowledge will be transformed into commodities that can be separated from the professional herself.[32]

Thus, the professions have historically acted collectively in establishing and asserting a property right in expertise and a concomitant

28. ABBOTT, *supra* note 18, at 5–6 (discussing the work of Magali Sarfatti Larson).

29. LARSON, *supra* note 27, at 14.

30. *Id.* at 14–15.

31. Freidson, *supra* note 20, at 22. Commodification of professional products and services has long posed a threat to professionalism. Fixed legal form wills, contracts, leases, and divorce documents all exemplify the specter of commodification, rendering lawyers unnecessary to complete simple legal transactions. ABBOTT, *supra* note 18, at 146.

32. ABBOTT, *supra* note 18, at 147. The use of computer diagnostics and artificial intelligence systems in medicine furnishes one example of such a threat to professional work. *Id.* Technology has the capacity to absorb the expertise and, ultimately, the work itself from the professions, just as it has from many nonprofessional occupations. *See id.* at 149.

In a more indirect and insidious fashion, technology also enhances the role of physical capital in structuring and controlling professional work, rendering professionals more dependent on organizations that can afford to purchase and maintain such machinery and equipment—just as manual workers are dependent upon the corporation that owns and maintains the manufacturing plant or assembly line. *Id.* at 156; *see also* Nathan Newman, *Trade Secrets and Collective Bargaining: A Solution to Resolving Tensions in the Economics of Innovations*, 6 EMP. RIGHTS & EMP. POL'Y J. 1, 23 (2002) (observing that where workers' skills and innovation are dependent on their employers' machinery, employees are effectively anchored to the firm; the "sheer physicality of machinery" is a more powerful shackle than any legal rule).

right to control and exploit that property for personal profit.[33] The leverage conferred by the possession of knowledge facilitated a social contract that allowed the professions to protect their jurisdiction over this knowledge base by controlling who entered the craft, the dissemination of abstract knowledge relative to the craft, and its techniques. Control over knowledge and technique is the quintessential element that defines, structures and maintains any craft; professionals are no different than other skilled workers in this regard. The difference in their economic status and socially privileged position is one of degree, rather than one of kind.

II. THE FUTURE OF PROFESSIONS IN AN ADVANCED CAPITALIST INFORMATION ECONOMY: IS THE SOCIAL BARGAIN STILL VIABLE?

Social commentators once hailed the knowledge worker—including, especially, the professions—as the ascending star in the information economy. As power shifted from those who owned the physical means of production to those who possessed and controlled knowledge, many believed that professionals would enjoy enhanced power and status relative to that of physical-capital owners.[34] Daniel Bell, John Kenneth Galbraith, Alvin Gouldner, and others argued that the role of knowledge would be so central in the postindustrial economy that expertise would metamorphose into the new critical resource, conferring further leverage on professionals and the intellectual class as a whole.[35] These scholars, dubbed "functionalists" because they viewed the professions' elevated social status as instrumental in maintaining a stable society,[36] argued that in a society increasingly ordered by scientific and rational standards, those who possess the knowledge to create, disseminate, and apply the standards would play a powerful strategic role in the division of labor. Ultimately, professionals would define for capital owners the limits and possibilities of the production process, revolutionizing the way in

33. *See* DONALD CLARK HODGES, CLASS POLITICS IN THE INFORMATION AGE xii (2000).

34. Derber, *Professionals As New Workers*, *supra* note 25, at 4 (citing DANIEL BELL, THE COMING OF POSTINDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING (1976) and JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE (4th ed. 1985)); *see also* ALVIN W. GOULDNER, THE FUTURE OF INTELLECTUALS AND THE RISE OF THE NEW CLASS 4–7, 53–57 (1979) (arguing that the intellectual class would emerge as the "new" revolutionary class, supplanting the working class).

35. *See supra* note 34.

36. *See* BUDRYS, *supra* note 26, at 34–35 (discussing work of Talcott Parsons).

which jobs were constituted and work was performed.[37] The functionalists warned that jobs must be sufficiently challenging and rich to attract such professionals as market demand grew to exceed the supply.[38]

Other scholars, known as revisionists, believed that the professional class was little more than a political creation of the capitalist class, and hence dependent upon it for maintenance of its monopoly over knowledge work.[39] Some predicted the evolution of a new professional-managerial class with one foot in each class: the "professional-managerial" class would simultaneously manage lower-level professional and nonprofessional employees and be managed by higher-level administrators.[40] This positioning would create a unique set of interests that would shield professionals from complete proletarianization,[41] or loss of control over the labor process, while leaving them vulnerable to the loss of professional autonomy and control over the ends to which their work is put (loss of ideological control). Though freed from the "petty forms of supervision or humiliation" that other employees endured, the professional-managerial class in an advanced capitalist economy would still be subjected to increased levels of supervision, heightened specialization and division of labor, and increased estrangement from policymaking.[42] "Organically" tied to the class whose interests are upheld by its work and products, namely capital,[43] the professional-managerial class would be a dependent social formation, incapable of representing itself, and fundamentally allied with the capital-owning class.[44] Ultimately, the

37. Spangler & Lehman, *supra* note 20, at 63–64.

38. *See e.g.*, J. Richard Hackman, *What is Happening to Professional Work?*, 2 PERSP. ON WORK 4, 6 (1998); *see generally* PETER F. DRUCKER, THE AGE OF DISCONTINUITY: GUIDELINES TO OUR CHANGING SOCIETY (1968).

39. These scholars include C. Wright Mills, Magali Sarfatti Larson, and Barbara and John Ehrenreich. *See* Spangler & Lehman, *supra* note 20, at 64.

40. Derber, *The Proletarianization of the Professional*, *supra* note 25, at 20–21 (discussing the work of Barbara and John Ehrenreich).

41. "Proletarianization" as used by these theorists refers to "the human and social effects of capitalists' efforts to maintain an acceptable rate of exploitation," including automation, mechanization, and strategies that increase the scale of production in order to increase the rate of fixed capital assets to labor. JERRY LEMBCKE, CAPITALIST DEVELOPMENT AND CLASS CAPACITIES: MARXIST THEORY AND UNION ORGANIZATION 6–7 (1988).

42. Derber, *The Proletarianization of the Professional*, *supra* note 25, at 21.

43. *See* LARSON, *supra* note 27, at xiv (discussing the views of Antonio Gramsci).

44. *See, e.g.*, Stanley Aronowitz, *The Professional-Managerial Class or Middle Strata*, *in* BETWEEN LABOUR AND CAPITAL 213, 217–19, 224–25 (Pat Walker ed., 1979).

professional-managerial class would suffer a diminishing scope of autonomy as it was curbed by the elites that it served.[45]

The revisionists worried that the professional class would use its privileged position to exploit those beneath it in the occupational hierarchy. For example, because physicians achieved and maintained dominance by monopolizing control over medical work, eliminating competition from other groups, and institutionalizing their dominance through licensing requirements, they were likely to resist expansion efforts by nurses or other skilled workers beneath them in the hierarchy of medical occupations.[46]

Functionalists believe that professionals' power base of expertise is real, while revisionists argue that it is socially constructed. Thus, functionalists are confident about the continuing strength of professionals' class position, while revisionists question its stability if the monopoly over knowledge is lost. Revisionists point out that in fact much of the work done by professionals can be performed by less skilled, less educated workers (paralegals rather than lawyers, physicians' assistants or nurses rather than doctors), creating the opportunity for job fragmentation and de-skilling by cost-conscious managers.[47] Functionalists also trust the validity of the educational system as a purveyor of both knowledge and values. They believe that professional training is effective to transmit knowledge and to inculcate professional ethics and values essential to maintaining the public's trust. Revisionists agree that knowledge is effectively transmitted through professional training, but assert that professional training functions to discipline the minds of students, transforming "naive outsiders" into "knowledgeable insiders," a process in which "naive idealism is tempered to become realistic idealism."[48] More importantly, revisionists observe, professional training performs a screening and sorting function, limiting the supply of licensed professionals entering the field, thus preserving the market position of those already in practice.[49]

The significance of the differences between these two schools of thought cannot be overstated: functionalists predict increasing or sus-

45. Spangler & Lehman, *supra* note 20, at 64.

46. *See* BUDRYS, *supra* note 26, at 36–37 (discussing Eliot Freidson's work).

47. Spangler & Lehman, *supra* note 20, at 65–66.

48. *Id.* at 66; *see generally* JEFF SCHMIDT, DISCIPLINED MINDS: A CRITICAL LOOK AT SALARIED PROFESSIONALS AND THE SOUL-BATTERING SYSTEM THAT SHAPES THEIR LIVES (2000).

49. Spangler & Lehman, *supra* note 20, at 67.

tained power for the professional class, since the basis of its power—abstract knowledge and technical skills—is real. Revisionists predict that since professional power rests on an artificially maintained monopoly of knowledge and skill, an increased demand for professional services in an information society will induce capitalists to take measures to control and constrain that monopoly.[50]

In the remainder of this Part and the next, I show that the revisionists were correct. Rather than becoming more rich and interesting, professionals' jobs in the new millennium have constricted. For many, influence over job content and performance, autonomy, and ability to exercise professional discretion is increasingly limited.[51] Market instability accompanying the shift from an industrial economy to a postindustrial, service sector, information economy has yielded profit-driven management techniques that increasingly threaten to undermine the autonomy, judgment, and control over job content and performance that once characterized professional status. Principles of scientific management (or "Taylorism"),[52] originally developed for application to manual labor, were ultimately applied to white-collar work and to the professions through the medium of bureaucratization.[53]

A. *Scientific Management*

An important strategic tool in employers' control over manual labor was scientific management, which achieved popularity during the first half of the twentieth century. Scientific management refers to the systematic process of dividing jobs up into discrete components so as to centralize control over the knowledge of the labor process in management and increase profits. Its aim is to wrest from skilled workers control over the knowledge that constitutes the craft.

50. *Id.* at 69.

51. *See* Hackman, *supra* note 38, at 4–6.

52. Taylorism was the brainchild of Frederick Winslow Taylor, who advocated the application of "scientific" methods to the problem of controlling labor. *See generally* HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 85–121 (1974); DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR: THE WORKPLACE, THE STATE, AND AMERICAN LABOR ACTIVISM, 1865–1915 at 9–57, 214–56 (1987) [hereinafter MONTGOMERY, THE FALL OF THE HOUSE OF LABOR]; DAVID MONTGOMERY, WORKERS' CONTROL IN AMERICA: STUDIES IN THE HISTORY OF WORK, TECHNOLOGY, AND LABOR STRUGGLES 9–10 (1979) [hereinafter MONTGOMERY, WORKERS' CONRTOL].

53. *See* STANLEY ARONOWITZ, FALSE PROMISES: THE SHAPING OF AMERICAN WORKING CLASS CONSCIOUSNESS 291–93 (1992).

Through the use of time and motion studies designed to maximize output, skilled workers become automatons tending machines.[54]

Scientific management techniques typically involve an in-depth study of the craft and subsequent reduction of its principles or knowledge base to a series of rules, which can be delegated to less-skilled or specialized workers in the interest of efficiency and profit maximization. Execution is severed from conception, and conception is centralized in management. Management plans the work of every category of employee, specifying each day what tasks are to be done, the way in which they should be done, and the time allotted for completing them. Workers thus lose control over the content of their work, its pace, and the manner in which it is performed.[55] As one scholar summarized it, Taylorism is the "effort to strip the workers of craft knowledge and autonomous control and confront them with a fully thought-out labor process in which they function as cogs and levers."[56]

Scientific management, as its name implies, purports to subject workers and employers to the objective laws of science rather than to the arbitrary whims of human beings. The substitution of neutral norms of efficiency mutes class conflict since all are subject to its rules and science legitimates it.[57] Science, rather than class interest, appears to constrain the worker.[58]

Scientific management was used very successfully to maximize output in the industrial workplace, particularly among relatively low-skilled workers. Control over the technical aspects of the work was achieved through the use of technology that structured both the work process and the workplace. The assembly line was the prototypical example of technological control: production appeared to be regulated by the technology rather than by people. Work was divided into discrete tasks that could be more efficiently performed by a single worker who specialized in that particular assembly. No worker pos-

54. *See* Newman, *supra* note 32, at 22. One of the most powerful depictions of this process of dehumanization attendant to scientific management is contained in the classic documentary film entitled *Clockwork*, which features the application of Taylor's principles to unskilled workers moving objects from one place to another. Drawings and motion picture renderings reduce the person doing the work to a stick figure to illustrate the efficiencies of one style of motion over another. Throughout the video, stick figures represent the workers whose labor is being analyzed, deconstructed, and reconstructed into the most efficient, profit-maximizing form.

55. *See* BRAVERMAN, *supra* note 52, at 85–121; MONTGOMERY, THE FALL OF THE HOUSE OF LABOR, *supra* note 52, at 9–57, 214–56; MONTGOMERY, WORKERS' CONTROL, *supra* note 52, at 9–10.

56. BRAVERMAN, *supra* note 52, at 136.

57. LARSON, *supra* note 27, at 141–42.

58. *Id.* at 142.

sessed a complete picture of the product; the conception of work was divided from its execution. The assembly line controlled the pace of work, the timing of breaks, and even the physical movements made to complete tasks.[59]

B. Bureaucratization

If scientific management was the key tool in bringing unskilled workers under the thumb of the industrial machine, bureaucratization was its parallel in the sphere of the skilled worker. In the bureaucratic reorganization of work, management's profit goals are brought to bear on the labor process in such a way that the skilled worker's work is transformed.[60] Ultimately, the worker's control over his craft is undermined. Outsiders come to exercise control over the labor process, resulting in a dramatic loss of authority and autonomy.[61]

Bureaucratization is superficially similar to scientific management. Bureaucratization refers to the manipulation of the social organization of work through a pattern of specialization scientifically designed to maximize productivity; in this respect, it closely resembles scientific management. Bureaucratization adds, however, a system of rules and regulations that impose a hierarchical structure upon the specialized positions, and a sharp differentiation between management, professionals, and support staff.[62] Bureaucratic control over skilled workers—including professionals—is achieved through impersonal rules, evaluation and promotion mechanisms rather than through personal supervision.[63] Cloaked in the garb of neutrality, meritocracy, and objectivity, bureaucratization is consistent with professionals' conception of their own status and expertise.[64] Nonetheless, bureaucratic control ultimately and insidiously molds workers to organizational objectives and ties them to a division of labor conceptualized by management and policed by the application of "neutral"

59. Spangler & Lehman, *supra* note 20, at 70–71.

60. Derber, *The Proletarianization of the Professional*, *supra* note 25, at 14.

61. Richard W. Hurd, *Professional Workers, Unions and Associations: Affinities and Antipathies*, *at* http://www.shankerinstitute.org/Downloads/hurd.doc (background paper prepared for The Albert Shanker Institute Seminar on Unions Organizing Professionals, Summer 2000).

62. Spangler & Lehman, *supra* note 20, at 72.

63. Derber, *The Proletarianization of the Professional*, *supra* note 25, at 18 (summarizing RICHARD EDWARDS, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY (1979)).

64. *Id.*

rules and policies.[65] The rule-bound hierarchical differentiation tends to direct workers' energies toward individual advancement opportunities, distracting them from making common cause with other workers and muting dissent through the appearance of the rules as objective and meritocratic, as well as through the distancing of supervisory and managerial personnel from decisions made pursuant to rules.[66]

Bureaucratic control effectively metamorphoses into ideological control over the work objectives and process because only management speaks and interacts directly with the larger society (*i.e.*, patients are clients of the institution, not patients of an individual doctor).[67] Professionals thus lose the ability to forge their own relationships with clients or to define the uses to which their skills are put; management makes those decisions.[68] Of the various modes of control, bureaucratic control is probably the hardest to resist for professionals because it isolates the worker from the community that he or she serves.[69]

C. *Deprofessionalization*

Professionals' historical status as self-employed entrepreneurs was instrumental in avoiding commodification of professional work through scientific management or bureaucratization. The shift away from self-employment and increasing dependence of the professions upon large organizations as an institutional base for the exercise of professional authority create the potential for the application of techniques designed to control and restrict professionals' sphere of influence.[70] Technological advances and the cost of machinery and technology that individual professionals could not afford made it increasingly difficult for professionals to own the "means of production."[71] Centralized administration became necessary in order to cope with the demands of a mass clientele and legal/administrative requirements (as in medicine, with the advent of managed care).[72] As

65. *Id.*
66. Spangler & Lehman, *supra* note 20, at 72.
67. *Id.*
68. *Id.* at 72–73.
69. *Id.*
70. Charles Derber, *Managing Professionals: Ideological Proletarianization and Mental Labor*, *in* PROFESSIONALS AS WORKERS, *supra* note 20, at 167, 168, 172–73.
71. Derber, *Professionals as New Workers*, *supra* note 25, at 6.
72. *Id.* at 6–7.

professionals combined within large single multi-professional workplaces, the fundamental nature of professional work—and especially professionals' autonomy and control over their work—changed.[73] Multi-professional worksites such as hospitals, law firms, accounting firms, and architectural firms organized professionals to work in layers. Such multi-professional worksites developed their own internal hierarchies of professions.[74]

For the first time, professionals found themselves vulnerable to the management techniques to which nonprofessional workers had long been subject. Professionals followed the pattern established in the crafts: they lost control first over the ideological direction of their work (the product itself, and the ends to which it is put), and later over the technical aspects of the labor process (how tasks will be carried out and time/pace of work).[75]

1. Ideological Control

Ideological proletarianization posed a significant threat to professional identity. It stripped professionals of their sense of professional values and purpose, restricting the professions to the realm of technique.[76] The loss of professional autonomy and ideological control is especially grave for a group that has traditionally approached its work as a calling.[77] With the loss of ideological control, the bonds connecting professionals to the larger community that they are charged with serving become frayed.[78] The service and knowledge goals possessed by professionals that are most closely aligned with those of clients or of the larger society recede in significance, while the market interests of professionals in high income, social status, and

73. *See id.* at 7.

74. ABBOTT, *supra* note 18, at 151.

75. Derber, *The Proletarianization of the Professional*, *supra* note 25, at 30; Derber, *supra* note 70, at 169–70.

76. Derber, *supra* note 70, at 172.

77. *Id.* at 180. Professionals tend to be more highly invested in the work role than other workers. LARSON, *supra* note 27, at 60. Moreover, the threat to stability and expectations of upward mobility posed by deskilling is especially serious for professionals since the very allure of professionalism is its promise of an orderly progression through a work-life plan: "career is a pattern of organization of the self." *Id.* at 229. Most professionals are conformists who rely on the prospect of predictable and continuous rewards and are willing "to adopt a long view and defer immediate gratification." Such a "life plan" is a central aspect of professionals' privileged status. *Id.* at 229.

78. Derber, *supra* note 70, at 173.

career advancement assume priority as professionals relinquish ideological control yet attempt to cling to technical control.[79]

In an effort to adapt their expectations to the shifting conditions of their worksites, professionals dissociated themselves from the ideological context of their work, withdrawing from areas in which they lacked voice or power, and investing instead in the areas in which they still enjoyed power (technical expertise).[80] Nonetheless, many professionals remain deeply committed to cognitive goals and feel entitled to do work that is challenging and stimulating. They are not committed to ideological goals, however, nor do they require that their work serve socially useful ends.[81] They dissociate themselves from the uses to which their work is put, and deny interest or responsibility for it.[82] The professional adapts further by aligning herself with the employing institution and advancing institutional goals and interests rather than those of clients, professional values and ethics, or larger societal interests.[83] At the same time, professionals redefine their personal goals so that they are congruent with institutional goals.[84] Their work life patterns become organized by the bureaucratic standards to which they are subject: those surrounding criteria for advancement and institutionalized promotions. Indeed, they may even organize to demand more bureaucratization, preferring it to the arbitrariness of management by direct supervision.[85]

2. Technical Control

The professions initially defended their professional status by expanding their technical expertise.[86] The retention of technical dis-

79. *Id.* at 174.

80. *Id.* at 180–84 (describing "ideological desensitization"). This explains why professional education and training emphasize technical knowledge and expertise as of greater import than ethical or social concerns; a "disinterested" stance is assumed toward the uses or potential uses of professionals' work. Education deliberately performs this function in law, medicine, and even nursing. *Id.* at 182–84. *See also* SCHMIDT, *supra* note 48 (describing the role of professional education in socializing professionals toward ideological dissociation and disenfranchisement).

81. Derber, *supra* note 70, at 182.

82. *Id.* at 180.

83. *Id.* at 174–75.

84. *Id.* at 185–88 (describing "ideological cooptation").

85. LARSON, *supra* note 27, at 233.

86. Derber, *supra* note 70, at 174. Derber writes that professionals at some point made a "Faustian pact" with employers, giving up ideological control in exchange for the privileges of status and technical authority. *Id.* Thus, he asserts, it should not surprise us when professionals who witness their corporate employers engaging in acts incongruent with professional values "swallow the whistle" rather than blowing it, subordinating personal and professional values to organizational loyalty and discipline. *Id.* at 177.

cretion over the day-to-day attributes of work assisted professionals in maintaining, at least temporarily, many of their professional privileges and status.[87] Ultimately, however, management began to chip away at professionals' technical expertise as well. As in the crafts, technical proletarianization proceeded in two phases: first, workers lost control over their time; later, the work itself was standardized according to a plan devised by management.[88]

a. Time

Time is a critical measure of the worth of work. Indeed, the basis of the entire occupational hierarchy is that the time of those in subordinate positions is worth less than the time of those in supervisory positions, so that tasks must be delegated for reasons of cost effectiveness.[89] Not surprisingly, then, loss of control over hours of work and pace of work are a significant source of concern among professionals because they signal a loss of status. The core attribute of professional work is that because it requires the exercise of discretion and judgment and cannot be standardized, "it cannot be established from the outside *that a given result should be obtained in a given time.*"[90]

The "tyranny of the clock" is a powerful contributor to the alienation of workers from their work. Studies of industrial workers indicate that lack of control over the immediate work situation, especially the rhythm and pace of work, is demoralizing.[91] Magali Larson explains how loss of control over time is particularly significant for professionals because it threatens their identity, and with it their class status:

> Even if their products and the organization of their work lives escape their control, they are *masters of their time*; this freedom extends from apparently trivial but nevertheless fundamental aspects of the work situation all the way to the *discretion* which they enjoy in the productive activity itself. Experts are not usually asked to punch time cards, they take their coffee breaks when they like, they arrange their work schedules and vacations with relative freedom, they have free access to telephones . . . . In their work, they tend to have absolute discretion, even though their own decisions are in-

87. *See* Derber, *The Proletarianization of the Professional*, *supra* note 25, at 30.
88. *See* Derber, *supra* note 70, at 171.
89. *See* LARSON, *supra* note 27, at 235–36.
90. *Id. at* 235 (emphasis in original).
91. *Id.*

serted within the framework of goals and strategies chosen by others.[92]

b. *Standardization of Tasks*

Bureaucratic organization of work has proven effective in expropriating knowledge from the professions, standardizing what is known, and dividing it among professionals through specialization of function organized in hierarchical fashion. Like the assembly line, the effect of bureaucratization is to press professionals toward specialization in order to produce economies of scale while potentially raising the quality of service.[93] As the professional specializes, he or she becomes a mere technician, sacrificing the freedom of broad scope professional work and losing the ability to establish the objectives of his or her own work.[94] When specialized professionals perform under the direction of management, often coordinating with other professionals in a division of labor specified by management, they relinquish the autonomy and control over the objectives of their work that they once possessed.[95] Thus, professional knowledge increasingly becomes encoded in the structure of the organizations rather than residing with professionals themselves. Professional work itself is restructured and standardized by administrators (perhaps themselves a new professional class!) who strive to maximize the economic returns to the organization.[96]

D. *From A Service Economy to an Encounter Economy?*

Some sociologists have identified a concomitant shift in service-providing by employers that moves from a focus on providing delivery of a service to a customer or patient, to a focus on delivering services via "encounters."[97] This is a potentially powerful form of commodification with important ramifications for the professions because it separates the service from the professional provider. Instead of a customer/patient–caregiver/service-provider relationship at the point of service delivery, "encounter" service deliveries are char-

92. *Id.*

93. *See* Derber, *The Proletarianization of the Professional*, *supra* note 25, at 16.

94. *Id.* at 16–17.

95. *Id.* at 17.

96. ABBOTT, *supra* note 18, at 325.

97. *See* Barbara A. Gutek, *Service Workers: Human Resources or Labor Costs?*, 544 ANNALS AM. ACAD. POL. & SOC. SCI. 68, 69 (1996).

acterized by a single-episode encounter with a service-provider who is fungible with any other similar provider. Purchasing fast-food epitomizes the encounter service, as does obtaining medical care through an HMO.[98] Not only can lower-cost labor be substituted for higher-cost labor on the provider side (patients may see nurse practitioners and physicians' assistants instead of medical doctors, and psychologists or social workers instead of psychiatrists),[99] but the delivery side may entail a single provider servicing multiple customers (doctors see groups of patients with similar complaints at the same time), [100] particularly with the aid of technology (a single professor may impart knowledge to students at multiple schools around the country through teleconferencing used in distance learning programs; U-scan machines in grocery stores and retail department stores may be overseen by one teller;[101] specialists can be centralized and their services made available to remote locations through telemedicine[102]).

Consistent with the loss of ideological control over work that characterizes deprofessionalization, encounter providers generally emphasize delivery style or process rather than expertise or relationship, which lies at the core of traditional provider relationships.[103] Encounter providers "have jobs that are less challenging, more monotonous, more stressful, less autonomous, require less skill, have lower wages, and tend not to provide workers with skills that allow them to advance in the organization."[104] Encounter providers' jobs have been Taylorized: Instead of making decisions about which ser-

98. *Id.*

99. *See id.* at 70.

100. *See* Barbara Martinez, *Now It's Mass Medicine: Doctors Start Seeing Groups of Patients to Save Time; One-on-One vs. One-on-12,* WALL ST. J., AUG. 21, 2000, AT B1 (reporting that Kaiser Permanente doctors are utilizing group visits, particularly for patients with common chronic ailments, such as diabetes, arthritis, or hypertension, or for those needing routine pediatric or geriatric care; one physician can service twenty-four patients in a single two-hour group session utilizing this strategy).

101. *See* GLAZER, *supra* note 4, at 18–19 (noting expense of machinery and technology required to facilitate the reduction in labor costs).

102. *See* TELEMEDICINE: A GUIDE TO ASSESSING TELECOMMUNICATIONS IN HEALTH CARE 18 (Marilyn J. Field ed., 1996). Telemedicine is defined as "the use of electronic information and communications technologies to provide and support health care when distance separates the participants," and it ranges from telephone and radio use to communicate to "telesurgery," in which a surgeon is provided with visual and tactile information which is used to guide robotic instruments to perform surgery at a distant site. *Id.* at 16.

103. *See* Gutek, *supra* note 97, at 74–75.

104. *Id.* at 74. Even highly skilled providers can be encounter providers—for example, surgeons who perform only hernia operations, at clinics that offer only hernia operations to patients who are otherwise healthy. *Id.*

vices to provide, they simply carry out a directive that someone at a policy-making level has already issued.[105]

Loss of technical control over work is inherent in this commodification strategy. Product standardization ensures that service-providers need not possess special information, expertise, or discretion.[106] Although the substitution of the encounter provider for the relationship service provider and the standardization of services has significant benefits for the public—some who could never before afford such services now may be able to—its labor cost-savings aspects also hold the threat of commodifying all service occupations, and indeed, ultimately automating them or eliminating them.[107]

The next Part traces the loss of ideological and technical control over work in particular professions—medicine and law—in order to provide more detail and depth to these observations about the commodification of professionals through control of their labor process.

III. THE COMMODIFICATION OF MEDICINE AND LAW

Some of the most striking organizing initiatives underway at present are taking place in medicine and in law, where dissatisfaction with the state of the professions themselves appears widespread. This Part traces the transformation of the structure of employment in those two professions, with an eye toward linking structural changes to organizing initiatives in Part IV.

A. *Medicine*

The quintessential image of a medical professional is a physician who operates a sole proprietorship or is a partner in a small partnership. While this image once reflected the reality of the structure of the medical profession, it appears increasingly outdated: the modern physician is more and more likely to be an employee, not an entrepreneur. In 1983, approximately 75 percent of physicians were self-employed, either in group or solo practices.[108] By 1999, only 62 per-

105. *See id.* at 76.

106. *See* GLAZER, *supra* note 4, at 27–28 (discussing role of product or service standardization in facilitating both self-service in the retail industry and deprofessionalization through the use of standard protocols in the delivery of health care).

107. Gutek, *supra* note 97, at 71, 82.

108. Paul D. Staudohar & James B. Dworkin, *Doctors and Unions*, 9 J. INDIVIDUAL EMP. RTS. 197, 199 (2001).

cent of physicians were self-employed;[109] the remainder (38 percent) were salaried employees of group practices, hospitals, or other health care institutions.[110] It seems likely that the trend toward employee status will continue.[111]

Salaried employee physicians are typically employed in bureaucratic settings (hospital, HMO, teaching, research, or administration).[112] Modern medical education ensures a dependence of physicians on technology and subordinate staff to whom the physician can delegate tasks; lacking these, it is difficult for physicians to satisfy current standards of care.[113] Moreover, rising malpractice costs,[114] the growth of specialization,[115] regulatory legislation and paperwork all

109. *Id.* Physicians defined as self-employed include solo practitioners, partners, or major shareholders in group medical practices. At law, some physician partners and shareholders are categorized as employees, see *infra* note 172, so the percentage of self-employed physicians is arguably even lower.

110. Staudohar & Dworkin, *supra* note 108, at 199; Margery Gordon, *Diagnosis: Labor Unrest,* CORPORATE COUNSEL, Feb. 14, 2002. Some estimates put the percentages of salaried employee-physicians even higher. *See* Ellen L. Luepke, *White Coat, Blue Collar: Physician Unionization and Managed Care,* 8 ANNALS HEALTH L. 275, 283 (1999) (estimating that 45 percent of physicians are employed on a salaried basis by hospitals, HMOs, or other institutions); *see also* Tracey I. Levy, *Collective Bargaining in the Elite Professions—Doctors' Application of the Labor Law Model to Negotiations With Health Plan Providers,* 13 U. FLA. J.L. & PUB. POL'Y 269, 270 (2002) (estimating that 43 percent of physicians are employed).

111. In the past five years, eighty to eighty-five percent of all doctors entering the profession took salaried positions in medical institutions. Barry Liebowitz, *Medical Doctors Turn to Unions,* WORKING USA, Fall 2000, at 27, 30–31. The Doctors' Council predicts that by 2010, more than 80 percent of all physicians will be salaried employees of hospitals and medical centers. *Id.* at 31.

112. *See* John B. McKinlay, *Toward the Proletarianization of Physicians, in* PROFESSIONALS AS WORKERS, *supra* note 20, at 37, 42–44.

113. *Id.* at 45.

114. According to the AMA, some twelve states are in "crisis" mode, with malpractice premiums threatening to drive doctors to other states or out of particularly high-risk practice areas. *See* Ertel Berry, *Bill Would Cap Medmal Damages, Contingency Fees,* N.C. LAW. WKLY., FEB. 17, 2003, at 1, 3 (discussing a bill pending in North Carolina legislature).

115. Reasonable minds differ on whether specialization detracts from or promotes quality of service. On the one hand, the sheer proliferation of medical knowledge and technology associated with it arguably renders specialization essential in order to master the knowledge base and maximize high standards of patient care. McKinlay, *supra* note 112, at 50–52. As patients themselves have become better educated and more sophisticated, public confidence in physicians has waned; it is logical that physicians would seek to meet this pressure by increasing their level of knowledge through specialization. *See id.* at 57. On the other hand, the pressure to specialize shares some features of scientific management, as work is broken down into smaller and discrete parts, and execution separated from overall conception of a treatment plan. This is particularly visible at the bottom end of the skills hierarchy, as less skilled actors, including nurse practitioners, physician's assistants, allied health workers, and midwives, perform the same work that physicians once did, albeit with less training and at a far lower cost to the institution. *Id.* at 52. Similarly, the work once done by RNs can and has been divided and assigned to a series of aides and technicians, redesigning patient care processes and creating mini-assembly lines. *See* James E. Eggleston, *Patient Advocacy and Consumer Protection Through Union Activism:*

combine to push physicians into larger workplaces where they will be shielded somewhat from these costs.[116] High student debt loads attributable to rising tuition costs undoubtedly contribute to the financial pressure on young physicians to pursue a traditional employment relationship.

The health care delivery system is notorious for its bureaucratization.[117] Advances in medical technology, large numbers of people needing care, and a need for centralization have produced a focus on efficiency and economies of scale.[118] Indeed, cost reduction was the explicit motivation for the shift to managed care.[119] It is not surprising to find tension between the twin goals of quality medical care and cost reduction; managed care is the guardian of the cost reduction side of the equation.[120]

1. Loss of Ideological Control: The Meaning of Care

Managed care organizations control costs by redefining the standard of medical care. The major tools in the cost containment arsenal include case control or utilization management (a process that provides guidelines for all health care decisions made during the stages of diagnosis and treatment, including standardized diagnostic tests, prescription drugs, and hospital stays), and retrospective claims review after the care is concluded.[121] Failure to adhere to these standards is

Protecting Health Care Consumers, Patients and Workers During an Unprecedented Restructuring of the Health Care Industry, 41 ST. LOUIS U. L.J. 925, 935 (1997).

116. McKinlay, *supra* note 112, at 45–46. Self-employed physicians have felt the squeeze of managed care, as well: managed care health plans have the ability to direct significant volumes of patients to particular physicians, and they direct patients to physicians who will cooperate with the health plan in reducing costs, particularly in reducing the utilization of health care services. Thus, they confer preferred provider status on physicians who are willing to order shorter hospital stays, make fewer referrals to specialists, and prescribe drugs and treatments that are the least expensive alternatives. Physicians who are unwilling to follow these guidelines are "deselected," the equivalent of termination. *See* Staudohar & Dworkin, *supra* note 108, at 199.

117. McKinlay, *supra* note 112, at 39–40.

118. *Id.* at 40.

119. DENNIS A. ROBBINS, INTEGRATING MANAGED CARE AND ETHICS: TRANSFORMING CHALLENGES INTO POSITIVE OUTCOMES 3 (1998). A secondary rationale was to improve medical service, particularly preventative care, early diagnosis, wellness programs, and patient education to promote better self-care. *See* Peter D. Fox, *An Overview of Managed Care*, *in* ESSENTIALS OF MANAGED HEALTH CARE 3 (Peter R. Kongstvedt ed., 2d ed. 1997).

120. In the focus on cost-cutting, there is little mention of the profitability of the health care industry to the corporations and corporate executives who run the corporate bureaucracies. Cost-cutting is focused exclusively on consumers and providers of services, rather than on equipment, pharmaceuticals, and corporate owners. *See* GLAZER, *supra* note 4, at 117 (noting profitability of corporate side of health care service delivery).

121. *See* Luepke, *supra* note 110, at 276–77.

punished: the claims reviews are used to make future contracting and staffing decisions vis-á-vis physicians.[122]

An important tool of ideological control is the "critical pathway." The critical pathway is a total quality management system technique that consists of a roadmap suggesting the course of treatment for any patient in a hospital setting.[123] Once a diagnosis is made, the critical pathway provides "a 'cookbook' approach to medicine."[124] It is sufficiently detailed that deviations from it can be easily tracked and recorded,[125] so that nonconforming careproviders may be identified and brought into line; it is a direct medium by which hospitals may control the day-to-day clinical decisions made by physicians.[126]Alternatively, physicians working in bureaucratic organizations find their diagnostic work guided by "protocols," flow charts that dictate what decisions will be made at each fork in the road during a diagnostic process.[127] Critical pathways and protocols represent examples of the application of scientific management to the medical profession.[128]

The overall impact of bureaucratization on the practice of medicine is also significant. Work is segmented and directed by adminis-

122. *Id.* at 277.

123. Karen A. Butler, Comment, *Health Care Quality Revolution: Legal Landmines for Hospitals and the Rise of the Critical Pathway,* 58 ALB. L. REV. 843, 844–45 (1995).

124. *Id.*

125. The practice of monitoring physician treatment patterns and using statistical analysis to identify and discipline those who deviate from the standardized care pattern is known as physician profiling or benchmarking. It can be used to identify over or under-utilization of services, evaluate outcomes, and document variations in both quality of care and efficiency of practice. *See* Edmund R. Becker & Kareen Hall, *Physician Services in a Academic Neurology Department: Using the Resource-Based Relative-Value Scale to Examine Physician Activities,* 27 J. HEALTH CARE FIN. 79 (2001). Individual physician profiles are compared with peer-practice-based norms and significant deviations identified. Christine Ramsey et al., *Performance-Improvements Strategies Can Reduce Costs,* 2001 HEALTHCARE FINANCIAL MGMT. RESOURCE GUIDE 2, 4 (2000).

126. *See* Butler, *supra* note 123, at 845–46. While critical pathways could conceivably improve the quality of medical care, not all pathways are developed by physicians, and the pathways are clearly implemented as a cost-saving measure. *Id.* at 861–64. One study found that critical pathways were so successful at eliminating over-utilization of resources by physicians that they reduced the mean cost per case by 35 percent, and the mean hospital stay decreased 27 percent as a result of implementation of the pathways. Ramsey et al., *supra* note 125, at 4.

127. Spangler & Lehman, *supra* note 20, at 71.

128. Conceivably, a physician's job might be broken down into its parts (taking a medical history, physical examination, ordering tests, forming a diagnosis, prescribing treatment, and determining prognosis) and most if not all of these tasks assigned to subordinate workers or performed by computer; biotechnology is far more efficient and reliable at both diagnosis and treatment than most physicians, it appears. *See* McKinlay, *supra* note 112, at 52–54. "There have also been studies showing that computers can perform nearly all aspects of diagnosis, treatment, and therapy at a level of reliability higher than that of even the most highly-trained and up-to-date physician." *Id.* at 54.

trators rather than controlled by the practitioner, so that a physician may not have either a vision of the ultimate ends of her action or overall role in patient care. Pressure toward specialization, the delegation of medical tasks to less skilled medical practitioners, and isolation from patients who have come to view themselves as clients of the institution rather than as patients of the doctor, all stem from thc pressure toward cost containment and profit production in HMOs.[129] Technology is owned and controlled by the institution and its use curtailed according to institutional goals. Physicians become dependent upon allied health professionals for effective functioning in the bureaucracy, as their practice is organized in a teamwork fashion.[130] As a member of the team rather than its captain, the physician in a large bureaucracy or hospital setting is subject to hospital rules established by administrators who are professionals themselves, but who do not share the medical ethic of care. Health care management and hospital administration training equip administrators with an ideology of guarding scarce organizational resources rather than of providing the highest quality medical care in any given case, and the technical skills to justify their decisions curtailing the activities and practice of physicians.[131]

2. Loss of Technical Control: Time and Standardization

In order to control costs, managed care organizations must control physicians' time and standardize their product.[132] Accordingly, in bureaucracies that employ physicians, working hours are established

129. *See* Staudohar & Dworkin, *supra* note 108, at 200-01.

130. McKinlay, *supra* note 112, at 55–56.

131. *Id.* at 56. Even those administrators who are recruited from the ranks of physicians appear to shift priorities once in administration, adopting the organizational priorities of profit, efficiency, and "fiscal responsibility" in preference to the prerogatives of medical care. *Id.* at 56.

132. One physician explained:

> Because physicians are responsible for ordering up to 80% of all healthcare services, it is obvious that . . . a healthcare corporation . . . must control the physician. The most benign method of controlling physicians is to put them on salary so that their income is not influenced by or dependent on the number of tests or procedures they order. The most malignant way to control physicians is to inversely associate their income with the level of services they order. A capitated physician in U.S. Healthcare, the HMO of the Aetna insurance company, has as much as 50% of his gross income at risk. One component of his income is a bonus, which rewards the physician for meeting clinical and marketing goals and achieving a high level of patient satisfaction. Another component is punishment in the form of withheld income for ordering an "excessive" amount of clinical services.

Kevin Loh, *Professionalism, Where Are You?*, 79 EAR, NOSE & THROAT J. 242, 243 (2000) (footnotes omitted).

by the organization rather than controlled by the physician.[133] Administrators regulate directly the number of patients physicians see per day, the number of minutes spent with each patient, the diagnostic and treatment protocols that physicians follow, the tests they order, and the forms of treatment they may offer.[134] Specific strategies used by managed care systems to control physicians' behavior include requiring preauthorization for some medical services, restricting access of patients to specialists, denying payment for services provided outside the network, restricting payments for coverage on prescription drugs, and tying bonuses to certain utilization levels.[135] Finally, physician performance can be linked to pay, so that advancement through a pay range is based upon the physician's contribution to the practice group, measured not only by clinical quality and patient satisfaction, but also by use of resources.[136]

3. Summary

It appears, then, that the revisionists were correct: the historical autonomy of physicians was secured primarily by their strategic monopoly over knowledge, rather than by the actual possession of knowledge.[137] As bureaucratization and advances in technology proceed, physicians are losing their collective monopoly over medical knowledge and may be expected to become more and more proletarianized, just as craft workers did during the transition to an industrial era. Thus, physicians can be replaced by workers who perform unskilled or semi-skilled work, or by technology, either of which can be

133. McKinlay, *supra* note 112, at 51.

134. Gordon, *supra* note 110.

135. *See* David A. Hyman, *Regulating Managed Care: What's Wrong with a Patient Bill of Rights?*, 73 S. CAL. L. REV. 221, 229 (2000); John J. Deis, Comment, *The Unionization of Independent Contracting Physicians: A Comedy of Errors*, 36 HOUS. L. REV. 951, 954 (1999). In one controversial case, a patient suffered a ruptured appendix because her physician delayed ordering an ultrasound test that would have disclosed the condition. When she discovered that her HMO paid bonuses to doctors who ordered fewer diagnostic tests, she sued the treating physician and the HMO under ERISA, alleging that the bonus plan created a conflict of interest for physicians, and thus represented a breach of fiduciary duty by the HMO. The Supreme Court ruled that because mixed treatment and eligibility decisions by HMO doctors are not fiduciary decisions under ERISA, the action failed to state a claim. Pegram v. Herdrich, 530 U.S. 211, 221 (observing that "inducement to ration care goes to the very point of any HMO scheme, and rationing necessarily raises some risks while reducing others," and declining to make social policy judgments about the overall wisdom of managed care which are better left to the legislature).

136. *See* Stephanie B. Woodson, *Making the Connection Between Physician Performance and Pay*, 53 HEALTHCARE FIN. MGMT. 39 (1999).

137. McKinlay, *supra* note 112, at 55.

exploited more effectively by the bureaucratic organization. Alternatively, physicians may suffer job consolidation, traditionally known as "speed-up," as tasks once performed by less-skilled workers are shifted to them in order to cut labor costs at the bottom of the pyramid.[138] Either way, "their labor power will lose its value, and the privileges physicians presently enjoy in conditions of work, social prestige, and income will diminish, along with distinctions between them and related medical care workers."[139]

B. Law

1. Private Law Firms

Law firms once assumed the form of partnerships, characterized by professional values and a familial spirit. The modern market has pressed them toward a large firm business model organized hierarchically.[140] The rise of large corporations and the concentration of assets and power in fewer corporate entities have had a spillover effect on the legal profession. As lawyers undertake to serve large corporate interests, they have institutionalized the tenets of mass production that guide the clients whose interests they serve.[141] Efficiency and productivity are believed to require bureaucratization and specialization of attorneys by subject matter.[142] The modern firm is organized

138. Job consolidation has been used extensively in nursing. "Team nursing," as the array of providers offering caregiving services to patients was called, has been replaced in some hospitals with "primary care," in which RNs perform all tasks including direct care, allowing the employer to reduce therapy, clerical, and housekeeping staff. *See* GLAZER, *supra* note 4, at 146–49.

139. McKinlay, *supra* note 112, at 55.

140. S.S. Samuelson, *The Organizational Structure of Law Firms: Lessons From Management Theory,* 51 OHIO. ST. L.J. 645, 645–46 (1990).

141. *See* Harlan F. Stone, *The Public Influence of the Bar,* 48 HARV. L. REV. 1, 6–7 (1934) ("The rise of big business has produced an inevitable specialization of the Bar. The successful lawyer of our day more often than not is the proprietor or general manager of a new type of factory, whose legal product is increasingly the result of mass production methods."); A.A. Berle, Jr., *Modern Legal Profession,* 9 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 340, 344 (1933):

> Intellectually the [legal] profession commanded and still commands respect, but it is the respect for an intellectual jobber and contractor rather than for a moral force. The leading lawyers, especially those who are the heads of the great law factories, must be able to please or serve the large economic groups and they become therefore extremely skilled technicians.

142. Economies of scale (unit costs decline as volume of production rises), scope (many clients need more than one type of legal specialist, and a large firm environment insures that the client's interests can be served by a team of lawyers with varying specialties, or that the client can be transferred from one lawyer to another with minimal loss of startup time), and specialization militate toward the large bureaucratically structured firm rather than the smaller, traditional partnership or sole proprietorship. Samuelson, *supra* note 140, at 647–48.

vertically by rank and tenure.[143] When confronted by declining profits in the recession of the 1980s and early 1990s, law firms behaved as their clients did—they downsized, starting with associates at the bottom of the firm hierarchy. In short, as Second Circuit Judge Irving Kaufman observed, "the largest law firms have acquired the *characteristics of the corporations* they have represented."[144]

The traditional partnership represented "the ultimate cooperative organization, a marriage of equals" and was characterized by equality in management and profit-sharing among the equity partners.[145] By contrast, the large law firm concentrates power and control in a relatively small number of partners who make decisions with little or no input from the other partners in the firm. An executive committee dominated by a select cadre of senior partners typically exercises ideological control over the firm's work, determining content of the firm's work, the firm's growth rate, and performance standards for associates.[146] A managing partner or partners exerts ultimate control.[147] Rules, procedures, annual performance reviews, and bonuses tied to billable hours or positive performance serve as the enforcement tools for maintaining technical control.[148] Associates are provided with every incentive to identify with management, rather than with labor. Conflict with management is muted; constraints on autonomy are perceived as arising from the client.[149]

Inevitably, lawyers sacrifice autonomy to the larger goals of the bureaucratic law firm.[150] By far the most significant tool of technical discipline that large firms exercise over lawyers is the billable hour. The need to measure lawyer output, and the difficulties in valuing intangible legal services, have resulted in heavy reliance on the billable hour.[151] Billable hour requirements have increased dramatically

143. Spangler & Lehman, *supra* note 20, at 77.

144. Irving R. Kaufman, *Broken Contracts,* N.Y. TIMES, Dec. 17, 1990, at A17 (emphasis added).

145. Samuelson, *supra* note 140, at 650.

146. Spangler & Lehman, *supra* note 20, at 77.

147. Samuelson, *supra* note 140, at 652.

148. *See* Spangler & Lehman, *supra* note 20, at 77.

149. *Id.* at 79–80. Corporate clients of large law firms sometimes do impose specific limitations on the work attorneys may do, including how much they may bill, how many research hours they may work, how many client contacts they may make, etc. This is increasingly common in the insurance defense industry.

150. Samuelson, *supra* note 140, at 674.

151. *See id.* at 647; *see generally* WINNING ALTERNATIVES TO THE BILLABLE HOUR: STRATEGIES THAT WORK xiii-xiv (James A. Calloway & Mark A. Robertson, eds., 2d ed. 2002)

over the past half-century, moving from 1100 hours per year in 1950 to 1900 hours per year in 2000.[152] At some firms, additional compensation is explicitly tied to billing hours over and above the threshold level required of all associates: so-called "sweat bonuses," "productivity bonuses," or optional "higher hour" salary tracks reflect these arrangements.[153]

Past ABA president Robert Hirshon recently pressed the question of why the value of legal services must be measured exclusively in terms of hours, asking pointedly, "As lawyers, do we sell our time or our skill?"[154] He observed that reducing lawyering to increments of time saps the creativity from lawyering and squeezes out other aspects of lawyering as a profession, such as pro bono service to the community.[155] Moreover, it is not clear that hourly billing is the most effective business valuation method. If lawyer output is measured exclusively in terms of hours, some unintended consequences follow: inefficiency may be rewarded,[156] improvements in technology that allow re-use and tailoring of an attorney's or firm's prior work product will not be recognized or their costs recaptured,[157] training and

[hereinafter ALTERNATIVES TO THE BILLABLE HOUR] (suggesting that hourly billing became the norm because it is perceived as unambiguous, objective, and easy to measure).

It is not clear that other valuation methods necessarily avoid the evils of standardization. For example, total quality management, which would require measuring the value of particular services performed by lawyers, is rejected by many because it assumes that legal services can be standardized. Deborah K. Holmes, *Learning from Corporate America: Addressing Dysfunstion in the Large Law Firm*, 31 GONZ. L. REV. 373, 395–96 (1996); *see also* G. Howland Blackiston, *A Road Map for Quality in Legal Services,* 43 EMORY L.J. 507, 509–10 (1994).

152. Martha Neil, *Off To A Running Start: Hirshon Announces Initiatives on Billable Hours and Student Loans*, A.B.A. J., Oct. 2001, at 82. These figures are minimums only; it is common at many firms for associates seeking partnership to bill hours considerably in excess of that—as many as 2500 per year or more would not be surprising. *Id.*

153. In the year 2000, Covington & Burling paid new associates $125,000 per year for baseline billings of 1950 hours per year. For associates who billed 2000 hours, it offered an $8,500 minimum bonus. Orrick, Herrington & Sutcliffe offered a $25,000 sweat bonus for those billing 2400 hours. Hogan & Hartson in Washington D.C. created two salary tracks: $110,000 for 1800 billable hours and $125,000 for 1950 billable hours. Ted Allen, *Who Wants to Earn $160,000 a Year?,* LEGAL TIMES, Mar. 13, 2000, at 18.

154. Robert E. Hirshon, *Law and the Billable Hour: A Standard Developed in the 1960s May Be Damaging our Profession*, A.B.A. J., Feb. 2002, at 10.

155. *See id.* Reliance on hourly billing as a system for measuring output, taken in combination with increases in billable hour requirements, also squeezes out other aspects of life—most significantly family life and parenting. Utilizing time worked as an indicator of commitment to the firm, as well as the sole measure of productivity and often merit as well, impacts working parents disproportionately and blocks work/family innovations that offer the potential to improve both morale and productivity. *See* Marion Crain, *"Where Have All the Cowboys Gone?": Marriage and Breadwinning in Postindustrial Society*, 60 OHIO ST. L.J. 1877, 1950–51 (1999).

156. *See* Holmes, *supra* note 151, at 388–89; Crain, *supra* note 155, at 1950 n.318.

157. *See* ALTERNATIVES TO THE BILLABLE HOUR, *supra* note 151, at xv.

mentoring are treated as luxuries that cannot be recaptured in client fees and thus are disincentivized,[158] and efficiency stemming from experience is not recognized beyond certain limits.[159] At bottom, the relationship between the value of the services received and the fee charged is questionable.[160] Nonetheless, the billable hour remains the industry standard for large law firms.

Pressure on the billable hour and the significance of quantity of hours worked was intensified by the trend, led by Cravath, Swaine & Moore in the 1980s, to raise salaries of first year associates to unprecedented levels, a move soon followed by other large law firms across the nation.[161] This shift, which Gordon calls "one of the most antisocial acts of the bar in recent history,"

> devalues public service by widening the gulf . . . between starting salaries in private practice and in government and public interest law. It drives impressionable young associates toward consumption patterns and expectations of opulence that will be hard to shake off if they want to change careers. It forces every lawyer in the firm, especially the associates who are its supposed beneficiaries, to pay heavily for it in extra billable hours and, insofar as high incomes for the partners depend upon low partner-associate ratios, in reduced prospects of reaching partnership.[162]

Alarmed by the market-driven increases in salary for beginning attorneys,[163] a number of large law firms have taken further steps to narrow the professional role, restructuring the way work (and profits) are allocated. Some firms are shifting work to contract or staff attorneys, who are paid much less than partner-track associates and bill at a lower rate, or to nonlawyer professionals like paralegals.[164] Other firms use "attorney advisors" to substitute for attorneys; these persons have backgrounds in technology or economics, and can do part of the job the firm has been hired to perform, but at a lower cost.[165]

158. *See* Holmes, *supra* note 151, at 389.

159. ALTERNATIVES TO THE BILLABLE HOUR, *supra* note 151, at xv (noting that the market will not always bear upward hourly rate adjustments to take account of attorney expertise).

160. *See id.* at 129.

161. *See* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 60 (1988).

162. *Id.*

163. The median first year associate salary in April 2002 was $90,000 among more than 600 law firms surveyed nationwide, with a range of $53,000 at firms with twenty-five or fewer attorneys to $118,000 for those with more than 500 attorneys. In addition, some firms distributed bonuses of $25,000 (down from $40,000 two years previously) to junior associates. Martha Neil, *What Goes Up . . . Starting Associate Salaries Are Flat for Now, and the Future Is Uncertain*, A.B.A. J., Feb. 2003, at 24.

164. *See* Michael Orey, *Law Firms Ponder Major Changes to Fund Leap in Starting Salaries*, WALL ST. J., May 12, 2000, at B1.

165. *See id.*

All of these strategies are profit-maximizing moves that reflect the use of scientific management or bureaucratization to divide the professional work into its component parts.

The dramatic bureaucratization of the modern law firm has resulted in a bewildering array of attorney statuses that range far beyond the traditional partner/associate dichotomy.[166] "Permanent associates," "non-equity partners," attorneys who are "of counsel," and "junior partners" now work alongside contract lawyers and legal temps.[167] The legal significance of these various statuses is now coming to the attention of the federal courts. In 1999, Sidley & Austin demoted thirty-two partners (who were primarily in their mid-fifties and early sixties) to "counsel" or "senior counsel" status as part of an operational restructuring designed to improve profitability.[168] At the same time, it changed its mandatory retirement age from sixty-five to a sliding scale of sixty to sixty-five. Both decisions were made by the firm's thirty-six-member executive committee; the firm's remaining 377 partners were not permitted to vote on the question.[169]

The EEOC initiated an investigation under the Age Discrimination in Employment Act ("ADEA"), arguing that the move was part of a strategy to push older attorneys out of the firm in order to make room for younger partners and associates who were more productive. Sidley & Austin responded that the EEOC lacked jurisdiction over the partners because they were not "employees" covered by the ADEA's antidiscrimination protections. The U.S. District Court granted the EEOC's request to subpoena partnership records, ordering the firm to turn over employment records for the thirty-two former partners, including compensation records and information about their capital accounts, which were necessary in order to ascertain whether the EEOC had jurisdiction (*i.e.*, whether the partners were "employees"), and whether discrimination had occurred.[170] Judge Posner, writing for the Seventh Circuit, vacated and remanded the case with instructions to order Sidley to comply fully with the portion

166. *See* Samuelson, *supra* note 140, at 656.

167. *Id.*

168. The firm's rationale for the demotions was that the demoted partners' contributions were "less than expected." T. Shawn Taylor, *'Partners' Put Law Firms in Labor Bind: EEOC, Chicago Firm do Battle*, CHI. TRIB., Apr. 7, 2002, at C1.

169. In May of 2002, Sidley & Austin merged with Brown & Wood, and has increased its staff of more than 900 attorneys worldwide to more than 1,325 attorneys. Michael Bologna, *Federal Judge Grants EEOC Subpoena of Chicago Law Firm's Partnership Records*, DAILY LAB. REP. (BNA) NO. 30, Feb. 13, 2002, at A-7.

170. EEOC v. Sidley & Austin, 88 FEP Cases 64 (N.D. Ill. 2002).

of the subpoena that requests documents necessary to determine coverage, and therefore jurisdiction; and then to make a determination upon completion of the document submissions whether the demoted partners were arguably covered by the ADEA.[171]

The court's opinion did not settle the question whether the thirty-two demoted partners were employees for the purposes of coverage under the ADEA. Nonetheless, the court did agree with the EEOC that the partners' classification as partners "under state law is not dispositive of their status under federal antidiscrimination law."[172] That the federal courts are now engaged in determining the status of workers at the upper end of the employment spectrum for purposes of conferring protection rather than liability under labor and em-

171. EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 707 (7th Cir 2002). In the event the court finds coverage arguable, further compliance with the subpoena would be required on the portions of the materials requested that relate to the merits of the claim. *Id.*

172. *Id.* at 702. Whether the partners are employees for purposes of antidiscrimination law turns largely on whether they are NOT employers, who are not protected under the antidiscrimination statutes. Neither the partners' share in the profits of the firm, ability to bind the firm through opinion letters, their ownership of some part of the firm's capital, or their liability for debts of the practice were sufficient to categorically define them as employers rather than employees. Because the partners do not elect the members of the executive committee, they cannot be said to have delegated their decisionmaking powers to the executive committee. The court concluded,

> What the Commission particularly wants to know is how unevenly the profits are spread across the entire firm. Are profits so concentrated in members of the executive committee . . . that the [32 demoted partners] occupied the same position they would have if they had been working at a comparable rank for one of the investment banks that once were partnerships but now are corporations? This might not be decisive but it would bear on the unavoidably multifactored determination of whether this large law firm—which in recognition that conventional partnership is designed for much smaller and simpler firms has contractually altered the structure of the firm in the direction of the corporate form–should for purposes of antidiscrimination law be deemed the employer of some at least of the individuals whom it designates as partners.

Id. at 707. A case raising related issues was recently decided by the Supreme Court. In *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440 (2003), the Court ruled that the EEOC's six-point test for determining who is an "employee" was appropriate for application to the Americans With Disabilities Act ("ADA"), which utilizes the same definition of "employee" as do the ADEA and Title VII. The Court noted that the professional corporation is a "new type of business entity that has no exact precedent in common law," but went on to observe that the traditional inquiry into the extent of the employer's right to control the servant's work used in other contexts should serve as the "principal guidepost" in determining whether a physician-shareholder in a medical practice is an "employee" for purposes of ADA applicability. *Id.* at 1679. The Court remanded the case to the Ninth Circuit to apply the EEOC's test and rule on whether the physician-shareholders in the medical practice were "employees." The EEOC test focuses on whether the organization hires, fires and sets rules and regulations governing the individual's work; whether and to what extent the organization supervises the individual's work; whether the individual reports to a higher level person in the organization; whether and to what extent the individual has influence over the organization; the parties' intent as to the employee status of the individual, evidenced by written agreements; and whether the individual shares in profits, losses, and liabilities of the organization. *Id.* at 1680–81.

ployment legislation evidences professionals' vulnerability to profit-maximizing strategies such as scientific management and bureaucratization.

2. In-House Counsel

In-house counsel face even greater bureaucratization than do attorneys in large law firms. The jobs are less prestigious and entail more routine assignments; the most challenging and creative legal work is contracted out to specialists at law firms.[173] In-house counsel lack any ideological control over their work; unlike associates in large law firms, they cannot even use the criterion of profitability to argue for change.[174]

3. Government Attorneys

Undoubtedly the most starkly bureaucratized work settings for lawyers are government offices. The minutely detailed job descriptions, "GS" ranking systems which determine salary, and relatively routine promotions based upon seniority that characterize government employment combine with the forced specialization and highly technical work of most government lawyers to produce a workforce that is subject to both ideological and technical control.[175]

4. Legal Services Attorneys

Lawyers who serve the poor are perhaps the most visibly dissatisfied of all lawyers, at least as measured by unionization rates. Legal services provides an especially compelling example of the efficacy of bureaucratic control mechanisms in shaping the ideological content of professional work.[176] Moreover, the paucity of social resources dedicated to providing legal assistance to the poor has forced legal services lawyers to create self-help packets for client use when underfunded Legal Aid offices cannot take their cases. In so doing,

173. Spangler & Lehman, *supra* note 20, at 83.

174. *Compare id.* at 77–78, 80 (describing universal profit motive which guides law firm decisionmaking) *with id.* at 86 (describing muted voice of in-house counsel in corporate decisionmaking).

175. *See id.* at 87–88.

176. *Id.* at 73; *see* Deborah M. Weissman, *Law As Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737 (2002) (discussing history of political and legislative restrictions imposed on the legal work that legal services lawyers may perform).

they are forced to Taylorize their own work, standardizing their work and separating themselves from their products.[177]

5. Law Professors

Even legal academics have been impacted by the trend toward control of time and product standardization. A senior colleague advising junior colleagues about the character of scholarly work most likely to yield significant raises or chairs summarized it this way: "deans can count." By this he meant that while deans might hesitate to pass judgment on the quality of one faculty member's scholarship over another's work at raise time, many are quite willing to rest decisions on volume of scholarship produced. Similarly, Professor Ian Ayres recently advised new law professors seeking tenure to publish two articles per year timed to coincide with the article "sweeps" periods in major law reviews (fall and spring); this quantitative level of production, he asserted, was "guaranteed" to earn tenure.[178] Professor Ayres sought to "demystify" the production of scholarship by outlining a production schedule aimed at meeting this goal. He advised aspiring academics to draft 1000 words per day (four words per minute during a four hour writing block per day) for twenty-five to thirty days, which should yield a 25,000–30,000 word article, the norm for publication in most major reviews.[179]

6. Summary

The increasing emphasis in the practice of law on specialization and standardization of products, as well as the allegiance to the billable hour or other quantitative measures of the value of services, furnishes powerful evidence that lawyers have yielded ideological and technical control over their work to employers. Whether the employer is a large law partnership, a corporate employer, the government, a legal services corporation, or an educational institution, the lawyer who cedes autonomy over the ideological ends to which her work is put, her labor process, and her time itself loses the autonomy that has been central to the definition of the lawyer as a professional. She becomes vulnerable to profit-maximizing strategies that divide

177. Spangler & Lehman, *supra* note 20, at 93.

178. Ian Ayres, Developing A Scholarly Agenda, Presentation Before the New Law Teachers' Workshop, Annual Meeting of the Association of American Law Schools, Jan. 2003, in Washington, D.C. [audiotape on file with author].

179. *Id.*

her work into its component parts and sub-contract out significant aspects to less-skilled, non-professional, cheaper workers, or commodify it for purposes of distributing it more efficiently through economies of scale.

IV. UNIONS FOR PROFESSIONALS? ORGANIZING DOCTORS AND LAWYERS

It appears, then, that the revisionists were correct in their predictions about the working futures of professionals: they are moving steadily toward commodification. Professionals' resistance to the commodification process can be measured by the depth of their anger and sense of betrayal at the breach of the social bargain and the denial of privileges to which they believed themselves entitled on the basis of their extended professional education and elevated class status.[180] Research suggests that rising expectations, fostered by an ideology of self-interest and unlimited individual mobility, eventually coalesce as an assertion of a right to meaningful and remunerative work, particularly by the highly educated workforce.[181] Charles Derber has posited that highly entitled workers (such as professionals) are more likely to externalize blame for failure to achieve onto employers and society.[182] Ultimately, he suggests, they may furnish "an especially fertile base for the growth of social dissent."[183] But how

180. Charles Derber, *Unemployment and the Entitled Worker: Job-Entitlement and Radical Political Attitudes Among the Youthful Unemployed*, 26 SOC. PROB. 26, 27 (1978).

181. *See id.* at 26–27. Many professionals are not even inclined to trade off intrinsic rewards of work for extrinsic rewards such as higher pay; they feel strongly that both ample remuneration and interesting and challenging work are their due as professionals. *Id.* at 27–28.

182. *Id.* at 28. Derber's 1970s study of unemployed workers under thirty-five years of age collecting unemployment insurance in a suburb of Boston revealed no significant difference in job entitlement perceptions between college-graduates and non-college graduates. Three-quarters of the workers in his sample expressed high beliefs in job entitlement, regardless of educational background. *Id.* at 30–31. Thus, while education is one source of entitlement beliefs, it appears that it is not the only source. Derber concludes that a new, universal expectation of entitlement is emerging that is divorced from individual achievement and is accepted by workers at lower skill levels. Those who are highly educated and skilled appear more likely to attribute their job entitlement to personal achievement, however. He concludes:

> [T]hese attitudinal differences between the more educated and less educated workers are generally consistent with their respective class interests. The preliminary indication is that the highly educated, more privileged worker, while largely supportive of the new universalistic ideology of entitlement, persists in asserting entitlement-claims on the basis of personal accomplishments as well. This adherence to individualistic ideology is deeply ingrained in the middle classes and legitimates class privilege.

Id. at 31.

183. Charles Derber, *Underemployment and the American Dream: "Underemployment-Consciousness" and Radicalism Among Young Workers*, 49 SOCIOL. INQUIRY 37, 43 (1979)

likely is it that professionals' outrage over diminishing status will find expression in unionism?

A. *Shifting Tides*

At first blush, professionals' traditional strong commitment to an individualist ethos would appear to make them unlikely candidates for a collectivist strategy.[184] Professionals' working conditions were historically organized around an ideology of individualism: individualized work, individualized clients, and individual specialization of function.[185] Nonetheless, professionals have always been joiners, working collectively through professional associations to maintain their market monopoly (through furthering professional education, conducting peer review, and maintaining and refining licensing and certification standards). Indeed, the very existence of professions is actually the "collective assertion of special social status and . . . a collective process of upward social mobility."[186] Professionals are thus accustomed to the role of collective organization and self-governance, and look to professional associations to establish, maintain, and enhance professional identity, as well as for information, education, and professional development opportunities.[187] Accordingly, when the professional associations began to respond to the tendency of corporate employers to commodify the professions by endorsing unionization and collective bargaining, the stage was set for change. The American Association of Administrative Law Judges, the American Pharmaceutical Association, The American Medical Association, the American Nurses' Association, the American Federation of Teachers, and the National Education Association have all adopted a posture supporting unionization and collective bargaining, and are in various stages of a transition to becoming more like unions themselves.

Increasingly, professionals are organizing in response to employer efforts to circumscribe discretionary power, to control how

(finding support for the underemployment thesis in a study that revealed a correlation between underemployment-consciousness and radical political views).

184. Derber, *supra* note 180, at 29.

185. LARSON, *supra* note 27, at 236–37.

186. *Id.* at xvi. Larson explains that professionals translate scarce cultural resources (expertise, skill) into social and economic rewards, and then maintain the scarcity of resources (knowledge) via a monopoly power over the market for their expertise. *Id.* at xvii.

187. Hurd, *supra* note 61, at 3 (suggesting that if unions could adopt some of the characteristics of professional associations–such as an information and education-intensive focus, they might attract a larger percentage of professional workers).

particular tasks are performed, or to reduce the exercise of professional judgment. They seek voice and input in decisionmaking, particularly about professional objectives, and to regain the societal respect, prestige, and dignity they once enjoyed as part of their professional status.[188] The paradigm professions of medicine and law evidence this phenomenon well, and I turn to them as illustrations.

B. Physicians

By 1999, 42,000 of the 620,000 doctors nationwide were organized.[189] There are three major established physicians' unions and one housestaff union. The first doctors' union, the Committee on Interns and Residents ("CIR"), was formed in 1957.[190] By 1999 it boasted 9000 members and had affiliated with the Service Employees' International Union ("SEIU").[191] The largest physicians' union, the Union of American Physicians and Dentists ("UAPD"), began organizing doctors in 1972 in the San Francisco area.[192] By 2000, it had a membership of 6000—all postresidents.[193] The UAPD further strengthened its market share of physician representation when it affiliated with the American Federation of State, County, and Municipal Employees ("AFSCME").[194] The Federation of Physicians and Dentists ("FPD"), established in Tallahassee in 1983, is also affiliated with AFSCME.[195] A third founding doctors' union was the Doctors' Council, founded in New York City in 1959; it merged with two other unions in 1999 to form the Doctors Alliance in New York, and affiliated with the SEIU

188. *See* Charles B. Craver, *Why Labor Unions Must [and Can] Survive,* 1 U. PA. J. LAB. & EMP. L. 15, 44–46 (1998); Liebowitz, *supra* note 111, at 32; *see also* Hurd, *supra* note 61, at 1–3 (noting that freedom to exercise professional judgment lies at the top of the list of organizing issues). The charter of the UAPD exemplifies the goals of a professional organization in the medical context. The UAPD charter strives

> to provide optimum medical care for people; to insure quality facilities for the provisions of medical care; to enable doctors to give of themselves, unhindered by extraneous forces, for the welfare of their patients; to insure reasonable compensation for doctors commensurate with their training, skill, and the responsibility they bear for the life and health of their fellow beings.

BUDRYS, *supra* note 26, at 9 (quoting preamble to UAPD charter).

189. Valliere, *supra* note 6.

190. Staudohar & Dworkin, *supra* note 108, at 205.

191. *Id.*

192. *Id.*

193. *Id.*

194. Valliere, *supra* note 6; Jeremy Lutsky, *Is Your Physician Becoming a Teamster: The Rising Trend of Physicians Joining Labor Unions in the Late 1990s,* 2 DEPAUL J. HEALTH CARE L. 55, 99 (1997).

195. Valliere, *supra* note 6.

that same year.[196] In 1999, the AMA endorsed physician unionization and created its own union, Physicians for Responsible Negotiation ("PRN") (which has disavowed strikes as a method for increasing bargaining leverage).[197] The number of doctors estimated to belong to one of the major unions was approaching 50,000 by the year 2000.[198]

Much of the earliest doctor organizing was focused on the problem of deteriorating patient access and services, particularly in nonprofit clinics and hospitals located in areas that serve low-income residents.[199] Threats to professional autonomy surfaced when third party players began to dictate standards of care. Physician organizing received a significant boost in the 1970s with the advent of Medicare and the limitations it imposed on treatment through its coverage, which indirectly impacted physician autonomy. Similarly, the phenomenon of managed care and the control that HMOs and third party payor insurance companies seek to exercise over doctors' treatment decisions prompted the newest wave of physician organizing in the 1990s, and was certainly responsible for the PRN's entry onto the scene.[200]

The primary organizing impetus today thus stems from the loss of professional autonomy and the right to determine treatment and control over patient care service delivery; salary and benefit issues are secondary and reflect the loss of public respect and prestige.[201]By controlling physicians' time and limiting their authority to diagnose and treat patients and to refer them to specialists, HMOs have commodified physicians. As one physician-unionist described it, "[Blue Cross/Blue Shield] wanted to pretend that we were no more impor-

196. *Id.*; Staudohar & Dworkin, *supra* note 108, at 205; Liebowitz, *supra* note 111, at 28. The Doctors' Council affiliated with the SEIU in 1999. *Id.* at 29.

197. Staudohar & Dworkin, *supra* note 108, at 206. Subsequent to the Court's decision in *Kentucky River, see infra* notes 314–20 and accompanying text, the AMA announced that it would no longer seek to organize private sector physician employees through PRN because of the now-unfavorable legal climate, but indicated that it would continue to represent those already organized and that it would monitor legal developments in the private sector, with the intention of recommencing its organizing efforts there when the legal climate becomes more hospitable. *See High Court Ruling Causes PRN to End Organizing Efforts for Private Sector Doctors,* DAILY LAB. REP. (BNA) NO. 111, June 8, 2001, at A-6.

198. Staudohar & Dworkin, *supra* note 108, at 206.

199. Liebowitz, *supra* note 111, at 28.

200. Staudohar & Dworkin, *supra* note 108, at 199, 206.

201. Liebowitz, *supra* note 111, at 32, 34. *See, e.g.*, *Physicians At Tucson Medical Clinic Vote for Representation by AFSCME Affiliate,* DAILY LAB. REP. (BNA) NO. 16, Jan. 24, 1997, at A-5 (noting that the major issue in the organizing drive, conducted by the Federation of Physicians and Dentists, was doctors' professional autonomy in making patient care decisions).

tant than the tables and chairs in the health centers, that we could be bought and sold."[202]

Some have suggested that there is an ethical conflict created when physicians unionize because promotion of self-interest conflicts with their professional obligation to represent the interests of their patients and to act as guardians of public health. Advocates of unionization, however, point out that other employees charged with protecting the public are unionized without apparent conflict.[203] Two obvious examples are firefighters and the police force. It is possible for worker self-interest and advocacy on behalf of the public to coexist, even to coincide.[204]

Moreover, while protection of third party interests is a likely by-product of physician unionization,[205] the assertion of patient rights is not necessarily altruistic. Instead, promoting patient interests is a critical aspect of professional identity and a central feature of the social bargain that undergirds professionalism and secures privileged class status.[206] Accordingly, key goals at the bargaining table today—

202. Lutsky, *supra* note 194, at 89 (quoting Mary Chris Jaklevic, *Physicians Find Power in Unions: A Small But Growing Number of Docs Are Using Organized Labor to Gain Economic Advantage,* MODERN HEALTHCARE, Oct. 6, 1997, at 99).

203. *See Id.* at 92.

204. *Id.* at 100. *See also* Joseph Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn From History and Experience, and Why*, 6.2 U. PA. J. LAB. & EMP. L. (forthcoming 2004) (manuscript at 85–86, on file with author) (discussing bravery of unionized police and firefighters during 9/11 crisis and observing that union work rules did not undermine their professionalism and performance under stress).

205. In *Boston Medical Center, see infra* note 221, for example, the housestaff sought to obtain "adequate translators for their non-English speaking patients." Eva M. Panchyshyn, Comment, *Medical Resident Unionization: Collective Bargaining by Non-Employees for Better Patient Care,* 9 ALB. L.J. SCI. & TECH. 111, 112 (1998).

206. Quality of patient care issues are undeniably implicated in physician organizing. The American College of Physicians' Ethics Manual specifically notes that professional status carries with it the obligation for physicians to be responsible to society for their professional actions, which includes an obligation to "participate in decisions [concerning resource allocation as it relates to patient health] at the policy level." *See* American College of Physicians, *Ethics Manual, Fourth Edition,* 128 ANNALS INTERNAL MED. 576 (1998), *available at* www.acponline.org/journals/annals/01apr98/ethicman.htm._The AMA argues that physician unionization is important in order to afford physicians "the leverage they now lack to guarantee that patient care is not compromised or neglected for the sake of profits." Steven Greenhouse, *A.M.A.'s Delegates Vote to Unionize,* N.Y. TIMES, June 24, 1999, at A1. The AMA, which has resolved that doctors who join the PRN will not strike, adheres to the ethical canon that doctors "should not participate in a strike that adversely affects access to health care." *See Ethics Manual, supra.*

Others are more cynical about the reasons why doctors are organizing, arguing that they are responding primarily to a loss of prestige, power, and income, rather than in an effort to assert patients' rights. *See* Greenhouse, *supra* (noting comments by professor of health care policy to that effect); John J. Deis, Comment, *The Unionization of Independent Contracting Physicians: A Comedy of Errors,* 36 HOUS. L. REV. 951 (1999) (arguing that physician unioniza-

control over amount of time spent with each patient, autonomy to make clinical decisions, elimination of "gag" clauses preventing doctors from fully explaining medical treatment options to patients (particularly those that fall outside the health plan's coverage), ability to prescribe drugs that are not on an insurer's table of covered drugs, and the discretion to refer patients to specialists—[207] evidence physicians' efforts to reclaim professional identity, not to assert patient rights on patients' behalf.[208]

It is also clear that protection of class privilege and professional status is itself a goal of many physician organizing drives. This is most easily seen at the margins of the profession. The assignment of routine duties thought to be outside the sphere of professional skills prompted residents and interns at Montefiore Medical Center in New York to unionize. Cost-cutting measures implemented by the hospital in order to remain financially viable fell disproportionately on interns and residents, provoking anger and resentment, which crystallized into an organizing drive by the Committee of Interns and Residents. The drive was not triggered by a demand for additional wages (interns and residents earn between $43,000 and $50,000 per year), but by the impact of staff cuts on those at the bottom of the physician hierarchy. As one resident explained, "To have to answer the phones, to have to draw the bloods, to have to wheel the patients to X-ray ourselves, that is not the best use of our time and our resources. . . .

tion is a poor vehicle for protecting consumers' interests because it leaves the "fox guarding the henhouse").

207. *See* Valliere, *supra* note 6; Liebowitz, *supra* note 111, at 36; Deis, *supra* note 206, at 969.

208. To the extent that physician organizing can be recast as the self-interested promotion of professional identity and privilege, it is ironically more likely to be promoted effectively by the collective bargaining process than were it done solely in the interests of patient care quality. The labor law mandates bargaining over issues pertaining to the interests of third parties only where such interests "vitally affect the terms and conditions of employment" of the employees on whose behalf the bargaining is done. Allied Chem. & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971); *see also* Deis, *supra* note 206, at 977–78; Michael J. Stapp, *Ten Years After: A Legal Framework of Collective Bargaining in the Hospital Industry,* 2 HOFSTRA LAB. L.J. 63, 99–100 (1984) (noting that whether patient care issues are mandatory subjects of bargaining is questionable); Rabban, *supra* note 14, at 707 (staffing and equipment levels as well as standards of patient care in hospitals may be nonmandatory subjects of bargaining). Further, because employers retain managerial prerogative to control the "scope and direction of the enterprise," decisions regarding how the service or product will be constituted, how it will be delivered, and so on need not be bargained over unless they directly impact terms and conditions of employment. *See* First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 677–79 (1981). Thus a union may be able to compel bargaining over some, but not all, patient care issues under existing labor law. *See* Deis, *supra* note 206, at 969–83 (analyzing medical topics under traditional NLRA mandatory/permissive subjects of bargaining framework). Recharacterizing these patient care issues as self-interested issues concerning professional identity and affecting professionals' conditions of employment is critical to their amenability to collective bargaining.

That's time not spent on patient care."[209] Another resident explained that the professional responsibility of doctors for patient care places interns and residents in a Catch-22: "[W]e've got residents changing bedpans, which prevents us from seeing more patients. The doctor is ultimately responsible, [both] medically and legally. We aren't going to allow these chores not to get done, even if that means doing them ourselves."[210]

Some unions have led efforts to address quality of patient care issues through legislation establishing rights for health care workers rather than through collective bargaining. These too are efforts to reclaim professional identity and status, albeit cast in the politically palatable language of patient rights to adequate care. For example, under pressure from nursing unions, New York enacted a Whistleblower Protection bill that prohibits retaliatory action against health care workers who disclose or threaten to disclose information to a supervisor or public body concerning instances of substandard patient care.[211] Similarly, professional organizations and labor unions have sought to address some of the worst employer exploitation of health care professionals through minimum standards legislation geared to the health care industry, but premised the legislation on a rationale of patient protection: overtired residents and nursing staff may jeopardize patient health and safety. For example, the AMA has established guidelines limiting working hours of residents,[212] and several states have enacted bills banning mandatory overtime for nurses in hospitals except in emergency situations;[213] similar proposals have been urged

209. Richard Perez-Pena, *Union Drive at Montefiore Could Be Labor Landmark*, N.Y. TIMES, Mar. 31, 2003, at F1.

210. *Id.*

211. *See Pataki Signs Whistleblower Protection Act For Health Care Workers Who Cite Poor Care,* DAILY LAB. REP. (BNA) NO. 65, Apr. 4, 2002, at A-7. The statute creates a private right of action and prescribes a civil penalty of up to $10,000 against employers who act in bad faith. Penalties recovered are deposited in a statewide patient care improvement fund. *Id.*

212. *See* Thom Wilder, *AMA Establishes Guidelines on Resident Physician Working Hours, Conditions*, DAILY LAB. REP. (BNA) NO. 120, June 21, 2002, at A-5. In addition, residents have challenged the matching system through which they are placed in residencies by the Association of American Medical Colleges. The residents contend that the matching system amounts to a conspiracy to depress and standardize residents' salaries in violation of the antitrust laws. *See Jung v. Ass'n. of Am. Med. Colls.*, 300 F. Supp. 2d 119, (D.D.C. 2004), *reported in Federal Court Decides Residents' Lawsuit Against Matching Program May Proceed*, DAILY LAB. REP. (BNA) NO. 30, Feb. 17, 2004, at A-1.

213. Lorraine McCarthy, *New Jersey Governor Signs Measure Banning Mandatory Overtime in Hospitals*, DAILY LAB. REP. (BNA) NO. 2, Jan. 3, 2002, at A-8 (making "it a violation of New Jersey Wage and Hour Law to require an hourly employee involved in direct patient care or clinical services to accept" regularly scheduled work of more than forty hours per week; the bill excludes physicians); Nan Netherton, *Governor Signs Bill to Prohibit Mandatory Overtime for*

at the federal level.[214] California was the first state to enact legislation establishing mandatory staffing ratios at nursing homes[215] and hospitals.[216]

The challenge to physician autonomy and to the self-image of physicians as guardians of the public health is such a fundamental blow to physician identity that "more than one-third of surveyed physicians characterized their morale as low," and almost one-half indicated that they had considered changing careers.[217] Nonetheless, many doctors remain ambivalent about affiliating with unions because they

Nurses, DAILY LAB. REP. (BNA) NO. 57, Mar. 25, 2002, at A-2 (describing Washington state bill prohibiting mandatory overtime work for nurses, and prescribing fines of $1,000 per violation with additional penalties imposed on repeat violators). New York also limits the numbers of hours residents may work, although teaching hospitals routinely violate the legislation. *See New York Study Says Most Teaching Hospitals in Violation of Residency Working Hour Limits*, DAILY LAB. REP. (BNA) NO. 125, June 28, 2002, at A-7 (finding that 66 percent of the teaching hospitals inspected by the New York state Health Department were in violation of the law, which limits resident working hours to no more than eighty hours per week averaged over a four-week period, and prescribes penalties of $6,000 per violation and additional fines for repeated violations).

214. *See Bipartisan Measure Would Limit Mandatory Overtime for Most Nurses*, DAILY LAB. REP. (BNA) NO. 30, Feb. 13, 2003, at A-4 (noting reintroduction in both House and Senate of The Safe Nursing and Patient Care Act of 2003, which seeks to limit mandatory overtime for nurses to stem the exit of nurses from the profession and to minimize dangers for patients created by overtired nursing staff); *Unions, Congressman Urge Action on Bill That Would Ban Forced Overtime for Nurses*, DAILY LAB. REP. (BNA) NO. 233, Dec. 6, 2001, at A-5 (discussing Safe Nursing and Patient Care Act of 2001, H.R. 3238, introduced in November of 2001 by Rep. Fortney Stark and supported by the American Federation of Teachers, the American Nurses Association, AFSCME, AFGE, SEIU, UAW, and the AFL-CIO); *Bills Would Limit Mandatory Overtime for Nurses, Reduce Hours for Residents*, DAILY LAB. REP. (BNA) NO. 215, Nov. 8, 2001, at A-7 (discussing The Patient and Physician Safety and Protection Act of 2001, H.R. 3235, introduced by Rep. John Conyers, which seeks to place limits on the number of hours interns and residents could work).

215. *See California Assembly Approves Measure to Set Staffing Ratios at Nursing Homes*, DAILY LAB. REP. (BNA) NO. 112, Jun 11, 2001, at A-6 (discussing legislative progress of bill to set minimum staff-to-patient ratios for nurses at skilled nursing facilities). Improved staff-patient ratios are designed both to enhance the quality of patient care and to address the nursing staff shortage which currently exists nationwide; heavy patient loads are a major contributing factor to nurses' dissatisfaction with the nursing field and are cited in a number of studies examining nursing burnout. *See Advocates for Nurse Staffing Ratios Say JAMA Study Boosts Their Cause*, DAILY LAB. REP. (BNA) NO. 207, Oct. 25, 2002, at A-9 (noting study published in Journal of the American Medical Association that showed a correlation between increased surgical patient loads for nurses and patient mortality); *Nurses See Better Staff-Patient Ratios, Increased Pay as Top Fixes for Shortage*, DAILY LAB. REP. (BNA) NO. 12, Jan. 17, 2003, at A-5 (reporting results of survey in which 85 percent of respondent nurses mentioned reducing the nurse/patient ratio as a strategy to address nursing staff shortages nationwide; improving pay was mentioned by 82 percent of the respondents).

216. *See* Laura Mahoney, *Final Regulations Give California First-in-Nation Nurse Staffing Ratios*, DAILY LAB. REP. (BNA) NO. 190, Oct. 1, 2003, at A-5 (describing final regulations setting staffing ratios for hospitals).

217. Dionne Koller Fine, *Exploitation of the Elite: A Case for Physician Unionization*, 45 ST. LOUIS L.J. 207, 212 (2001).

see unions as incompatible with professional status.[218] Some worry that unionization is inherently incompatible with professionalism; to unionize would associate them with the blue-collar workforce, and would communicate that they viewed their work as a job rather than as a profession. While unionization might confer a temporary improvement in bargaining power, these physicians fear a long-term loss of prestige, income, and social status and influence.[219]

However, increasing numbers find unionization a rational response to the rise of managed care. A recent survey of 1200 physicians practicing in the northeast found that 69 percent would join a union.[220] Moreover, if residents and house-staff take advantage of the organizing protections and bargaining rights afforded by the National Labor Relations Board's recent change of position on the covered status of interns and residents under the NLRA,[221] a pro-union shift in doctors' attitudes toward unions may follow.[222] Residents and interns are more likely to perceive the utility of unionization because of the compelling organizing issues presented by their working conditions,

218. Indeed, as one commentator has observed, the very fact of employee status—which is a predicate for protected unionization under current law—may be viewed by many physicians as a significant departure from the idealized self-image of the independent private practitioner American physician. Thus, the emergence of physicians' unions underscores the significance of that departure from the ideal, and in turn signals the descent from a privileged class into working class status. *See* BUDRYS, *supra* note 26, at 71–72.

219. Lutsky, *supra* note 194, at 92; BUDRYS, *supra* note 26, at 15.

220. James L. Frank et al., *Physician Labor Union Formation: Attitudes of 400 Physicians*, 7 J. INDIVID. EMP. RTS. 331, 341 (1999). Physicians trained outside the U.S. and specialists were more than twice as likely to be favorably disposed toward unions. *Id.* Of those who weren't favorably disposed, the most frequent reason given was concern about ethical obligations not to strike. Only 45 percent of the overall population surveyed would participate in a strike involving withholding elective patient care; foreign-educated physicians and specialists, however, were more than twice as likely to be willing to participate in such a strike. *Id.*

Of course, economic alternatives to the strike exist, and willingness to unionize should not be coextensive with willingness to strike. For example, doctors might engage in a financial strike rather than a care strike, in which they would provide care to patients but would refuse to accept their insurance, instead negotiating private payment schedules with patients and relying on patients to pressure insurance companies or HMOs. *See* Christopher Guadagnino, *Physician Unions Gain Steam*, *at* http://www.physiciansnews.com/cover/1297.html (Dec. 1997).

221. *See* Boston Med. Ctr. Corp., 330 N.L.R.B. 152, 152 (1999) (finding interns, residents, and fellows to be covered employees within the meaning of the NLRA for purposes of organizing and collective bargaining, because they function primarily as employees rather than as students). Prior to *Boston Medical*, the Board had considered residents and housestaff to be more akin to students than to employees, and had excluded them from the Act's coverage. *See* Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251, 253 (1976) (finding primary purpose of housestaff positions is educational); St. Clare's Hosp. & Health Ctr., 229 N.L.R.B. 1000, 1002 (1977) (affirming *Cedars-Sinai* and refining test for student/employee distinction). At public hospitals, however, state labor board and state court decisions permitted housestaff to organize. Cramm, *supra* note 7, at 1614–15.

222. *See* Cramm, *supra* note 7, at 1603–04 & n.5.

notoriously long hours, and captive status; exit is not an option.[223] In addition, residents and interns are the first line physicians who feel the sting of job consolidation stemming from reduced staffing at levels beneath them in the professional hierarchy. Reduction in nursing staff shifts many of the duties previously performed by nursing staff to interns and residents, including unskilled or menial tasks not consistent with professional status. Indeed, the attenuated relationship between many of the tasks performed by housestaff and the professional educational process was among the reasons mentioned by the Board in *Boston Medical Center* for categorizing them as primarily employees rather than students.[224] Eventually, medical residents and interns will become physicians, taking with them the pro-union sentiments that they developed during earlier years.

Overall, it appears that the devaluation of medical professionalism and revocation of traditional privileges of autonomy afforded doctors in the social bargain between doctors and society is provoking unprecedented anger and radicalism among doctors, and at least some of it is finding an outlet in unionization.[225] Such activism is not,

223. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. at 45 (Brame, dissenting) (noting that residents lack the freedom to move easily from employer to employer, making resort to the strike weapon less likely); *see id.* at 154 n.6 (discussing long hours and related patient tragedies).

224. *See id.* at 154 (noting that house staff at BMC spent up to 80 percent of their time engaged in direct patient care). According to the Regional Director's opinion, their responsibilities include starting intravenous lines, drawing blood, taking medical histories, performing CPR, and other activities which non-physician professionals are qualified to perform. *See* Regional Director's Decision and Order, *reprinted in* Boston Med. Ctr. Corp, 330 N.L.R.B. 152 app. at 184 (1999).

225. *See* Valliere, *supra* note 6, at (summarizing remarks of Professor Grace Budrys (citing BURDYS, *supra* note 26)).

In the eyes of the law, however, self-employed physicians are independent contractors vis-à-vis the health management organizations that they rely upon for reimbursement, rather than employees covered by the NLRA. Amerihealth, Inc., 329 N.L.R.B. 870, 870 n.1 (1999) (finding that physicians who contract to provide services to members of Amerihealth, an HMO, are independent contractors because the HMO does not exercise significant control over the physicians' conduct in examining patients, diagnosing illnesses, and performing specific medical procedures). As a result, they are not covered by the antitrust exemption to the labor laws, and antitrust considerations bar them from negotiating in groups with managed care companies.

Self-employed physicians have shown a strong interest in legislative reform that would facilitate collective pressure and bargaining with health plans. Several unions active in physician organizing and the AMA seek legislative change at the federal level in the form of an exemption from antitrust regulations that would allow collective negotiation. Representative Thomas J. Campbell of California introduced the first such proposal in 1999. The Quality Health-Care Coalition Act of 1999, H.R. 1304, 106th Cong. (1999), purported, in the interest of improving patient care quality, to confer upon "groups of health care professionals" negotiating with HMOs, insurers, or other health care payors "the same treatment under the antitrust laws accorded to members of a bargaining unit recognized under the National Labor Relations Act." Unions seeking to organize physicians have also pursued state antitrust reform. In 1999, Texas became the first state to adopt a law which would exempt physicians from antitrust laws in order

however, "radicalism" in the usual sense of seeking to overthrow the existing social structure. Instead, it is a deeply conservative response that seeks to preserve the social meaning and privileges of professionalism—to enforce the social bargain.[226] In this sense, physicians who unionize are not so different from the blue-collar workers who have struck to preserve the social contract of permanence that they believed undergirded their work arrangements.[227]

In short, housestaff and physician unionizing is prompted by the challenge to professional identity and the social position that it has historically secured. Functionalists trusted professional ethical norms to curb abuses of professional power; professionalism itself was the primary means of social control over physicians.[228] Physicians em-

to allow them to negotiate collectively through third party administrators on reimbursement and contract issues. *See Texas Gov. Bush Signs First-Ever Law Allowing Doctors to Bargain with HMOs*, DAILY LAB. REP. (BNA) No. 119, June 22, 1999, at A-2; *Attorney General Proposes Rules For First Physician Bargaining Law*, DAILY LAB. REP. (BNA) NO. 45, Nov. 18, 1999, at 1827.

One creative strategy utilized by unions seeking to avoid the antitrust restrictions on bargaining by self-employed physicians or medical practice groups is the Messenger Model independent practice association (IPA). Messenger Model IPAs are intended to allow self-employed physicians to market themselves to payors as a network without engaging in price-fixing. *See* Edward B. Hirshfeld, *Physicians, Unions, and Antitrust*, 32 J. HEALTH L. 43, 60–62 (1999). A messenger communicates with each physician individually to ascertain the fee schedule (which may be a fee range) that each is willing to accept. The messenger then aggregates the information and develops a schedule showing what percentage of physicians in the network would accept offers at given fee levels or ranges (however, the fee schedule should not require the health plan or insurer to meet those price ranges in order to contract with the network). *Id.* Without sharing that information with the individual physicians, the messenger presents the schedule to the payors. The messenger may accept offers made by the payor that are within the fee range of any physician that he represents, but may not negotiate over prices with the payor on behalf of the physicians. *Id.* Offers not within the fee range given by the individual physician must be communicated to the individual physician for acceptance or rejection. The messenger may not advise the physicians on acceptance, and the physicians may not communicate with one another about whether to accept particular offers. *See* http://www.fpdunion.org/ (Website of the Federation of Physicians & Dentists, a physicians' union); EDWARD B. HIRSHFELD, AM. HEALTH LAWYERS ASS'N., PHYSICIANS, UNIONS, AND ANTITRUST 11–12 (1998). Messenger Model IPAs have been challenged under the antitrust laws in at least six states—Connecticut, Colorado, Delaware, Florida, Ohio, and Texas. *See* Sarah A. Klein, *Physicians' Union Feels Antitrust Scrutiny*, AM. MED. NEWS, Mar. 9, 1998, at 3; John W. Jones, *Physician Messenger Model Under Fire*, PHYSICIAN'S NEWS DIG., *at* http://physiciansnews.com/law/203.html (Feb. 2003). The Federal Trade Commission and the Department of Justice have developed a set of parameters designed to assist in determining the legality of such arrangements. *See* U.S. DEPT. OF. JUSTICE, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 106 (1996), *available at* http://www.usdoj.gov/atr/public/guidelines/0000.htm.

226. *See* BUDRYS, *supra* note 26, at 95.

227. *See* JUSTICE IN THE COALFIELDS (Appalshop Film & Video 1995) (describing 1990s strike by Virginia coal miners against Pittston coal over demise of social contract between coal mine owners and community); *see also* Crain, *supra* note 155, at 1926 (describing demise of social promise of permanence in employment and in marriage).

228. *See* BUDRYS, *supra* note 26, at 35–36.

braced functionalism and internalized it as part of professional identity. It is not surprising, then, when they react with outrage when their autonomy is denied; the social compact between physicians and society has been violated. In the modern era, the need for professional self-monitoring receded as other mechanisms of social control emerged.[229] Managed care, risk management practices and cost controls utilized by hospitals and other institutional employers, the specter of medical malpractice liability, and a more highly educated patient base with ready access via the internet to extensive information about medical treatments[230] reduced the justification for self-monitoring and autonomy. The path was paved for the commodification of medicine.

C. Lawyers

Lawyers have been far less inclined toward unionization than doctors, despite the presence of a similar trend in the profession toward employee status, bureaucratization and loss of ideological control over work, loss of control over time, standardization of output, and loss of autonomy. Most law professors would argue that lawyers' professional self-image is fundamentally inconsistent with the modern organizational structure and demands of large law firms, government practice, and legal services work for legal technicians.[231] Yet the focus

229. *See id.* at 66.

230. *See id.* at 70.

231. *See, e.g.*, Gordon, *supra* note 161, at 7–10 (suggesting that lawyers' professionalism is characterized by independence and individual control over the legal work we undertake, the clients on whose behalf we advocate and the strategies we use to represent them). Gordon describes the professional life to which lawyers aspire in this way:

> [T]he professional life is appealing because professionals can, within the confines of their need to make a living, structure their own time, choose among their commitments, and be selective about the people they work with and for and the causes to which they lend their talents. They are relatively free to follow the dictates of craft and conscience and the advice of discriminating peers, rather than pursue only profit and worldly success. And yet, miraculously, they may not actually *have* to sacrifice all hope of income and success, because professional (unlike, let us say, artistic) integrity will command public recognition and a market premium. The independent professional can, ideally, both 'do good *and* do well.'

Id. at 9 (footnotes omitted). Gordon points out that it may not be necessary for lawyers to resist bureaucratization in order to maintain professional independence, if other safeguards are in place, such as an advantageous market position, a diverse client base, a reservoir of trust and a long term relationship with one's client base, social influence over clients deriving from a lawyer's individual social standing or from the client's need for approval of third parties, particularly government agencies, authority deriving from special expertise, and a firm culture that promotes independence. *See id.* at 35–39. Control over one's own time is a key condition of independence, however, and in the modern firm individual associates lack such control; instead, it is exercised at a managerial level, usually by the executive committee. *See id.* at 39–40.

on output as measured by standardized units (the billable hour),[232] pressure towards specialization, and limits imposed by government on the types of litigation that legal services lawyers may undertake[233] tends to produce lawyers who are defined more by their technical skills than by their ability to influence public policy and public law.[234] Still, one rarely hears of lawyers organizing unions. Why are lawyers relatively quiescent in the face of pressures toward commodification?

The ABA historically opposed unionization for attorneys, and specifically banned government lawyers from joining unions.[235] The bar's primary concern was the creation of divided loyalties (between client and union), specifically, the worry that the union-member-attorney would surrender her independent judgment and be required to submit to direction by the union officers and directors even when client interests were compromised.[236] In 1967, the ABA changed course and permitted attorneys to join unions with two caveats: the attorneys could not strike, and the union had to be independent of unions representing nonlawyers.[237] Eventually, the ABA backed away even from these limitations, requiring only that lawyers not surrender their independence to an employee organization, and that the lawyer remain vigilant to avoid neglect of legal matters entrusted to her and

232. Standardized measures of productivity assume significance even in the public sector. Government lawyers are required to keep meticulous records in order to justify the agency's budget requests to Congress.

233. *See* Weissman, *supra* note 176, at 758 (examining restrictions on legal services lawyers).

234. This trend toward specialization and lawyering as a craft is not new. Woodrow Wilson's remarks to the ABA in the early 1900s illustrate a similar concern:

> You cannot but have marked the recent changes in the relation of lawyers to affairs in this country; and, if you feel as I do about the great profession to which we belong, you cannot but have been made uneasy by the change. Lawyers constructed the fabric of our state governments and of the government of the United States, and throughout the earlier periods of our national development presided over all the larger processes of politics. . . . Every question of public policy seemed sooner or later to become a question of law, upon which trained lawyers must be consulted. . . . A new type of lawyers has been created; and that new type has come to be the prevailing type. Lawyers have been sucked into the maelstrom of the new business system of the country. That system is highly technical and highly specialized. . . . [Lawyers] do not handle the general, miscellaneous interests of society. They are not general counselors of right and obligation.

Woodrow Wilson, *The Lawyer and the Community* (An Address in Chattanooga Tennessee to the American Bar Association (Aug. 31, 1910)), *in* 21 THE PAPERS OF WOODROW WILSON, at 64, 69–70 (Arthur S. Link ed., 1976).

235. Laura Midwood & Amy Vitacco, *The Right of Attorneys to Unionize, Collectively Bargain, and Strike: Legal and Ethical Considerations*, 18 HOFSTRA LAB. & EMP. L.J. 299, 315–16 (2000).

236. *See id.* at 316.

237. *See id.* at 315–16 (citing ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 986 (1967)).

place her clients' interests first.[238] Participation in strikes is not a per se violation of ethics unless in striking the attorney violates a disciplinary rule (such as neglecting a legal matter entrusted to him, failing to carry out an employment contract with a client, or prejudicing or damaging his client's interests by his conduct).[239] Some commentators have suggested that ethical canons may not only permit, but actually require attorneys to strike in some circumstances—for example, where the lawyer cannot provide competent and zealous representation because of case loads, lack of resources for representation (*e.g.*, lack of funds for expert witnesses), or employer policies interfering with representation (such as a Legal Aid Society's practice of assigning different lawyers to represent the same client at successive stages of a case).[240]

With the ABA's imprimatur, unions gained a foothold among government lawyers and lawyers employed in the nonprofit sector. Government lawyers, court-appointed public defenders, and legal aid attorneys began to seek the protections of collective action or union organization.[241] The impetus for organizing has fallen into two categories: demands for better pay, and demands for improvements in working conditions that would facilitate competent performance of the lawyer's role (such as reduction in case loads, office space consistent

238. *See id.* at 316–17 (citing ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1325 (1975), discussing Model Code of Professional Responsibility EC 5-13, which provides:

> A lawyer shall not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influence.)

239. *See id.* (citing ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1325 (1975) (discussing disciplinary rules 6-101(A)(3), 7-101(A)(2), and 7-101(A)(3))).

240. *See id.* at 318–23.

241. *See* FTC v. Superior Court Trial Lawyers' Ass'n, 493 U.S. 411 (1990) (finding that a strike by court-appointed counsel to represent the indigent in criminal cases in the District of Columbia violated federal antitrust laws); Neighborhood Legal Services, Inc., 236 N.L.R.B. 1269, 1273 (1978) (finding attorneys employed as unit heads in a nonprofit organization that provided legal services to the indigent covered professionals under the NLRA; they were neither supervisors nor managers); Northwest Fla. Legal Serv., Inc., 320 N.L.R.B. 92, 93–94 (1995) (finding head of litigation unit in nonprofit legal services organization to be a covered professional without supervisorial duties); Chiles v. State Employees Attorneys Guild, 734 So. 2d 1030, 1036 (Fla. 1999) (striking down a 1994 Florida law that prohibited public sector attorneys in the Department of Insurance, the comptroller's office, the Department of Transportation, and the Department of Business and Professional Regulations from organizing); Chief Judge of the Sixteenth Judicial Circuit v. Ill. State Labor Relations Bd., 687 N.E.2d 795, 798 (Ill. 1997) (finding assistant public defenders managerial employees not covered by the Illinois Public Labor Relations Act).

with maintaining client confidentiality, adequate library resources, computer equipment, access to online legal research tools, and nonlawyer support staff such as law clerks and paralegals).[242] Both of these sorts of demands involve a defense of professional identity. The first is directed toward defending class status and professional prestige, while the second category demands are necessary for lawyers to fulfill the social bargain as competent professionals. Legal services attorneys have been willing to strike to press their demands.[243]

Private law firms have been the least likely crucibles for unionism. Nonetheless, in April 2003, sixteen lawyers at Parker Stanbury in Phoenix, Arizona voted unanimously to join Teamsters Local 104.[244] Among the issues mobilizing associates were inadequate access to legal research materials, performance quotas, and being forced to work in open cubicles that compromised client confidentiality.[245] Not coincidentally, Parker Stanbury has a contract to provide prepaid legal services for poor and middle class persons seeking access to a lawyer.[246] Union substitutes seem even more promoising as vehicles for attorney representation and voice. One such vehicle emerged on the Internet in 1998: www.greedyassociates.com.[247] Although the name of the organization and its website connotes only monetary concerns, the website has proved to be a lightning rod for discussion of a variety of issues, many of which reveal a perception that professional identity is under siege at a broader level. The lawyers on Greedy Associates discuss firm salaries, benefit packages, work/family accommodation and leave programs, and technical tips, among many other topics.[248] Because the site is occupation-wide

242. Rabban, *supra* note 14; Midwood & Vitacco, *supra* note 232, at 310–14.

243. *See* Midwood & Vitacco, *supra* note 232, at 310–14 (describing strikes by Legal Aid and Legal Services attorneys in New York City during the 1980s and 1990s over wages and caseloads; caseloads were as high as 650 cases per year per lawyer in some offices, salaries were less than $26,000 per year for some public sector attorneys, and hourly rates for court-appointed attorneys ranged from $13 per hour to $75 per hour).

244. *NLRB Certifies IBT as Bargaining Agent For Unit of Private Attorneys in Phoenix*, DAILY LAB. REP. (BNA) NO. 64, Apr. 3, 2003, at A-7.

245. Tresa Baldas, *Lawyers Unionize, Vote to Join the Teamsters*, NAT'L L.J., Apr. 8, 2003, *reprinted at* http://www.law.com/jsp/article.jsp?id=1048518259019.

246. *See id.*

247. *See* Debra Baker, *ShowMeTheMoney.com: Associates Are Turning Internet Hangouts Into De Facto Union Halls*, A.B.A. J., June 2000, at 18. The purpose of the organization was to allow law firm associates to exchange information about their law firms. *See* http://www.greedyassociates.com.

248. *See* Baker, *supra* note 247, at 20. Generation X associates are demanding, and receiving, mentoring and training programs. Terry Carter, *A New Breed*, A.B.A. J., Mar. 2001, at 37, 40. They are also seeking firm accommodations for parenting and work/life balance programs. *See* Denise Magnell, *Short-Term Sacrifices, Long-Term Payoff*, AM. LAW. MEDIA, Apr. 18,

rather than limited to a single firm or worksite, participants are able to compare and contrast firm policies. This information-sharing function has enabled participants to reap quasiunion benefits by placing pressure on large firms to match the programs that others are offering in order to avoid attorney attrition.[249]

The Generation X attorneys who participate in the chats on the Greedy Associates website share a radically different set of values from those of the partners at their law firms. They feel entitled to certain levels of pay, benefits, training, and lifestyle accommodations, and demand them on penalty of exit.[250] The threat of exit is no bluff—41 percent of law firm associates change firms within the first three or four years of practice,[251] either to pursue professional development opportunities, different practice interests, or to obtain financial advantages.[252] Most young attorneys do not assume that they will stay with the firm until they make partner; indeed, they view themselves increasingly as relatively short-term workers rather than as aspiring partners, perhaps in a predictable response to the big law firms' business-style approach to law firm management.[253] Other postings reflect fears about job security, including warnings of layoffs and downsizings in response to economic downturns.[254]

Some of the postings on the Greedy Associates' web page suggest that the underlying cause of attorney dissatisfaction does not concern income at all—instead, it is about respect. As one poster wrote, "'How much you gunna pay me' does matter. It shows how much (or how little) they think you're 'worth' as an attorney....

2000, *available at* www.law.com/jsp/newswire_article.jsp?id=1015973964125. Included among these are sabbatical leaves to reduce burnout, see Kurt Sauer, *The Pause That Refreshes*, TEX. LAW., Mar. 29, 1999, at 1, formalized mentoring arrangements with partners, see Anna Snider, *Weil Gotshal Takes Aim at Burnout: Program Boosts Bonuses and Lawyer Relationships*, N.Y. L.J., Nov. 8, 1999, at 24, and paternity leave policies, see Scott Brede, *Father-Friendly Firms Flourish*, CONN. L. TRIB., July 18, 2000.

249. *See* Neil, *supra* note 163, at 24, 25.

250. Carter, *supra* note 248, at 40; Paula A. Patton, *Lateral Moves Now Part of Landscape; How Paradigm Shift Impacts the Profession*, N.Y. L.J., Apr. 9, 2001, at S5 (discussing a NALP Foundation research study of 2,200 lateral lawyers, titled *The Lateral Lawyer: Why They Leave and What May Make Them Stay*).

251. Carter, *supra* note 248, at 40.

252. *See* Patton, *supra* note 250.

253. *See* Michael D. Goldhaber, *Waging A War of Attrition: Some Grew, Some Shrank, but the Real Game was Turnover*, NAT'L L.J., Dec. 13, 1999, at A1.

254. Postings by Gardener on Apr. 2, 2001 (message no. 4966), *at* http://www.greedyassociates.com/messageboard/. One poster suggested that the forum name should be changed to "'Just want to keep my Job' Associates." Posting by kmw4899 on Apr. 17, 2001 (message no. 5079), *at* http://www.greedyassociates.com/messageboard/.

[Through lack of raises] [t]hey're telling you in not so many words that you have no future."[255] All in all, the Greedy Associates postings reflect the cognitive dissonance between the professional image of an autonomous lawyer and the reality of practice experienced by many attorneys, and a widespread dissatisfaction with the practice of law.[256]

In short, collective protest does exist in the private for-profit sector, albeit in nontraditional forms. In addition to participation on websites, many young attorneys have expressed their dissatisfaction through exit from the profession.[257] Others have stayed in the profession but endured health problems and clinical depression,[258] or adopted dysfunctional coping methods such as substance abuse.[259] An entire genre of books dedicated to assisting lawyers in finding meaning in life has grown up in the last two decades.[260]

D. *Administrative Law Judges*

Perhaps the most unlikely group of union adherents among lawyers is judges. However, even judges will respond with collective action when professional identity is threatened. In 1999, 1000 ALJs working for the SSA voted to unionize by an overwhelming 88 percent majority, affiliating with the International Federation of Profes-

255. Posting by eyestrain on May 2, 2001 (message no. 5176), *at* http://www.greedyassociates.com/messageboard/. Some firms are responding to associates' concerns by shifting from the lockstep model of pay according to year of tenure to performance-based pay. *See* William G. Johnston & Joseph B. Altonji, *Eliminate Lockstep Model and Reward Performance, Not Time Served*, N.Y. L.J., Feb. 27, 2001, at S6. Linking motivation and performance to compensation is considered more likely to improve morale than simply throwing more money in the form of additional bonuses at dissatisfied associates, because it treats them as individuals rather than as fungible, the equivalent of human robots. *See id.* Even at these firms, however, quantity of billable hours remain a key component of merit determination. Nathan Koppel, *The Next Pay Revolution,* AM. LAW., Feb. 13, 2001 (on file with author).

256. *See* Holmes, *supra* note 151, at 376–77 (1996) (summarizing results of various surveys which showed that by the 1990s, 19 percent of attorneys in private practice were dissatisfied with their work, with many of those at the senior levels of the firm; a North Carolina survey found that 25 percent of lawyers would choose another occupation if they could relive their lives).

257. *See* DEBORAH L. ARRON, RUNNING FROM THE LAW: WHY GOOD LAWYERS ARE GETTING OUT OF THE PROFESSION (1989).

258. *See* Holmes, *supra* note 151, at 377–78 (75 percent of lawyers report that they are chronically anxious; over 50 percent experience mental or physical strain; more than 33 percent suffer from depression; and the suicide rate for lawyers is at least twice as high as that for the general population).

259. *See id.* at 378–80 (alcoholism rates among lawyers are estimated at 15 percent, compared to a national average of 10 percent).

260. *See, e.g.*, ARRON, *supra* note 257.

sional and Technical Engineers.[261] The impetus for organization was a steady stream of SSA efforts to undercut the ALJs' judicial independence and autonomy, including imposition of a quota system by which productivity was measured (assessing performance solely by reference to the number of dispositions rather than quality of work or complexity of cases),[262] substantive review of judicial resolutions to ensure that at least two-thirds of the cases decided were resolved in favor of the government,[263] loss of supervisory control over staff and clericals (apparently in part as a result of the fact that clericals and attorney staff members are unionized, and deal directly with management rather than with the ALJs),[264] and transfer of authority to paralegals to make determinations about which cases are appropriate for hearing and which should be decided on the record (in order to reduce backlogs).

The major impetus for the SSA ALJ organizing drive was the SSA's effort to deprofessionalize the ALJs. For example, the ALJs explained that they perceived the SSA office as imposing controls and limitations inconsistent with their "natural" authority as judges; some of the controls imposed undermined the judges' ability to fairly resolve the interests of claimants, which the judges view as central to their professional identity. Further, the SSA would not bargain with the Association of Administrative Law Judges, a professional organization that did not have bargaining status under the Federal Labor Relations Act (which covers federal government employees). At the same time, the SSA was bargaining with the unions who represented other employees subordinate to the ALJs in the workplace hierar-

261. *See* Dorsey, supra note 10. The ALJs at the SSA are not the only unionized judges—for example, an AFL-CIO affiliated union that represents 220 immigration judges. *See NewsWatch*, LAB. NOTES, Mar. 2002, at 4.

262. *See* Editorial, *Mass Justice*, WASH. POST, Feb. 6, 1983 (describing efforts of SSA administrators to improve judicial output); Al Kamen, *Law Judges Charge Illegal Quotas Set on Disability Cases,* WASH. POST, Jan. 20, 1983 (describing the performance rating system for ALJs which requires judges to hear a quota of cases each month and to resolve no more than two-thirds of them against the government).

263. Kamen, *supra* note 262 (noting that judges who did not meet the quotas would be subject to removal from office); *see also* Felicity Barringer, *Administrative Judge Faced With Dismissal for Low Productivity*, WASH. POST, Apr. 15, 1983 (discussing ALJ's dismissal for failure to meet production quota, and noting that the ALJ's "legal competence, fairness and diligence [were] not being challenged"); Martin Tolchin, *Judges Who Decide Social Security Claims Say Agency Goads Them to Deny Benefits*, N.Y. TIMES, Jan. 8, 1989, at 16 (reporting ALJ's complaints about the quota requirements and substantive review of decisions, and detailing punitive measures taken by judges who failed to conform).

264. Dorsey, *supra* note 10; Telephone Interview with Judge Ira Epstein, Administrative Law Judge, Social Security Admin. (Nov. 5, 2001).

chy—attorneys, clericals, even janitors.[265] The ALJs alone lacked a voice at the bargaining table. Traditional workplace issues—a lack of coherent travel or transfer policies, and respect issues about parking and office space[266]—were relevant too. The overriding theme was the threat to the ALJs' professional identity as judges and to their relatively privileged status in the workplace hierarchy. One comment reported in the press succinctly captured the basis of the ALJs' unrest: "The Social Security Administration doesn't treat judges like judges. . . . They treat them as other employees."[267]

While lawyers of all stripes have so far appeared less interested in unionizing than physicians, those lawyers who have been subject to the highest degree of bureaucratization and have lost technical control as well as ideological control over their work have responded with enthusiasm to union organizing efforts. Legal services attorneys, government attorneys, and ALJs have proved receptive to unionization, perhaps because bureaucratization and scientific management pose a threat to their class privilege as well as to their professional competence. For lawyers in private firms, class privilege seems secure; it is only professional competence/autonomy that is threatened.

Moreover, if professional organizing is triggered by the need to defend professional identity, perhaps the reason for the disparity in organizing between physicians and lawyers is that lawyers are less invested in their professional identities than physicians. Attorneys generally have fewer years of education invested in their professional identities than do physicians, which may increase the likelihood that they will choose exit over voice. Additionally, attorneys may be able to obtain significant improvements by moving to another firm, field of practice, or form of legal work; the pressure towards commodification is not as universal across the practice of law as it is across the practice of medicine because of the absence of third party payors. Finally, opportunities for exit outside law abound: the law degree provides an entree into other fields; again reducing the likelihood that dissatisfied attorneys will choose voice over exit.

265. *Id.*

266. *See* Debra Cassens Moss, *Judges Under Fire: ALJ Independence At Issue*, A.B.A. J., Nov. 1991, at 56 (noting ALJ discontent over loss of secretaries, loss of parking spaces, inadequate numbers of law clerks, inadequate facilities, but observing that the threat to the ALJs' professional status and independence posed by productivity quotas was the major basis for unrest).

267. Tolchin, *supra* note 263 (quoting Judge Nahum Litt, then chief ALJ for the Department of Labor).

V. RECONCEPTUALIZING UNIONISM: UNIONS FOR INDIVIDUALISTS

With this positive evidence of willingness to engage in collective action to defend professional identity, why haven't professionals forged a stronger alliance with traditional unions? While some professionals have been willing to do so, many have resisted. The most significant basis for this reluctance to make common cause with traditional unions is a fundamental unwillingness to sacrifice class privilege by allying with workers beneath them in the occupational and social hierarchy. This is often expressed as a profound commitment to an ethos of individual achievement and merit.

A. *The Role of Class Privilege*

Privilege and status play a vital role in the construction of professional identity. Professionals' distance from the working class is a significant common bond among professionals.[268] As the revisionists predicted, rather than allying itself with the working class to advance common interests, the professional class has sought to differentiate itself from the working class, endeavoring to retain privileges not available to nonprofessionals so as to maintain its status.[269] Professionals' concern with status, particularly relative status based on comparisons of their own situations with those of other workers, thus blocks alliances with workers in lower classes. Because unions are associated exclusively with the working class, resort to unionization would symbolize a loss in status.[270] Ultimately, professional status has become "an ideological consolation used by employers to accommodate professional workers' needs for status privileges, or a negotiating device used by professionals themselves to justify wages and privileges that differ from those of other workers."[271] Thus, alliances be-

268. LARSON, *supra* note 27, at xvi.

269. Derber, *Professionals As New Workers*, *supra* note 25, at 21. *See, e.g.*, Barbara & John Ehrenreich, *The Professional-Managerial Class,* in BETWEEN LABOUR AND CAPITAL 5, 5–7, 9–10 (Pat Walker ed., 1979). These authors argue that the professional managerial class is a distinct class which manages its opposition to capital by exploiting the working class. *Id.* at 17. Some believe that "[m]anagement has replaced capital as the main enemy of organized labor in the United States." HODGES, *supra* note 33, at 15.

270. LARSON, *supra* note 27, at 236. Professional employees are individualistic in orientation and have historically looked down upon unions, either because they are perceived as blue-collar organizations, because they are self-interested and narrowly economic in their agenda, or because they pursue confrontational strategies that escalate conflict.

271. Derber, *Professionals As New Workers*, *supra* note 25, at 15–16. An analogous defense of privilege—in this case, racial privilege—historically blocked whites from making common

tween professionals and non-professional workers may threaten professional identity.

More insidiously, professionals' concern with status and privilege also blocks alliances *among professionals*, at least in the form of unionization. Capitalist ideology traditionally links job entitlement to individual performance, ensuring that individuals assume both the credit and the blame for their positions in the employment hierarchy.[272] A relatively small percentage of workers possess "underemployment consciousness"—a form of work alienation in which workers become aware that their skills are being wasted or underutilized, and that work may not ever be an area of fulfillment for them.[273] Less than one-third of workers express such a consciousness, which Derber believes may be attributable to a "pervasive and often unfounded faith in the American Dream of individual opportunity and occupational mobility."[274] Only a sustained economic decline sufficient to close the channels of occupational mobility would shake this faith, which in turn blocks the formation of class/group consciousness."[275] Accordingly, in order to appeal to highly educated workers, unions would have to embrace the individual achievement explanation for status and job entitlement, at least to some degree; otherwise, unions' historical association with the universalistic entitlement model would clash with the self-perception of highly educated workers.[276]

Moreover, resistance to an alliance between professionals and the working class is not one-sided. Non-college graduates in Derber's study also displayed a universalistic belief in job entitlement, which Derber interprets as "a subtle expression of class interest, in opposition to the traditional individualistic criteria of entitlement."[277] The anti-individualist philosophy that characterizes traditional forms of unionism is obviously an uneasy fit with the ideology of professional-

cause with Blacks in the labor movement. *See* Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313, 1320–22 (2002).

272. Derber, *supra* note 180, at 27–28.

273. *See* Derber, *supra* note 183, at 37.

274. *Id.* at 43.

275. *Id.* at 43–44. Conditions of scarcity tend to intensify the cultural contradictions experienced by highly educated workers, making revolt and mobilization into political action more likely—though not necessarily in common cause with less highly educated workers. *See* Derber, *supra* note 180, at 34–36.

276. Derber, *supra* note 180, at 34–36.

277. *Id.* at 31.

ism and the class mobility aspirations of white-collar workers more generally.

B. *Unions for Generation X?*

Nor is the dilemma of class privilege that unions face in attempting to ally workers across class lines limited to the professional versus nonprofessional context. Young workers entering the labor market at all levels increasingly subscribe to an individualist philosophy. Unlike earlier age cohorts, however, generation X workers (defined as those between the ages of eighteen and thirty-five) possess a fundamentally individualistic view of themselves and their own skills as the sole source of leverage in a restructured modern labor market that increasingly decentralizes and individualizes the labor process.[278] In the modern market environment of flexible work, risk-taking, and entrepreneurialism, old patterns of collective action focused on obtaining job security and guaranteeing longevity of employment have been replaced by individual-level responses to economic insecurity.[279] Consequently, the workers in Generation X focus on training opportunities to enhance their skills, merit-based pay, and individual advancement opportunities, rather than on the traditional bread-and-butter issues of union contracts—wages, rates of pay tied to years of service and job description, and insurance and retirement benefits tied to a single firm.[280]

As employers reorganize the structure of work toward flexible, short-term, project-based work, the risk of responsibility for getting and keeping work is shifted onto employees and away from employers.[281] Highly educated, highly skilled mobile young workers accept this ideology of risk and seek to profit from it.[282] Thus, Generation X

278. *See* MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 1–2 (1996):

> [c]apitalism itself has undergone a process of profound restructuring, characterized by greater flexibility in management; decentralization and networking of firms both internally and in their relationships to other firms; considerable empowering of capital *vis-á-vis* labor, with the concomitant decline of influence of the labor movement; increasing individualization and diversification of working relationships; . . . intervention of the state to deregulate markets selectively, and to undo the welfare state; . . . [and] stepped-up global economic competition.

279. *See* Gina Neff, *Risk Relations: The New Uncertainties of Work*, WORKINGUSA, Fall 2001, at 59, 60–61.

280. *See* Michael Bologna, *Generation X Supports Organized Labor, But Some Say It Sees Unions As Irrelevant*, DAILY LAB. REP. (BNA) No. 241, Dec. 12, 2002, at C-2.

281. *See* Neff, *supra* note 279, at 60.

282. *Id.* at 63–64.

workers strive to augment and protect their skill sets as a means of enhancing their leverage with employers. They willingly exchange job security for individual market leverage.[283] They are not averse to walking off the job to achieve their ends—but in a strategy of individual exit rather than in a coordinated strike action aimed at improving conditions at the workplace where they are currently employed. Accordingly, traditional unions with their job-protective collective bargaining contracts and strike weapons are a poor fit with Generation X workers. As Professor Gary Chaison succinctly put it, Generation X workers view unions as "irrelevant" to the modern economic and social structures in which they must compete.[284]

Nevertheless, evidence is mounting that Generation X workers are favorably disposed toward unions as a vehicle for voice in the workplace. In a recent AFL-CIO study, dropping the "U" word when asking workers what sort of workplace voice they would like to have increased positive sentiment toward collective workplace strategies from a 23 percent positive response toward unions to 31 percent positive response toward an association which would perform exactly the same functions a union would; further increases in positive response occurred as the word "bargaining" was removed from the question.[285] Among Generation X, 58 percent said they would join a union if given the opportunity.[286] This high level of interest in unions is borne out by the recent wave of graduate student organizing across the country.[287]

283. *See* Tom Peters, *The Brand Called You*, FAST COMPANY, Aug./Sep., 1997, at 83, *available at* http://fastcompany.com/online/10/brandyou.html (depicting economic insecurity and organizational flexibility as opportunities to be exploited by individual workers, and advising workers to reimagine themselves as "CEOs of [their] own companies: Me Inc.").

284. Bologna, *supra* note 280, at C-1. Professor Chaison explains:

> [G]eneration X workers use the issue of their work skills as leverage in the workplace. Although previous generations may have seen a long-term, collectively bargained contract as essential for gaining respect, . . . younger workers use the quality and level of their job skills to obtain the wages, benefits, and employment terms they seek from employers. When employment terms fail to meet generation X workers' expectations, . . . members of this group are more likely to walk out the door than engineer a job action with other workers.

Id.

285. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 150–51 (1999).

286. Bologna, *supra* note 280, at C-1.

287. *See id.* at C-2. Nonetheless, it is clear that graduate students are not interested in membership in traditional industrial unions, which they perceive as advancing goals irrelevant to their concerns. *See Cornell Graduate Teaching Assistants Overwhelmingly Reject UAW Affiliate*, DAILY LAB. REP. (BNA) NO. 208, Oct. 28, 2002, at A-2 (reporting election loss for UAW among research assistants and teaching assistants at Cornell).

C. *Reconceptualizing Unionism*

For unions, the question is how to capitalize on this apparent interest. That opportunities are being created by the commodification of the labor process in many professions seems clear. Can unions channel the outrage that professionals are feeling into unionism? In some professions, particularly medicine, the potential for harnessing the desire for voice is great. Where the forces pressing for commodification are occupation-wide—specifically, the advent of managed care and associated cost-containment measures—exit is an ineffective response unless the worker is willing to leave the occupation entirely. Physicians in particular have so many years invested in medical education that exit from the profession seems unlikely. With exit blocked, it is logical that these professionals would be more likely to turn to voice as a strategy for change.[288] This may explain the relatively high incidence of organizing by nurses and physicians,[289] and the relatively low incidence of lawyer organizing, where exit (both within the profession and in tangential areas) is readily available and no occupation-wide force comparable to managed care exists.

Clearly, unions must reconceptualize themselves if they are to take advantage of these opportunities. Indeed, doing so is critical to their survival. In a market characterized by a decline in employment in blue-collar trades and a dramatic incline in the service sector and white-collar work, it is no surprise that unions represent only 12.9 percent of the workforce (37.2 percent in the government sector, 8.2 percent in the private sector).[290] White-collar employees on the other hand, were 60 percent of the labor force in 2000 (up from 18 percent in 1900), and they are projected to increase: 98 percent of the growth of labor markets through 2008 is projected to be in the service sector. One-third of all white-collar workers, or 19 percent of the total workforce, were employed in the professions or as highly skilled techni-

288. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 53 (1970) (noting that voice is amplified by the absence or difficulty of exit).

289. *See* Paul F. Clark et al., *Healthcare Reform and the Workplace Experience of Nurses: Implications for Patient Care and Union Organizing*, 55 INDUS. & LAB. REL. REV. 133, 136, 145 (2001) (observing that industrial relations researchers have identified desire for control or power over work and influence over work outcomes as connected to an individual's likelihood of voting for union representation, and predicting that threats to job autonomy, voice, and power of nurses posed by healthcare reform will produce increased propensity to unionize).

290. *Decline in Membership Continued in 2003 To 12.9 Percent of Workforce, BLS Reports*, DAILY LAB. REP. (BNA) NO. 13, Jan. 22, 2004, at A-1.

cians, and these two groups are predicted to be the fastest growing occupational groups.[291]

Unions have enthusiastically courted professionals.[292] For a minority of professionals, professional identity has long been thought compatible with unionization. Despite the widespread perception that unions are for blue-collar workers, architects, engineers, chemists, teachers, journalists, air line pilots, and musicians all formed unions in the New Deal pro-union atmosphere of the 1930s and 1940s.[293] The AFL-CIO reports that 50 percent of union members in 2000 were white-collar employees, and many of those are professionals (primarily government employees, teachers and professors, nurses, physicians, social workers, and psychologists).[294] Professionals are now the largest contingent of union members in any occupational category—greater than 22 percent in 2000.[295]

Nevertheless, there is no doubt that traditional unionism is a hard sell to professionals. What alternative forms of unionism might appeal to them, while also accommodating Generation X's individualistic, entrepreneurial vision of work? One model that has been very successful is the "old media" model of unionism.[296] In the motion picture and television industries, unions have been successful in gaining

291. DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO, CURRENT STATISTICS ON WHITE COLLAR EMPLOYEES at viii (Pamela Wilson ed., 2001).

292. The AFL-CIO's Department for Professional Employees recently launched the Professional Rights and Opportunities Network, designed to focus on issues of concern to professionals, to coordinate public information campaigns, propose model contract language, and advocate for legislative and regulatory reforms. The earliest fora sponsored on the rights of professionals have addressed the rights of professionals in media and higher education to a "zone of professional independence and expression" free from the influence of corporate conglomerates. *Unions Launch Network to Examine Issues of Concern to Professionals,* DAILY LAB. REP. (BNA) NO. 206, Oct. 24, 2002, at A-2.

293. JURGEN KOCKA, WHITE COLLAR WORKERS IN AMERICA 1890–1940: A SOCIAL-POLITICAL HISTORY IN INTERNATIONAL PERSPECTIVE 219–23 (Maura Kealey trans., 1980).

294. DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO, *supra* note 291, at viii; *see also White-Collar Workers Joining Union Ranks in Growing Numbers, AFL-CIO Report Says,* DAILY LAB. REP. (BNA) NO. 169, Sept. 2, 2003, at A-5 (reporting a surge of successful union organizing drives among professionals in 2002, including attorneys, teachers, engineers, pharmacists, scientists, entertainers, and journalists).

295. DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO, *supra* note 291, at viii.

296. I use the phrase "old media" professionals or unions to distinguish them from "new media" professionals and unions. New media professionals include workers in the computer-driven economic sector—computer programmers, computer graphic animators, web site designers and others who are essentially the engineers of the computer-driven labor market. *See* ROSEMARY BATT ET AL., NET WORKING: WORK PATTERNS AND WORKFORCE POLICIES FOR THE NEW MEDIA INDUSTRY 12–36 (2001) (discussing challenges for the new media workforce in keeping abreast of technological advances and acquiring skills to remain marketable and to advance their careers, finding work, and obtaining protection against illness through health care benefits).

and retaining the loyalty of highly skilled, highly compensated, highly mobile professionals.[297] Like many professionals (including those in medicine and law), motion picture and television media professionals' career paths depend upon skill acquisition rather than being characterized by long-term tenure, they rely upon social networks to obtain work, they earn relatively high wages, their loyalties run to their professions rather than to a relationship to a single employer, and they accord high value to receiving control and credit for the work they do.[298] Yet unlike most traditional manufacturing and service sector unions, old media unions enjoy high union density and have been growing rather than shrinking in membership over the last twenty years.[299] The old media unions accomplished this feat by organizing around craft and professional identification rather than worksite or employer-identification;[300] offering professional support in the form of training and skills enhancement, educational opportunities, and on the job mentoring; sponsoring annual awards recognizing accomplishments of their members; functioning as a de facto hiring hall, maintaining and distributing resumes to production companies; and negotiating health and retirement insurance benefits with the employers in the industry which are then maintained and run by the unions, with employer signatories to collective bargaining agreements contributing to the funds on behalf of the members that they hire.[301]

However, all old media labor contracts contain language allowing individual members to set their own rates of pay above the floor set in the agreement.[302] The contracts typically contain language allowing for grievances to be filed by high achievers, or "stars," who allege a breach of a side agreement to a higher rate of pay or additional benefits beyond the floor in the collective agreement. By protecting and enforcing the stars' arrangements as well as those of the less-highly-leveraged workers, the unions ensure the stars' loyalty.[303]

297. *See* John Amman, *Union and the New Economy: Motion Picture and Television Unions Offer a Model for New Media Professionals*, WORKINGUSA, Fall 2002, at 111, 112–13.

298. *Id.* at 114–15.

299. *Id.* at 119.

300. Dorothy Sue Cobble has pressed the advantages of occupational organization with compelling historical evidence from the waitress unions. *See* DOROTHY SUE COBBLE, DISHING IT OUT: WAITRESSES AND THEIR UNIONS IN THE TWENTIETH CENTURY (1991); Dorothy Sue Cobble, *Organizing the Postindustrial Workforce: Lessons from the History of Waitress Unionism*, 44 INDUS. & LAB. REL. REV. 419 (1991).

301. Amman, *supra* note 297, at 120–25.

302. *Id.* at 126.

303. *See id.* at 126–27.

In essence, the old media unions are "hybrids" of traditional labor unions and professional associations. Unlike their traditional union cousins, old media unions focus on the professional/occupational identity of their members rather than on a worksite-specific identity as employees. Rather than "leveling down" individual high-achievers, the old media unions negotiate minimum terms agreements that leave stars free to negotiate better deals, thereby preserving the illusion—and perhaps the reality—of the American Dream. Finally, the old media unions independently offer benefits that are of great interest and value to their members, ranging from economic benefits like insurance to training and networking opportunities.[304] In this respect, they resemble the professional associations with which professionals are already comfortable. Old media unions offer a plausible and detailed blueprint for traditional unions seeking to organize professionals, or professional associations who decide to create organizing arms.

The remaining question is whether the law poses an insurmountable barrier to professionals' organizing efforts. Might the thesis of commodification and deprofessionalization developed above provide a useful basis for arguing for NLRA protection?

VI. THE DIFFERENCE COMMODIFICATION MAKES: PROFESSIONALS AS EMPLOYEES COVERED UNDER THE NLRA?

The labor and employment laws represent Congress' attempt through legislation to ameliorate the harshest conditions of commodified labor. Having abolished slavery, Congress enacted the Clayton Act of 1914, which proclaimed that "the labor of a human being is not a commodity or article of commerce."[305] Other employment laws followed, intended to inject humane ideals about work—including minimum standards of pay, safe working conditions, and protection from discriminatory treatment in the workplace—into the lives of workers.[306] These statutes were enacted as a palliative response to the

304. *See id.* at 128–31.

305. Clayton Act, ch. 323, § 6, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 17 (2000)).

306. *See* RADIN, *supra* note 5, at 80, 108. These statutes include the Fair Labor Standards Act, 29 U.S.C. §§ 201–19 (2000); the Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e–2000e-17 (2000); the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2000); the Americans With Disabilities Act, 42 U.S.C. §§ 12101–12213 (2000); the Occupational Safety and Health Act, 29 U.S.C. §§ 651–78 (2000); the Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2000); the Health Insurance Portability and Accountability Act, 42 U.S.C. §§ 300gg–300gg-2 (2000); the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2000); and the Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–2109 (2000).

harms caused to human bodies, psyches, and spirit by the commodification of their labor.

The National Labor Relations Act ("NLRA")[307] was unique: instead of prescribing minimum standards, it offered a vehicle for worker self-empowerment. Designed not only to improve productivity and reduce the incidence of strikes, but also to rectify the imbalance in power between individual workers and employers organized in the corporate form,[308] the NLRA sought to shore up democracy by creating the opportunity for voice in the workplace.[309] Its goal was more than merely palliative; the Act was the antithesis of the commodification of workers.

A. *The Inclusion of Professional Employees*

The Wagner Act broadly defined the term "employee."[310] Professional employees are covered under the Act, although particular unit determination rules apply to them if the Board seeks to combine professionals and nonprofessionals in a single unit.[311] Section 2(12) defines a professional as:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an

307. 29 U.S.C. §§ 151–68 (2000).

308. *See* NLRA § 1, 29 U.S.C. § 151 (2000).

309. *See* Marion Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953, 968–69 (1990) (explaining that the Act's goal of supporting industrial democracy through the provision of a voice mechanism for workers was linked to the idea that participation in decisionmaking combats feelings of alienation, which in turn enhances productivity) [hereinafter Crain, *Building Solidarity*]; Marion Crain, *Expanded Employee Drug-Detection Programs and the Public Good: Big Brother at the Bargaining Table*, 64 N.Y.U. L. Rev. 1286, 1291-95 (1989) (examining connection between participatory democracy in the workplace and participation in the larger political process, worker self-actualization, and productivity).

310. *See* NLRA § 2(3), 29 U.S.C. § 152(3) (2000) ("The term 'employee' shall include any employee. . . .").

311. *See* NLRA § 2(3), 29 U.S.C § 152(3) (2000) (defining employee); NLRA § 9(b)(1), 29 U.S.C. §159(b)(1) (2000) (requiring a majority vote for professionals in order to include them in a unit with nonprofessionals).

> apprenticeship or from training in the performance of routine mental, manual, or physical processes.[312]

The statutory definition is consistent with sociologists' description of the distinguishing features of professionals: expertise attained through lengthy education, work characterized by discretion or judgment, and resistant to standardization by unit of time.

B. *The Supervisor Exclusion*

Supervisors were covered prior to the 1947 Taft-Hartley Amendments.[313] Reacting to the Supreme Court's decision in *Packard Motor Car* and reasoning that employers needed front line "faithful agents" to carry out their policies in a hierarchically ordered workplace, Congress amended the Act in 1947 to exclude supervisors.[314] The rationale for this amendment was twofold: (1) fears that supervisors' loyalties would be divided between the employer and the rank and file workers joined in solidarity with supervisors in unions; and (2) prevention of the leveling effects of seniority, uniformity, and standardization that unionism was assumed to produce on otherwise upwardly mobile workers.[315] The divided loyalties rationale was particularly powerful with regard to supervisors. Congress worried that supervisors would subordinate the employer's interests to those of rank and file workers, either out of feelings of solidarity with them or to gain their support in a strike.

Section 2(11) of the NLRA defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[316]

The Court has reframed this definition as a three-part test. It asks: (1) "[D]oes the employee have the authority to engage in 1 of the 12 listed [functions]?"(2) "[D]oes the exercise of [this] authority

312. NLRA § 2(12), 29 U.S.C. § 152(12) (1994).

313. Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

314. *See* 29 U.S.C. § 152(3) (2000) (excluding supervisors from the definition of employees covered by the Act); 29 U.S.C. § 152(11) (2000) (defining supervisors so excluded).

315. Crain, *Building Solidarity*, *supra* note 309, at 972–73; H.R.Rep. No. 80-245, at 15–16 (1947), *reprinted in* NLRB, 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 292, 306–07 (1948).

316. NLRA § 2(11), 29 U.S.C. § 152(11) (2000).

require the 'use of independent judgment'" (rather than being of a merely routine or clerical nature)?; and (3) "[D]oes the employee hold the authority 'in the interest of the employer'?" If the answer to all three questions is yes, the individual is a supervisor excluded from the Act's protections.[317]

C. *Professionals As Supervisors?*

In two cases raising the issue of the intersection between the two categories of workers, the Supreme Court significantly broadened the definition of supervisors excluded from the Act's coverage.[318] In *NLRB v. Health Care & Retirement Corp. of America*, the employer had disciplined four licensed practical nurses who filed unfair labor charges with the Board. The employer contended that the nurses were not covered employees, and hence the NLRA's protections did not apply to them. The Board attempted to resolve the tension between the Act's inclusion of professionals in Section 2(12) and its exclusion of supervisors in Section 2(3): the Board held that the nurses were professionals covered under the Act rather than excluded supervisors, reasoning that professionals who utilized independent judgment in connection with patient care pursuant to their professional judgment would be acting in their own interests as professionals rather than in the employer's interests, and so would fail the third step of the analysis outlined above. The Sixth Circuit, and ultimately the Supreme Court, disagreed, and found that the nurses were supervisors. The Court reasoned that the Board had created a "false dichotomy" between professional interests in patient care and the employer's interests. Proclaimed the Court, "[t]hat dichotomy makes no sense. Patient care is business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the

317. NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 574 (1994) (quoting Northcrest Nursing Home, 313 N.L.R.B. 491, 493 (1993)).

318. The Court has also created an additional exclusion from coverage, the managerial exclusion, which is implied from the explicit supervisory exclusion. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), the Court ruled that because managerial workers occupy a higher status position in the workplace hierarchy than do supervisory workers, they are impliedly excluded from coverage under the Act as well. Subsequently, in *NLRB v. Yeshiva University*, 444 U.S. 672 (1979), the Court ruled that the faculty at Yeshiva University were managerial, on the basis that faculty played a role in the administration of the university through their decisionmaking on academic matters, including curriculum, admissions, scheduling, grading, and teaching methodologies. Such ideological control—over the product produced, the terms upon which it is offered, and the customers who will be served—was consistent with managerial status and thus the professors were excluded from the Act's coverage. *Id.* at 686.

employer's customers, is in the interest of the employer."[319] Thus, nurses who use independent judgment to responsibly direct aides in matters of patient care are supervisors.

The Court's view of professionals as employees of the firm tending to the firm's interest rather than professionals treating patients is consonant with the bureaucratized system in which many professionals now work. Such a conceptualization of professionals tends to isolate them from their patients, severing one of the links that distinguished professionalism, the intangibility of their product and the personal nature of the professional service. The Court's decision thus underscores the loss of a critical aspect of professional identity in a bureaucratized workplace.

In *NLRB v. Kentucky River Community Care, Inc.*,[320] the union sought to represent a unit of professional and nonprofessional employees at the employer's Caney Creek Development Complex. The employer objected to the inclusion of Caney Creek's six registered nurses in the bargaining unit, on the basis that they were supervisors excluded from coverage under the Act. The Board found that the employer had the burden to prove that the nurses were supervisors and therefore not covered, and that it had failed to carry its burden.[321] The Board reasoned that the nurses were not supervisors because they did not exercise "independent judgment" within the meaning of Section 2(11) when they used ordinary professional or technical judgment to direct lesser skilled employees to deliver services in accordance with employer-specified standards.[322] Because the nurses exercised their professional judgment rather than their judgment on behalf of management, the Board considered that defining them as supervisors would cancel out the inclusion of professionals under Section 2(12).[323] The union won the election and was certified as the representative of the employees.

The Supreme Court again simplified and broadened the definition of supervisor, rejecting the newest dichotomy established by the Board. It affirmed the Sixth Circuit, which had again reversed the Board, and ruled that while the employer did have the burden to prove that the nurses were supervisors excluded from coverage, it had

319. *Heath Care & Ret. Corp.*, 511 U.S. at 577.
320. 532 U.S. 706 (2001).
321. *Id.* at 709.
322. *Id.* at 710.
323. *Id.* at 720.

shouldered that burden. The Court characterized employees as supervisors if they "exercise 'independent judgment' in 'responsibly . . . directing' other employees 'in the interest of the employer.'" The Court held that the use of ordinary professional or technical judgment in directing less-skilled employees to deliver services constituted independent judgment that resulted in exclusion. The fact that the judgment was professional and that Congress expressly included professionals within the sweep of the Act's coverage did not exempt it from the test; the Board was wrong to categorically exclude professional judgments from the term "independent judgment," which naturally includes them.[324] Although conceding the soundness of the Board's argument as a matter of labor policy, the Court found that the statutory text of Section 2(11) simply did not support it. Noting that the Board's interpretation of the statute turned on factors that had no relationship to the degree of discretion exercised by the employee—for even if the employer allowed the exercise of significant independent judgment and discretion, the Board's interpretation would require that if the discretion permitted is professional or technical, or based on greater experience, then the employee would be included in the Act's coverage as an employee—Justice Scalia asked sarcastically, "What supervisory judgment worth exercising, one must wonder, does not rest on 'professional or technical skill or experience'?"[325]

Although the Court noted the tension created between the exclusion of supervisors and the inclusion of professionals, who by definition engage in work "involving the consistent exercise of discretion and judgment" as defined in Section 2 (12)(a)(ii), it viewed the tension as being of Congress' making. Justice Scalia did note in *dicta* that the Board might offer a "limiting interpretation of the supervisory function of responsible direction by distinguishing employees who direct the manner of others' performance of discrete *tasks* from employees who direct other *employees*, as § 152(11) requires." [326] Since

324. *Id.* at 721.

325. *Id.* at 715.

326. *Id.* at 720 (citing Providence Hospital, 320 N.L.R.B. 717, 729 (1996), *enforced,* 121 F.3d 548 (9th Cir. 1997)). In *Providence Hospital,* the Board interpreted the term "assignment" in § 2(11) to include "the assignment of an employee's hours or shift, the assignment of an employee to a department or other division, or other overall job responsibilities." 320 N.L.R.B. at 727. The Board focused particularly on the preparation of monthly schedules as the sort of assignment that would be closely related to managerial functions and hence, supervisorial in nature. *Id.* at 731. The Board noted, though, that "[w]hether assignment also includes ordering an employee to perform a specific task is . . . less clear." *Id.* at 727. The Board did not explore

the issue had not been raised in the case before it, the Court did not consider the question. Cases raising the issue before the Board post-*Kentucky River* are still winding their way through the administrative process; administrative law judges have thus far concluded in the bulk of pending cases that physicians and nurses remain non-supervisory.[327] Nonetheless, most labor unionists believe that the case poses a significant hurdle to obtaining protection for organizing efforts dedicated toward professionals. The AMA, for example, discontinued its organizing efforts following the Court's decision in *Kentucky River*, believing the legal climate to be "hostile" to physician organizing.[328]

the question further because it found that the employees were included professionals rather than excluded supervisors because the judgment exercised was based on their professional training or skill rather than constituting an independent judgment in management's interest. This interpretation, subsequently rejected by *Kentucky River*, requires that the Board return to the question of considering whether supervisory status attaches to those who direct the performance of tasks rather than people, pursuing a parallel analysis to that which it conducted in *Providence* on the meaning of the term "assign."

327. *See, e.g.*, Occupational Health Ctrs. of N.J., PA, 22-RC-11944 (Jan. 31, 2002), *available at http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2002/22-RC-11944.pdf* (finding New Jersey physicians employed by Occupational Health Centers of New Jersey and Concentra Managed Care, Inc, not supervisors); *PRN Scores Major Victory With NLRB Decision New Jersey Physicians Not Supervisors*, Feb. 1, 2002, *at http://*www.4prn.org/pr20020201.html (discussing the *Occupational Health Centers of New Jersey* decision); Advocates Health & Hosp. Corp., 13-RC-20426 (2001), *available at* http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2000/13-RC-20426.pdf (finding chief resident at a hospital not a supervisor).

In the sole case on which the Board has rendered an opinion on the supervisory status of physicians post-*Kentucky River*, the record was not sufficiently developed to require the Board to address the substantive legal issues surrounding supervisory status. *See* St. Barnabas Hosp., 334 N.L.R.B. 1000, 1000 n.2 (2001) (refusing to reopen the record to address the employer's contention, *post-Kentucky* River, that physicians were not supervisors where the employer relied upon a record formed in 1999, pre-*Kentucky River*, and thus failed to present sufficient evidence of physicians' supervisory status to sustain its burden of proof to show supervisory status); *see also* Lutheran Home at Moorestown, 334 N.L.R.B. 340 (2001) (finding that employer waived issue by not raising it in representation proceeding prior to decision in *Kentucky River*). *But see* Beverly Health & Rehab. Servs., Inc., 335 N.L.R.B. 635 (2001). On review, the D.C. Circuit affirmed the Board's ruling because the Board had re-evaluated the ALJ's conclusion that the nurses were not supervisors in light of the new standard announced in *Kentucky River*. Beverly Health & Rehab. Servs., Inc. v. NLRB, 317 F.3d 316, 324 n.3 (D.C. Cir. 2003). The Board found that the ALJ's conclusion was supported by the factual record because the nurses exercised only "routine" authority that did not entail the use of independent judgment. Beverly Health & Rehab. Servs., Inc., 335 N.L.R.B. at 635 n.3, 669–70.

Most recently, the Board has granted review of the Regional Directors' decisions in three cases raising issues about the meaning of the phrases "independent judgment," "degree/scope of discretion," "responsibly to direct," and other related issues determining the extent of the supervisory exclusion after *Kentucky River*, and solicited briefs from all parties and interested *amici*. *See NLRB Notice and Invitation to File Briefs, Oakwood HealthCare, Inc.; Beverly-Enterprises-Minnesota, Inc.; and Croft Metals, Inc.*, DAILY LAB. REP. (BNA) NO. 144, July 28, 2003, at E-1.

328. *See supra* note 197.

D. *The Link Between Deprofessionalization and Coverage*

The Court's interpretation of the term "supervisor" is now so broad that it risks obliterating the inclusion of professionals under the Act. It would seem that nearly all professional employees will be swept into the definition of supervisor if they perform professional services in a bureaucratized environment where they work in teams with other professionals and are required to direct other less-skilled medical care personnel. The relative status of professionals in the workplace hierarchy and their possession of expert knowledge almost guarantees that they will be required to delegate tasks to others and to direct the performance of such tasks.[329] The more bureaucratized the environment and the more profit-maximizing the business plan, the more such delegation and direction will be required. Thus, the more deskilled the professional, the more direction and delegation she will perform, and the more likely she will be to be characterized as a supervisor! Moreover, in multi-professional worksites organized around a team care concept, nearly every professional will have sufficient authority to direct others to perform tasks, even those above them in the status hierarchy, and consequently all would be supervisors excluded from coverage.

Surely this ironic result cannot be consonant with Congress' goal of avoiding divided loyalties. Professionals, it might be argued, were never really at risk of possessing divided loyalties anyhow, since (1) they cannot be included with a bargaining unit with other employees absent a majority vote of professionals, and (2) they are professionals first, employees second, answering to the clarion call of professional codes of ethics.

Putting aside what Congress might have intended, there are two routes that might be taken to argue for professionals' inclusion in the Act's coverage even if they are required to give direction in the workplace. The first is deceptively simple: If professionals have been deprofessionalized, they arguably lack the independent judgment required by the second prong of the Court's test. Notwithstanding Justice Scalia's rhetorical question ("what supervisory judgment

329. For example, in one case now on review before the Board, the Regional Director found that all 140 registered nurses employed by an acute care hospital are supervisors, because they "responsibly direct" over 100 less highly trained employees including licensed practical nurses, ward clerks, escorts, auxiliary nurses, and technicians. *See* M. Pavia Hernandez, Inc., 26-RC-8289 (Oct. 6, 2001), *available at* http://www.nlrb.gov/nlrb/shared_files/decisions/dde/2001/26-RC-8289.pdf.

worth exercising, one must wonder, does not rest on professional or technical skill or experience?"), the only reason that one would presume that the judgment was independent in the first place would be that it was made by a professional. If the professional has in fact been deprofessionalized by the employer's usurpation of technical as well as ideological control over the labor process, then the professional is, in fact, no longer a professional precisely because she lacks the autonomy to make "independent" judgments.[330] In other words, her status should be analyzed identically to that of any other employee, rather than applying the Court's assumption that she is a professional and therefore, that her judgments will be "independent." If the direction given is one that is merely routine, or even clerical—mandated by critical care pathways or protocols, for example—then it is not supervisory.

Some support can be found for this proposition in the Court's embrace of the Board's argument that "the degree of judgment that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer."[331] Such detailed regulations might include checklists of tasks, flow charts dictating medical care decisions at each juncture, and similar constraining rules typical of managed care utilization review. Alternatively, as one recent case illustrated, they might assume the form of state or federal laws, which in turn dictate hospital protocols and standing orders.[332] In essence, this ar-

330. As the Board stated in Amerihealth Inc., physicians were not necessarily disqualified from employee status by the failure of the HMO to exercise substantial control over physicians' conduct in examining patients, diagnosing illnesses, and prescribing treatment or performing medical procedures, because "it is not customary in the medical profession for fully trained physicians . . . to be subject to substantial controls over the manner in which they perform their professional duties." Amerihealth Inc, 329 N.L.R.B. 870, 870 n.1 (1999).

331. NLRB v. Kentucky River Cmty. Care, Inc., 532 U.S. 706, 713–14. In one case decided by the Board after *Kentucky River*, the Board ruled that where instructions given by workers are "circumscribed by detailed orders and regulations issued by the Employer and other standard operating procedures," the worker giving such instructions does not exercise sufficient independent judgment to render him a supervisor. *See* Dynamic Sci., Inc., 334 N.L.R.B. 391, 391 (2001); *see also* Beverly Health & Rehab. Servs., Inc., 335 N.L.R.B. 635, 635 n.3, 669–70 (2001) (finding that RNs do not exercise independent judgment when they assign duties to lower skilled employees where the duties are dictated or constrained by patient care plans), *aff'd in relevant part*, 317 F.3d 316 (D.C. Cir. 2003).

332. *See* Third Coast Emergency Physicians, P.A., 330 N.L.R.B. 756 (2000) (finding that emergency room physicians are not supervisors because they direct tasks performed by mid-level providers such as nurse practitioners and physician assistants, pursuant to Texas law mandating accountability to ensure adherence to hospital protocols and federal law regarding standards in patient chart preparation). *Third Coast Emergency Physicians* was a pre-*Kentucky River* decision, but its reasoning is consistent with Justice Scalia's suggestion that those who supervise the performance of tasks rather than people may not be supervisors. Analogous

gument uses the fact of the deprofessionalization of professions to argue for their nonsupervisorial status. To the extent that professionals' jobs have been micromanaged so that each task performed has been standardized, it is arguable that professionals now lack the independent judgment to direct other personnel. Thus, professionals are not supervisors because they are no longer professionals! Ironically, the management strategy of deprofessionalization that prompted professional unionization in the first place may ultimately furnish the shield against categorization as a supervisor excluded from NLRA coverage.

Alternatively, the Board might avail itself of Justice Scalia's limiting interpretation, defining the scope of supervisory authority by reference to whether the professional directs people on an ongoing basis (in which case she is a supervisor), or simply directs the performance of discrete tasks (in which case she is a covered professional). If the tasks delegated to others are so standardized and routine that lesser level employees can be instructed to do them without further supervision or oversight, the person giving direction can be said to be supervising only tasks rather than people. It might further be argued that the deskilled professional must, out of necessity, direct the performance of tasks that would once have been part of her professional duties but are now, for cost-efficiency reasons, delegated to a lesser-skilled worker. Thus, the cost-efficiency purposes of the delegation of tasks preclude an employer argument that the professional was charged with overseeing people, since such would be a waste of the time saved by delegating the tasks in the first place and could not have been the employer's purpose in structuring its bureaucracy as it has. This argument might be most successful where the professional retains discretion and independent judgment within the narrow bailiwick of her own professional duties, but has been divested of it relative to duties that have been carved out and assigned to others. Only independent judgment that is supervisory in nature (involving the direction or assignment of tasks or supervision of others), counts in the assessment of whether the professional is functioning as a supervisor.

authority is available under the FLSA. *See* Schaefer v. Indiana Michigan Power Co., 358 F.3d 394 (6th Cir. 2004) (finding that nuclear waste environmental specialists may lack day-to-day discretion and independent judgment required for FLSA exemption because his decisions are dictated by Department of Transportation and Nuclear Regulatory Commission rules, which create conformity, minimize discretion, and divest employees of independent judgment).

The most persuasive aspect of both of these arguments is that they are accurate to a fault. That is, the reason that the professionals are seeking to organize and bargain collectively is in response to the commodification of their labor brought about by the employer's strategy of deprofessionalization. The employer cannot have it both ways: either the professionals enjoy professional privilege and retain at least a modicum of technical control over the labor process (in which case perhaps they will have sufficient bargaining clout to achieve their collective goals even without the Act's umbrella of protections), or they have been deprofessionalized, in which case they lack the independent judgment (which might otherwise be presumed to stem from their professional status) to responsibly direct other employees.

CONCLUSION: MUSINGS ABOUT WORKERS, PROFESSIONAL IDENTITY, AND ORGANIZING

When professional status is challenged at its core, as it has been throughout the 1980s and 1990s by managerial cost cutting strategies and bureaucratization, professionals feel their work becoming commodified and their identity questioned. Perhaps it should not surprise us that such a challenge has led to organizing, even among groups not previously believed to be strongly disposed toward union organizing. As one organizer aptly put it, "it is conditions that threaten identity that compel people to action. It is an assault on one's basic sense of self that leads people to get angry, to take risks, to extend their reach."[333]

Where their investment in professional training and status is so significant, and especially where the deprofessionalization of an occupation is industry-wide, professionals are likely to prefer voice (unionization) over exit.[334] Professionals have become more receptive to collective strategies that offer the hope of reprofessionalization on an occupation-wide level. Organizing issues for professional employees and white-collar employees thus revolve primarily around dignity and professional autonomy rather than around purely economic issues, although economic issues can also become central as a powerful symbolic reflection of the esteem in which the professionals' cultural capi-

333. Roberta Lynch, *Organizing Clericals: Problems & Prospects*, LAB. RES. REV, Fall 1985, at 91, 96.

334. *See* HIRSCHMAN, *supra* note 288, at 53.

tal is held. The goal of professional organizing is to protect professional identity, which includes both a privileged class status and ideological and technical control over particular areas of expertise.[335]

Professional organizing is an expression of outrage at the breach of the social contract between professionals and society, which professionals believed would shield them from commodification. As bureacratization and scientific management commodify employed professionals' labor, their similarities to other workers become more pronounced and the differences of less significance, pointing toward the need for coverage under the labor laws. If unions can reconceptualize themselves to provide some of the best features of professional associations (skills training, support for professional achievements and goals at an individual level) while retaining the leverage of collective action and organization, professionals may embrace them. If unions build it, perhaps professionals will come.

335. See Craver, supra note 188, at 44–46; Rabban, *supra* note 14; David M. Rabban, *Is Unionization Compatible With Professionalism?*, 45 IND. LAB. REL. REV. 97 (1991); Hurd, *supra* note 61 (observing that freedom to exercise professional autonomy is at the top of the list of organizing issues for professionals).