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In Search of Core Values

W Bradley Wendel*

A consensus appears to have emerged among American lawyers that globalisation and information technology are transforming the practice of law in fundamental ways. In particular, non-lawyers are increasingly involved in what has traditionally been defined as the practice of law. The legal profession has, of course, historically been granted a monopoly over the provision of any services that are deemed the practice of law. Thus, the participation by non-lawyers from various disciplines—accountants, consultants, business managers, financiers and information technology professionals—in the delivery of legal services has been not been welcomed with open arms by many lawyers. The issue of the extent to which non-lawyers may be involved in the delivery of legal services was first widely debated in 1999 and 2000, in connection with the American Bar Association's (ABA's) proposal to permit so-called Multidisciplinary Practices (MDPs), and renewed in the proposal by the ABA Commission on Ethics 20/20 to permit limited investments by non-lawyers in law firms, which came to be known as the Alternative Law Practice Structures (ALPS) proposal.¹ In both of these instances, many lawyers were receptive to changes in the structure and regulation of the market for legal services, but their more traditionally minded colleagues expressed concerns—sometimes in fairly apocalyptic terms—about the erosion of the core values of the legal profession.

While the ABA was debating proposals for regulatory changes permitting limited involvement by non-lawyers in the market for legal services, a few scholars have imagined a world in which the distinction between lawyers and non-lawyers breaks down entirely. Richard Susskind,² in the United Kingdom, and Thomas Morgan,³ in the United States, have both hypothesised that lawyers may be going the way of wheelwrights, cordwainers or mercers (traders in fine cloths and silks), and that one day in the not-so-distant future we will consider the profession of lawyer as something to be studied historically, wonder

* Professor of Law, Cornell University, USA. I am grateful to Deborah Rhode for the invitation to participate in this symposium and to Dana Remus for her helpful comments on a draft of this essay. All websites accessed November 2013.

1 In August 2009 the American Bar Association (ABA) established the Commission on Ethics 20/20, with a mandate to consider modifications to the ABA's Model Rules of Professional Conduct in light of changes to legal practice. See ABA Commission on Ethics 20/20, Introduction and Overview, www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_hod_introduction_and_overview_report.authcheckdam.pdf.

2 Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press, 2008).

3 Thomas D Morgan, *The Vanishing American Lawyer* (Oxford University Press, 2010).

why lawyers were once needed by society, and speculate as to the cause of their demise as a distinct occupational group. Like the demand for fine cloths and leather goods, the demand for legal services will still exist, but new technologies and means of delivering these services will develop and displace the traditionally organised guilds that previously enjoyed a monopoly in this market.⁴ The result will be increased democratisation of and access to the law, as citizens are better able to meet their needs for information about their rights and obligations.

What would be lost in this world? The MDP and ALPS debates suggest that the answer would be that the legal profession, as currently constituted and regulated, is committed to certain core values that are not shared by allied occupational groups such as accountants, business managers and information-technology specialists.⁵ The trouble with the idea of core values is that it is often invoked in a question-begging way, and when the rhetoric of professionalism is probed more carefully, it often turns out to be merely a cover for a rearguard action to protect the profession's monopoly rents. The pattern of this argument is familiar: Some characteristic of lawyers not shared with non-lawyers, such as an almost exceptionless duty of confidentiality, is identified as a core value that would be threatened by the involvement of non-lawyers. Lawyers seldom stop to ask, however, whether that posited characteristic is in fact a value from a disinterested standpoint. Near-absolute confidentiality, for example, may not be a good thing from the point of view of affected non-clients,⁶ and it may not even be desired by clients.⁷ For something to be a value, let alone a core value, it must be a reason that can be endorsed from the perspective of others. Without getting into deep issues of value theory, it should be clear that some *X*'s being good for a relatively small occupational group is not a reason that counts in favour of *X* for others.

To see this point, consider the standard social contract account of the professional monopoly: An identifiable occupational group is given the power to exclude others from practising some craft, as well as a significant degree of regulatory autonomy. Those holding power in society—in a democracy, that would be all of us—must be persuaded that there is something distinctive about this craft, and the way it is regulated and practised by its members, that warrants granting a privilege to the occupational group to regulate itself. Those distinctive characteristics include

the functional importance of the body of knowledge and skill for the well-being of some significant segment of society, its intrinsic cultural importance, its unusually complex and esoteric character, and its superiority over the knowledge and skill claimed by competing occupations.⁸

4 Susskind (n 2) 4.

5 See eg Nathan M Crystal, 'Core Values: False and True' (2001) 70 *Fordham Law Review* 747; Bruce A Green, 'The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, their Development, and Some Implications for the Core Values Debate' (2000) 84 *Minnesota Law Review* 1115; James A Jones and Bayless Manning, 'Getting at the Root of Core Values: A "Radical" Proposal to Extend the Model Rules to Changing Forms of Legal Practice' (2000) 84 *Minnesota Law Review* 1159.

6 See William H Simon, *The Practice of Justice* (Harvard University Press, 1999).

7 See Daniel Fischel, 'Lawyers and Confidentiality' (1998) 65 *University of Chicago Law Review* 1.

8 Eliot Friedson, 'Professionalism and Model and Ideology' in Robert L Nelson, David M Trubek and Rayman L Solomon (eds), *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Cornell University Press, 1992) 220.

Significantly, all of these reasons pertain to *social* interests. There is a *quid pro quo* between the legal profession and society as a whole. The profession preserves the prerogative of self-regulation by demonstrating that it can be trusted to regulate itself in the public interest.

It may be the case, however, that a profession's exercise of its self-regulatory authority proves no longer to be in the public interest. Many scholars have argued that the legal profession, acting through the organised bar, mostly promotes regulation in the economic self-interest of lawyers, and it is up to other institutions, such as courts or legislatures, to protect the public interest.⁹ A familiar illustration is the effect of the consumer-rights movement on the regulation of the legal profession in the 1960s and '70s, culminating in decisions by the US Supreme Court holding that schedules of minimum fees violated federal antitrust statutes and that many restrictions on advertising were invalid under the First Amendment.¹⁰ These interventions by the Supreme Court had a basis in statutory or constitutional law, but today's expressions of discontent do not appeal to a conflict between self-regulation and other *legal* norms. Rather, the claim is that professional self-regulation makes it more difficult or expensive for clients to obtain the services they demand. As a result, market forces are putting significant pressure on the legal profession's asserted regulatory authority.

Thus far the market forces have mostly existed on the corporate side of the divide between lawyers representing individual clients and those serving organisations.¹¹ Lawyers in large law firms must satisfy increasingly empowered institutional actors such as in-house counsel and liability insurers, and enjoy relatively little autonomy in their dealings with clients; powerful clients can use the threat of exit from the relationship and the existence of fierce competition for clients as a means to control the behaviour of outside counsel.¹² In-house counsel may demand, for example, that an outside law firm outsource certain functions, such as transactional due diligence review or litigation document review, to a lower-cost service provider. Individual clients do not have the same market power, but in

- 9 See eg Stephen Gillers, 'What We Talked About When We Talked About Ethics: A Critical View of the Model Rules' (1985) 46 *Ohio State Law Journal* 243; Richard L Abel, 'Why Does the ABA Promulgate Ethical Rules?' (1981) 59 *Texas Law Review* 639; Deborah L Rhode, 'Why the ABA Bothers: A Functional Perspective on Professional Codes' (1981) 59 *Texas Law Review* 6891; Deborah L Rhode, 'Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions' (1981) 34 *Stanford Law Review* 1. In the United States, the organised bar has authority over the rules of professional conduct only indirectly. Enforceable rules are promulgated by state courts, pursuant to their inherent authority. See Charles W Wolfram, *Modern Legal Ethics* (West, 1986) § 2.2. As Deborah Rhode argues in her contribution to this issue, the assertion by state courts of inherent and exclusive regulatory authority is an obstacle to reform. See Deborah L Rhode, 'Reforming American Legal Practice and Legal Education: Rethinking the Role of Nonlawyers in Delivering and Financing Legal Services', this issue.
- 10 See Eliot Friedson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (University of Chicago Press, 1986) 116–18 (discussing *Goldfarb v Virginia State Bar*, 421 US 773 (1975) and *Bates v State Bar of Arizona*, 433 US 350 (1976)).
- 11 See John P Heinz and Edward O Laumann, *Chicago Lawyers: The Social Structure of the Bar* (Northwestern University Press, rev edn 1994) (finding that the legal profession was roughly divided into 'hemispheres' corresponding to differences in the social class, educational background, prestige, and income of lawyers).
- 12 See eg Robert L Nelson, 'Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm' (1985) 37 *Stanford Law Review* 503; Robert A Kagan and Robert Eli Rosen, 'On the Social Significance of Large Law Firm Practice' (1985) 37 *Stanford Law Review* 399.

the aggregate demand for new means of delivering legal services can be perceived. The rise of online legal services providers such as LegalZoom and RocketLawyer are evidence of unmet demand by individuals for efficient, low-cost services such as wills, bills of sale, residential leases, creation of small-business entities, protecting intellectual property, and uncomplicated divorces.¹³ Although LegalZoom cancelled an initial public offering of securities in August 2012,¹⁴ its net profit of \$12.1 million in the preceding year shows fairly robust demand for legal services by individuals dissatisfied with either the cost or quality of the services provided by lawyers.

Notwithstanding the successes of firms like LegalZoom, the American legal profession has managed to hold the line against other encroachments by non-lawyers, including outside equity investors in law firms and non-lawyer partners in MDPs. Some reformers have argued that the insistence by the organised bar that it cannot compromise the core values of legal professionalism stands as an impediment to clients, even powerful corporate clients, obtaining the services they demand from US-based law firms.¹⁵ The experience in the United Kingdom has been very different, with wide-ranging reforms having been implemented by Parliament. The Legal Services Act of 2007, based on a report prepared by Sir David Clementi, led to the abandonment of much of the traditional regulation of the divided profession in England and Wales by the Law Society and the Bar, for solicitors and barristers, respectively.¹⁶ Significantly, the Clementi Report advocated regulatory changes that would be in the interests of the consumers of legal services, while ensuring that certain core values would be embodied in codes of professional conduct. Those core values were independence, integrity, the duty to act in the best interests of the client, and confidentiality.¹⁷ As long as those core values are respected, however, lawyers are free to organise themselves in innovative ways. The Legal Services Act permits alternative business structures, in which non-lawyers can be managers or owners of entities providing legal services, as long as at least one manager of the entity is a licensed solicitor and as long as only lawyers provide ‘reserved legal services’, including court appearances and the preparation of certain documents such as deeds.¹⁸ The alternative business structures concept has become known in the UK as ‘Tesco Law’, after the large supermarket chain;¹⁹ the equivalent in the US, if it were permitted, would presumably be something like ‘Wal-Mart Law’.

¹³ Not surprisingly, lawyers have resisted attempts by these entrepreneurial firms to engage in what they consider to be the practice of law. Some courts have concluded that online legal service providers are engaging in the unauthorised practice of law. See eg *Janson v LegalZoom, Inc*, 802 F Supp 2d 1053 (WD Mo 2011).

¹⁴ See eg LegalZoom Delays IPO, *LA Biz* (3 August 2012), www.bizjournals.com/losangeles/news/2012/08/03/legalzoom-delays-ipo.html.

¹⁵ Gillian K Hadfield, ‘The Growing Economic Cost of Professional Control over Corporate Legal Markets’ (2008) 60 *Stanford Law Review* 1689.

¹⁶ See John Flood, ‘Will there be Fallout from Clementi? The Repercussions for the Legal Profession after the Legal Services Act 2007’ [2012] *Michigan State Law Review* 537.

¹⁷ *Ibid*, 544 (citing David Clementi, *Review of the Regulatory Framework for Legal Services in England and Wales: Final Report* (2004), 21).

¹⁸ For a helpful summary of the Alternative Business Structure regulations, see the Practice Guide published by the Law Society, www.lawsociety.org.uk/advice/practice-notes/alternative-business-structures.

¹⁹ See eg Neil Rose, ‘“Tesco Law” — Not the Big Bang, But it Will Change the Face of Legal Services’ *The Guardian*, 25 March 2011.

The hope of supporters of alternative business structures is that competition from well-financed providers of legal services will lower prices while maintaining quality, thereby enhancing access to justice for consumers. This goal takes on added importance in light of cuts to the budget of the Legal Services Commission (LSC) in England and Wales (which also motivated the adoption of conditional fees, despite traditional resistance to that form of financing).²⁰ As Richard Susskind notes, Tesco lawyers would seek to reduce costs to consumers by ‘bring[ing] to bear a more contemporary suite of tools and techniques for managing the delivery of legal services’, eliminating the ‘enormous duplication of effort and reinvention of the wheel’, and dealing with the problem of ‘too many lawyers and too few advanced systems.’²¹ But even if Tesco lawyers innovate lower cost means of providing legal services, it is not at all clear that they will replace the services previously provided by the LSC. Any lower-cost service provider will seek efficiencies, and efficiency-minded lawyers might be motivated to avoid certain types of cases. Routine wills and residential leases are very different from complex public law litigation, for example. It may be possible for a mass-market legal services provider to squeeze additional efficiencies out of relatively routine services, but if they cannot do so in other areas, they may not be willing to take on the clients who formerly were served by the LSC.

In the US, where adequately funded public legal aid has always been a chimera, Wal-Mart Lawyers would fill an important niche for low- to moderate-income consumers of legal services if that type of practice structure were allowed. But the experience with the ABA Ethics 20/20 Commission suggests that the atmosphere on this side of the Atlantic is hostile to reform, at least at the national level. Of course, any state highest court has the authority to enact Clementi-type modifications to the rules of professional conduct, and the District of Columbia already has a limited provision for alternative law practice structures. But the proposal by the working group on alternative law practice structures, formed as part of the Ethics 20/20 Commission process, ran into a firestorm of opposition, and the Commission elected not to pursue amendments to the ABA Model Rules aimed at taking even very modest steps in the direction of permitting non-lawyer investments in law firms.²² The reason cited was, once again, core values—never mind that the Clementi reforms sought to ensure that the core values of the legal profession would be preserved in alternative business structures.²³ The core value most frequently mentioned in opposition to the ABS proposal was the independence of lawyers from the business interests of investors.²⁴ Where Susskind sees an admirable attempt to engineer costs out of the system, the ABA perceives only money-grubbing investors interfering with the judgment of lawyers.

²⁰ See Richard L Abel, ‘An American Hamburger Stand in St Paul’s Cathedral: Replacing Legal Aid with Conditional Fees in English Personal Injury Litigation’ (2001) 51 *DePaul Law Review* 253. The LSC was recently abolished by the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, and replaced with the Legal Aid Agency, an executive agency of the Ministry of Justice. I am grateful to Hilary Sommerlad for clarifying the recent history of the LSC.

²¹ Susskind (n 2) 11.

²² See Ted Schneyer, “Professionalism” as Pathology: The ABA’s Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities’ (2012) 40 *Fordham Urban Law Journal* 75.

²³ *Ibid.*, 79–80.

²⁴ *Ibid.*, 94–95.

Never mind that sometimes the judgment of lawyers results in ‘enormous duplication of effort and reinvention of the wheel’—if lawyers believe their clients ought to pay for redundant services, then no alternative business structure should be permitted that would permit the intrusion of business norms into professional decision-making.

As Ted Schneyer and other scholars have shown, the legal profession has long been rhetorically committed to the distinction between a profession and a ‘mere’ business or trade.²⁵ In her dissent in *Shapero v Kentucky Bar Association*,²⁶ Justice O’Connor accepted the economic argument that allowing attorneys to advertise would reduce the price and increase the quality of legal services, but she nevertheless would have permitted the states to ban attorney advertising in order to reinforce the business/profession dichotomy:

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market ... Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth.²⁷

If being a business meant only that lawyers delivered services in an efficient manner, at a fair price, that would be something to celebrate, at least from the point of view of clients.²⁸ However, on Justice O’Connor’s conception, earning a reasonable return for investors can never be a core value of the legal profession, because it is a *profession*—an occupation which, by hypothesis, is committed to pursuing, or at least prioritising, values other than the pursuit of economic success. This argument verges on incoherence, at least if professionalism is defined narrowly as the exclusion of non-lawyers from providing legal services, because the invocation of professionalism as a value allows lawyers to charge higher prices for their services. One cannot disclaim the pursuit of profit while resisting changes in the market for one’s services that would result in lower profits. But that is what opponents of alternative business structures are also arguing, at least if they are not careful in their definition of core professional values. Rhetorically, professionalism functions as a kind of trump card for lawyers that can be played against the consumer-welfare arguments of the proponents of change. It is conceivable, however, that we are at a historical moment in which the rhetoric of professionalism may be swamped by market forces. Hence the preoccupation with globalisation and information technology.

Globalisation threatens the American profession’s self-understanding, because it permits certain types of clients to shop for lawyers whose core values match up with their own. As Tom Morgan warns American lawyers, multinational companies will surely gravitate toward providers of legal services who can deliver the same quality services at lower

²⁵ Schneyer (n 22) 94–102.

²⁶ 486 US 466 (1988).

²⁷ *Shapero*, 486 US at 488–9 (O’Connor J dissenting).

²⁸ See Ronald J Gilson, ‘The Devolution of the Legal Profession: A Demand Side Perspective’ (1990) 49 *Maryland Law Review* 869.

cost.²⁹ Sophisticated business clients have already put pressure on the profitability of law firms by enhancing the role of in-house legal departments. Historically, large corporate clients had relationships with one or only a few law firms. They used these outside law firms for a variety of matters, and these retained lawyers in effect served as counsellors in a broad sense, not only as providers of technically complex legal services.³⁰ This pattern began to change in the 1980s as corporate clients started to bring legal expertise within the corporation itself. Illustrating Coase's point about firms minimising transaction costs,³¹ corporations found it more efficient to maintain an internal legal department to handle routine or repeated matters. In-house lawyers also supervised the work of outside counsel more closely, scrutinising their bills with care. Morgan observes:

Until somewhat recently, outside lawyers have been relatively sheltered from the pressure to control their fees, but that cannot last ... More and more in-house counsel are cutting the number of outside firms a company retains, requiring highly detailed case budgets, early assessments, regular updates, use of specific technology, and minimum experience levels for lawyers working on their cases.³²

It would not be surprising to see large, multinational clients seeking to retain law firms outside the US whose capital and management structures gave them a competitive advantage in delivering cost-effective services.

As for technology, *New York Times* columnist Tom Friedman has written that 'anything that can be digitised can be outsourced to either the smartest or the cheapest producer, or both'.³³ The ability to digitise information has allowed firms to decompose or 'unbundle' legal services into components parts, and find more efficient ways of handling some of the more routine tasks that traditionally have been performed by lawyers.³⁴ Morgan notes that 'information technology promises to transform lawyer work that used to be seen as complex, unique, and worthy of substantial fees into a series of "commodities"—simple, repetitive operations that will be provided to clients by the lowest bidder'.³⁵ A litigated matter or a deal is composed of sub-tasks, some of which require highly specialised training, skills and judgment, but others of which are simply commodity work. Coding documents for electronic discovery, for example, is highly routine and standardised. If legal matters can be broken down into sub-tasks, clients may begin to demand (and many have begun to demand) that lawyers charge prices for routine tasks that are set in a competitive market with many potential service providers.³⁶ Going even further, if some legal tasks can be

²⁹ Morgan (n 3) 90.

³⁰ Kronman laments the loss of long-term professional relationships between corporations and their outside counsel. See Anthony T Kronman, *The Lost Lawyer* (Harvard University Press, 1993).

³¹ Ronald M Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386.

³² Morgan (n 3) 121–2.

³³ Quoted in Morgan (n 3) 90–91.

³⁴ See Milton C Regan, Jr and Palmer T Heenan, 'Supply Chains and Porous Boundaries: The Disaggregation of Legal Services' (2010) 78 *Fordham Law Review* 2137.

³⁵ Morgan (n 3) 94.

³⁶ *Ibid*, 95 (citing Susskind (n 2) 27–33, 100–5).

automated, clients may demand that these services be provided by outside information technology firms rather than by lawyers if it would be more efficient to do so.³⁷

One may see technology as offering numerous benefits, not only to lawyers but to the parties and the administration of justice. Party-controlled litigation, in which the adversary lawyers decide what issues to pursue, what discovery to conduct and what motions to file, enables lawyers to impose costs on the opposing party. Not only the opposing party but also the trial court must bear the cost of managing the discovery process and sorting through substantive and procedural motions. The externalities associated with adversarial litigation have been well understood for some time, but the relatively recent phenomenon of electronic discovery has put such an additional strain on the resources of courts that there has been a concerted effort by judges to rethink the regulation of the discovery process.³⁸ The object of this regulation has been to make discovery less adversarial and therefore less susceptible to the arms-race dynamic.³⁹ Judges are now requiring opposing lawyers to cooperate in electronic discovery, including filing joint submissions of search terms and agreeing to non-waiver of the attorney-client privilege in the discovery process. Lawyers who do not negotiate in good faith may be sanctioned by the court.⁴⁰ In principle, everyone is better off. The clients pay less for discovery, the relevant information is disclosed, and the court does not have to waste time adjudicating disputes over the scope of production or the legitimacy of objections.

As Dana Remus has argued, however, technology threatens the core values of the legal profession in subtle ways.⁴¹ While lawyers in theory have responsibility to ensure compliance by outside vendors with the rules of professional conduct,⁴² neither lawyers, nor judges, nor state disciplinary authorities are likely to know enough about the technology involved to exercise effective oversight. Thus, the e-discovery support industry is likely to develop its own norms, which may not reflect the duties owed by lawyers to their clients or the court. This may be okay. Richard Epstein, in an influential article on the use of custom in tort law, notes that most industries have an incentive to exercise reasonable care for the protection of their customers.⁴³ If riders kept getting injured at an amusement park, or customers frequently got food poisoning at a restaurant, people would stop going

³⁷ See Dana Remus, 'Managing Mechanization: Technologies of Discovery and the Ethics of Advocacy' (2013) 99(2) *Iowa Law Review* (forthcoming).

³⁸ Professor Richard Marcus, the drafter of the amendments to the Federal Rules of Civil Procedure addressing electronic discovery, estimates that the typical cost of preparing a privilege log, indicating which documents have been withheld on claims of privilege, is about \$1 million in a case involving significant amounts of electronically stored information. The Tyson Foods Antitrust Litigation, in the US District Court in the Middle District of Georgia, involved a review of 22,500,000 pages of documents from 229 hard drives and 52 file servers.

³⁹ See John K Setear, 'The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse' (1989) 69 *Boston University Law Review* 569, 627.

⁴⁰ See eg *In re Fannie Mae Securities Litigation* (DC Cir 2009); *Williams v Taser International* (nD Ga 2007); *Hopson v Baltimore* (D Md 2005).

⁴¹ Remus (n 37).

⁴² ABA Model Rules, r 5.3.

⁴³ Richard A Epstein, 'The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Tort' (1992) [21 Journal of Legal Studies](#) 1.

there. In cases involving informed consumers who have choices about where to do business, Epstein argues, courts can rely upon ‘the practices formulated by those who have an incentive to get things right.’⁴⁴ As Epstein observes, however, this reasoning breaks down in ‘stranger’ cases, where potential victims cannot bargain with those who may harm them and demand additional care to be taken.⁴⁵ Many of the duties imposed on lawyers—and, via Rule 5.3, on non-lawyer service providers—are meant to substitute for bargained-for duties as a matter of contract law. In some cases the rules of professional conduct serve as default rules that may be bargained around; most conflicts of interest can be waived with the informed consent of affected clients, for example. But there are numerous obligations within the rules that are not waivable and clearly intended to function not as default rules but as absolute duties. The reason is that given by Epstein, namely that the law must step in and supply norms of conduct where the potentially wronged party is not in a position to bargain for protection. Remus’s point is similar. The process of negotiation between lawyers and information-technology providers may take place without consideration of the interests the rules of professional conduct are aimed at protecting. These values are not only not the values of the technology industry (although that is probably true), but they are not dependent upon negotiated agreement. Some duties owed by lawyers to clients may be modified or waived; others are non-waivable. Other duties are owed not to clients but to third parties and courts. In either case the process of establishing those duties must take into account the full range of values implicated by the lawyer-client relationship.

This observation suggests a general point about the core values of the legal profession: By nature they are plural and sometimes conflicting. The role of lawyer can be located at a nexus of duties owed to the client, non-clients to whom the client owes duties, third parties, courts, the profession, and the public interest. It is a commonplace that client-regarding duties such as confidentiality and diligent representation are in tension with third-party-regarding duties such as refraining from assisting client fraud and disclosing confidential information where necessary to prevent wrongdoing; the contested issue is which of these duties has priority over the others. High-profile cases such as the enforcement action against a law firm representing shady savings and loans have served as an occasion for vigorous debate over the relative priority of duties owed to clients and those owed to investors or other affected third parties.⁴⁶ What is less well understood is that even duties owed to clients may vary considerably in content, from one context to another.⁴⁷ Lawyers are fiduciaries. This means the client is in a position of dependency with respect to the lawyer and must rely on the lawyer’s loyalty and honesty; the fiduciary principle prohibits the lawyer from putting her own interests above those of the client. Fiduciary duties include

⁴⁴ *Ibid.*, 21.

⁴⁵ *Ibid.*, 20.

⁴⁶ See eg Lawrence J Fox, ‘OTS v Kaye, Scholer: An Assault on the Citadel’ (1993) 48 *Business Lawyer* 1521; William H Simon, ‘The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology’ (1993) 23 *Law & Social Inquiry* 243; David B Wilkins, ‘Making Context Count: Regulating Lawyers After Kaye, Scholer’ (1993) 66 *Southern California Law Review* 1145.

⁴⁷ This discussion is drawn from Geoffrey C Hazard, Jr et al, *The Law and Ethics of Lawyering* (Thomson Reuters/Foundation Press, 5th edn 2010) 770–5.

the prohibition on disclosing or making adverse use of confidential information and rules against various types of self-dealing.⁴⁸ At the same time, however, competent adult clients are permitted to strike mutually beneficial bargains with other actors in the marketplace, including lawyers. The common law principle of freedom of contract reflects a widespread belief that people are often in a better position than lawmakers to know what is in their best interests. Lawyers therefore may agree with clients to limit the scope of the representation, disclose confidential information, or waive conflicts of interest.⁴⁹ Finally, lawyers owe duties to strangers—non-clients—which cannot be represented as either fiduciary duties or duties assumed by agreement. For instance, lawyers may not introduce false testimony, nor counsel or assist a client to commit a criminal or fraudulent act.⁵⁰

Duties owed to clients often strike a balance between fiduciary and market principles. For example, the rule on business transactions with clients does not prohibit them outright, but requires extensive disclosure and substantive fairness to the client, reflecting the fiduciary nature of the lawyer-client relationship.⁵¹ Freedom of contract is thus qualified to some extent to prevent lawyers from overreaching vulnerable clients. Similarly, the rule on attorneys' fees does not simply validate any fee arrangement that was agreed upon by the lawyer and client, but requires that the fee be reasonable,⁵² thereby preserving some authority for regulators to enforce norms more stringent than the proverbial morals of the marketplace. These examples show that core values must be seen as *prima facie* only, not absolute and unyielding.⁵³ Where *prima facie* duties come into conflict, one may speak of 'compromising' or 'interfering with' a core value, but it seems more natural to speak of one value having priority over another or having greater weight under the circumstances. Alternatively, values may be lexically ordered, meaning that values of one type must be fully satisfied before moving on to satisfy values of a different type.⁵⁴ For example, if a lawyer-client business transaction is deemed permissible, it is not because the attorney had no fiduciary responsibilities to the client. Rather, it was the case that the lawyer had satisfied whatever fiduciary obligations she owed, which were lexically prior to the principle of freedom of contract.

The Clementi approach to alternative business structures makes sensible use of the idea of lexical ordering. Lawyers may practise in association with other professionals, or may accept equity investments or even managerial control by non-lawyers, but *only if* the organisation complies with the core values of the legal profession, including loyalty and confidentiality. As the Law Society explains in a Practice Note on Alternative Business Structures:

48 See eg ABA Model Rules, r 1.6(a) (disclosing confidential information), r 1.8(b) (adverse use of confidential information), r 1.7 (concurrent conflicts of interest), r 1.8(c) (soliciting gifts from clients).

49 See *ibid*, r 1.2(c) (limitation on scope of representation), r 1.6(a) (informed consent to disclose confidential information), r 1.7(b) (waiver of concurrent representation conflicts).

50 See *ibid*, r 1.2(c) (counseling or assisting crime or fraud), r 3.3(a) (false testimony).

51 *Ibid*, r 1.8(a).

52 *Ibid*, r 1.5(a).

53 See William David Ross, *The Right and the Good* (Oxford University Press, 1930).

54 See John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 42–43n.

You may not be able to accept instructions from some clients where aims of different parts of an ABS may conflict with a client's best interests. For instance, an ABS with an insurance arm would probably be unable to offer legal services to a client whose claim was against an organisation or individual insured by that ABS. This is because, it would be in the interest of part of the ABS (the insurance arm) for the client to lose the case and this creates a conflict which would normally preclude the ABS from acting for the client.⁵⁵

The relevant core value of loyalty to the client's best interest is not compromised by this structure, because the permissibility of the structure is contingent upon respect for that value.

In the minds of many tradition-minded lawyers, however, nothing like the Clementi approach would be tolerable in the US, apparently because the relevant core values can never be satisfied if lawyers are permitted to practise with non-lawyer professionals or receive equity investments from non-lawyers. (Or, at least, that the threat to core values in some contexts is so severe that the involvement of non-lawyers is intolerable even if it is possible in other contexts to safeguard professional values.) The Ethics 20/20 Commission received many comments to this effect, which are remarkable for the all-or-nothing quality of the rhetoric. The Illinois Bar Association, for example, submitted a resolution opposing 'the ownership or control of the practice of law by nonlawyers [as] inconsistent with the core values of the legal profession.'⁵⁶ Striking a blow for American exceptionalism, the Illinois Bar exhorted that '[t]he American concept and practice of lawyer independence is as important to proclaim and advocate throughout the world as is due process and the rule of law abroad.'⁵⁷ In a similar vein are the following comments, submitted by the general counsels to nine large US-based corporations:

[A]llowing any form of non-lawyer ownership of law firms will harm the core values of the American legal profession. The proposal opens the door to arrangements that make the practice of law more like other businesses and less like the distinct profession it has always been. Even a limited permission for non-lawyer ownership will make subsequent debates about matters of degree, not principle. The better course is to hold the line now.⁵⁸

[T]he proposal threatens to undermine the unique attorney-client relationship, to exacerbate the law's drift from a profession into a business, and to hasten the day when the legal profession is no longer self-regulated.⁵⁹

Traditionally, the attorney-client relationship has been treated as fundamentally different from a business relationship—because it is. The relationship is protected by a unique privilege for attorney-client communication and by the professional ethic that lawyers must unequivocally put client interests first. In recent years, we have witnessed a thirst for profits that has led to the

⁵⁵ See Law Society Practice Note on Alternative Business Structures, ¶ 4.

⁵⁶ See Illinois Bar Association, Resolution 10A, http://iln.isba.org/sites/default/files/blog/2012/08/isba-raises-issue-nonlawyer-ownership-law-firms-aba-house-delegates/joint_isba_sr_lawyers_div_resolution%20authcheckdam.pdf.

⁵⁷ *Ibid*, 5.

⁵⁸ Comments of Nine General Counsels (29 February 2012), p 1, www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/ninegeneralcounselcomments_alpschoinceoflawinitialdraftproposal.authcheckdam.pdf.

⁵⁹ *Ibid*, 2.

increasing conglomeration of law firms and the disregard of what were once sacrosanct conflict rules. Given that the constant chase after higher profits and the relentless pursuit of growth have already enhanced the influence of business concerns on the practice of law, we are deeply troubled by a proposed change that would only further undermine the tradition that law is a profession rather than a business. Taking a step that will encourage a firm's partners to place an even higher premium on profit and wealth can only exacerbate a problem that is already threatening lawyers' sense of professionalism.⁶⁰

The comments suggest that there is no way to ensure respect for core professional norms, such as the attorney-client privilege and the prohibition on representing conflicting interests, when lawyers are practising in association with non-lawyers. Not only do the commenters simply disbelieve the feasibility of the Clementi strategy, but they ignore two points about the pressures on core values that already exist.

First, lawyers are frequently subject to the influence of non-lawyers. The obvious illustrative case is the representation of the defendant whose defence is funded by a liability insurer.⁶¹ This creates incentives and means for the insurer to interfere with the lawyer's professional judgment in the representation of the insured.⁶² An insurance company paying a lawyer's bill will want to know how the defence is going, and has a contractual right to receive information from the insured. Companies have typically reserved the right to settle cases within policy limits; they therefore want the freedom to decide how much spending on a defence is cost-effective. If a lawyer is careless or incompetent, the loss will fall on the insurance company. Insurance companies have employed staff attorneys, and there may be a cost or quality advantage to employing them. Finally, in very practical terms, the insurer pays the attorney's fees in the matter at hand and is likely a source of repeat business for the attorney, while the insured is merely a one-off player. Interestingly, the judicial response to the prospect of interference with the lawyer's representation has been to posit lexical priority among competing duties. The Tennessee Supreme Court, for example, considering the possibility that duties to the insurer might complicate the lawyer's representation of the insured, wrote:

While this practical reality raises significant potential for conflicts of interest, it does not become invidious until the [insurer's] attempted control seeks, either directly or indirectly, to affect the attorney's independent professional judgment, to interfere with the attorney's unqualified duty of loyalty to the insured, or to present 'a reasonable possibility of advancing an interest that would differ from that of the insured.'⁶³

The Tennessee court's holding represents the majority position in insurance cases, recognising that some duties may be owed to the insurer, while maintaining that the attorney's

⁶⁰ *Ibid*, 4–5.

⁶¹ See eg Geoffrey C Hazard, Jr, 'Triangular Lawyer Relationships: An Exploratory Analysis' (1987) 1 *Georgetown Journal of Legal Ethics* 15.

⁶² See Thomas D Morgan, 'What Insurance Scholars should Know about Professional Responsibility' (1997) 4 *Connecticut Insurance Law Journal* 1.

⁶³ *Givens v Mullikin ex rel Estate of McElwaney*, 75 SW 3d 383, 395 (Tenn 2002) (citing Tenn Bd of Prof'l Resp, Formal Op 00-F-145).

inherent duty of independence owed to the primary client, the insured, supersedes any obligations owed to the insurer in the event of a true inconsistency. The court also stresses, in referring to the insurer's attempted control, that there will be pressure on the independence of lawyers, but they are nonetheless expected to comply with their ethical obligations.

Second, even in a world in which lawyers answer only to their clients and to each other, the supposed ethical commitment to putting client service above the accumulation of wealth has not prevented lawyers from engaging in wrongdoing in the furtherance of greater profits. Mitt Regan has written about the case of John Gellene, a partner in a large New York City law firm who went to federal prison for bankruptcy fraud after attempting to finesse the required disclosure of conflicting interests to a federal court.⁶⁴ To simplify a complex story, the explanation for Gellene's failure was not his ignorance or venality, but the intense competitive pressures *within* the law firm by the recent adoption of an 'eat what you kill' compensation system. The firm had sought to attract entrepreneurial lawyers from other firms, and to compete in an increasingly fluid market for lateral hires. The unintended consequence was to dramatically disempower 'service' partners like Gellene who were not able to attract new business like the better-compensated 'rainmaker' partners. Due to the episodic and cyclical nature of bankruptcy practice (if the lawyer representing a debtor did a good job, the client would only need to retain the law firm once), Gellene was dependent upon others within the firm, including a mergers-and-acquisitions partner who had relationships with some of the creditors in the bankruptcy, for his livelihood. Recognising these intra-firm pressures does not excuse the bankruptcy partner's wrongdoing,⁶⁵ but it does help to explain why lawyers sometimes fail to respect core values such as not participating in frauds on the court.⁶⁶

Some of the traditionally minded participants in the Ethics 20/20 debate might respond that the *Gellene* case is an aberration which in any case says nothing about core values. Gellene never argued that the pressure felt by the firm to remain profitable, which led to the adoption of the eat what you kill compensation system, somehow relaxed the usual strictures on lying to the tribunal. But this example is not meant to show that the profession's core values have actually changed, only that lawyers are already under tremendous pressure to compromise them. The managers of Gellene's firm believed that the firm needed to do a better job of attracting 'high-revenue' partners from other firms, and therefore it could no longer afford to continue paying partners in lockstep, according to years of service with the firm.⁶⁷ Whether the demand to increase profitability comes from lawyer managers or non-lawyer shareholders, the result is the same. Some lawyers who may already be susceptible to

64 Milton C Regan, Jr, *Eat What You Kill: The Fall of a Wall Street Lawyer* (University of Michigan Press, 2004). The reported criminal case is *United States v Gellene*, 182 F 3d 578 (7th Cir 1999).

65 A point I made reviewing the book in W Bradley Wendel, 'Ethical Lawyering in a Morally Dangerous World' (2006) 19 *Georgetown Journal of Legal Ethics* 299.

66 In the introduction to a special symposium issue of this journal dedicated to studies of lawyer misconduct, Rick Abel summarises the results of his studies of New York and California lawyer disciplinary cases: By and large greed was not a motivation for violating the rules; lawyers knew that what they were doing was wrong, but often come to accept unethical patterns of behaviour they see demonstrated by other lawyers with whom they interact in practice. See Richard L Abel, 'Comparative Studies of Lawyer Deviance and Discipline' (2012) [15 *Legal Ethics* 187](#).

67 Regan (n 64) 46.

cutting ethical corners may succumb to the pressure. The general counsels' comments on the ABA's alternative business structures proposal contends that having non-lawyer investors in a firm would 'encourage a firm's partners to place an even higher premium on profit and wealth [that] can only exacerbate a problem that is already threatening lawyers' sense of professionalism'.⁶⁸ My hunch, from what is known about the psychology of ethical decision-making, is that the capital structure of an organisation is much less important than factors that are general across organisation types, such as group loyalty, commitment, and the tendency to adopt the moral perspective of the group (which of course depends in turn on how the group in question is structured); loss aversion; the origination of wrongdoing in automatic, intuitive, System 1 judgments; the tendency to interpret the silence of others as approval or acquiescence; confirmation bias; and the induction mechanism whereby past practices become a benchmark for making judgments about new practices.⁶⁹ These effects are present in organisations large and small, and are enhanced not primarily by economic incentives but by subtle cues in the norms of a workplace culture.

Having observed the debate over MDPs and, more recently, the ABA's alternative business structures proposal, it is apparent that the position of many of the opponents of change is ultimately not empirical.⁷⁰ Rather, it is close to an assertion that terms such as 'lawyer' or 'legal profession' refer to natural kinds, not conventionally designated categories. The idea of core values is therefore analogous to identifying the essence of a natural kind. 'Lawyer' refers to a member of an occupational group possessing certain properties—having become licensed after a course of study and passing an examination; dealing with certain types of problems involving rights and duties and the relationships of citizens to each other and to the state; and being committed to particular ethical norms such as loyalty and confidentiality. But it seems to me too strong to assert that 'lawyer' is a rigid designator, so that it is true in all possible worlds that lawyers have all of the properties ascribed to them by the traditionalists.⁷¹ Something can turn out to have different properties and still properly be called a lawyer. To take a trivial example, most Americans would refer to English solicitors as lawyers even though traditionally they did not enjoy rights of audience in all courts.⁷²

68 Comments of Nine General Counsels (n 58).

69 See eg Max H Bazerman and Ann E Tenbrunsel, *Blind Spots: Why We Fail to Do What's Right and What to Do About It* (Princeton University Press, 2011); John M Darley, 'The Cognitive and Social Psychology of Contagious Organizational Corruption' (2005) 70 *Brooklyn Law Review* 1177; Andrew J Wistrich, Chris Guthrie and Jeffrey J Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) 153 *University of Pennsylvania Law Review* 1251; Ann Tenbrunsel and David Messick, 'Ethical Fading: The Role of Self-Deception in Unethical Behavior' (2004) 17 *Social Justice Research* 223; Don A Moore and George Loewenstein, 'Self-Interest, Automaticity, and the Psychology of Conflict of Interest' (2004) 17 *Social Justice Research* 189, 190.

70 Startling confirmation of this claim came in an exchange between Commission member Stephen Gillers and arch-traditionalist Larry Fox. Gillers asked Fox whether his mind could be changed by any empirical evidence showing that non-lawyer owners of law firms did not interfere with the professional judgment of lawyers; Fox said no. See Joan C Rogers, 'Speakers Debate Nonlawyers' Role in Firms At First Ethics 20/20 Commission Hearing', *ABA/BNA Lawyers' Manual on Professional Conduct*, 26, 110 (17 February 2010).

71 Cf Saul A Kripke, *Naming and Necessity* (Harvard University Press, 1980) 106–55.

72 That situation has been changed by statute, but the general distinction between barristers and solicitors still exists in England and Wales. As Deborah Rhode points out in her contribution to this symposium, numerous countries recognise parallel occupational groups as something less than full-on lawyers, but permit them to provide many of the services reserved exclusively to lawyers in the United States. To make matters worse, our

Prior to the US Supreme Court's decisions in *Bates* and following cases,⁷³ one might have said that American lawyers had the property of being unable to advertise their services. Contingent fees are regarded as anathema to the concept of lawyer in most countries, but accepted as unproblematic by American lawyers. More closely related to alternative practice structures, the organised bar in the United States vigorously fought against the providers of group legal services plans, offered by organisations like unions and automobile clubs, which made lawyers available to low- to middle-income consumers.⁷⁴ Now no lawyer would seriously contend that providing services under a legal services plan is incompatible with the core values of her profession.⁷⁵

Notwithstanding these examples, the traditionalists persist in denying that the concept of 'lawyer' is compatible with the sharing of legal fees with non-lawyers. Thus, one might pause for a moment and ask a question about methodology. What is it that we are talking about when we talk about professionalism and core values? It is hard to know how to respond to an argument that is not empirical and, insofar as it is conceptual, seems immune to counterexamples showing that it is possible to be a lawyer with characteristics different from those of the American profession of the recent past. The issue inevitably becomes a normative one, requiring direct engagement with the fundamental question of what social value the legal profession serves. Or, to return to the question with which this essay opened, what would be lost in a world in which non-lawyers could compete with lawyers to provide legal services or associate with lawyers to provide those services?

One way to think about this question might be to imagine a hypothetical choice situation in which there are no restrictions on which services may be provided by various occupational groups, all of whom may associate with each other in whatever form of organisation suits their needs. Anyone, whether currently classified as a lawyer, accountant, broker, consultant, investment banker, human-resources officer, information technology specialist, or just an ordinary citizen, can counsel clients on compliance with regulations, draft wills, prepare and file tax returns or applications for government benefits, negotiate and document complex merger transactions or real estate development deals, represent employees in discrimination cases and injured parties in personal injury lawsuits, conduct arbitration hearings, and so on. For which of these services would a client select a full-on licensed lawyer, with that role understood in the way the traditionalists insist it should be? Several possible answers suggest themselves. One is that clients will use the designation of lawyer as a way to reduce information costs. Whatever else one gets by hiring a lawyer, one receives some assurance that the service provider has gone through a fairly rigorous

current system of legal education is beset by increasing costs and structural pressures that tend to result in the production of graduates who are not well suited to providing legal services to currently underrepresented potential clients. See Rhode, this issue.

⁷³ See *Bates v State Bar of Arizona*, 433 US 350 (1977); *Zauderer v Office of Disciplinary Counsel*, 471 US 626 (1985).

⁷⁴ See Schneyer (n 22) 96–99. As in the advertising controversy, the organised bar relented only after constitutional litigation in the Supreme Court. See *United Mine Workers of America v Illinois State Bar Association*, 389 US 217 (1967); *Brotherhood of RR Trainmen v Virginia ex rel Virginia State Bar*, 377 US 1 (1964); *NAACP v Button*, 371 US 415 (1963).

⁷⁵ See ABA Formal Opinion 87-355 (1987) (approving of prepaid legal services plans under the Model Rules).

training and evaluation process. Another possibility is that the client receives the benefit of confidential communications protected from compelled disclosure by the attorney-client privilege, although of course that is a contingent benefit—a legislature is always free to create an analogous privilege for communications with other service providers. A third answer is that, even in a world of perfect information and one in which all communications were privileged, there are services that lawyers are better at delivering than are accountants or consultants, or that lawyers *ought* to deliver for reasons relating to the impact the delivery of the services has on non-clients.

In my view, the third answer suggests a productive way of thinking about core values. There may be things at which lawyers really are better than non-lawyers, such as advocacy or the capacity for complex, polycentric judgment. But even this approach leaves out an important perspective. The hypothetical choice scenario involved prospective clients matching up with service providers. There was no allowance made for the interests of non-clients, unless for some reason the clients had an interest which overlapped with theirs. This leaves out one of the most important clusters of professional core values, which is the concern for the interests of third parties, the lawyer's role as an officer of the court, obligations owed to the tribunal, and duties of fidelity to law. The market-oriented rhetoric of the Clementi reforms, as well as the warnings by Morgan and Susskind that other service providers are going to eat lawyers' lunches in a competitive marketplace, is only part of the core values story. As many scholars have argued, the lawyer's role is best understood as mediating between the interests of clients and the public interest.⁷⁶ Professionalism, in this sense, refers not to a closed cartel or to the abnegation of the desire to earn a living, but to a commitment to maintaining the law and related institutions in good working order instead of attempting to game or subvert it.⁷⁷ The role of lawyer and the lawyer-client relationship are distinctive, and are associated with certain core values, because they are created by the legal system. Lawyers are accordingly not at liberty to pursue any of their clients' ends; rather, their obligation is to seek to further their clients' *lawful* ends. That is the respect in which they are different from accountants, consultants and other allied professionals (which may have their own distinctive ethical commitments). In a liberal society there is inevitably an 'enforcement gap', to use Susan Koniak's term, between what the state can enforce and what the law legitimately requires citizens to do or refrain from doing.⁷⁸ On this account, a different way to understand the professional *quid pro quo* is that, wishing to obtain the benefits of a liberal society, including relative freedom from the vigorous, centralised enforcement of the law by the state, we have entrusted the exercise of judgment regarding legal rights and duties to a class of service providers called lawyers.

⁷⁶ See eg Susan P Koniak, 'When the Hurlyburly's Done: The Bar's Struggle with the SEC' (2003) 103 *Columbia Law Review* 1236; Robert W Gordon, 'Why Lawyers Can't Just be Hired Guns' in Deborah L Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Oxford University Press, 2000) 42; William H Simon, 'The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology' (1998) 23 *Law & Social Inquiry* 342; Robert W Gordon, 'The Ideal and the Actual in the Law' in Gerald W Gawalt (ed), *The New High Priests: Lawyers in Post-Civil War America* (Greenwood Press, 1984) 51.

⁷⁷ I have argued for this conception of professionalism in W Bradley Wendel, 'Professionalism as Interpretation' (2005) 99 *Northwestern University Law Review* 1169.

⁷⁸ Koniak (n 76) 1246.

The interests of clients have played a prominent role in the debate over core values, as they should. It is cause for concern, however, that the interests of non-clients have played a comparatively insignificant role. In the ongoing conversations about professional regulation, deregulation and regulatory reform, it is essential not to lose sight of the social interests that underlie the core values of the legal profession. Confidentiality and loyal client service are rightly held to be core values, but what about the obligations traditionally associated with the public, or 'officer of the court' role of the lawyer? These core values are the truly distinctive ones in comparison with other occupational groups. No one other than lawyers claims to be committed to maintaining the rule of law as a counterweight to market forces. It is the commitment to protecting those interests that will keep lawyers from going the way of the cordwainers and wheelwrights, who are now but a historical oddity.