

2013

Medicine and Law as Model Professions: The Heart of the Matter (and How We Have Missed It)

Rob Atkinson

Follow this and additional works at: <https://ir.law.fsu.edu/articles>



Part of the [Law and Society Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Rob Atkinson, *Medicine and Law as Model Professions: The Heart of the Matter (and How We Have Missed It)*, 22 *HEALTH MATRIX* 345 (2013),
Available at: <https://ir.law.fsu.edu/articles/402>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

MEDICINE AND LAW AS MODEL PROFESSIONS: THE HEART OF THE MATTER (AND HOW WE HAVE MISSED IT)

Rob Atkinson[†]

“Now I’ll put my meaning in a clearer light, if I can. I maintain that these two, body and soul, have two arts corresponding to them; that which deals with the soul I call government, but though the subject of physical welfare constitutes a unity I cannot find a single name for the art which deals with the body, which has two branches, training and medicine. In the art of government what corresponds to training is called legislation and what corresponds to medicine is called the administration of justice. The members of each of these pairs, training and medicine, legislation and justice, have something in common, because they are concerned with the same object, but they

[†] Professor of Law, Florida State University College of Law. The Florida State University College of Law has generously supported my scholarship in professionalism and other fields for nearly a quarter of a century now, most generously under the nearly two decades of Donald Weidner’s admirable deanship. On this particular project I am indebted to my research assistants Sara Hassler and Hannah Monroe and to the staff of the FSU College of Law and its Research Center for invaluable support, always cheerfully given. To two of my colleagues who work much more than I at the intersection of law and medicine, Marshall Kapp and Reid Fontaine, I owe special thanks for helping me find this article its happy placement here in Health Matrix.

In writing this article, I have often thought of my brother, Ernest McIntosh Atkinson, a family practitioner; my sister, Louise Atkinson Witherspoon, a physical therapist; and our late father, Robert Edward Atkinson, a rural veterinarian. In our father’s large and small animal practice in Williamsburg County, South Carolina, we as children learned the kind of care that I have come to see as the core of the properly professional practice of medicine. In this paper I have found myself describing the standard of care that my father delivered his entire working life. No one could give or receive better care, or greater love. May the day soon dawn when the kind of care our father gave the animals of that rural community, livestock no less than pets, becomes the birthright of every human being born anywhere in the world. If this paper could help hasten that day, then my professional work would properly stand alongside his, and theirs.

are different from one another nonetheless. We have then these four arts, constantly concerned with the highest welfare of the body and soul respectively”

Plato¹

“The secret of the care of the patient is in caring for the patient.”

Dr. Francis Weld Peabody²

“[A] lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may call himself an architect.”

Sir Walter Scott³

ABSTRACT

This article has two coordinate goals: to undergird the functionalist understanding of professionalism with classical normative theory and to advance the classical theory of civic virtue with the insights of modern social science. More specifically, this article seeks to connect classical theories about the care of the body and the soul with modern theories of market and government failure. The first step is to distinguish two kinds of professions, caring professions like medicine and public professions like law, by identifying the distinctive virtue of each. The distinctive virtue of the caring professions is single-minded commitment to those in their care, their principals, to the virtual exclusion of all other concerns; the distinctive virtue of the public professions is commitment to the common good, sometimes even at the expense of their principals’ self-defined interest. The next step is to show how these two distinctive professional virtues, the one principal-protecting, the other public-protecting, branch from the same root, the common function of all proper professions: guaranteeing the delivery of socially essential but necessarily esoteric knowledge when the usu-

¹ PLATO, GORGIAS 45–46 (Walter Hamilton trans., 1960) (statement attributed to Socrates).

² JEROME GROOPMAN, HOW DOCTORS THINK 54 (2007) (quoting textual language as “[o]ne of the most celebrated statements in clinical medicine”).

³ WALTER SCOTT, GUY MANNERING 213 (P.D. Garside ed., Edinburgh University Press 1999) (1815).

al protections of both private contracts and government regulation systematically fail. The third and final step is to map out the implications of this neo-classical understanding of professionalism, beginning at its core in the paradigmatic caring and public professions of medicine and law, through putative professions that take these as their models, to the kind of republican society that places care of individuals and concern for the public welfare at the center of its value system. The result of this analysis should be not only a fuller theoretical appreciation of professionalism's proper function, but also a practical guide to professionals themselves for better service to both the individuals in their care and the common good of all humankind.

TABLE OF CONTENTS

Introduction.....	349
I. The Fundamental <i>Faux Pas</i> : Mistaking Liberal Learning as Essential to All Proper Professions.....	354
A. The Functionalist Thesis: Professions as a Response to Both Market and Government Failure in the Provision of Necessary Specialized Knowledge	356
1. Market Failures in the Provision of Specialized Knowledge.....	357
a) Information Asymmetries: The Threat of Professionals to their Own Principals	358
b) Externalities: The Threat of Professionals and their Principals to Third Parties and the Public.....	360
(1) Undercompetence.....	360
(2) Excessive Zeal.....	361
c) Summary.....	362
2. Government Failure in Regulating the Provision of Specialized Knowledge	362
3. Professional Institutions as Superior Guarantors of Specialized Knowledge	365
4. Summary.....	366
B. Focusing the Functionalist Thesis: Narrowing the Field of Professional Knowledge	367
1. The Line Between Artisans and Technicians: Distinguishing Informal from Formal Specialized Knowledge	367

2.	The Line Between Technicians and Professionals: Connecting Formal Occupational Knowledge and General Cultural Knowledge	371
C.	Finding the Crucial Link with Liberal Learning.....	373
1.	The Law and Liberal Learning	373
2.	The Missing Link Between the Practice of Medicine and the Application of Liberal Learning	376
II.	Toward a Refined Functionalist Understanding of Professionalism.....	383
A.	Professional Knowledge and Professional Virtue: Re-Mapping Their Proper Relationship	384
1.	The Locus of Virtue in Public-Protecting Professions.....	384
2.	The Locus of Virtue in Principal-Protecting Professions.....	386
3.	Summary.....	388
B.	Professional Virtues and Professional Institutions: Re-Mapping the Boundaries Between the Professions, the Market, and the State	389
C.	Re-Integrating Professional Knowledge, Virtues, and Institutions: Refining the Ideal-Type Profession.....	394
1.	A New Taxonomy of Professional Virtue: One Genus, Two Species.....	394
2.	Comparison with the Prior Definition	397
a)	The Basic Agreement: A Common Focus on Professional Function	397
b)	The Critical Distinction: A New Focus on Professional Virtue	398
(1)	Specialized Knowledge as an Insufficient Condition.....	398
(2)	Market Control as an Unnecessary Condition.....	399
3.	Summary.....	400
III.	The Implications of Neo-Classical Professionalism.....	400
A.	Revisiting Medicine and Law: Refining the Basic Concepts, Reforming the Paradigmatic Professions.....	401
1.	At the Core of the Legal and Medical Professions: Preserving the Critical Virtues.....	402
2.	In Between the Principal-Protecting and Public-Protecting Professions	405
a)	Hybrids: Double Doses of Professional Virtue	405

b) Exceptions that Prove the Rules: Branches of One Profession with the Virtues of the Other	407
c) On the Frontiers of the Paradigmatic Professions ...	407
(1) False Positives: Faux Professions	408
(2) False Negatives: Unrecognized Professions	408
B. The Professions and Other Occupations.....	409
1. Professional Virtue as Neo-Classical, not Retro-Victorian	410
2. Professional Virtue, the Virtues of Other Occupations, and Other Occupational Virtues	411
3. Comparative Perspective: Professionalism in Other Times and Places	414
a) The Necessary Knowledge Base.	415
b) The Relative Strength of Complementary Social Institutions.	416
c) The Social Ranking of the Values Professions Serve	416
C. Paradigm Professions and Our Society: Law and Medicine as Both Limiting Cases and Cultural Mirrors	418
Conclusion: From the Virtues of the Professions to the Values of the Republic.....	420

INTRODUCTION

Nearly everyone takes the three classic professions to be law, medicine, and the clergy.⁴ By virtually all accounts – professional and lay, practical and theoretical, favorable and critical – this trinity of occupations, holy or otherwise, shares the core of what a profession should be. The breadth of this agreement is hardly an accident; it contains more than a grain of truth. But this agreement needs deeper analysis, because it also contains a fundamental mistake: the assump-

⁴ ELIOT FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* 32 (1986) (“As we all know, the medieval universities of Europe spawned the three original learned professions of medicine, law, and the clergy (of which university teaching was part).”); MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 4–5 (1977) (“In the Anglo-Saxon world at the beginning of the nineteenth century, the recognized gentlemanly professions were, in practice, only three: divinity, and its recent offshoot of university teaching; the law . . . and the profession of medicine.”).

tion that all three classic professions, and by extension all proper modern professions, rest on the same foundation of liberal learning. That assumption is demonstrably false, and its consequences have been pernicious.

From that bad seed has grown many a thorny problem in the academic study, self-perception, and public appreciation of the professions. We need to learn about the three classic professions what Sesame Street teaches about other incongruous catalogings: "One of these things is not like the others; one of these things doesn't belong."⁵ The odd one out among the classic professions, this article argues, is medicine; once we see why the practice of medicine does not necessarily entail liberal learning, we can appreciate not only medicine's distinctive and legitimate claim to professional status, but also the common function of all proper professions.

By contrast, the practice of law, properly understood, closely approximates functionalist theory's ideal type of the classic profession: an occupation that serves an essential social value by combining esoteric technical knowledge with general cultural knowledge in a way that neither the regulatory state nor for-profit firms can guarantee as well, alone or together, as the occupation's own institutions.⁶ With necessary adjustments for the clergy's place in modern secular societies, an equally plausible case can be made for that occupation's professional standing as well.⁷ The problem lies with medicine, the third member of the classic professional trinity that is now very much *primus inter pares*.

Medicine's status as a profession poses this basic dilemma. On the one hand, the practice of medicine is not only a supremely important occupation, as Socrates anciently insisted; it is also the paradigmatic profession in our modern world. Physicians now eclipse lawyers and the clergy in what, at least for the laity, are the hallmarks of professional status: income, prestige, and power. In explicit recognition of this standing, theorists of professionalism have tended to take the practice of medicine as our society's closest approximation

⁵ *One of These Things: Hat*, SESAME STREET, http://www.sesamestreet.org/video_player/-/pgpv/videoplayer/0/96480d64-694e-44dc-8140-8c65f68d93cb (last visited Apr. 7, 2012).

⁶ See Robert E. Atkinson, Jr., *Laying the Foundations for Neo-Classical Professionalism in Law and Business*, 10 GEORGETOWN J. L. & PUB. POL. (forthcoming 2013).

⁷ See Rob Atkinson, *The Western Christian Clergy: From Most Professionalized Occupation to Least (and Back?)* (unpublished manuscript) (on file with author).

to the ideal-type profession, the model of what a profession should be if it were to function properly.⁸

On the other hand, the practice of medicine today lacks what professionalism's most sophisticated defenders take to be one of an ideal-type profession's defining attributes: an essential link between highly technical, socially valuable knowledge and a university-level liberal education. Put less abstractly, this is the rub: to serve you well, your lawyer, when you really need one (and your clergy-person, should you ever want one) must have not only a deep knowledge of the humanities, but also at least a passing familiarity with both the physical and the social sciences; your physician need only know the "hard" sciences (unless it is your psyche that is sick).⁹

This article addresses the dilemma of medicine's professional status with a double thesis: (1) the common core of all proper professions is a peculiar genus of occupational virtue; and (2) that genus has two main species, the principal-protecting, or caring, and the public-protecting, or public. That is the heart of the matter we have missed: the practice of medicine is the proper paradigm, not of professionalism in general, but of the caring professions in particular. Medical doctors need not master liberal learning to perform their social function properly.

But that function itself is literally vital: preserving and promoting life itself, the very foundation of all other human values. To perform that function properly, medical doctors must take the care of their individual patients as wholly to heart as is humanly possible. We, both as individuals and as a society, deeply want our doctors, day in and day out, to be caring and careful, to care for our lives as much and

⁸ See ELIOT FREIDSON, *PROFESSIONALISM: THE THIRD LOGIC* (2001); ELIOT FREIDSON, *PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE* (1970); LARSON, *supra* note 4, at xi ("The elements that compose the ideal-type profession appear to be drawn from the practice and from the ideology of the established professions; medicine, therefore, as the most powerful and successful of these, should approximate most closely the sociological criteria of what professions are and do."); Harold J. Cook, *Good Advice and Little Medicine: The Professional Authority of Early Modern English Physicians*, 33 *J. BRITISH STUD.* 1, 2 (1994) ("As one of the three learned professions surviving from the Middle Ages, the 'medical profession' has been a crucial test case for various definitions of what a profession is or was.") (citation omitted). *Id.* at n.1 (listing examples of major sociological studies of professionalism that have focused on medicine); see also ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* 20 (1988) ("Let us begin with the familiar case of American medicine."). *Id.* at 189 ("The most familiar example of the shift to scientific legitimacy claims is that of nineteenth century medicine.").

⁹ We take up the exceptional case of psychotherapy later in this article. See *infra* Part III.A.2.

as well as they can, to the very limits of human capability. Doctors routinely hold our very lives, sometimes quite literally our hearts, in their hands. The kind of care appropriate to that situation is precisely what sets medicine apart as a profession and makes it the paradigm of all caring professions.

Again, to put the matter less abstractly, if your lawyer is a bit careless in handling your case (and if your plea is not for an eleventh-hour stay of execution), you'll most likely live to have a second lawyer amend any mistakes your first may have made. But if your family doctor fails to notice that that mold just above your hairline has taken an angry turn since your last routine check-up, you may very well die of metastatic melanoma, quite soon and quite painfully.¹⁰

Medicine, then, is better seen as the model, not of a learned profession, but of a caring profession. We certainly need doctors, and we need those doctors to be deeply committed to our care, not just rigorously trained and closely regulated. But those doctors do not generally need, as an essential part of their job-performance, a thorough grounding in the humanities and social sciences.

Failing to appreciate this distinction between a learned profession and a caring profession has had the most profound of consequences, in both theory and practice. On the theoretical side, it has fundamentally distorted our understanding of professionalism itself. On the practical side, it has seriously jeopardized the proper education of professionals. And that, in turn, has jeopardized the proper rendering of professional services, and thus the good of both individuals and society, not least our professionals themselves. We have made a very big mistake about medicine, and we need to fix it fast.

Part I of this paper begins this reassessment of medicine's unique status as a profession by sketching the necessary background: the broader debate over whether any occupation, in order to apply specialized knowledge to an essential social function, must be organized along the lines of the classic professions, with its members' performance guaranteed in important part by institutions internal to the occupation itself and distinct from the institutions of both the market and the state. The second section of Part I isolates the problem of medicine under the prevailing definition. Although classic professionalism theory holds that the professions must entail a wedding of technical

¹⁰ As your medical file closes, of course, your legal file may open. Once you're gone, your lawyer can see that your family is fully compensated for your doctor's oversight, at least in the contemplation of the law. But that legal relief is likely to be small consolation to your loved ones (not to mention you!), a distant second-best to the longer, fuller life that proper medical care would have given you.

knowledge and general knowledge,¹¹ the need for that “wedding” is dubious in the case of medicine. This section shows why the practice of medicine, in contrast to law, does not really require a liberal education, and thus why medicine’s distinctive occupational status must be found elsewhere.

Part II undertakes that more positive task. The first step is to distinguish two kinds of professions—caring professions like medicine and public professions like law—by identifying the distinctive virtue of each. The distinctive virtue of the caring professions is single-minded commitment to those in their care, their principals, to the virtual exclusion of all other concerns; the distinctive virtue of the public professions is commitment to the common good, sometimes even at the expense of their principals’ self-defined interest. The next step is to show how these two distinctive professional virtues branch from the same root, the common function of all proper professions: guaranteeing the delivery of socially essential but necessarily esoteric knowledge when the usual protections of both private contracts and government regulation systematically fail. Building upon these insights—the fundamental structure of professional virtue and the essential role of professional institutions in promoting that virtue—the final section of Part II outlines a refinement of the functionalist theory of the professions.

Part III works out the implications of that refined theory of the professions, in principle and in practice, from the specific to the general. Its first section applies that theory to the paradigmatic caring and public professions, medicine and law. The second section widens the focus of the revised theory to examine the professional claims of other occupations and to compare professional virtues with other occupational virtues. The final section turns the analytic lens around and raises, albeit only in a tentative way, the converse question: What kind of society does the neo-classical theory of the professions imply? Answering that question highlights the neo-classical republican elements in our present society, shared norms beyond both majority will and consumer preference.

And that, in turn, brings us around to understanding the problem with which we began: mistaking liberal learning as an essential element of the practice of medicine. A neo-classical republic honors wisdom above all other virtues. Its lawyers must make that virtue the foundation of their profession, if they are to protect the common good; all of its ablest citizens—doctors as well as lawyers, layfolk as well as

¹¹ FREIDSON, *PROFESSIONALISM: THE THIRD LOGIC*, *supra* note 8, at 121.

professionals—must make wisdom not only the goal of their personal lives, but also the measure of their commonwealth.

I. THE FUNDAMENTAL *FAUX PAS*: MISTAKING LIBERAL LEARNING AS ESSENTIAL TO ALL PROPER PROFESSIONS

Certain occupations in our society have secured especially high social, economic, and political status by successfully claiming that they alone can best provide socially essential esoteric knowledge, and only under conditions of considerable occupational autonomy. These are the professions. The professions pose to those who study them two basic questions, one descriptive, the other normative. The descriptive question is this: What identifiable aspects of an occupation qualify it as a profession? The answer to that descriptive question, in turn, poses the normative question: Does a given profession—or any profession at all—actually merit its special status?

Students of the professions have tended to agree on the answer to the basic descriptive question, what an ideal-type profession would look like, even as they radically divide in their answer to the basic normative question, whether professions are a necessary mode of organizing the provision of certain services essential to the common good, or whether professions are the means by which certain occupations have been able to gain control of the provision of certain services to their own advantage as suppliers and to the detriment of the public as consumers.¹² Functionalists believe the professions serve the common good;¹³ revisionists insist that they subvert it.¹⁴

¹² Or, as stated by a contemporary sociologist of the professions,

The crucial characteristic of the knowledge systems of professionals, as they have been perceived in the discussions of professionalism of recent years, is to what extent they really serve a problem-solving purpose which in turn gives power and prestige to the owners of this capacity, or to what extent the knowledge is a symbolic value that serves the purpose of being something that can be brought forward in other people's eyes as important but which has no clear relation to the problem-solving capacity of professionals.

Rolf Torstendahl, *Introduction: Promotion and Strategies of Knowledge-Based Groups*, in *THE FORMATION OF PROFESSIONS: KNOWLEDGE, STATE AND STRATEGY* 1, 3 (Rolf Torstendahl & Michael Burrage, eds., 1990).

¹³ See, e.g., TALCOTT PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY* 43 (1954).

¹⁴ The leading general work in this vein is LARSON, *supra* note 4; as for the legal profession in particular, see Richard L. Abel, *United States: The Contradictions of Professionalism*, in 1 *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* 186, 186–87 (Richard L. Abel & Philip S.C. Lewis eds., 1988); BERNARD SHAW, *THE DOCTOR'S*

All scholars, functionalists and revisionists alike, agree that any occupation's claim to professional status rests on applying a body of specialized knowledge in the provision of an essential service, the proper delivery of which can only be guaranteed by institutions internal to the occupation itself and relatively independent of both the market and the state.¹⁵ This claim has three distinct components: (1) certain occupations provide essential services that entail a distinctive kind of knowledge; (2) optimal provision of those services cannot be guaranteed by ordinary contracts between service providers and service consumers, even with the routine intervention of the regulatory state; but (3) institutions within the occupation itself can, given sufficient power and autonomy, ensure optimal provision (or, more precisely, provision that is superior to any feasible alternative).¹⁶ Functionalist defenders of professionalism affirm all three of these propositions; revisionist critics challenge one or more.

But, again, all scholars implicitly agree that, if there are to be legitimate professions, these three conditions must all be met. What is more, scholars also generally agree that medicine is the paradigmatic profession.¹⁷ If any occupation deserves to be a profession, it is medicine; if medicine cannot be shown to warrant professional status, neither can any other occupation. Part I shows how both halves of this double claim come a cropper when we look closely at medicine and law under the prevailing paradigm: on the one hand, not all classic professions are necessarily learned, because medicine cannot be shown to require liberal learning; on the other hand, liberal learning is essential to at least one other classic profession, the law.

Part I.A sets out the general understanding of professions as uniquely effective providers of specialized knowledge, using the classic professions of law and medicine as examples. Part I.B narrows the focus on professional knowledge to isolate what is supposed to separate proper professions from other occupations that entail special knowledge, traditional artisans on the one hand and modern techni-

DILEMMA 16 (Penguin Books reprint, 1965) (calling professions "conspiracies against the laity"); and see also ABBOTT, *supra* note 9, at 7 ("For some, professionalism was a means of controlling a difficult social relation; for others, a species of corporate extortion.").

¹⁵ See ABBOTT, *supra* note 8, at 7–8 (noting that theorists of the professions "[c]ertainly all agreed that a profession was an occupational group with some special skill" and using as his own working definition of professions "exclusive occupational groups applying somewhat abstract knowledge to particular cases").

¹⁶ See LOUIS DEMBITZ BRANDEIS, *BUSINESS – A PROFESSION* 2 (1914).

¹⁷ See FREIDSON, *PROFESSIONALISM: THE THIRD LOGIC*, *supra* note 9, at 181; see LARSON, *supra* note 5, at xi; see also ABBOTT, *supra* note 9, at 30 ("It has been easy to mistake American medicine for the paradigm [of professional life].").

cians on the other. Unlike artisans and technicians, proper professions are said to be “learned”; their members must master not only a body of special occupational knowledge, but also the advanced cultural knowledge associated with a college-level liberal education.¹⁸ Part I.C then looks for that hybrid of special and general knowledge in two paradigmatically learned professions, law and medicine. This search yields decidedly different results for law and medicine. The general assumption that professional services necessarily entail liberal learning nicely fits the practice of law but poses insurmountable problems when applied to medicine. A central aspect of the practice of law—making plausible appeals to the public good—requires just that integration of advanced occupational and cultural knowledge. But the same cannot be said of medicine; its claim to professional status, as Part II shows, must lie elsewhere.

A. The Functionalist Thesis: Professions as a Response to Both Market and Government Failure in the Provision of Necessary Specialized Knowledge

As we have seen, all students of the professions, from the most optimistic functionalist to the most skeptical revisionist, agree on this: the legitimacy of any occupation’s claim to be organized as an ideal-type profession rests on that occupation’s delivery of a particular kind of specialized knowledge. To qualify as a profession, an occupation must deliver a form of esoteric knowledge that is essential to the performance of an important social function but that cannot be guaranteed by either the market or the state, but only by largely autonomous institutions of the occupation itself.¹⁹

This is, admittedly, both a complex and an abstract formula. The first step in unpacking it is to notice that it entails implicit claims of superiority to two other sources or guarantors of that specialized

¹⁸ FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 121 (“The ideology of professionalism asserts knowledge that is not merely the narrow depth of the technician, or the shallow breadth of a generalist, but rather a wedding of the two in a unique marriage. This wedding of liberal education to specialized training qualifies professionals to be more than mere technicians.”).

¹⁹ *Id.* at 78–79 (“In professionalism, sheltered labor markets for particular jurisdictions in a division of labor are created on the basis of a claim to be able to perform a defined set of discretionary tasks satisfactorily.”). See Torstendahl, *supra* note 12, at 3 (noting agreement of professionalism scholars on centrality of claims about specialized knowledge). Functionalism had earlier proponents among social reformers who were also theorists, particularly Louis Brandeis in the United States and R. H. Tawney in the United Kingdom. See WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS 123 (1998) (noting close parallels between Progressives like Brandeis and functionalist sociologists like Parsons).

knowledge, the market and the state. The professions, in other words, are a double default mode in our basic system of state-regulated capitalist markets. In that system, consumers' first recourse for knowledge beyond their ken is to enter into ordinary contracts with private, for-profit firms; if those for some reason fail, consumers then look to government intervention in the market. Only when routine market provision and state regulation both fail do consumers look to professions as the appropriate providers. To understand the claims of professionalism to provide special knowledge, then, we need to look first for the kind of special knowledge that would not be readily available by purchase from private firms through garden-variety, two-party contracts.

But that is just the first step to showing why the occupation must be organized as a profession. Having identified this specialized knowledge, we must then identify reasons why government intervention is not an appropriate remedy. The professions' claim to provide specialized knowledge, in other words, will require both a market failure theory and a government failure theory. And so it does.²⁰

1. *Market Failures in the Provision of Specialized Knowledge*

The claim that professions provide specialized knowledge unavailable from ordinary private firms involves two common forms of market failure identified by neo-classical economists, information asymmetries and externalities.²¹ The former market failure occurs between the consumer and the provider; the latter occurs between the consumer and provider, on the one hand, and third parties, strangers to the transaction between the provider and consumer, on the other.²² To illustrate both kinds of problems, let's consider a paradigmatic medi-

²⁰ Analysis comes from the following law review article and the sources cited therein: Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 271-73 (1995).

²¹ As I have noted elsewhere, the standard account of the professions was first theoretically articulated by sociologists, and theirs is still the most detailed account. *See id.* at 272-73. For purposes of our analysis, however, functionalism's primary thesis is most cogently outlined in terms of neo-classical economics. *Id.*

²² *See, e.g.*, Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 489 (1988) (O'Connor, J., dissenting) (warning that lawyers have the power to abuse their clients for their own benefit and the legal system for their clients' benefit); RICHARD A. POSNER, OVERCOMING LAW 92-93 (1995) (arguing that competitive pressures force lawyers to focus on serving the customer, their client, at the expense of the courts and the community); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1922 (1993).

cal activity, surgery, and a paradigmatic lawyerly activity, medical malpractice litigation.

a. Information Asymmetries: The Threat of Professionals to their Own Principals

With respect to consumers of professional services, the problem is information asymmetry.²³ Remember the underlying facts in *Hawkins v. McGee*,²⁴ the contracts casebook classic.²⁵ A young man needs a skin transplant to restore a badly injured hand. He can neither perform the operation himself nor learn how at reasonable cost. Even if he knew how, it would be devilishly difficult to do the work himself, literally single-handedly. What is more, he cannot assess at reasonable cost whether anyone who purports to have the necessary knowledge and skill actually does have it and can be trusted to use it properly. He seems to need a professional, someone whom knowledgeable and trustworthy third parties certify has the necessary skills and applies them appropriately.

That was not, of course, quite what Mr. Hawkins got. Either because Dr. McGee lacked the relevant knowledge or because he failed to apply that knowledge properly to Mr. Hawkins's hand, the hair follicles of the skin transplanted to his palm were not destroyed; Mr. Hawkins was left, as every first-year law student knows, with a "hairy hand," the basis for a malpractice suit against Dr. McGee.²⁶

Mr. Hawkins sought from his lawyer, as from his doctor, the proper application of specialized knowledge. Here, too, he would have met information asymmetries. A litigator must be able to assess the relative merits of the client's case, the likely gains from prevailing in that case over against the costs of prosecuting it, and the relative advantages of other modes of pursuing relief. And this is only the

²³ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 112–13 (7th ed. 2007); MARK SEIDENFELD, *MICROECONOMIC PREDICATES TO LAW AND ECONOMICS* 66–67 (1996). See FREIDSON, *PROFESSIONALISM: THE THIRD LOGIC*, *supra* note 8, at 79 ("The requirement of discretionary specializations . . . and most particularly those based on esoteric, abstract theory, poses a serious problem to prospective labor consumers. How are they to judge whether a particular worker is able to perform tasks adequately?").

²⁴ 146 A. 641, 642–43 (N.H. 1929).

²⁵ THOMAS D. CRANDALL & DOUGLAS J. WHALEY, *CASES, PROBLEMS, AND MATERIALS ON CONTRACTS* 259–62 (3d ed. 1999); LON L. FULLER & MELVIN EISENBERG, *BASIC CONTRACT LAW* 190–93 (8th ed. 2006); E. ALLEN FARNSWORTH, ET AL., *CONTRACTS CASES AND MATERIALS* 2–4 (7th ed. 2008); JOHN P. DAWSON, ET AL., *CONTRACTS CASES AND COMMENTS* 2–6 (9th ed. 2008).

²⁶ DAWSON, *supra* note 25, at 2–6.

beginning. Once the case is underway, the lawyer must make a host of similarly complex assessments: whether to call a particular witness, whether to make an especially novel argument, whether to invoke an obscure line of precedent. The appropriate answer to each of these questions is difficult for lay-folk like Mr. Hawkins to assess. He cannot know whether a particular claim or strategy will succeed without studying law himself or taking other self-protective measures that are prohibitively expensive. As with Mr. Hawkins's doctor, then, so too with his lawyer: the services he needs from the one, like those from the other, are so unusual or complex that ordinary consumers like him cannot, at reasonable cost to themselves, independently evaluate whether the service actually delivered is of the quality promised or reasonably expected.²⁷ To assess whether their lawyers and doctors get these decisions right, clients and patients would need to have precisely the kind of knowledge that they lack, the kind of knowledge that leads them to need, and to hire, a lawyer or doctor in the first place.²⁸

Conversely, both surgeons and litigators have an incentive to trade on their superior knowledge—and consumers' relative ignorance—to the consumers' disadvantage, in either of two basic ways. They can claim to have special expertise they lack, or they can cut corners and fail to take proper care in providing the knowledge they do have. The usual rule of the market, *caveat emptor*, would work badly in such cases; here the buyer may not know what to beware of, or even to beware at all. The fundamental problem for the consumers of services involving esoteric occupational knowledge, then, is one of information asymmetry—buying, not the proverbial pig in a poke, but the performance of a service in a black box. In the case of lawyers, that black box is the *camera obscura* of litigation; in the case of doctors, it may literally be the client's own skull, rib cage, or abdominal cavity.

²⁷ DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 646 (1st ed. 1992) (describing "information barriers" as the inability of consumers to accurately assess the legal services they receive and concluding that this is an appropriate reason to regulate lawyers); see also *Shapiro*, 486 U.S. at 490 (O'Connor, J., dissenting) (noting that ordinary fraud provisions cannot protect clients from lawyers' abuse of specialized knowledge).

²⁸ See SIMON, *supra* note 19, at 123 ("The market is not viable because consumers lack the expertise to evaluate the quality of such services.").

b. Externalities: The Threat of Professionals and their Principals to Third Parties and the Public

Information asymmetries, we have seen, are the problem that putative professionals pose to the purchasers of their services. The purchase of professional services poses a second set of problems, externalities, to those outside the transaction. Because some costs and benefits of a transaction do not affect the parties to the transaction, but are in that sense “external” to them, the parties tend to ignore them. As a result, they tend to produce and consume the service in socially non-optimal amounts, and the consequences of their less than ideal consumption decisions fall on others.²⁹ In our paradigmatic medical and legal services (surgery and litigation), two recurrent problems—undercompetence and overzealousness—nicely illustrate the basic externality problems.

(1) **Undercompetence**

Let’s consider first the simpler problem, undercompetence. As we have already seen, undercompetence is often a problem for the purchaser of the service; Dr. McGee’s undercompetence is probably what caused Mr. Hawkins’s “hairy hand.” But that will not always be the case. If a consumer is in a position to recognize undercompetence or minimize its risks, that consumer may well use it to his or her advantage. Thus a client might well be willing to hire a lawyer relatively lacking in basic professional knowledge, on the assumption that such a lawyer will be comparatively cheap, even though the client knows the quality of service delivered will be correspondingly low. Assuming the client can assess the quality of the service delivered (in other words, there is no information asymmetry), and looking only at the transaction in terms of the lawyer and client, this is not particularly troubling. Some go to orthopedists with their back pain, others consult chiropractors or Christian Science healers, still others self-medicate with alcohol or other drugs. Similarly, some discuss the viability of their legal claims with lawyers, others never get past their bar tenders, or file pro se in small claims court. All, we can assume for present purposes, get what they pay for.

But the costs of undercompetence may not always be so nicely self-contained within the relationship of consumer and supplier, the

²⁹ See STEPHEN BREYER, REGULATION AND ITS REFORM 23 (1982) (presenting the elimination of “spillover” costs as the classical rationale for governmental regulation).

client and lawyer in our example. If the ill-preparedness of the lawyer causes delays in court, or requires the judge to spend time and energy prompting or correcting the lawyer, then some of the costs of under-competence are borne, not by the consumer (the lawyer's client), but by the rest of us, in the form of docket crowding or additional judges. So, too, with at least some forms of health care. If my faith healer fails to reduce my back pain, the discomfort is pretty much limited to me (although I may remain a pretty grouchy co-worker). But if my doctor dismisses my cough as the symptom of a common cold, rather than diagnosing it as an early sign of tuberculosis, you too may suffer, particularly if I'm your caterer or barista. Thus society, on purely efficiency grounds, has a legitimate interest in preventing consumers from externalizing such costs, whether they be associated with legal assistance or health care.³⁰

(2) Excessive Zeal

Excessive zeal, the second source of externalities relevant to our analysis, is essentially the converse of undercompetence. Service providers can be excessively as well as insufficiently attentive to their clients, and this excessive zeal can produce external costs of its own.³¹ Suppose litigational delay on the lawyer's part is not a by-product of undercompetence, but a carefully calculated strategy to achieve client advantage at the expense of another party. The client will, to be sure, have to pay the lawyer to undertake these "hard-ball," "pit-bull," "scorched-earth" tactics. "But," as I have argued elsewhere, "if the client does not also have to pay either the opposing party's legal fees in responding to such measures or society's costs in wasted judicial time and general fraying of the social fabric, the client has a perverse economic incentive to engage in tactics that no neutral observer would believe conducive to a resolution of the case on its merits."³²

Medical care can pose parallel problems. If my physician over-prescribes antibiotics to me, the super-bugs that evolve may become a scourge to you as well.³³ More generally, if someone other than the

³⁰ See Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 705, 710–11 (1977) ("[T]he costs of dispute resolution and the impact of delay are rarely limited to the particular parties—the social costs involved are borne by society as a whole.").

³¹ See *Shapero*, 486 U.S. at 489 (citing "abuse of the discovery process" as an example of "overly zealous representation of the client's interests").

³² Atkinson, *supra* note 20, at 273.

³³ See RHODE & LUBAN, *supra* note 27, at 647 (referring to the public's interest in the efficient resolution of disputes "in circumstances where individual clients would be willing to pay lawyers to delay or impede truth-finding processes"); Ronald

patient pays for medical care, the doctor and patient may be tempted to pursue more therapies than might be appropriate if benefits were more objectively balanced against their full costs.

c. Summary

These examples of information asymmetries and external costs all suggest that at least some of the paradigmatic services rendered by both lawyers and doctors are not likely to be optimally provided by ordinary contracts between providers and consumers, lawyers and doctors on the one hand and clients and patients on the other. In the case of information asymmetries, providers have incentives to give consumers less than they are paying for. In the case of externalities, producers and consumers together tend to pass costs onto third parties or the public. To avoid these market failures, lawyers and doctors must be induced to deploy specialized knowledge in ways that ordinary market forces may not optimally reward.

2. *Government Failure in Regulating the Provision of Specialized Knowledge*

The standard response to these classic market failures is governmental intervention. That intervention, mapped along a spectrum from the least intrusive to the most, includes subsidizing or penalizing suppliers, imposing mandatory government standards, or even outright government provision of the product in question. In the context of professional services, these regulatory measures typically include the following: special educational requirements, to ensure that the professionals are capable of providing the service in question; special fiduciary duties, to ensure that the services of the requisite quality are provided; and third-party monitoring of both training and service delivery.³⁴ Broadly stated, these market-correcting regulatory measures must ensure that the unqualified do not deliver services and that the qualified deliver them as promised, at an appropriate level of quality, and without excessive costs to either clients or third parties.³⁵ In prin-

J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 873–77 (1990) (outlining an economic justification for “the Rawlsian . . . prohibition of strategic litigation” contained in Model Rule 3.1).

³⁴ Atkinson, *supra* note 20, at 272–73.

³⁵ See FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 220 (explaining that consumer protection is especially important when “the profession’s skills are so complex and esoteric that lay people are not well enough informed to be able . . . to choose the competent over the incompetent”).

principle, these regulatory correctives should be applied so long as their costs are lower than the benefits gained, so long, that is, as the prescribed regimen of governmental regulation isn't a cure more costly than the market malfunction it is intended to correct.

Why, we have to wonder, wouldn't these routine regulatory measures work to correct the market failures we have identified in the delivery of medical and legal services? Here proponents of traditional professions like law and medicine interpose a critical objection: All the problems with market provisions of professional services have correlates on the government side; when we look for regulatory corrections for these particular market failures, we run into corresponding government failures. In these cases, in other words, the regulatory correctives generally prescribed for market failures are either unsafe or ineffective.

All these government failures trace back to what functionalists take to be an essential feature of genuinely professional work. The proper use of professional knowledge includes the ability to apply general principles or techniques to the particular case at hand, very like what the ancients called "phronesis," or practical wisdom.³⁶ This necessarily requires a large element of discretion which is, by its very nature, difficult to cabin with bright-line, categorical rules.³⁷ Law, according to professionalism's defenders, is distinctly ill-equipped to ensure that this kind of discretion is properly exercised.

Consider, from this perspective, our earlier medical and legal examples. As we have seen, the litigating lawyer must know, not only the substantive laws in which clients' claims are grounded and the procedural laws by which those claims are asserted, but also subtle, difficult to calibrate matters such as what witnesses to call, how to question them, when to press on and when to leave off. So, too, with doctors in the examination and treatment of particular patients.³⁸

Lawyers and doctors may omit some such measures because they do not know that those measures are critical in the case at hand; if you'll pardon the pun, that may well have been the problem in *Hawkins v. McGee*. Lawyers and doctors may also omit certain essential

³⁶ See FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 31; see also DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 170 (1988); SIMON, *supra* note 19, at 21–25 (identifying "practical reason" with his fundamental lawyerly attribute, "contextual judgment").

³⁷ See FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 31; SIMON, *supra* note 19, at 123 ("Because such services depend on technical knowledge and resist standardization, they are not readily compatible with market or bureaucratic organization.").

³⁸ GROOPMAN, *supra* note 2, at 5 (noting the tension in medical practice between applying complex individual judgment and following detailed protocols).

measures as a means of cutting costs without corresponding fee reductions, thus improperly increasing their private gains. In either case, capturing the proper measure of effort in a mathematically precise rule is quite problematic.³⁹

Excessive zeal presents a parallel problem in both fields: Just as it takes an expert to know when professional knowledge is being applied poorly on the client's behalf, so it takes an expert to know whether that knowledge is being applied over-zealously, even maliciously, at the expense of the client's opponent or the general public. It is difficult to reduce the applicable standard to bright-line rules or protocols. The point, for example, at which a line of appropriately probing cross-examination veers toward harassment of a witness is impossible to specify with Euclidian clarity, even though an expert may be able to mark it, in practice, to a single moment or to detect it in a steady but subtle undercurrent of tone.⁴⁰ So, too, it may be apparent to any medical expert which suspicious "lumps" are dark or hard or otherwise abnormal enough to require a further battery of tests, even though these factors may not be possible to state literally "on paper" in generally applicable protocols or guidelines.

These considerations, according to functionalist theory, make it impossible for fungible state functionaries to measure professional performance by standardized, bureaucratic protocols.⁴¹ Professional practice must, instead, be evaluated by the professional cognoscenti themselves with inevitably hazily-stated, "know it when I see it" standards rather than "hard and fast," bright-line rules.⁴² Such standards are doubly difficult: On the one hand, their very looseness leaves lots of wiggle-room for the incompetent or unscrupulous; on the other hand, that same vagueness may force the conscientious to be overly

³⁹ The law has a generally effective means of addressing this problem, its ancient and honorable default to principles of equity as a corrective to the strict letter of the law or, in more modern terms, "standards" as an alternative to "rules." See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559–64 (1992); see also RICHARD POSNER, LAW AND LITERATURE 118 (2002) (discussing the tension between a "mechanical" jurisprudence and a discretionary one). But, as we will see later, neither the proponents of professionalism nor its detractors have fully appreciated either this possibility or its relevant limitations. See *infra* Part II.B.

⁴⁰ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 4.4(a) (2010) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . .").

⁴¹ FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 31; SIMON, *supra* note 20, at 123 ("Because such services depend on technical knowledge and resist standardization, they are not readily compatible with market or bureaucratic organization.").

⁴² See Atkinson, *supra* note 20, at 325.

cautious, doing sometimes more, sometimes less, than their best professional judgment dictates, lest they incur legal penalties.⁴³

3. *Professional Institutions as Superior Guarantors of Specialized Knowledge*

Professional knowledge, then, poses dual problems: With their limited grasp of matters within the special purview of professionals, consumers cannot guarantee proper professional service through private contracts with suppliers; with its routine range of regulatory remedies, the state can neither prevent professionals from exploiting those information asymmetries nor prevent clients and their professionals from externalizing costs.⁴⁴ These two problems bring us to professionalism's third and final claim: Only institutions internal to the professions themselves can adequately guarantee proper acquisition and deployment of the relevant knowledge. The cure for abuses by ignorant or unscrupulous individual practitioners, in other words, is regulation by knowledgeable and conscientious professional groups.

In the face of the two besetting sins we have identified, under-competence (taking advantage of the clients' relative ignorance) and externalities, (helping clients' externalize costs upon third parties and the public), the professions claim to provide two distinct virtues. The first involves placing the client's interests above the professional's own; the second, placing the public interest above the interests of both the client and the professional.⁴⁵ In the words of Justice O'Connor, "One distinguishing feature of any profession . . . 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."⁴⁶

⁴³ See MODEL RULES OF PROF'L CONDUCT Scope ¶ 20 (2010) ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.").

⁴⁴ See *id.*

⁴⁵ See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 66 (1992) ("Good lawyers . . . must sometimes ignore their own self-interest, or the self-interest of their clients."); SIMON, *supra* note 19, at 125 (noting that the self-regulatory regime of the "Progressive-Functionalist project" enforced two basic norms, which "are primarily concerned with the adequacy of service to clients, and secondarily concerned with fairness to third parties"); see also ELIOT FREIDSON, *PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY* 200 (1994) ("The character of professional work suggests two basic elements of professionalism – commitment to practicing a body of knowledge and skill of special value and to maintaining a fiduciary relationship with clients.").

⁴⁶ *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 488–89 (1988) (O'Connor, J., dissenting).

In functionalist theory, the organized, autonomous profession achieves proper deployment of professional knowledge through three basic means. First, the profession inculcates a commitment to the core professional virtues, particularly in the course of professional education, which it therefore needs to control.⁴⁷ Second, the profession denies admission into its ranks to those lacking in the relevant virtues, under its “character and fitness” requirements.⁴⁸ Third, the profession maintains a system of sanctions, positive and negative, that encourages its members to practice the requisite virtues and eschew the corresponding vices, upon pain of penalties that range from collegial reprimands to formal expulsion from the profession’s ranks.⁴⁹ In combination, these professional institutions—education, admission, and regulation—ensure a level of performance above what consumers could obtain from any array of private contracts or public regulations. Or so the proponents of professionalism claim.

4. Summary

Functionalists claim that the necessarily discretionary application of professional knowledge presents difficulties of both ordinary market provision and routine state regulation. Relatively autonomous professional institutions are supposed to fill this double gap with special professional virtues. We will skeptically assess that claim in Part II; as we will see there, the claimed need for professional institutions proves rather too little.⁵⁰ The case for the superiority of professional self-regulation over state regulation is, at best, badly focused. The institutions of professionalism are neither necessary to guarantee the acquisition of professional knowledge nor sufficient to guarantee the exercise of professional virtue. Before turning to those problems with functionalist theory, however, we need to focus on a more basic problem, in the other direction: The functionalist definition of specialized

⁴⁷ FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 94–95 n.13.

⁴⁸ See Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 508 (1985).

⁴⁹ See also MODEL RULES OF PROF’L CONDUCT Preamble ¶ 7 (2010) (In addition to the rules of professional conduct, “a lawyer is also guided by personal conscience and the approbation of professional peers.”); ABA MODEL CODE OF PROF’L RESPONSIBILITY Preamble (1980) (Although the lawyer is to be guided by both the Code and personal conscience, “in the last analysis it is the desire for the respect and confidence of members of his profession and of the society with he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct” and “[t]he possible loss of that respect and confidence is the ultimate sanction.”).

⁵⁰ See *infra* Part II.

professional knowledge tends to prove too much. Many occupations other than the classic professions seem to involve the kind of knowledge that requires considerable discretion in its application, which should lead to the same kinds of market and regulatory failures. Functionalism must thus distinguish professional services from a wide array of services that seem to require equally esoteric knowledge and an analogous regulatory regime.

B. Focusing the Functionalist Thesis: Narrowing the Field of Professional Knowledge

A complex economy involves many forms of specialized knowledge, from computer programming to auto repair; most of us can neither acquire that knowledge for ourselves at reasonable cost nor adequately assess it in others. To distinguish professionals from the wider range of those who provide these specialized knowledge-based services, scholars of the professions draw two critical lines. The first separates artisans from technicians; the second separates technicians from professionals. The requirement of university-based specialized education marks the first line; the necessary combination of university-based specialized education and university-based liberal education marks the second. As we shall see, scholars of the professions have never drawn either line very clearly and have blurred the second quite badly.⁵¹

1. *The Line Between Artisans and Technicians: Distinguishing Informal from Formal Specialized Knowledge*

Functionalists concede that occupations other than professions also involve specialized knowledge, and that that knowledge, in turn, requires a measure of discretion on the part of practitioners that is hard to restrain with black-letter laws.⁵² Remember Jerry Seinfeld and George Costanza's despair about over-priced auto mechanics:

George: Well, of course they're trying to screw you. What do you think? That's what they do. They can make up anything. Nobody

⁵¹ Notice that the line of university-based education is the one that Continental European countries tend to draw, without the further distinction of Anglo-American law. See Torstendahl, *supra* note 12, at 5.

⁵² FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 32 (“[I]t is possible to delineate skilled work as a discretionary specialization based upon everyday and practical, but not necessarily formal knowledge.”).

knows. ‘By the way, you need a new Johnson rod in there.’ ‘Oh, a Johnson rod. Yeah, well, you better put one of those on.’⁵³

Furthermore, many non-professional services entail not only information asymmetries, but also externalities. If the providers of these non-professional services fail, it is not just consumers who will suffer, but also third parties, and sometimes more than in the case of improperly performed professional work. A poorly drafted will may cost the client’s beneficiaries a fortune in the relatively distant future; a poor brake job on my pickup truck could easily cost both you and me our lives, later this very afternoon. Yet we leave the latter situation to an essentially unregulated market in auto repair, reinforced post hoc by the tort system (assuming the injured party can afford a private lawyer). If some combination of private market and government regulation is adequate for other services that entail the application of esoteric knowledge, why not in putative professions like law and medicine, as well?

How is putatively professional knowledge distinguishable from other esoteric knowledge that functionalist theory does not see as requiring professional institutions? If professional knowledge isn’t distinguishable, then functionalist defenders of the professions face a dilemma: Either, on the one hand, professionals need no more special occupational organization than other occupations providing equally complex and essential forms of knowledge, or, on the other hand, many more occupations qualify as professions than functionalist theory and social practice have acknowledged. Thus functionalist theory should either “elevate” these other knowledge-based occupations into professional status, or reconsider the possibility that the classic professional mode of organization could be replaced by some combination of governmental and market mechanisms. Either way, the implication of this criticism is that functionalist theory proves too much.

Functionalism has answered this over-breadth critique, although, as we shall see, that answer raises questions of its own. Functionalists insist that the specialized knowledge of professionals is distinct from that of artisans and technicians in several related ways. Most fundamentally, professional education requires a university foundation.⁵⁴ This critical distinction is already traceable in Brandeis’s century-old

⁵³ *Seinfeld: The Fusille Jerry* (NBC television broadcast Apr. 27, 1995), script available at <http://www.seinfeldscripts.com/TheFusilliJerry.htm> (last visited Feb. 2, 2012). See ABBOTT, *supra* note 8, at 8.

⁵⁴ FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 123 (“The professional school is where ethics is elaborated as well as taught and where that can be done somewhat independently of the market and the polity.”).

outline: “A profession is an occupation for which the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning, as distinguished from mere skill.”⁵⁵ Unlike craft training, which takes place largely in the workplace, and technical training, which “typically takes place in para-secondary and post-secondary institutions that are sometimes called technical institutes,”⁵⁶ the ideal-type professional “school is attached to institutions of higher education.”⁵⁷ What’s more, “in contrast to those involved in both craft and technical training, the faculty of the ideal-typical professional school is expected not only to teach, but also to be active in the codification, refinement, and expansion of the occupation’s body of knowledge and skill by both theorizing and doing research.”⁵⁸ Thus “[t]he prestige that distinguishes the professions from the crafts stems from the connection of their training with higher education.”⁵⁹

Both medicine and law readily meet this first half of functionalism’s dual test. The specialized knowledge of physicians is literally proverbial: “The doctor’s knowledge gives him high standing and wins him the admiration of the great.”⁶⁰ Even revisionist critics of medicine’s status as a profession concede that its practice is essentially rooted in the advance of experimental sciences after the Enlightenment. These critics cite that scientific grounding as essential to medicine’s success in obtaining and retaining a uniquely large measure of occupational autonomy and market control.⁶¹ This scientific knowledge is both inaccessible to laypeople and functionally related to providing a fundamental social value—individual physical health. And the scientific foundation of modern medical practice is itself based in the modern research university, as opposed to technical or occupational schools.⁶² As a result, medicine exhibits the kind of specialized knowledge required of an ideal-type profession.⁶³

⁵⁵ BRANDEIS, *supra* note 16, at 2.

⁵⁶ FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 91.

⁵⁷ *Id.* at 92; *see also* LARSON, *supra* note 4, at 17 (“[T]he link between research and training institutionalized by the modern model of university gives to university-based professions the means to control their cognitive bases.”).

⁵⁸ FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 92.

⁵⁹ *Id.* at 103. *See also* LARSON, *supra* note 9, at 3 (“But the association with the university and, especially, the knowledge of Latin, distinguished the ‘learned’ professions from the craft guilds that developed in the towns between the eleventh and the thirteenth century.”).

⁶⁰ THE ANCHOR BIBLE: THE WISDOM OF BEN SIRA § 38:3 (Patrick W. Skehan trans., 1987).

⁶¹ *See* LARSON, *supra* note 4, at 34, 36.

⁶² FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 185.

⁶³ We can take it as proved because it actually is proved or, more stingily, because, even if it is proved, its essential link with general knowledge cannot be

So, too, with the law. The need for inter-disciplinary education is apparent, even in simple, first-year curriculum cases like *Hawkins v. McGee*. At least since the time of Learned Hand's famous standard of negligence,⁶⁴ lawyers and judges have recognized that determining liability for non-contractual damages necessarily involves both cost/benefit analysis and risk calculation. In more complex cases, the interdisciplinary foundation of modern law is even more apparent. The structuring of mass torts, for example, implicates not only economics, but also sociology, psychology, and political and moral philosophy,⁶⁵ all university-based academic disciplines. These two examples come from private law; the academic foundations of public law are even more obvious. As Judge Posner points out, "[i]t is fair to say that at the beginning of its second century antitrust law has become a branch of applied economics"⁶⁶ And so, too, "administrative law scholarship . . . draws more on economics and political science than on law [traditionally defined]."⁶⁷ Private law itself is now seen to rest ultimately on the same foundations as public law;⁶⁸ modern law, private and public, is thus thoroughly grounded in advanced, university-based studies in the social sciences and humanities.

Both doctors and lawyers, then, can be shown to need a specialized knowledge that is not only beyond the ken of layfolk, but also grounded in the university. That grounding of both medicine and law in the university takes care of Seinfeld and Costanza's auto mechanic (at least for now); knowledge of the Johnson rod may indeed be important and esoteric, and there may be a certain "zen" about all vehicular maintenance, automobile as well as motorcycle. But mechanics do not acquire either that knowledge or that skill in college, and its foundations do not lie in university-based research. Thus it is not merely, as one prominent scholar of professionalism has suggested, that "[p]eople don't want to call automobile repair a profession because they don't want to accord it that dignity."⁶⁹

proved, as we shall see. Since these requirements are conjuncts, both are needed to make the case for medicine as a proper profession; if medicine fails to meet one of them, it fails the entire test.

⁶⁴ *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

⁶⁵ See Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 91 (2011).

⁶⁶ RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 229 (1999).

⁶⁷ *Id.* at 237.

⁶⁸ See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN*, at vii-viii (1985).

⁶⁹ Cf. ABBOTT, *supra* note 8, at 8.

2. *The Line Between Technicians and Professionals: Connecting Formal Occupational Knowledge and General Cultural Knowledge*

Even as the identification of university-based education essential to medicine and law promises to distinguish these paradigmatic professions from “crafts,” it poses another problem. It leaves a large and growing number of occupations on the professional side of the line: accounting, engineering, and business management, for example. As Louis Brandeis pointed out, business management is the subject of highly esoteric bodies of knowledge, in several quite disparate disciplines in both the physical and social sciences,⁷⁰ and it is taught at the university level.⁷¹

To distinguish such occupations as these, theorists of the professions point to a distinction traditionally drawn by the professions themselves. Professions do not merely involve a university-based theoretical foundation of their teachers; they also require a more broad-based liberal education on the part of their students and practitioners. Thus, according to Freidson,

The ideology of professionalism asserts knowledge that is not merely the narrow depth of the technician, or the shallow breadth of a generalist, but rather a wedding of the two in a unique marriage. This wedding of liberal education to specialized training qualifies professionals to be more than mere technicians. It qualifies them to serve in managerial positions where they can establish policy as well as organize and control their own work and the work of their colleagues independently of both managers and consumers. By grounding a functionally specific specialization in the advanced, elite generalism that provides executives and politicians with a mandate to command consumers, subjects, and citizens, the professional ideology creates a basis for claiming legitimacy that goes beyond the technical.⁷²

And this elite generalism, according to Friedson, “provides or requires prior exposure to high culture.”⁷³

But outlining the basis for professions’ claim to a kind of esoteric knowledge above the merely technical simply raises another question: Is that foundation substantial enough to sustain the edifice that has

⁷⁰ BRANDEIS, *supra* note 16, at 2–3.

⁷¹ *See id.* at 1 (“The establishment of business schools in our universities is a manifestation of the modern conception of business [as a profession].”).

⁷² FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 121.

⁷³ *Id.*

been erected upon it? To put the question in functionalism's own terms: Is this university-based training in the liberal arts as well as in a particular occupational specialty functionally related to professionals' performance of their socially necessary and knowledge-based tasks?

Revisionist critics of functionalism have a ready response: no. Liberal education of professionals is a pseudo-necessity, either another costly and artificial barrier to entry,⁷⁴ or simply a high-status consumption item or social ornament.⁷⁵ The real function of the requirement is thus to dominate the market for certain services, either by restricting supply of qualified practitioners or by creating demand for what amounts to little more than mystifying pseudo-science.⁷⁶ As even the leading defender of professionalism concedes, the professions may cloak themselves in the status-enhancing allure of university education because it associates them, in various ways, with powerful elites.⁷⁷

To answer these criticisms and defensibly distinguish the professions from other occupations that rely on university-based technical

⁷⁴ See, e.g., FRITZ K. RINGER, *EDUCATION AND SOCIETY IN MODERN EUROPE* 21 (1979) (“[T]he ability to do without any particular competence was clearly honorific . . . suggest[ing] the power to direct others, as against having to be useful and usable oneself.”); RANDALL COLLINS, *THE CREDENTIAL SOCIETY: AN HISTORICAL SOCIOLOGY OF EDUCATION AND STRATIFICATION* 189 (1979) (“It has been by the use of educational credentials that the lucrative professions have closed their ranks and upgraded their salaries, and it has been in imitation of their methods that other occupations have ‘professionalized.’”); LARSON, *supra* note 4, at 87 (“Social qualifications became the first requirement for membership, and it was held that the necessary ‘morals and manners’ could be learnt only at the universities.”) (quoting A.M. CARR-SAUNDERS & P.A. WILSON, *THE PROFESSIONS* 71 (1933)). *Id.* at 89 (“The classics . . . served the professions in a different way: as the intellectual sanction which Oxford and Cambridge bestowed upon the gentry’s hegemony, a classical education functioned as a gate-keeping mechanism for the most prestigious professional roles.”); see also *Griggs v. Duke Power*, 401 U.S. 424, 433 (1971) (finding it inappropriate to require higher education of employees when their job performance does not require that education and when that requirement tends to exclude minority applicants).

⁷⁵ See COLLINS, *supra* note 74, at vii (“The old requirements of a knightly style of life . . . is nowadays in Germany replaced by the necessity of participating in its surviving remnants, the dueling fraternities of the universities which grant the patents of education; in the Anglo-Saxon countries by the athletic and social clubs that fulfill the same function.”) (quoting MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY, VOLUME 2*, at 1000 (Guenther Roth & Claus Wittich, eds., University of California Press 1978)).

⁷⁶ See LARSON, *supra* note 4, at 48; Abel, *supra* note 14, at 187.

⁷⁷ FREIDSON, *PROFESSIONALISM: THE THIRD LOGIC*, *supra* note 8, at 103–04. See also ABBOTT, *supra* note 8, at 137 (describing the professional strategy of “drawing power from without” though “alliance with a particular social class, a strategy usually preferred by elite professions”: “In such a case, a profession draws both its recruits and its clients from the upper classes, locates its training in the elite universities or similar settings, and affects an ethic of stringent gentlemanliness.”).

knowledge, proponents of professionalism must establish a necessary link between technical professional knowledge and a university-level education in the liberal arts. This case, we shall see in the next section, can be made for the practice of law, but the case for the practice of medicine is a very different matter.

C. Finding the Crucial Link with Liberal Learning

To distinguish the professions from other occupations that deploy university-based bodies of knowledge, functionalist sociologists have identified an additional kind of knowledge that professionals need: the kind of generalist knowledge associated with a liberal, not just a university, education. As we have seen, however, functionalism has been more than a little vague about what this link is, and what function it serves. Without more precision on this point, functionalism leaves itself open to the revisionist charge that this asserted link is really a distinction without a difference, a makeweight that serves the interest of the occupation rather than its consumers or the public.

Into that gap in functionalist theory this section brings both good news and bad. The good news is that a closer analysis of the legal profession shows that it entails exactly the kind of hybrid general and specialized knowledge that functionalism is looking for. The bad news is that no such link is to be found in the practice of medicine. We begin, accordingly, by considering law as a paradigm of this kind of knowledge, the better to notice its apparent absence in the practice of medicine.

1. *The Law and Liberal Learning*

To see why lawyers need this special hybrid knowledge, let's reconsider our medical malpractice example. We noticed that the standard of tort liability, as currently understood in the law, implicates the kind of economic analysis that is based in university economics departments.⁷⁸ This link and others like it, according to functionalist theory, distinguishes the lawyer's specialized knowledge from that of the automobile mechanic or even the master artisan.

It does not, however, distinguish lawyers from actuaries.⁷⁹ Their grounding in university-based economic theory is at least as clear as that of lawyers; quite likely, the typical actuary will need a much more sophisticated appreciation of economics than the average law-

⁷⁸ See *supra* Part I.A.

⁷⁹ See ABBOTT, *supra* note 8, at 235–38 (examining the partial professionalization of statisticians, quality controllers, and operations researchers).

yer. Thus, the critical distinction between actuaries and lawyers must lie elsewhere. On the functionalist argument, it lies in the lawyer's wedding of specialized, university-based knowledge with general, liberal learning.

And so, indeed, it does. This linkage becomes clear if we imagine the aftermath of the *Hawkins* case from the perspective of a lawyer representing Dr. McGee's malpractice insurance carrier. Suppose that, having lost the *Hawkins* case under the existing standard of care, the medical malpractice insurer asks for help dealing with a more general problem: burgeoning medical malpractice claims. What the insurance company wants now, in other words, is "tort reform."

Although this issue could have come up in the trial itself,⁸⁰ the setting for seeking such legal change would more likely be either administrative or legislative.⁸¹ More ambitiously, the insurance company might seek federal preemption of state standards or some other sweeping "tort reform" plan; more mundanely, it might merely apply for an increase in permitted premiums to cover expanding liability under the existing regime.

At each of these levels, one thing is clear: the lawyer's argument for the insurance company cannot be that the proposed change is good for just that company, or for the insurance industry as a whole, or even for American companies generally. The insurance company must argue that its proposal is good for society at large. So it was with all the recent bail-outs: the banks, GM and the automobile industry, and AIG.⁸² Corporate lawyers cannot prevail in these settings based on corporate profitability or even broader business interests. They must invoke some other standard because the relevant decision-makers—legislatures, administrative agencies, and ultimately the

⁸⁰ Dr. Hawkins's lawyer could have argued, not that the doctor's particular level of care was appropriate, but that the level of care itself was inappropriate. This is not, however, a particularly flattering portrayal of the doctor himself, nor is it likely to be his best defense.

⁸¹ This is not to deny, of course, that "test cases" are both an important and legitimate instrument for legal change. See Leroy D. Clark, *The Future Civil Rights Agenda: Speculation on Litigation, Legislation, and Organization*, 38 CATH. U. L. REV. 795, 837 (1989); MODEL RULES OF PROF'L CONDUCT R. 3.1 (2010); FED. R. CIV. P. 11 (recognizing the legitimacy of litigation based on arguments for the modification, extension, or reversal of existing law).

⁸² Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008) ("To provide authority for the Federal Government to purchase and insure certain types of troubled assets for the purposes of providing stability to and preventing disruption in the economy and financial system and protecting taxpayers, and for other purposes.").

courts—have protection of the public interest as their constitutional mission.⁸³

This is the central point: to argue for any change in the law, the insurance company's lawyers, qua lawyers, must engage in the discourse of public interest, as distinct from their client's particular interests. The lawyer cannot simply argue that the change in law would be good for the client; the lawyer must also argue that the change in law would be good for the public as well. To serve their client's interest, the insurance company's lawyers must be able to speak in terms that transcend both what is technically legal under current law and what is in the client's own interest.

This brings us to the larger point. Law is ultimately grounded in claims of justice, and justice invariably involves resolving conflicts of particular interests consistently with the public interest. Law's origin as a profession precisely coincided with the need of European monarchs for just such an occupation and the offering of legal training in the earliest European universities (with England as a notable exception).⁸⁴ As a matter of basic competence, then, at least some lawyers must know how to make public-benefit based arguments.⁸⁵

Thus, when we examine a basic element of the lawyer's role—arguing on behalf of private clients for changes in the law—we discover that they need precisely the combination of technical and general knowledge that functionalists say the ideal-type profession re-

⁸³ This is reflected, perhaps most basically, in the minimum scrutiny applied to garden-variety economic and social legislation after *United States v. Carolene Products Co.*, 304 U.S. 144, 153–54 (1938): All legislation must at least offer a minimally reasonable prospect of advancing a legitimate state interest.

⁸⁴ No one makes this point better than Larson, hardly an apologist for the traditional claims of professionalism:

In continental Europe, the development and the codification of the law had coincided with the multiplication of the universities in the fourteenth and fifteenth centuries. In Italy especially, but also in some French universities, the demand for lawyers and administrators led to notable developments in civil and canon law. In England, the civil courts had resisted the introduction of the Roman Code and created, instead, a native common law, considered much too coarse and plebeian to be a fit subject of university teaching.

LARSON, *supra* note 4, at 85 (citation omitted).

⁸⁵ See, e.g., MODEL RULES OF PROF'L CONDUCT Preamble ¶ 13 (2010) ("Lawyers [as guardians of the law] play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship [with and function in] our legal system."). The bracketed language is from the otherwise identical provision of the Preamble of the A.B.A.'s 1969 Model Code of Professional Responsibility. See MODEL CODE OF PROF'L RESPONSIBILITY Preamble (1980).

quires. In order to argue for changes in the law that are in their clients' interests, they must be able to make the case that those changes are in the public interest, too, that what is good for GM really is good for the country. And, in order to make these arguments, they must be able to identify and balance core social values. On this process rests the legal profession's best claim to require a foundation of university-level liberal learning. Here we have an account that both links the technical with the liberal arts in legal education and shows how the practice of law necessarily implicates that link.

2. *The Missing Link Between the Practice of Medicine and the Application of Liberal Learning*

In Part I.A, we saw that the essential element of an ideal-type profession is provision of a service that, on account of the specialized knowledge it entails, must be regulated by an essentially autonomous occupation. In Part I.B, we saw that that the specialized knowledge that distinguishes professions from other knowledge-based occupations must be generated and conveyed in a research-oriented university and must be functionally related to the kind of general knowledge included in a liberal arts education. The practice of law, we saw in Part I.C.1, offers a paradigm of just this sort of knowledge-based occupation. By contrast, as we shall see in the rest of Part I.C, the practice of medicine, long the paradigmatic learned profession, lacks precisely the link between technical knowledge and liberal education needed to make a profession "learned" in the relevant way.

As a start, let's compare the role of medical and legal experts in the example that we just considered, changing the standard of care relevant to doctors. Doctors' specialized knowledge would, of course, be essential to making that case. Only medical experts could supply necessary data about what results various procedures are likely to produce, at what costs, and at what risks. But those are only the empirical predicates to answering the ultimate question, what the appropriate standard of care should be. Actually answering that question involves not just knowing what to do to achieve a particular result, but also whether the cost of doing that is warranted when compared with other considerations. It is making the case for just such decisions that requires lawyers to rely, not only on a specialized knowledge of law as a body of rules and procedures, but also on the kind of general appreciation of social values that is the core of both a liberal arts education and law understood more broadly as a system for the rational resolution of disputes over just such values—law understood as judges understand it, as a "system of justice."

As we have seen, competent delivery of a wide range of legal services requires just such knowledge; lawyers must be able to ground client claims in the public interest. To do this, they must be able to articulate the shared values that are said to form the public interest. Knowledge of these shared values can only be obtained from a liberal education.

By contrast, it is difficult to see why a medical doctor would need a deep appreciation of such values in order to deliver competent medical care. Doctors, to be sure, need to know that health is a value, but they could presumably either infer the value of health from the fact that consumers are willing and able to pay for it or accept its value as a “given” of our legal and social systems more generally. With respect to other social values, doctors need know even less. The Hippocratic Oath itself implies that all doctors need to know about other values is that doctors are always to subordinate the pursuit of those values to that of the individual patient’s health.⁸⁶ Someone, of course, needs to know why this subordination is appropriate, but it need not include all doctors (and could conceivably include no doctors). By contrast, to the extent that this subordination is legally binding, part of the minimally acceptable level of medical care, at least some lawyers would need to understand it: those who would effectively argue that the client-first standard has been met in a particular case, or needs to be changed across the board.

And we can see this same distinction between doctors and lawyers much more broadly, in the general debate over how health care is to be weighed against other social values. In a purely market economy, consumers alone would decide how to weigh health care against other social values. They would budget for health care according to two considerations, willingness and ability to pay: how much they could afford to pay for that service, and how much they value it relative to other goods and services they might purchase instead. In this purely laissez-faire system, doctors would certainly convey esoteric information to consumers about how healthy they are, and what they would need to stay that healthy or get healthier. That would be the essence of the service they provide; they would fail to provide it at peril of malpractice liability, loss of licensure, and other legal penalties.

But the doctor’s service would include no essential role—and, unless asked, perhaps no proper role—in advising patients whether to value a given level of health higher or lower than anything else (e.g., a given level of pastry or tobacco consumption or, for that matter, dona-

⁸⁶ Peter Tyson, *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>.

tions for the benefit of those who cannot afford basic health care). This is emphatically not to say that social values are not in the balance when one decides whether to undergo a tummy-tuck or send one's plastic surgeon off to a Third World country to mend a child's cleft palate. It is just to say that, in weighing these alternatives, the opinion of one's doctor, as a doctor, is professionally irrelevant. Or, to put the point a bit more precisely, the opinion of one's doctor could be made irrelevant, legally or functionally, without undermining that doctor's delivery of optimal medical care.

No modern health-care system, of course, operates on so purely a market model, with medical services allocated strictly on the basis of individual patients' willingness and ability to pay. We not only regulate to ensure that patients get the kind of treatment they are paying for, we also redistribute wealth, in various ways, to make sure that some people receive at least some treatments they want but cannot afford.⁸⁷ And the law sometimes intrudes even more into individuals' consumption of medical care, by overriding an unwillingness to pay. The government sometimes mandates that people receive medical care that they can readily afford but would emphatically refuse. The paradigm of this today, of course, is mandatory vaccination;⁸⁸ not too long ago, it was mandatory sterilization.⁸⁹ And, conversely, the law sometimes forbids medical procedures that some are willing and able to pay for: extremely late-term abortions today;⁹⁰ virtually all abortions in the recent past⁹¹ (and, perhaps, in the near future).⁹²

All these examples, of course, involve the weighing of health-care costs and benefits against each other and against competing social

⁸⁷ Medicaid and Medicare are, of course, the prime American examples; some countries have much more extensively subsidized health-care provision. See EINER ELHAUGE, *THE FRAGMENTATION OF U.S. HEALTHCARE* 3–4 (2010).

⁸⁸ *Jacobson v. Massachusetts*, 197 U.S. 11, 25–27 (1905); *Prince v. Massachusetts*, 321 U.S. 158, 166–70 (1944).

⁸⁹ See *Buck v. Bell*, 274 U.S. 200, 205 (1927); *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

⁹⁰ *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 541 (1989) (“[T]he State may not fully regulate abortion in the interest of potential life (as opposed to maternal health) until the third trimester . . .”).

⁹¹ *Roe v. Wade*, 410 U.S. 113, 118 n.2 (1973) (listing the following states as having laws limiting abortions: Arizona, Connecticut, Idaho, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, Wyoming).

⁹² *Gonzales v. Carhart*, 550 U.S. 124, 170 (2007) (Ginsburg, J., dissenting) (stating that the ruling upholding the partial-birth abortion ban was an “alarming” one that ignored Supreme Court precedent and “refuse[d] to take *Casey* and *Stenberg* seriously”).

values. And all these examples necessarily implicate knowledge that only the medically trained can provide: the technical feasibility of various therapies and procedures, perhaps the relative costs and effectiveness of various alternatives. But, once that data is in, we do not need doctors, *qua* doctors, to help us weigh it. That balancing of values is not, strictly speaking, a medical decision. It will, by contrast, always be a legal decision: what to fund, what to allow, what to require, what to forbid.

Consider a recent but already classic case, the much-discussed “death panels” of President Obama’s Affordable Care Act.⁹³ The function of those panels, contrary to the rumors, was not to decide whether to save particular individuals or to let them die. Instead, their function was to give the terminally ill the basis on which to make an informed decision about whether or not to elect potentially life-prolonging treatment. On any such panel, doctors would surely have a place, to explain what the relevant treatment options were, in terms of their likely success, side-effects, quality of life, and costs. Someone other than a doctor might deliver that information, but its ultimate source would have to be someone trained in the science of medicine itself. But, to the extent that the patient wanted to know what he or she should do, whether he or she should elect a given therapy or any treatment option at all, the doctor, *qua* doctor, need have no role. Such counseling could be given by someone specially trained to weigh such values, quite possibly someone of the patient’s own religious or political faith. That person would be, in essence, a kind of chaplain; that kind of chaplain need not be any kind of medical doctor.

The same is potentially true, if less politically dramatic, in the case of all end of life decisions. The law has long since removed these decisions from the unilateral discretion of doctors; doctors now “play God” in that sense only at the peril of malpractice liability, loss of licensure, or even conviction for homicide.⁹⁴ The role of the doctor, *qua* doctor, is now to diagnose terminal illness, inform the patient, and identify possible modes of treatment. But the choice of treatment, though often not the patient’s alone, need never be the doctor’s at all.⁹⁵ You can, of course, ask your doctor for his or her opinion about whether you should pursue a life-extending course of treatment, but that opinion would be personal, not professional. Again, we can

⁹³ See Robert Pear, *Obama Institutes End-of-Life Plan that Caused Stir*, N.Y. TIMES, Dec. 26, 2010, at A1.

⁹⁴ *People v. Kevorkian*, 639 N.W.2d 291, 331 (Mich. Ct. App. 2001) (finding consent and euthanasia were not viable defenses in Kevorkian’s murder prosecution).

⁹⁵ FREIDSON, PROFESSION OF MEDICINE, *supra* note 8, at 318–19.

structure the delivery of health care in a way that makes the doctor's rendering of that opinion unnecessary to the delivery of medical care.

Nor is this distinction merely theoretical; the Supreme Court's abortion cases have effectively written it into constitutional law. To see how this is so, consider two landmark Supreme Court cases, *Roe v. Wade*⁹⁶ and *Rust v. Sullivan*.⁹⁷ The former, of course, affirmed a woman's basic constitutional right to terminate a pregnancy with a doctor's assistance. The latter upheld a federal regulation that forbids doctors in federally-funded family planning clinics from giving advice about non-therapeutic abortions. Opponents of the regulatory prohibition argued that it unconstitutionally interferes with patients' right to have non-therapeutic abortions, in effect overturning *Roe v. Wade*. In analyzing this challenge, the members of the court isolated a distinction at the core of our analysis: therapeutic as opposed to non-therapeutic advice.

Justice Blackmun, in dissent, nicely set out the critical premises of the challenge to the regulatory ban: "In our society, the doctor-patient dialogue embodies a unique relationship of trust. The specialized nature of medical science and the emotional distress often attendant to health-related decisions requires that patients place their complete confidence, and often their very lives, in the hands of medical professionals."⁹⁸

This, as we shall examine in detail later, eloquently states the core of the case for medicine as a caring profession.⁹⁹ As Blackmun points out, the majority itself was careful to note that the regulation in question did not impinge upon doctors' delivery of health-related advice, specifically, advice about therapeutic abortions.¹⁰⁰ And both Blackmun and the majority noted that earlier Supreme Court decisions had struck down laws forbidding all doctors to discuss abortions even in cases where the patient's physical health was at stake.¹⁰¹

But Justice Blackmun's next assertion, which tried to link protected therapeutic advice with the non-therapeutic advice at issue in *Rust*, is a normative non sequitur that the majority refused to write into constitutional law: "One seeks a physician's aid not only for medication or diagnosis, but also for guidance, professional judgment, and vital emotional support. Accordingly, each of us attaches profound im-

⁹⁶ 410 U.S. 113 (1973).

⁹⁷ 500 U.S. 173 (1990).

⁹⁸ *Id.* at 218 (Blackmun, J., dissenting).

⁹⁹ *See infra* Part II.A.2.

¹⁰⁰ *Sullivan*, 500 U.S. at 218 (Blackmun, J., dissenting).

¹⁰¹ *Id.*; *see also* *Boos v. Barry*, 485 U.S. 312, 319 (1988).

portance and authority to the words of advice spoken by the physician.¹⁰²

As an empirical matter, this second assertion may well be true; many of us may often rely on our doctors for just such non-medical advice. But this latter form of advice can be separated, both logically and legally, from advice that is purely diagnostic and therapeutic. That separation, in essence, is precisely what the Supreme Court majority recognized in upholding the regulation: the Constitution protects therapeutic advice about abortions much more strongly than non-therapeutic advice.

We do not know, except along that rather extreme frontier, how the constitutional rights of patients shape the content of the doctor-patient relationship. But we do know enough to make several important observations. First, both the *Rust* majority and Blackmun's dissent treat the diagnostic and therapeutic function of doctors as very socially significant; in the case of pregnant women, that function is so closely related to a fundamental legal right as to enjoy constitutional protection. Second, the majority in *Rust* was unwilling to extend that constitutional protection, on the facts before it, to doctors' more general, non-therapeutic counseling, even when that counseling would involve discussions of the exercise of a constitutionally protected right, reproductive autonomy. Third, in deciding what elements of the doctor-patient relationship are subject to legislative regulation, and to what extent, it is members of the legal profession, not the medical profession, who decide.

Again, in making decisions like these, members of the legal profession—not only judges, but also the lawyers who prepare such cases—must be able to draw on the most basic sources of our shared social values. And so in *Roe v. Wade* itself, Blackmun, writing then for the Court's majority, reviewed the history of abortion in Western culture all the way back to the classics and the scriptures.¹⁰³ Nothing could more nicely make the point we need to see here. The Supreme Court recognizes the importance of the service that doctors alone have the knowledge to provide. But protection of the right to receive what doctors alone can provide is conferred only by our courts, and only on the basis of their knowledge of the deepest norms of our culture.

Having an abortion may sometimes literally save a woman's life, as a medical matter; having either an abortion or a baby may very well ruin her life, as a moral or psychological matter. *Roe* forbids the elected branches of government from depriving a woman of medical

¹⁰² *Sullivan*, 500 U.S. at 218 (Blackmun, J., dissenting).

¹⁰³ *Roe v. Wade*, 410 U.S. 113, 130–36 (1973).

advice, even medical assistance, in the first matter; *Rust* allows those branches to deny her medical advice on the second matter when that advice would be publicly funded. The point for us to see is, again, that therapeutic and non-therapeutic advice about even the most fundamental medical matters can be, and often are, separated, in law as well as in logic.

Consider a possible exception that helps clarify, if not prove, that rule: weighing an individual patient's good against public cost, especially where that cost is being borne by third parties. Let's assume that we want doctors to make these calls in individual cases, under more or less strict guidelines. What they would need to know is the reason for the balancing, not the public good more broadly conceived. They might need to know how to strike the balance between benefits and costs to individual patients, on the one hand, and the benefits and costs to the public, on the other. But they would not need to know, beyond that, how these balances are struck, or why. They would not need to know, for example, the classic debates over the good of the few versus the good of the many.¹⁰⁴ These decisions are, ultimately, for the popular branches of government, subject to constitutional review by the courts.

As the examples in this section remind us, many decisions about health care, public as well as private, implicate the most profound balancing of social values we can imagine: who we as a society decide to save by providing subsidized health care, and who we are willing to watch die without it; whose most profoundly held religious beliefs must yield to the interests of others and to the common good. But neither these value choices nor advice about how to make them is part of the services that physicians, as physicians, provide. Although we must look to doctors for the technical medical expertise necessary for making all these decisions, we do not need to look to doctors for the weighing of social values in any of these decisions. What is more, it is not clear why we would ever need doctors, in the delivery of routine health-care services, to appreciate fundamental social values or to help us resolve conflicts among them. And so it seems that the asserted link between specialized medical knowledge and a general liberal education is, at best, not proved.

If so, then the practice of medicine cannot be, as it is generally assumed to be, the prime example of the ideal-type profession, an occupation that essentially weds specialized technical knowledge with general cultural knowledge in the provision of an essential social ser-

¹⁰⁴ See J. J. C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 30–31 (1973).

vice. If medicine is to sustain its claim to a distinctive professional status, it must rest that claim on something else. As we shall see in Part II, it has just such a claim, founded on the particular kind of care we need doctors to take when they apply their specialized occupational knowledge in serving patients. What is more, recognition of that claim points to a significant refinement in our understanding, not only of medicine as a profession, but also of professions more generally.

II. TOWARD A REFINED FUNCTIONALIST UNDERSTANDING OF PROFESSIONALISM

This Part takes up the two basic questions posed in Part I: What, if anything, makes the practice of medicine a profession, and what effect does relocating the basis of professionalism in medicine have on our understanding of professionalism generally? To get at the first question, Part II.A begins by looking back at what makes law distinctive. It is not, we shall see, law's distinctive kind of knowledge alone, but rather the failure of the market to deliver that knowledge optimally, even with regulatory correctives. With that insight, we can then isolate a similar distinction about medicine. The state and the market can guarantee the necessary knowledge; what they cannot guarantee is the professional virtue necessary to apply that knowledge optimally. For that, we need the special institutions of the professions themselves.

When we turn to those institutions in Part II.B, however, we discover a paradox for both law and medicine: The very kind of virtue we need to ensure proper delivery of professional knowledge in both occupations cannot be guaranteed by professional institutions as traditionally conceived. Those institutions critically rely upon the coercive power of the state to exclude from the market those practitioners lacking the relevant professional attributes. But the kind of professional virtues we identify as essential attributes of law and medicine, respectively, cannot be regulated by the rules of professions any better than by the laws of the state. When the professions try to root out professional vices with the coercive power of law, they run into the same problems as government regulators.

These two insights—the unique importance of the virtue of care in medical practice and the difficulty of ensuring that virtue—take us in Part II.C to a refined understanding of what conditions make professions necessary, and how the professions might meet those conditions. And that understanding gives us a new ideal-type profession with two distinctive branches, the public professions like law and the caring professions like medicine.

A. Professional Knowledge and Professional Virtue: Re-Mapping Their Proper Relationship

We saw in Part I that the practice of law, unlike the practice of medicine, requires general knowledge of the public good as well as particular occupational knowledge. From this it is tempting to draw two related conclusions, both deeply erroneous: first, that this hybrid knowledge is somehow the essence of professional status; second, that requiring this knowledge makes law a proper profession, even as medicine's lacking it means that medicine is not. A closer look at the legal profession's hybrid of general and specialized knowledge will point us to the common factor that makes both medicine and law proper professions, although of significantly different kinds.

1. *The Locus of Virtue in Public-Protecting Professions*

Let's return, then, to our examples of why lawyers must deploy general knowledge of the public good as well as the technical knowledge of their particular occupation.¹⁰⁵ Those examples showed that, to make the case for legal changes favoring their clients—bailouts for banks and automobile companies, more favorable liability rules for medical insurance providers—lawyers have to be able to argue that these changes would benefit the public as well as their clients. Lawyers, again, have to lend at least plausibility to the claim that what's good for GM is good for the country.

Here we need to notice something else about that lawyerly deployment of general and special knowledge on behalf of private clients: It may very well be possible to guarantee its deployment to the satisfaction of those clients themselves without any need for special professional institutions. That knowledge is, as we have seen, quite outside the scope of the ordinary consumer, and lawyers, left to their own devices, might well exploit this information asymmetry. But, we should note here, corporate managers are not ordinary consumers; some of them are lawyers themselves. Thus the esoteric knowledge of lawyers may be well within the scope of their corporate clients, whose management includes lawyers like the ones they are hiring. Indeed, a principal function of in-house counsel today is to select and monitor effective outside counsel.¹⁰⁶ And, of course, in-house counsel and

¹⁰⁵ See *supra* Part I.C.1.

¹⁰⁶ See Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77 (2011).

their corporate employers have every incentive to hire lawyers with the requisite knowledge.

On the other hand, not all lawyers who must make public-regarding arguments on behalf of private clients work for sophisticated corporate managers. Some work for individual clients who may well not be in a position to determine whether their lawyers have this knowledge, or whether they are deploying it as they should. Think, again, of the plaintiffs in *Hawkins v. McGee* and *Roe v. Wade*. Here the risk of lawyers' exploiting information asymmetries is very real. It is not clear, however, why the state could not mandate that lawyers have this knowledge as a condition of being licensed and police their application of this knowledge in practice.

We need not answer that question here;¹⁰⁷ what we need to see now is how different matters stand with respect to another problem lawyerly knowledge presents, that of externalities. In both of the situations we have re-examined thus far, those involving sophisticated as well as unsophisticated clients, we have focused only on information asymmetries, the clients' difficulty in ensuring that the lawyer does not trade on superior knowledge to underserve the client. Even if standard regulatory measures could address that problem, that would leave another, analytically distinct problem, which we identified earlier: excessive zeal.¹⁰⁸

Here, remember, the problem is not doing too little for a client, but doing too much; not the lawyer's exploiting the unknowing client, but the lawyer's advancing client interests at the expense of third parties or the public. Preventing this, I have argued elsewhere,¹⁰⁹ is beyond the capacity of both the state and the market. The market actually exacerbates the problem; more knowing clients are all too eager to reward lawyers who subordinate the public interest to particular client interests. And the regulatory regime of the state cannot adequately address this, since it involves mandating a commitment to the public good that would be difficult to define and impossible to police, if not unconstitutional to impose.

The point to see for present purposes is this: What makes a lawyer's necessary knowledge special is not content alone—its distinctive combination of general and specialized knowledge—but also the difficulty of ensuring the optimal deployment of that knowledge by any combination of market and state mechanisms. If we focus on the differences between lawyerly knowledge and medical knowledge, we risk overlooking the possibility that the two occupations share a much

¹⁰⁷ I have examined it in detail elsewhere. See Atkinson, *supra* note 6.

¹⁰⁸ See *supra* Part I.A.1.b.ii.

¹⁰⁹ Atkinson, *supra* note 6.

more significant similarity. There may well be aspects of medical knowledge that make its delivery, like the delivery of legal knowledge, impossible for the market and the state adequately to guarantee.

2. *The Locus of Virtue in Principal-Protecting Professions*

Here again, Justice Blackmun's sketch of the doctor-patient relationship is particularly instructive. As we saw in Part I, that sketch nicely distinguishes between the physician's therapeutic and counseling roles.¹¹⁰ There we saw that the counseling role, the role that might well entail liberal learning, can be separated, both functionally and analytically, from the physician's therapeutic role. Here we need to focus on what Justice Blackmun says about the therapeutic role itself, the role that we have identified as the core of the physician's function: "In our society, the doctor-patient dialogue embodies a unique relationship of trust. The specialized nature of medical science and the emotional distress often attendant to health-related decisions requires that patients place their complete confidence, and often their very lives, in the hands of medical professionals."¹¹¹

As Justice Blackmun suggests, what is distinctive about the practice of medicine is less the esoteric content of medical knowledge, and more the configuration of factors that shape its delivery.¹¹²

As we have seen, the practice of medicine requires knowledge that is doubly removed from the everyday: it is not only beyond the ken of those for whom it is applied, it is also advanced and transmitted in research universities.¹¹³ Application of this knowledge thus creates an information asymmetry that practitioners could abuse, and, because application of this knowledge also involves the exercise of judgment in complex situations, it is difficult to monitor by bureaucratic protocols. But, as we have also seen, these conditions apply to the technical work of many occupations not traditionally recognized as professions. What (if anything) makes medicine *functionally* different?¹¹⁴

¹¹⁰ *Rust v. Sullivan*, 500 U.S. 173, 218–19 (Blackmun, J., dissenting).

¹¹¹ *Id.*

¹¹² See JEFFERY TOOBIN, *THE NINE* 49 (2007) (noting that Justice Blackmun had served as general counsel for the Mayo Clinic and retained a very high regard for medical doctors); see also THOMAS D. MORGAN ET AL., *PROFESSIONAL RESPONSIBILITY* 27 (11th ed. 2011) ("Blackmun said that if he had his life to live over again, he would like to be a medical doctor.").

¹¹³ See *supra* Part I.A.1.a.

¹¹⁴ Several factors make medicine *historically* different, in particular its relatively early reliance on modern physical science. See ABBOTT, *supra* note 8, at 189

It is the importance of care; care lies at the foundation of Justice Blackmun's "unique relationship of trust."¹¹⁵ Three critically related elements require this kind of caring relationship: (1) the significance of the values served, (2) the circumstances under which that service is rendered, and (3) the inadequacy of remedies for mistakes in that service. First, the values medicine serves, health and life itself, are profoundly important to us, both as individuals and as a society.¹¹⁶ Second, medicine typically serves those values when we as recipients are extremely sensitive to their importance, our need, and our vulnerability. In the paradigmatic situation of medical care even today, doctors address our health when we are sick or injured and thus both helpless and vulnerable and, as a result, often acutely aware of our neediness. And the third factor compounds these first two. The cost of our doctor getting it wrong is, from our individual perspective, virtually infinite and absolutely irreversible: one mistake can kill us, and nothing can bring us back. It is, accordingly, extremely important to us as patients that doctors deliver their service right "the first time 'round.'" Initial mistakes would inflict a huge loss on the individual patient, loss of life itself, and this loss cannot adequately be restored post hoc.

The practice of medicine, then, puts at risk a value of the highest order, life itself, under circumstances when those in need of proper performance feel most vulnerable to an infinite and irremediable loss. Not surprisingly, we urgently want our doctors to be supremely careful under these circumstances. More specifically, we need doctors to be more careful than either the gain-loss calculus of the market or the reward/penalty structure of the law can induce them to be. We need people dedicated to, and adequately prepared for, giving the kind of care that our health and life depend upon; we want them to treat us as they would want themselves to be treated, as if they loved us as much as they love themselves and those to whom they are closest. When

("The most familiar example of the shift to scientific legitimacy claims is that of nineteenth-century medicine."). LARSON, *supra* note 4, at 37.

¹¹⁵ The appropriate level of interpersonal care is not only a matter of fundamental concern to the law and other normative disciplines; a proper understanding of care may also have the most profound implications for ontology well. See MARTIN HEIDEGGER, BEING AND TIME 225–69 (John Macquarrie & Edward Robinson trans., Harper Row, 1962), especially Part VI, Care as the Being of Da-Sein (grounding a phenomenology of being on a careful analysis of care, or *sorge* in the original German).

¹¹⁶ FREIDSON, THIRD LOGIC, *supra* note 8, at 161 ("There are a few disciplines whose tasks bear on issues of widespread interest and deep concern on the part of the general population. These might be called *core disciplines*, bodies of knowledge and skill which address perennial problems that are of great importance to most of humanity.").

what you feel you need is love, or something very like it, you're not likely to be satisfied with either the letter of the law or the standards of the market. In the justly famous words of Dr. Francis Weld Peabody of the Harvard Medical School, "The secret of the care of the patient is in caring for the patient."¹¹⁷ This is also what makes medicine the paradigm of the caring professions.

3. *Summary*

The traditional theory of the professions led us, in Part I, to focus on a salient difference between medicine and law: the practice of law requires a knowledge of the public good that the practice of medicine does not. In this Part, we have seen why it would be wrong to conclude that, for want of that kind of knowledge, medicine is not a proper profession. Looking beneath that difference, we found a more basic similarity: proper delivery of the specialized knowledge peculiar to medicine, every bit as much as the hybrid of special and general knowledge necessary for law, cannot be ensured to our satisfaction by the market or the state. To operate optimally, both occupations require, beyond those mechanisms, a distinctive professional virtue.

In the case of law, that virtue is commitment to the public good, sometimes against the interest of private clients; in the case of medicine, that virtue is single-minded devotion to the physical well-being of individual patients, to the exclusion of all other otherwise relevant considerations. The virtues of the two professions differ, even as their distinctive occupational knowledge differs. What the two occupations have in common—and what makes them both professions—is the need for a distinctive professional virtue, a disposition in the delivery of knowledge-based services that neither the market nor the state can adequately ensure.

Fully to appreciate the importance of this common ground, we need to turn to the third element of the standard definition of the professions. That element is the claim that, in the face of certain kinds of market and government failures, the institutions of professionalism offer a superior guarantor of the proper application of specialized knowledge; that guarantor is, in a word, virtue. As we shall see, this may indeed be true, but not in the way that traditional theory has maintained.

¹¹⁷ GROOPMAN, *supra* note 2 (quoting textual language as "one of the most celebrated statements in clinical medicine").

**B. Professional Virtues and Professional Institutions:
Re-Mapping the Boundaries Between the
Professions, the Market, and the State**

In the face of market and regulatory failure, the institutions of professionalism are supposed to offer a solution. That solution, in a word (an admittedly old-fashioned word), is virtue. Recall the words of Justice O'Connor, "One distinguishing feature of any profession . . . 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."¹¹⁸ In the face of the two distinct vices we have identified—taking advantage of the clients' relative ignorance and externalizing costs upon third parties and the public, and the failure of both the market and the state adequately to police these vices—the professions plausibly claim to provide two distinct virtues. The first is the virtue of professions like medicine; it places the client's interests above the professional's own. The second virtue is that of professions like law; it places the public interest above the interests of both the client and the professional.¹¹⁹ The common aim of these virtues is to ensure proper application of each profession's distinctive knowledge.

The need for professional virtue brings us back to the basic affirmative proposition of the functionalist theory of the professions: autonomous professional institutions correct both market and government failure in the delivery of specialized professional knowledge. As we have seen, the professions claim to inculcate these virtues in the course of professional education, screen for them at the point of admission to practice, and ensure their application in the course of professional practice. The bottom line is this: if an aspiring member of the profession does not manifest the relevant virtue, the profession will deny admission into its ranks; if members of the profession do not manifest the relevant virtue in practice, the profession will expel them.

I have argued elsewhere that, with respect to the practice of law, the claimed superiority of professional institutions poses an inescapable double paradox: autonomous professional institutions with legal

¹¹⁸ *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 488–89 (1988) (O'Connor, J., dissenting).

¹¹⁹ See Edwards, *supra* note 45, at 66 ("Good lawyers . . . must sometimes ignore their own self-interest, or the self-interest of their clients."). SIMON, *supra* note 19, at 125 (noting that the self-regulatory regime of the "Progressive-Functionalist project" enforced two basic norms, which "are primarily concerned with the adequacy of service to clients, and secondarily concerned with fairness to third parties").

control of educating and regulating their members are neither necessary to guarantee distinctly professional knowledge nor sufficient to guarantee distinctly professional virtue.¹²⁰ On the contrary, on both counts: the state can quite adequately guarantee the required knowledge, and professional institutions cannot apply legal coercion to ensure the necessary professional virtues.

We cannot fully rehearse the arguments for those two conclusions here, but we do need to recapitulate them in enough detail to clarify critical parallels with the practice of medicine. Let's begin with the most basic, the argument that instrumentalities of the state can adequately guarantee that members of the profession acquire the requisite university-level knowledge. Appreciation of this knowledge may, ex hypothesi, require someone who has had that kind of training. But it does not follow that this expert need act on behalf of an autonomous professional body. He or she could just as well be an agent of the state.

The current licensing regime for both law and medicine lends considerable support to this argument. In order to practice either, an applicant must first pass an examination promulgated by an instrumentality of the state, medical boards in the case of medicine, the state supreme court in the case of law. The refutation of the claim that screening for the requisite knowledge must be in the hands of an autonomous professional body is simple: It is not in the hands of any such body now, in the case of either law or medicine.¹²¹

What, then, of the other claim, that professional institutions are not sufficient to maintain the necessary professional virtues? This second claim is both more important and more complex than the first. It rests on a proper understanding of the relationship between professional institutions and the state, which in turn requires a significant redefinition of professional institutions themselves. In the traditional understanding, the decisions of professional bodies to admit or expel members must have the force of law; that is, in effect, what it means for the profession to have a monopoly on the provision of a particular service. But the legal sword that guards the gate to professional practice is necessarily double-edged. This is what the traditional treatments of the professions, both favorable and critical, overlook.

The basic problem is this: A professional body, acting with the force of law in its efforts to guarantee professional virtue, encounters precisely the same problems as the state, subject to the same limita-

¹²⁰ Atkinson, *supra* note 6.

¹²¹ FREIDSON, *THIRD LOGIC*, *supra* note 8, at 3 (“[M]onopoly is essential to professionalism. . .”). *Id.* at 122 (“Ideal-typical professionalism is always dependent on the direct support of the state. . .”).

tions. The regulatory challenge to both the state and the profession is the same: the dilemma of imposing bright-line rules on conduct ideally left to the conscientious exercise of individual practitioners' expert discretion. As we have seen, drawn too tightly, the regulations unduly restrict the conscientious; left too loose, the regulations do not sufficiently restrain the unscrupulous.¹²²

The professional body not only encounters the same problems as the state in regulating professional conduct, it also faces the same limitations. Once a professional body's decisions have the force of law, that body itself is, as a matter of law, an instrumentality of the state. Accordingly, the grounds upon which professional bodies admit, discipline, and expel members must be legitimate legal grounds. They must, in other words, pass muster before all the basic requirements and limits of liberal law. In particular, the federal constitution protects professional licenses as liberty or property; the state and its instrumentalities can deny or revoke these licenses only with due process of law, both procedural and substantive, and without imposing unconstitutional conditions.¹²³ Professional bodies, every bit as much as routine state regulators, are forbidden to deprive people of their livelihood for violating "know it when I see it" standards. The "void for vagueness" principle applies to professional bodies as well as state agencies, for the same reason: Professional bodies whose decisions carry the force of law are, for precisely that reason, agencies of the state.

But the ideal standard of performance, in law and medicine, respectively, cannot be stated with much more clarity than this: balance the interests of private clients with a proper concern for the public interest; be as attentive to individual patients as you possibly can. Holmes's famous dictum that the law is for the bad man implies, for present purposes, its limitation: The law can punish people who fall below certain minimally acceptable standards, but the law cannot force people to be ideally good.¹²⁴ In the practice of law, the state can punish those who violate the letter of the law, but it cannot punish those who refuse to commit themselves to its spirit. To try to do that would produce this infinite regress: a literal law that commanded obe-

¹²² See *supra* Part I.A.2.

¹²³ See *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569–70 (1972); see also *In re Ruffalo*, 390 U.S. 544, 544 (1968); *Schwartz v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 238–39 (1957).

¹²⁴ See Oliver Wendall Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

dience to the law's spirit, and another law that commanded obedience to that law's spirit, ad infinitum.¹²⁵

In the practice of medicine, similarly, the state can punish those who fall below minimum standards of care, but it cannot punish those who fail to treat their patients as they themselves would want to be treated. The Golden Rule, for all its vaunted universality, is too vague to be made legally binding in any liberal state; it may well be the spirit of all secular law, but it can never be adequately incorporated into any legally binding obligation. That is at least part of the Gospel's message: "[T]he letter killeth, but the spirit giveth life."¹²⁶ For all the reasons Lon Fuller identified nearly five decades ago, the law in its punitive capacity can set its standards for individual conduct only so high; if we aspire to more than the law can mandate, we must look to other institutions.¹²⁷

This means two fundamental things for professional institutions, one negative, the other positive. First, the bad news—professional bodies cannot, by exercising the state's coercive powers, guarantee the professional virtues that we have seen to be necessary for the optimal delivery of professional services. They cannot make doctors adequately attentive to their individual patients' health nor lawyers sufficiently mindful of the public interest.

Now, the good news—professional bodies can, by a multitude of noncoercive means, cultivate those professional virtues that neither the market nor the state can guarantee. Professional bodies cannot deny their members basic property or liberty interests under vague, "know it when I see it," standards, but that does not mean that these standards are neither meaningful nor useful. Quite the contrary, sometimes experts really do recognize subtle but significant departures from occupational ideals too lofty for the law to incorporate. What's more, nothing in the law forbids professional bodies to make these ideals the basis for a system of relatively effective sanctions, both positive and negative. On the negative side, it can reprimand or admonish, publicly or privately, members who lapse from the professional ideal; on the positive side, it can reward self-abnegating, other-regarding conduct with comradely commendations and mutual re-

¹²⁵ See Atkinson, *supra* note 20, at 283–84, 287–94; John F. Sutton, Jr., *Outlawing Unjust Rules of Law: A Response to Quibbles*, 67 TEX. L. REV. 1517, 1517 (1989). The author parodies as a solution to legal but unjust results obtained by litigation a proposal to "[e]nact yet another law – but this time, an awesomely overriding law that outlaws lawyers' 'quibbling' [.]” *Id.*

¹²⁶ 2 *Corinthians* 3:6.

¹²⁷ LON FULLER, *THE MORALITY OF LAW* 30–32 (1964).

spect.¹²⁸ Armed with this more extensive arsenal and able to take more precise aim at the problems of professional misconduct, professional bodies may indeed be able both to set their standards higher¹²⁹ and to apply them with greater precision than either the law or the market.¹³⁰

These, then, are the two absolutely fundamental points about professional institutions and professional virtues, each precisely complementary to the other: On the one hand, professional institutions can no more guarantee essential professional virtues through legal coercion than can the regulatory state; on the other hand, professional institutions may, by noncoercive means, be able to provide levels of professional virtue beyond what the market and state can provide. To properly appreciate the role of professional institutions, we must neither overestimate nor underestimate their power. The standard theory of the professions pays too little attention to the limits of professional institutions. Revisionist theorists pay too little attention to professional institutions' potential to promote the necessary professional virtues, insisting that all talk of professional virtue is cant and that professional bodies exist only to advance the interest of their members against the laity.

Just because the law, acting through either state or professional institutions, cannot guarantee professional virtues does not mean that we do not need those virtues. Even though there is no way through legally coercive means to ensure that doctors are especially careful or that lawyers are attentive to the public interest, our society is still better off if they are. And, just because there are no legal means to ensure these virtues, it does not follow either that the law has no role in their encouragement or that other institutions cannot promote them by

¹²⁸ Parsons, *supra* note 13, at 43–46; FREIDSON, *supra* note 4, at 108; *see also* MODEL RULES OF PROF'L CONDUCT Preamble ¶ 7 (2010) (In addition to the rules of professional conduct, "a lawyer is also guided by personal conscience and the approbation of professional peers."); MODEL CODE OF PROF'L RESPONSIBILITY Preamble (1980) (Although the lawyer is to be guided by both the Code and personal conscience, "in the final analysis it is the desire for the respect and confidence of members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct" and "the possible loss of that respect and confidence is the ultimate sanction.").

¹²⁹ *See, e.g.*, CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 21 (1986) (noting that lawyers may be subject to civil remedies, criminal sanctions, and other formal regulation in addition to professional discipline); RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 5 (2000).

¹³⁰ *See* SIMON, *supra* note 19, at 123 ("The system can function in the absence of the material incentives of the market and the bureaucracy because professional work organized in this manner provides its practitioners with satisfactions that motivate responsibility.").

other means. The converse is, in fact, true on both counts: professional organizations without the coercive power of the state can insist that their members embrace and embody the necessary virtues, even as the state, by non-coercive means, can encourage all practitioners to do the same. The latter is an entirely appropriate, if peripheral, function of the law;¹³¹ the former is the core function of professional institutions, properly understood. The state can urge its professionals to be virtuous, even as it can urge its soldiers to be brave and its citizens to be patriotic. Professional bodies, by contrast, promote virtue by persuasive means as their core mission.

C. Re-Integrating Professional Knowledge, Virtues, and Institutions: Refining the Ideal-Type Profession

Maintaining the necessary balance between the limits and capacities of professional institutions, both in theory and in practice, requires a major refinement in our understanding of the role of those institutions, particularly their relationship with the state and the market. This section first sets out that refinement, then compares it with the prior understanding of both functionalists and revisionists.

1. *A New Taxonomy of Professional Virtue: One Genus, Two Species*

We have seen that the definition of a profession common to both its defenders and its critics does not fit what both take to be the paradigmatic profession, the modern practice of medicine, with respect to either of its essential parts, its substantive claim about professional knowledge and its formal claim about professional organization. With respect to the knowledge claim, we saw in Part I that the practice of medicine does not require the “wedding of special and general knowledge” that is supposed to distinguish the professions from other occupations that involve advanced technical knowledge. By contrast, we saw that law does in fact require just such a “wedding.”

But we also saw that it is not that particular kind of “hybrid” knowledge alone that distinguishes law from other occupations that entail the application of formal knowledge. The practice of law requires that wedding of general and special knowledge for the benefit of both private clients and the public good; only in the latter case, however, are both the market and the state predictably unable to guar-

¹³¹ Atkinson, *supra* note 20, at 274.

antee the proper application of that knowledge. What makes the practice of law distinct, therefore, seems to be, not a particular kind of formal knowledge, but rather a constellation of factors that makes the optimal delivery of that kind of knowledge impossible for the market and the state to ensure.

With that insight, in this Part we looked back at the practice of medicine and found a similar constellation of factors: for a variety of related reasons, the level of care our society insists on from its practicing physicians, like the commitment to the public good that our republic requires of its lawyers, cannot be guaranteed by either the market or the state. On the other hand, that level of care, like lawyers' commitment to the public good, may well be enhanced by special institutions of the occupation itself.

We can now draw these points together into a significant refinement of the functionalist definition of a profession:

A profession is an occupation that delivers a socially significant service entailing university-based knowledge under conditions in which optimal performance requires of practitioners an occupation-related virtue—principal-protective in the caring professions, public-protective in the public professions—which neither private contracts nor state regulation can adequately guarantee, but which special occupational institutions can significantly enhance.

This is, obviously, a definition that only a sociologist or a lawyer could love; even for us, it admittedly needs a good bit of unpacking if its full implications are to be clear.

The first step in unpacking this definition is to notice that the genus of neo-classical professional virtue—the personal commitment essential to the optimal deployment of professional knowledge—has two distinct species, of which medicine and law provide the respective paradigms: principal-protecting virtue and public-protecting virtue. The next step is to trace that division back to the dual government and market failure that professions typically address. And then we can better see how addressing these failures produces two distinctive kinds of professions, parallel to, but not quite congruent with, the traditional distinction between “learned” and “caring” professions.

Recall that professions address two basic forms of market failure: information asymmetries and externalities.¹³² Information asymme-

¹³² See POSNER, *supra* note 23, at 112–13; see also SEIDENFELD, *supra* note 24, at 63–67; see FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 79 (“The requirement of discretionary specializations . . . and most particularly those based on esoteric, abstract theory, poses a serious problem to prospective labor consumers. How are they to judge whether a particular worker is able to perform tasks adequately?”).

tries typically pose the risk that the service provider will exploit the consumer; externalities typically threaten third parties or the public.¹³³ The distinctive problem with the practice of medicine is insufficient attention to patients, the recipients of the services in question—failure, in other words, properly to apply specialized knowledge for the patient’s benefit. The distinctive problem with the practice of law, by contrast, is insufficient attention to the public interest, failure properly to apply knowledge of the public good in the course of representing private clients. The besetting “vices” of doctors and lawyers are thus distinct, each involving exploitation of a different but fundamental form of market failure.

It is important to notice, however, that this “mapping” of professional virtues and vices onto market failures is not perfect. Not all information asymmetries and externalities require professions. Some market failures can be adequately addressed by other means, typically routine government regulation. Only when those means are inadequate is it necessary to rely on professional virtue and the professional institutions that sustain it as guarantees of professional performance.

Even as the two distinctive professional virtues we have identified do not map perfectly onto the general forms of market failure that underlie them, so the two kinds of professions that embody those virtues do not quite perfectly map onto the existing subcategories of professions. Public-protective professions like law and principal-protecting professions like medicine cannot quite accurately be described as “learned” and “caring” professions, respectively. Our refinement of the general definition of profession implies its own subsets, with clearer bounds and foundations than the subcategories previously offered.

There is, to be sure, obvious overlap. Public-protecting professions must be versed not only in university-based formal knowledge, but also in the general cultural knowledge of a liberal education. Public-protecting professionals, then, are more learned than principal-protecting professions in the sense that practitioners of public-protective professions must master two forms of learning, not just one. And principal-protecting professions must be especially careful in the application of their occupational knowledge to the particular individuals whom they serve. They must be, in that sense, more caring than public-protective professions. Thus it would make sense to see the

¹³³ See Morgan, *supra* note 30, at 705, 710–11 (“[T]he costs of dispute resolution and the impact of delay are rarely limited to the particular parties—the social costs involved are borne by society as a whole.”).

public-protective professions as distinctly “learned” and the client-protective professions as distinctly “caring.”

But these associations between the two professional virtues we have just identified and the two terms in common use for subcategories of professions are also misleading. For one thing, it is the public-protecting professions’ *commitment* to the public good, every bit as much as their *knowledge* of the public good, that sets them apart; in that critical respect, they are as much “caring” as “learned.” What distinguishes them from principal-protecting professions is not that they are less caring, but rather that their care has a different focus.

Even as the public-protective professions are not less caring in this respect, so, too, the principal-protective professions are not less learned in another. Their knowledge, like the public-protective professional’s care, simply has a different focus. What’s more, the traditional terms are unfortunately asymmetrical: “learned” refers to the professional knowledge base, not the professional virtue; “caring” refers to the professional virtue, not the professional knowledge base.

For all these reasons, then, the traditional terms “learned” and “caring” are not entirely adequate synonyms for “public-protecting” and “principal-protecting.” On the other hand, the latter, more precise terms suffer disadvantages of their own. For one thing, they are neologisms; for another, their hyphenated form probably costs as much in unwieldiness as it adds in symmetry and accuracy. The discussion that follows, then, sometimes uses the terms “public” and “caring” as convenient short-hands, bearing in mind the qualifications noted here. As we shall see, these qualifications are quite important, because they involve the deepest difference between our refined understanding of the professions and its predecessors.

2. *Comparison with the Prior Definition*

At this point it will be helpful to compare the refined definition of profession with the more traditional definition. We begin with the basic point of agreement, the common focus on professional function, and then examine the most significant difference, the new definition’s focus on professional virtue.

a. The Basic Agreement: A Common Focus on Professional Function

The most significant thing about the refined definition is this: it is a refinement, not a rejection, of the standard definition. It keeps in place all three defining features of the classic professions: (1) formal learning in service of an essential social function, (2) the performance

of which service cannot be guaranteed by the “normal” means of government-regulated private contracts between providers and consumers, (3) thus requiring special professional institutions.

The practice of both law and medicine entails the application of university-based knowledge in the performance of two critical social functions, respectively, maintaining optimal order in a complex society and promoting the physical health of individuals. And the application of both kinds of specialized knowledge presents problems for the presumptive mode of production in a capitalist market economy (contracts between providers and consumers, subject to regulation by the state to protect both consumers and the public). The institutions of professionalism offer better ways to guarantee proper deployment of professional knowledge than the institutions of market regulation alone. All this is entirely consistent with prevailing theory.

b. The Critical Distinction: A New Focus on Professional Virtue

That said, it is important to underscore the one salient way in which the revised ideal type differs from prior versions: its focus on professional virtue. This new focus improves the older definition in two related ways. It shows both why specialized knowledge is not sufficient to account for professional status and why market closure is not necessary.

(1) **Specialized Knowledge as an Insufficient Condition**

The standard ideal-type profession tends to be either over- or under-inclusive. On the one hand, if we treat as professions all occupations that involve the discretionary application of university-based formal knowledge, we sweep in occupations like actuaries that seem to perform adequately under routine conditions of regulated markets. On the other hand, if we narrow the definition by insisting that university-based formal knowledge be somehow “wedded” to a university-level liberal education, we find that medicine, along with actuarial science, falls on the non-professional side of the line. Once we focus on professional virtue as an element that is both essential to the adequate delivery of certain kinds of specialized knowledge and yet impossible to secure with either private contracts or state regulations, then the problems of both under- and over-inclusiveness disappear.

Not all occupations that require the application of university-based knowledge, even in the performance of the most socially significant of purposes, would qualify as professions under the revised defi-

inition of professional, but only those occupations that, in addition, pose problems of both market- and government-failure like those that beset the practice of law and medicine. Proper application of some kinds of university-based knowledge to vital social functions may well be sufficiently handled by the usual regulatory methods (e.g., government licensing of suppliers and monitoring of contracts between suppliers and consumers).

Professional virtue, on this analysis, is what unites the *functions* of professions, the delivery of socially significant special knowledge, with their *form*, the institutions necessary to ensure that delivery. Professional virtue is what guarantees the proper application of professional knowledge; professional virtue is something only professional institutions can provide.¹³⁴ If the state regulation of ordinary for-profit suppliers is adequate to ensure proper delivery of an occupation's particular kind of formal knowledge, then that occupation need not be organized as a profession. Thus, medicine and law can be seen as proper professions; actuarial science cannot.

(2) Market Control as an Unnecessary Condition

In addition to adding an element, professional virtue, omitted by the standard model, the revised ideal type drops an element that the standard model includes—market closure. Both functionalists and revisionists tend to assume that, in order for an occupation that applies formal knowledge to be a profession, it must have state-delegated power to control delivery of its service. To be a profession, in other words, a knowledge-based occupation must also exercise a state-authorized monopoly. And, conversely, both functionalists and revisionists tend to assume that if an occupation that delivers the requisite kind of knowledge achieves market control it has also achieved professional status.

Our focus on professional virtue suggests that, here again, the traditional version of the ideal type is both over- and under-inclusive. It is over-inclusive because it recognizes as professions knowledge-based occupational monopolies that do not require professional virtue

¹³⁴ *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 488–89 (O'Connor, J., dissenting) (“One distinguishing feature of any profession . . . 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.”).

to perform adequately (e.g., certified public accountants).¹³⁵ On the other hand, the focus on market closure may be under-inclusive because it fails to recognize as professions occupations that require both professional knowledge and professional virtue for their proper performance, even though they do not need a state-sponsored monopoly to ensure professional knowledge.¹³⁶ As I have argued elsewhere, this seems to be the case with elite business management.¹³⁷ The problem here is not information asymmetry, but externalities. The corporations that hire managers may well be able to determine whether they possess and competently deploy the necessary knowledge base.¹³⁸ If so, the employers of corporate management have no need for either occupational licensing or professional virtue. But the public needs business executives to be attentive to the public good, not just their client's interest. And this public-protective virtue is precisely what legal controls cannot guarantee.

3. Summary

This section's revision of the ideal-type profession leaves the core of the traditional ideal type intact: A profession is an occupation that applies university-based education in the service of socially important services, under conditions where neither private contracts nor state regulation can ensure proper performance of that service. This revision is nonetheless significant. It has added one element, professional virtue, even as it has subtracted another, market control. The result is an ideal-type profession that is neither over-inclusive nor under-inclusive, because it recognizes as proper professions only those occupations in which the professional mode of organization actually enhances the occupation's function, delivering university-based information in the provision of a significant social service.

III. THE IMPLICATIONS OF NEO-CLASSICAL PROFESSIONALISM

Building on Part II's refined definition of professionalism, this Part spells out the fuller implications of those refinements, particularly the emphasis on professional virtue. Part III.A continues to test those

¹³⁵ See ABBOTT, *supra* note 8, at 215, 226–39 (identifying “quantitative information professionals,” including engineers, accountants, and statisticians).

¹³⁶ See *id.* at 9 (“Any occupation can obtain licensure (e.g., beauticians) . . .”).

¹³⁷ Atkinson, *supra* note 6, at 56–57.

¹³⁸ See *supra* Part II.B.

refinements against the practices of medicine and law, and, vice versa, to test medicine and law against that refined definition. Focusing on the defining virtues of the two paradigmatic professions clarifies how those two professions should be structured to foster their distinctive virtues, even as it shows how a proper understanding of the role of those virtues gives us a more precise understanding of the proper parameters of medicine and law and, more generally, of the caring and public professions as a whole. Part III.B extends the refined definition of professionalism to other occupations, the better to mark the line between the professional and the non-professional. And that, in turn, gives us a better sense of the distinction between professional virtues and other occupational virtues. Finally, Part III.C shows how law and medicine as the paradigmatic principal-protecting and public-protecting professions not only serve our society, but reciprocally depend upon and define that society itself. Ours is a society that creates professionals, even as professionals sustain our society's core values.

A. Revisiting Medicine and Law: Refining the Basic Concepts, Reforming the Paradigmatic Professions

Part I contrasted the practices of medicine and law to show that medicine lacks what traditional theory has made a hallmark of ideal-type professions: a wedding of university-based technical knowledge with a classical liberal education. Physicians can perform their core function, providing individual health care, without a grounding in historical debates about the public good; lawyers necessarily participate in that very debate in performing their core function, providing justice under law. Part II showed how a closer look at medicine and law suggests a significant modification of traditional theory. We traced the foundation of medicine's professional standing to a different source, the distinctive professional virtue of care.

On that analysis, what links medicine and law as professions is the necessity for professional virtue, a kind of commitment to occupational performance on the part of doctors and lawyers, which cannot be optimally guaranteed by either the market or the state, but which can be significantly enhanced by professional bodies acting without the force of law. On the other hand, what distinguishes medicine from law, at the highest level of generality, is precisely this distinctly professional virtue. In medicine, that virtue is client-protective; in law, it is public-protective; medicine, then, is the paradigm of the caring professions, even as law is the paradigm of the public professions. We were thus able to see law and medicine as paradigms of two basic

professional categories, the principal-protecting or caring professions and the public-protective or public professions. Here we take up that line of analysis again, the better to understand both the professions of law and medicine and the caring and public professions more generally.

Our revised understanding of the ideal-type profession, drawn largely from our examination of the distinctive functions of law and medicine, has implications for those occupations as they are now constituted, even as those arrangements point to further refinements in the theory itself. This analysis begins with the respective cores of medicine and law, then looks at areas of overlap, and concludes with areas of practice at the peripheries of both professions.

1. *At the Core of the Legal and Medical Professions: Preserving the Critical Virtues*

Both functionalists and revisionists agree that professional form should follow professional function; professional institutions should be organized to ensure professional performance. Functionalists and revisionists differ, of course, on how closely occupational reality matches the theoretical ideal. Our revised ideal type of professionalism, with its focus on professional virtue, sharpens that debate. Given that professional virtue is a necessary precondition of the proper deployment of professional knowledge, the professions should be structured so as to enable and encourage individual practitioners to exercise their professional virtue. If the primary need for professional institutions is to ensure professional virtue, then the primary goal of professional institutions should be to enhance, or at least not undermine, that virtue. To paraphrase the Hippocratic Oath: Every professional institution should improve professional performance; none should make it worse.

This basic principle has obvious and important implications for our two paradigmatic professions, law and medicine. In the case of medicine, anything that systematically undermines the physician's ability to give the appropriately high level of care to an individual patient is presumptively dysfunctional. And a precisely parallel analysis applies to law. Anything that systematically undermines the lawyer's ability properly to weigh a private client's interest against the public interest is, again, presumptively suspect.

When we apply that principle to doctors and lawyers, we note a paradox that underscores the importance of distinguishing between the caring and the learned professions: What is good for promoting professional virtue of one kind may well be bad for the other. Institution-

al arrangements that encourage proper performance in one kind of profession may be truly devastating if imported into the other kind.

Nowhere is this clearer than in the case of professional compensation. The necessary structure of payments in the private practice of law might well undermine client-protective virtue in medicine. In a basically capitalist economy, those who consume goods and services typically pay for them; all things being equal, that ensures that resources are efficiently allocated or, more colloquially, that consumers get what they pay for. But, of course, things are not always equal; two basic forms of market failure, information asymmetries and externalities, sometimes upset the market's normal equilibrium. As we have seen, professional virtue, enhanced by professional institutions, is the optimal solution to these two problems in certain situations.

We now need to notice how market factors not only produce the need for professional virtue, but also influence the likelihood of its effectiveness. The basic point is this: if the source of payment for professional services is different from the beneficiary of professional virtue, professional virtue will predictably suffer. This asymmetry of incentives is at the very root of the defining problem of the legal profession. Private clients typically pay for their own lawyers; conversely, those lawyers' attention to the public good redounds primarily to the benefit of third parties or the public, not to private clients. Accordingly, private clients have every reason to pay top dollar for lawyers who advance private client interests the most and attend to the public good the least. For reasons nicely isolated in the literature on legal insurance and civil legal assistance, it would be very difficult to structure third-party payment for legal services.¹³⁹ We seem to be stuck, then, with a system of compensating lawyers that entails direct disincentives against the legal profession's defining virtue.

In traditional medical care, by contrast, the relationship between the beneficiary of the professional virtue and the payment for the professional service is quite different. When patients pay their own doctors, patients themselves benefit from the doctor's distinctive professional virtue, a level of care beyond what the market or the state could guarantee. As our society moves, for various reasons, away from patient payment to third party payment, we move from that traditional identity of payer and beneficiary toward a situation more like that of law, where payer and beneficiary are typically different.

Precisely here, however, we need to notice a significant distinction between the two situations: in law, those who pay for the service

¹³⁹ See Nancy J. Moore, *Ethical Issues in Third-Party Payment: Beyond the Insurance Defense Paradigm*, 16 REV. LITIG. 585, 607–10 (1997).

and those who receive the principal benefit of professional virtue are not only different, but also almost inevitably antagonistic. Private client's pay for legal services; the distinctive virtue of lawyers protects the public interest against what lawyers might do for those very clients. Third party payments for doctors' services would inevitably separate the payer from the beneficiary, but that need not make their interests antagonistic. In restructuring payments for medical services, we may be able to select for arrangements that are more protective of the basic virtue of doctors—single-minded attention to care for their patients.

In seeking these arrangements, interestingly, the factor most relevant to preserving professional virtue on the part of doctors may be preserving choice on the part of patients. And patient choice would be important whether the third-party payment system were public or private. Without the chastening effect of patient choice in a private system, for-profit payers might tend to profit by favoring doctors who skimp on patient care. And without the chastening effect of patient choice in a public system, doctors would certainly have an incentive to slack off on patient care. In any case, a system of third-party payments for medical care should focus on structures that enhance or preserve the basic professional virtue of doctors—higher levels of care than either the market or the state can ensure.¹⁴⁰

¹⁴⁰ There is, of course, another side to this story. Although, *ex hypothesi*, only members of caring professions can be expected to insist upon the appropriately high level of individual care that we have identified, this is not to say that individual physicians should have *carte blanche* in all questions of patient care. By our standard, that, too, is automatically suspicious, for converse reasons. The very exercise of their defining virtue, single-minded devotion to individual patients, means that, in the case of each particular patient, the physician is likely to focus on benefits to that patient and to ignore costs to other parties and the public.

This dilemma, of course, is very near the central issue of all third-party health-care systems, and such systems, already widespread, show every indication of expanding. Identifying the role of the physician's defining virtue in this dilemma obviously has important implications for its resolution. On the one hand, cost-containment will surely have to entail the establishment of treatment protocols that incorporate some form of cost-benefit analysis, some weighing of benefits to individual patients against costs to third parties; as we have seen, the setting of these parameters is quite beyond the purview of doctors, acting as doctors; it entails questions of the public good outside the scope of their professional expertise as health-care providers. On the other hand, the survival of the level of care that we depend upon doctors, as caring professionals, to ensure demands that control of individual patient care remain essentially in their hands. Members of the caring professions, paradigmatically doctors, must preside over the care of individual patients. The lesson for present purposes is this: Any systemic shifting of responsibility for individual patient care away from physicians and onto nonprofessionals is, by our standard, automatically suspicious.

That leads to a final, broader point, which is something of a paradox: law may be more essentially a profession than medicine, precisely because law's distinctive virtue is always more at risk. Third party payments for medical services do not necessarily place patients at odds with their doctors, consequently, the professional virtue of patient care is not in grave danger. On the other hand, that antagonism is virtually unavoidable in the case of the private practice of law, where lawyers' public-protective virtue functions specifically to counterbalance the interests of the private clients who pay them. Here is the paradox: because the standard mode of lawyers' compensation is inherently corrosive of their professional virtue, the practice of law is, for that very reason, all the more in need of strong professional institutions.

2. *In Between the Principal-Protecting and Public-Protecting Professions*

Law and medicine, we have seen, are paradigms, respectively, of the public and the caring professions. The critical legal function of making appeals to the public good requires general cultural knowledge; the care of individual patients demands an extraordinary measure of devotion to each individual patient. As soon as we apply these templates to the actual work of lawyers and doctors, however, we note several significant mismatches between the "ideal" and the "real." Sometimes a medical or legal specialty will need the defining virtue of the other profession, in addition to, or even instead of, its own. More significantly, sometimes a medical or legal specialty will require neither virtue; conversely, sometimes an occupation allied to law or medicine but not recognized as a part of that profession will require its virtue, and thus warrant inclusion in its ranks. All of these anomalies require appropriate adjustments in professional status, in both theory and practice.

a. Hybrids: Double Doses of Professional Virtue

Let's consider first the easiest case, specialties in law and medicine that seem to involve elements of the other profession's defining virtue. Some medical doctors may need a commitment to the public good, even as some lawyers may need especially great concern for an individual client's welfare. This seems to be true of doctors who deal with mental health and lawyers who deal with family crises.

Psychotherapy nicely represents this kind of amphibious medical specialty; its practitioners need not only the extraordinary care that all doctors owe their patients, but also the appreciation of fundamental

social norms that makes law a public profession. Mental health, far more than physical health, is a matter of enabling individual patients to integrate themselves successfully into contemporary society, that, in turn, entails a deep enough appreciation of society to call its norms and mores into question. To take only the most salient example, homosexuality was all too recently listed as a disorder to be treated;¹⁴¹ now we (generally) recognize gay and lesbian lifestyles as entirely legitimate and (generally) treat homophobia as aberrant and discrimination based on sexual preference as immoral, even illegal.

In order to appreciate where the necessary adjustments need to be made, in the patient or in the patient's social setting, the psychotherapist has to be able to assess both individual and society, in consultation with professional colleagues, by the most basic norms of our common culture.¹⁴² If they are truly to be healers of the soul, they must have the fullest possible understanding of what our culture understands to be the whole range of possibilities for not just "mental health," but also human flourishing.

The practice of family law involves a comparable duality of professional virtues. Perhaps in large part because of their close practical alliance with psychotherapists, lawyers who deal with families in crisis must be deeply caring as well as committed to the public good. On the one hand, clients in such cases are often extraordinarily distraught, and the issues they present are among the most fundamental imaginable—the economic and social restructuring of relations among parents and children. The resolution of these issues may well determine not only the quality, but even the duration, of life itself, and thus requires the utmost care on the part of lawyers. On the other hand, the standard of determining custody issues nicely illustrates the need for family lawyers also to be well versed in both the humanities and the social sciences. That standard, the best interest of the child, incorporates into law a balancing of the most profound values in our common culture, guided by the most subtle assessments of our social science.¹⁴³ Thus, even as "doctors of the soul" must be liberally learned as well as caring, so lawyers for families in crisis must be not only liberally learned, but also caring.

¹⁴¹ See AM. PSYCHIATRIC ASS'N, APA DOCUMENT REFERENCE NO. 730008, HOMOSEXUALITY AND SEXUAL ORIENTATION DISTURBANCE: PROPOSED CHANGE IN DSM-II, 6TH PRINTING, PAGE 44 POSITION STATEMENT (RETIRED) (1973), available at http://www.torahdec.org/Downloads/DSM-II_Homosexuality_Revision.pdf.

¹⁴² See Judith H. Katz, *The Sociopolitical Nature of Counseling*, 13 THE COUNSELING PSYCHOLOGIST 615, 615 (1985) (stating that the psychologist's profession has "at its core a set of cultural values and norms by which clients are judged").

¹⁴³ See JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, *BEYOND THE BEST INTERESTS OF THE CHILD*, at xiii (1998).

b. Exceptions that Prove the Rules:
Branches of One Profession with the
Virtues of the Other

In more peculiar cases, a specialty in one profession may need the virtue of the other, not in addition to its own, as we have just seen with psychotherapy and family law, but instead of its own. In this latter situation, doctors would place the public interest above care for individual patients, even as lawyers would weigh the interests of individual clients much more heavily against the public interest than would normally be appropriate. This “virtue reversal” might be true, for example, of epidemiologists, who must look to the public health rather than to the health of particular individuals. It might also be true of lawyers who represent defendants accused of serious crimes, especially those punishable by death. The public health doctors must be committed to advancing the public good, even as typical lawyers are; criminal defense lawyers need to be especially careful of the cases of an individual client in a very vulnerable position even as typical doctors are.

In the special case of criminal defense lawyers, as in the case of the typical physician, the life of the layperson is in the hands of the professional. Death-row inmates will quite literally die, not only if their lawyers make mistakes, but also if they fail to go to lengths heroic by any ordinary measure of professional competence. And criminal defense lawyers need be less concerned with any public interest running counter to their individual client’s interest, since in every criminal case the public interest is doubly protected, by the public prosecutor advancing the case and by the judge hearing the case.

On the other hand, epidemiologists hardly need exercise the kind of care required of doctors who treat individual patients, and may indeed be hampered by it—as, for example, when the need to identify sources of contagion conflicts with the privacy interests of the individuals infected. With public health doctors and criminal defense lawyers, then, professional virtues are largely reversed.

c. On the Frontiers of the Paradigmatic
Professions

We have seen that some recognized medical and legal specialties require the defining virtue of the other profession, either in addition to or instead of their own. Now we need to consider two logically and practically related possibilities: in analyzing some practice areas to determine whether they need the relevant professional virtues, we may

discover both “false positives” and “false negatives.” False positives will be those specialties recognized today as part of the legal or medical profession, even though they do not require the defining virtues of either profession, and thus may not properly be part of the profession at all. False negatives will be those specialties allied to law or medicine that are not considered within either profession, even though they do require their respective virtues, and thus should be recognized as part of the appropriate profession. We will consider these opposing situations in turn: first, occupations that have slipped inside the professional folds without demonstrating proper functions, second, those with properly professional functions that have been fenced out.

**(1) False Positives:
Faux Professions**

To appreciate this situation, consider, first, the cases of pathology and radiology. Why would a pathologist or radiologist need to exercise any more care of the relevant kind than, say, a technician performing similar analyses? We need both of them to be extremely careful; neither will likely ever be in the physical presence of a patient, and both will almost certainly be reporting to a primary care physician. In both cases, what we need is someone, perhaps the primary care physician, ensuring that proper care is being taken.

So, too, with some specialties in the law. Searching real estate titles, probating wills, and securing uncontested divorces are not likely to implicate basic questions about the public good, much less weighing the interests of private clients against the public good in applying the law. The law has long recognized that relatively routinized areas of practice pose less risk of information asymmetries, and thus are subject to less intrusive state regulation.¹⁴⁴ Under our analysis, this sword may have another edge, which cuts these areas of practice out of the profession altogether.

**(2) False Negatives:
Unrecognized Professions**

As we have just seen, the neo-classical definition of the professions, with its focus on the need for very specific kinds of occupationally-related virtue, would call for some practitioners in the legal and the medical fields to be considered outside the scope of both profes-

¹⁴⁴ *Bates v. State Bar of Arizona*, 433 U.S. 350, 379 (1977) (finding that risks to clients associated with advertising of fees for routinized services do not warrant total prohibition of advertisements).

sions, properly defined. The converse, however, is equally true, and almost certainly more significant: Sometimes a highly technical occupation allied to law or medicine and requiring the relevant virtue for its proper practice has nonetheless not been recognized as a profession at all.

On the medical side, psychotherapy nicely illustrates this situation. All psychiatrists are medical doctors, but not all psychotherapists are psychiatrists. Some psychotherapists, generally grouped together as clinical psychologists,¹⁴⁵ are typically certified in university-based scientific study and have to undergo supervised clinical training. Their practice, though traditionally not classified as medicine, would seem to involve a need for the same high level of individual care as their counterparts in psychiatry.¹⁴⁶

On the legal side, the management of publicly-held corporations nicely illustrates the case of an occupation closely allied with law that would seem to require not only an equally high level of technical expertise, but also an equal measure of the profession's defining virtue, commitment to the public good. And so the calls, now nearly a century old, for management to become a profession have referred not only to the level of technical training involved, but also the importance of concern for the public welfare.¹⁴⁷

B. The Professions and Other Occupations

Having refined our neo-classical definition of professionalism in the paradigm cases of law and medicine, we can now extend it to other occupations, noting in the process some of its more general features. We saw, at the end of the last section, that neo-classical professionalism gives us the criteria for redrawing the borders of the traditional principal-protecting and public-protecting professions, medicine and law. It gives us, in other words, a way to distinguish, within genuine professions, between those traditional elements that are properly professional and those that are not.

It is but a small step to apply the same criteria to other occupations further afield. Just as our virtue-based standard can distinguish between the truly and the spuriously professional elements within the traditional professions, so it can, by reasonable extrapolation, among occupations as a whole. At the highest level of generality, this extension would logically entail three steps: (1) determining whether the occupation in question is a proper profession; (2) deciding whether its

¹⁴⁵ ABBOTT, *supra* note 8, at 300–01.

¹⁴⁶ See FREIDSON, *PROFESSION OF MEDICINE*, *supra* note 8, at 54.

¹⁴⁷ See BRANDEIS, *supra* note 16, at 1.

essential virtue is public-protecting or principal-protecting (or some third kind our analysis has not yet identified); and (3) assessing how well the occupation, in its present form, is performing its particular function. Each analytic step focuses on professional virtue: whether the occupation requires professional virtue for its proper function; whether that virtue is principal-protecting or public protecting; and how well that occupation, as now organized, is providing that virtue. Although this is not the place to carry out a detailed analysis of any other occupation in particular, we can specify here in somewhat greater detail how that analysis would go, which, in turn, will help sharpen our sense of what neo-classical professional virtue entails.

1. *Professional Virtue as Neo-Classical, not Retro-Victorian*

Since professional virtue will be at the center of this inquiry, we should first further clarify that core concept. Most basically, bear in mind that the kind of virtue at issue here is classical, not “Victorian,” virtue. Its focus is public life, and primarily work; its concern is not private life, and consensual sexual conduct thus generally lies outside its scope.¹⁴⁸ If it helps, put Queen Victoria’s frumpy portraits out of mind and recall a marble bust of Marcus Aurelius or, even better, a photograph of Abraham Lincoln.

Classical virtue, strictly speaking, is the condition of anything, even an inanimate object, in which that thing does its own work, or performs its proper function, well. Thus, in classical ethics, it made sense to say that the virtue of a knife is sharpness and the virtue of a horse, speed.¹⁴⁹ Occupational virtue, by parity of reasoning, is that condition of the members of a particular occupation most conducive to their performing that occupation’s central task. Occupational virtue would thus include both the knowledge required to perform the relevant task and the dispositions or character traits that lead to that

¹⁴⁸ As the notes to the ABA’s 1983 Model Rules of Professional Conduct make clear, this focus has not always been appropriately sharp. See MODEL RULES OF PROFESSIONAL CONDUCT R. 8.4 cmt. (2010) (noting that the traditional concept used to denote lapses from professional standards of conduct “moral turpitude . . . can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness to practice law”).

¹⁴⁹ See PLATO, THE REPUBLIC OF PLATO 32 (Allan Bloom trans., 2d ed. 1991) (“‘All right,’ [Socrates] said, ‘does there seem to you also to be a virtue for each thing to which some work is assigned?’”); see also ARISTOTLE, THE NICOMACHEAN ETHICS 41 (Martin Ostwald trans., 1962) (“It must, then, be remarked that every virtue or excellence (1) renders good the thing itself of which it is the excellence, and (2) causes it to perform its function well.”).

knowledge being applied properly. We can speak, as Socrates did, of the occupational virtues of gardeners or carpenters just as of doctors or ministers of state.

Gardeners must know horticulture; it also behooves them to have “green thumbs,” or special skill, innate or acquired, in putting that knowledge into practice. So, too, carpenters must know and apply the tools, materials, and skills of their trade. In the case of physicians the relevant knowledge would include anatomy and physiology, and the distinctive disposition would be a particularly high level of care for the patient’s welfare. Similarly, the lawyer must not only know both technical matters of procedure and substance and broader matters of public policy, but also be committed to advancing the public good.

Professional virtue, then, is a genus of occupational virtue, the optimal condition of the practitioner of any occupation for performance of that occupation’s central task. And occupational virtues are in the family of classical virtue, the optimal condition of anything in performing its defining function.

2. *Professional Virtue, the Virtues of Other Occupations, and Other Occupational Virtues*

The fact that professional virtue is a genus of occupational virtue has several important implications for the relationship of the professions to other occupations. In the first place, to identify specific virtues as essential to the professions is not to suggest that those who work in other occupations are immoral, or even amoral; it is just to say, rather, that the virtues that distinguish the professions are distinctive in ways that are essential to their proper functioning. And so, conversely, even though other occupations’ particular organizations may help to enhance the performance of their members,¹⁵⁰ that alone does not make those occupations professions.

In the second place, to say that the virtues distinctive of the professions are different from those distinctive of other occupations is not to deny that all work properly entails certain common virtues. Although, as we have seen, gardeners have their own special virtues, knowledge of and skill in horticulture, the better of them also have “garden variety” or “work ethic” virtues that are not occupation-specific but are, instead, important to almost any imaginable occupa-

¹⁵⁰ See, e.g., EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 29–31 (Cornelia Brookfield trans., 1957) (occupations not limited to the classic Anglo-American professions as guarantors of values not otherwise sustained in modern market economies).

tion: honesty, discipline, timeliness, efficiency. To focus on specific occupation-related virtues as distinctive of professionals is neither to deny, on the one hand, that professionals need these “garden variety” virtues, nor to assert, on the other hand, that other occupations need them any less, or more.

Claiming care and public concern as *distinctively* professional virtues is not tantamount to claiming that they are *exclusively* professional virtues. All occupations might perform better if their members took more care for the recipients of their service and showed more concern for the public good than the law or the market can ensure. What is distinctive about the professions is that these virtues are especially important in securing adequate practitioner performance. Beyond some point, the need for that extra care or public commitment becomes particularly great; in that respect, professional virtue is more a matter of degree than kind.

Our ordinary language nicely reflects this. One common use of the word “professional” and its cognates captures this universal aspect of professional virtue. We say that someone is a professional, as opposed to an amateur or a dilettante, irrespective of that person’s occupation; we mean to say, not that the professional is in any sense meretricious, but rather especially knowledgeable, serious, and committed. Identifying these distinctive professional virtues does not imply that all members of any profession actually exhibit the relevant virtue. On the contrary, some doctors are only as good as the law requires them to be (and, of course, some are even worse than that); some lawyers have little or no regard for the public good (and some, little or no regard for basic legality). It is thus quite possible to say that a practitioner has acted “unprofessionally,” without implying actionable incompetence or malpractice. Our theory holds that professional institutions are better guarantors of professional virtue than either the market or the state in the absence of those institutions, not that those professional institutions are themselves perfect.

This is the paradox of the oft-repeated, much-misleading assertion that “professionalism” involves standards above those of both the market and the law. Those standards are not necessarily above what clients are willing or able to pay for, nor are they necessarily higher than standards readily derivable from the law itself. Patients might well be willing and able to pay all the costs of the best possible medical care; thoroughly orthodox accounts of the law see it as necessarily entailing commitment to the public good on the part of its practitioners.¹⁵¹ The medical virtue of care is thus not alien to the market, any

¹⁵¹ LUBAN, *supra* note 36, at 171.

more than the legal virtue of commitment to the public good is extraneous to the law. Both virtues simply promote a level of performance above what any combination of enforceable market contracts and formal legal sanctions can effectively ensure.

It is also misleading to say that members of the professions, even those who embody those virtues, are somehow more “altruistic” or less “selfish” than members of other occupations. Nor is it quite right to say, with Talcott Parsons, that proper professionals take relatively more satisfaction in occupational proficiency and esteem of occupational colleagues, relatively less in monetary rewards and public acclaim.¹⁵² It is more nearly correct to say that professionals’ being so motivated is more important to their proper occupational performance. Members of other occupations, as we have seen, can and do exhibit the levels of care and kind of commitment to the public good characteristic of professionals, and society is the better for it. The critical difference is that these professional virtues are significantly more important in ensuring proper performance in some occupations than in others. Again, to say that a certain kind of virtue is critical to professional performance is not to say that professionals alone have that virtue.

It is also important to notice that, under the neo-classical understanding of professional virtue, professional institutions supplement the ordinary institutions of the law and the market, but they never entirely displace them. Professionals are not “above the law” or “outside the market.” They are subject to laws of general application and the competitive pressures of the market. In fact, many areas of professional performance are almost certainly enhanced by holding professionals to higher, not lower, standards of performance. That, to take the simplest example, is precisely what professional malpractice standards attempt to do.¹⁵³ Similarly, the cost-effective delivery of many professional services, including those provided by both doctors and lawyers, has doubtlessly been enhanced by competitive pressures. Professional institutions are not better guarantors of every aspect of professional performance than either the market or the state. They are simply, for the reasons we have seen, better guarantors of professional virtue, and the critical need for professional virtue is an essential part of what makes an occupation a profession.

On the other hand, when professional virtue is not an essential component of occupational performance, professional institutions can be counterproductive, even perverse. On the consumer side, both

¹⁵² PARSONS, *supra* note 13.

¹⁵³ See Ralph Peeples et al., *The Process of Managing Medical Malpractice Cases: The Role of Standard of Care*, 37 WAKE FOREST L. REV. 877, 878 (2002).

reformist courts and revisionist commentators have identified many professional institutions as little more than mechanisms to constrict supply or raise prices.

And scholars are now increasingly realizing, as courts have long held, that similar abuses occur on the producers' side as well, to exploit certain service providers.¹⁵⁴ This abuse takes several forms. Unscrupulous employers may describe workers as "professionals" in order to exclude them from wage, hour, and other labor benefits; employers may also shift onto "professionals" more work, or more onerous work, rather than hire more workers, buy better equipment, or deploy more appropriate procedures.¹⁵⁵

1. *Comparative Perspective: Professionalism in Other Times and Places*

Professional virtues, on our analysis, are not the only virtues, nor even the only occupational virtues. They are virtues distinctive of occupations that have three additional, and distinguishing, features: They involve the application of (1) formal knowledge, (2) in the provision of an essential social service, (3) that can be better ensured by professional institutions than market and regulatory measures alone. At any given time and place, these three critical factors may be more or less strong. So far, we have limited our analysis to contemporary American occupations, focusing on today's practice of medicine and law in the United States. We should also note, if only briefly, variations in other times and places, and compare them to our paradigmatic

¹⁵⁴ See Julia Evetts, *Introduction: Trust and Professionalism: Challenges and Occupational Changes*, 54 CURRENT SOCIOLOGY 515, 522–24 (2006) ("In general, then, as organizational budgets become leaner and customers/clients/governments become more demanding, as service work becomes more closely regulated and achieving targets are specified, measured, and assessed, so the changes are often characterized as the need to 'professionalize' the service and knowledge workers concerned."); see also Julia Evetts, *Short Note: The Sociology of Professional Groups*, 54 CURRENT SOCIOLOGY 133, 138–39 ("In general, then, as organizational budgets become leaner and customers/clients become more demanding, as service work becomes more closely regulated and achievement targets are specified, measured, and assessed, so the changes are often characterized as the need to 'professionalize' the service and knowledge workers concerned.").

¹⁵⁵ Working new doctors' long hours may well jeopardize their ability to deliver proper care. Faced with that situation, it would be nothing if not perverse to call on residents to be more careful, rather than simply to reduce the number of hours in their shifts. See ACCREDITATION COUNCIL FOR GRADUATE MED. EDUC., DUTY HOURS: COMMON PROGRAM REQUIREMENTS § VI.G.1 (July 2011), available at http://www.acgme.org/acwebsite/home/Common_Program_Requirements_07012011.pdf.

public-protecting and principal-protecting professions, law and medicine.

a. The Necessary Knowledge Base

Consider, first, the matter of formal knowledge. Sometimes the knowledge required to perform an essential service will not be sufficiently formalized to require its delivery by specialists. That was certainly the case with both medicine and law at important points in the history of the West.

As scholars have noted, medicine did not attain a firm foundation in modern science until quite late in the nineteenth century; on the other hand, it was firmly established in medieval universities, based on Islamic preservation of classical Greek texts, by the high middle ages.¹⁵⁶ But, before the time of Galen and Hippocrates, it is not at all clear that a sufficient body of formal knowledge, even of a pre-modern sort, existed to qualify medicine as a proper profession.

The history of the legal profession illustrates the same factors. No legal profession, under our standards, existed in classical Athens. For one thing, everyone argued his or her own case; legal knowledge had not yet become sufficiently formal to require a body of experts. By the time of Socrates, such a body was clearly taking shape in the program of the Sophists, who taught the wealthy young men of Athens to make their own cases before legal bodies. By the time of the late Roman republic, something identifiable as a prototypical legal profession appeared—a specially trained body of experts argued cases on behalf of others.

The content of lawyers' "learning" is not constant either, even in modern polities with complex legal systems that purport to serve the common good. For example, a lawyer in the former Soviet Union might well have qualified as a professional under our revised definition. But the necessary content of his or her education in cultural values would have been Marxism-Leninism, not the deeper and broader culture of the West, and the world. Similarly, a lawyer in the Islamic Republic of Iraq would not likely need to know much Aristotle, although it would have been very different for a lawyer in the service of the caliphates at Baghdad, Cordoba, and Cairo.¹⁵⁷

¹⁵⁶ ABBOTT, *supra* note 8, at 189; *see* LARSON, *supra* note 4, at 3.

¹⁵⁷ *See* Mohammad Hashim Kamali, *Law and Society: The Interplay of Revelation and Reason in the Shariah*, in *THE OXFORD HISTORY OF ISLAM* 107, 107–53 (John L. Esposito ed., 1999) (describing the diversity of approaches to law in the Islamic tradition, both historically and geographically).

b. The Relative Strength of Complementary Social Institutions

The practice of law in classical Rome also reminds us of a second critical factor: the relative roles of the state, the market, and occupational institutions in guaranteeing professional virtue and hence proper professional performance.¹⁵⁸ In classical Rome, both as a republic and as an empire, the state was not under modern liberal constraints against promoting a particular vision of the public good. Accordingly, classical Rome had relatively little need for special professional institutions to promote lawyerly loyalty to the public good; that was comfortably part of the job of the law itself.

Similar factors help account for the relatively greater reliance on professional institutions to guarantee professional virtue in modern American, Britain, and the Commonwealth countries. Anglo-American culture is more reluctant than its Continental and Japanese counterparts to rely on instrumentalities of the state to perform social functions. And the converse may also be true: Cultures with relatively strong states may be suspicious of strong institutions in the private sector, professional associations included. And some are suspicious of the institutions of professionalism in particular for non-statist reasons, seeing them as elitist and thus counter-democratic.

This discussion, in turn, points to the final relevant factor: The relative strength of social institutions may well reflect different underlying rankings of the social values that particular occupations serve.

c. The Social Ranking of the Values Professions Serve

As a profession's knowledge base can vary critically over time and across cultures, so, too, can the significance that any given society assigns to the value that a profession applies its special knowledge to serve. It is hard to imagine a society in which health is not socially significant; all societies depend, at some level, on the life and health of their individual members. But it is quite easy to imagine a society in which the level of care that our society insists on, at least for its better-off members, is not considered significant. Not all societies have taken the health of every (well-off) individual as seriously as we, and not all well-off members of those societies have taken their individual health as seriously. In the past, this may have been because the after-life loomed larger, or because the level of medical science or

¹⁵⁸ FREIDSON, THIRD LOGIC, *supra* note 8, at 122.

social wealth was too low to make our level of concern a realistic option to any but a tiny few. For any number of reasons, then, the level of care that requires a special virtue of our doctors may not be a socially significant value. For that reason, as much as for the lack of an adequate knowledge base or strong institutional framework, it may not be appropriate to speak, without serious qualification, of a medical profession in classical Athens or Rome.

The contrast between the practice of law in classical Athens and in Rome offers an even more telling example of the importance of how highly a society values what a given profession provides. As we have seen, Athens had no legal profession; Rome had the unmistakable beginnings of one. But Athens and Rome also differed at a much deeper level: Athens was a democracy; Rome, a republic. In a state where ultimate legal authority lies in popular votes, appeal to a public good beyond the people's will is, as the case of Socrates shows,¹⁵⁹ problematic. If one could imagine a pure democracy, where the people's will is instantly and ultimately the law,¹⁶⁰ appeal to deep cultural values would be legally irrelevant. Appeal to such values, might, of course, be politically persuasive;¹⁶¹ nostalgia is a common if not universal sentiment. But one could not say, as a matter of law, that anything other than the people's immediately expressed will had any legal significance. In the absence of something like judicial review, lawyers, as lawyers, need know little or nothing about the public good as anything other than the popular will.

As where the law is the will of all, so also where it is the will of one. In a classical tyranny, where the will of the monarch was the ultimate law,¹⁶² as in a pure democracy, where the will of the people is the ultimate law, the law would have no necessary connection with cultural traditions, and lawyers would not need to be learned in them. This would not be true, however, of all monarchies: some Roman emperors, even after institutional restraints on executive authority had almost totally atrophied, aspired to conserve the values of a republican constitution. As the Emperor Trajan reminded the lawyer Pliny the Younger, imperial proconsul for the Roman province of Bithynia,

¹⁵⁹ See Plato, *The Apology, Phaedo and Crito of Plato*, in 2 THE HARVARD CLASSICS 3, 21–23 (Charles W. Eliot ed., Benjamin Jowett trans., 1909).

¹⁶⁰ See ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 34–37 (1970) (outlining a computer-based direct and instantaneous democracy).

¹⁶¹ ARISTOTLE, RHETORIC 42–46 (W. Rhys Roberts trans., 1954) (noting the rhetorical power of appeals to those with shared values, “friends to whom the same things are good or evil”). ¹⁶² See PLATO, *supra* note 149, at 45; ARISTOTLE, POLITICS 115 (H.W.C. Davis ed., Benjamin Jowett trans., Cosimo, Inc. 2008).

¹⁶² See PLATO, *supra* note 149, at 45; ARISTOTLE, POLITICS 115 (H.W.C. Davis ed., Benjamin Jowett trans., Cosimo, Inc. 2008).

executing people based on mass rumor was not their law, even where the alleged offense was an insult to the emperor as symbolic embodiment of that law itself.¹⁶³

Radical populism has never needed lawyers learned in the shared values of a culture's past. Indeed, every form of radical populism has abhorred both law that constrains the people's will and the learned who remind the people of a public good beyond their private preferences.¹⁶⁴ So it was at Socrates's trial, and so it was in the slogan of Shakespeare's brigand: "The first thing we do, let's kill all the lawyers."¹⁶⁵ So it has also been under the extremes of French Jacobism, American Jacksonianism,¹⁶⁶ Russian Bolshevism, and Chinese Maoism. Radical populism cannot tolerate a profession of lawyers committed to classical notions of the public good, even as classical republicanism cannot survive without them.

C. Paradigm Professions and Our Society: Law and Medicine as Both Limiting Cases and Cultural Mirrors

Our paradigmatic professions, law and medicine, demonstrate that the status of a particular occupation can change over time and differ across cultures. I have argued that law and medicine, at present, meet all the basic criteria. But, conditions in our society could change in ways that would strip either of its professional status.

¹⁶³ PLINY, PLINY: A SELF PORTRAIT IN LETTERS 243 (Betty Radice trans., 1978).

¹⁶⁴ See FREIDSON, PROFESSIONALISM: THE THIRD LOGIC, *supra* note 8, at 162 n.7 ("Revolutions represent the installation of new (though often temporary) legal institutions."); *id.* at 167 n.11 ("In the case of law, popular justice has a short life.") (citing EUGENE HUSKEY, RUSSIAN LAWYERS AND THE SOVIET STATE: THE ORIGINS AND DEVELOPMENT OF THE SOVIET BAR 1917-1939, at 81-82 (1986), for the example of Lenin's abolition of the Russian bar in 1921, only to reinstate it later that same year, with particular reference to the need for defense counsel).

¹⁶⁵ WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.

¹⁶⁶ Lest the inclusion of Jacksonian democracy in this litany of populist excesses seem to mark a lapse into hyperbole, or worse, remember the Seminole Wars and the Cherokee removals. With respect to Marshall's opinion for the Cherokees' position in *Worcester v. Georgia*, 31 U.S. 515 (1832), Old Hickory may never actually have said, "Justice Marshall has made his decision; now let him enforce it," but he certainly seems to have acted on the principle. See SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN 428 (2005) (noting that, when "the Cherokee soon found themselves in need of federal protection" from illegal incursions and physical violence and advised the President of their plight, "Jackson did nothing").

But pressing our analysis of the professions back to the critical social functions that they serve brings us to another, and very different, set of limits. Even as medicine and law provide the paradigms of our two subspecies of neo-classical professions, the caring and the public, so these professions also provide limiting cases of the kind of society that they serve. A society could, quite conceivably, cease to treat concern for individual outcomes in any kind of service-delivery as warranting special care. So, too, a society could cease to treat concern for the public good beyond the aggregation of private preferences as warranting special commitment. But either of these societies would be dramatically different from our own. The society that needed no special virtue of care would be much less individualistic than ours;¹⁶⁷ the society that needed no special virtue of public commitment would be much less republican than ours.¹⁶⁸

In pressing our analysis of the professions back to the critical social functions that they serve, and the virtues that their practitioners need in order to perform those functions, we thus come round to a better understanding not just of our professions, but also of our society. Ours is a society that places a particularly high premium on the health of individual citizens; ours is also a society in which the will of the majority, at least as expressed in ordinary legislation, is subordinate to a vision of the public good entrusted to professionals whose function is, in essential part, to preserve and extend that good as traditionally understood.¹⁶⁹ Certain virtues, care for individual patients and commitment to the public good, are essential for our two paradigm professions to serve that kind of society.

This raises, in turn, another fundamental point about that society itself: For it to function well, to guarantee the kind of care and public good to which it is committed, it must assign the relevant professionals the appropriate roles and ensure that the practitioners of those professions have what they need adequately to perform those roles. Even as our society depends on its paradigm professions for the protection of its core values, so those paradigm professions depend on our

¹⁶⁷ See LARSON, *supra* note 4, at 19 (“The general ideological climate of Western societies has favored the functions medicine claims to serve; the value of individual life, rooted in the Judaeo-Christian religious tradition, and individualism in general, have formed one of the strongest ideological dimensions of the post-feudal world.”).

¹⁶⁸ See letter from John Adams to William Tudor (Nov. 17, 1775), in REVOLUTIONARY WRITINGS 1775-1783, at 33 (Gordon Wood ed., 2011) (“Virtue, my young Friend, Virtue alone is or can be the Foundation of our new Governments, and it must be encouraged by Rewards, in every Department civil and military.”).

¹⁶⁹ *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (opinion by Justice Frankfurter discussing the concept of “ordered liberty”).

broader society to ensure them their proper place. Our society is, of course, a liberal democracy, not Plato's Republic; we are ruled, not by Platonic guardians, but by the people's elected representatives and officials. Our fundamental law bans titles of nobility;¹⁷⁰ we cannot have kings, much less philosopher kings. But our constitution also establishes a republican form of government, even as it guarantees that form of government to the states.¹⁷¹ Our highest law, the Constitution itself, is in the hands of judges,¹⁷² and our judges must therefore be scholars of the values our culture holds most dear. If our lawyers are to understand them and influence them, they must be scholars, too.

If our democracy is to be truly liberal, constrained by principles beyond the will of any current majority, then our liberalism must be shaped by the demands of our professions. And so it is. Our society's fundamental law includes *Roe v. Wade*, with its guarantee that access to medical procedures essential to fundamental human rights cannot be legally denied, even as *Roe v. Wade* rests on *Marbury v. Madison*, with its echoing declaration that is the fundamental province of the courts to say what the law ultimately is: what it allows, and forbids, and requires.

CONCLUSION: FROM THE VIRTUES OF THE PROFESSIONS TO THE VALUES OF THE REPUBLIC

Our society, as Socrates noted in the passage from *The Gorgias*¹⁷³ that I quoted at the outset, values, very near its foundations, health and justice. Under the conditions of our world, even more than his, those twin values imply two paradigmatic professions, medicine and law, one devoted to extraordinary care in attending the health of individuals, the other committed to tempering private interests with concern for the public good.

Contrary to previous accounts, both functionalist and revisionist, this account of professionalism in law and medicine has argued that only public-protective professions like law essentially entail the wedding of university-based technical knowledge with broad cultural education in the liberal arts. Lawyers need to know our culture's deepest values in order to form the counterweight to both popular majorities and plutocratic minorities that is the critical liberal constraint on our

¹⁷⁰ U.S. CONST. art. 1, § 9.

¹⁷¹ U.S. CONST. art. 4, § 4.

¹⁷² See *Marbury v. Madison*, 5 U.S. 137 (1803).

¹⁷³ See *supra* note 1, and accompanying text.

political regime;¹⁷⁴ doctors do not need that knowledge to provide even the most scrupulous care to their individual patients.

But this account also implies a reason why others, not only scholars of the professions but also members of the medical profession themselves, have insisted on liberal education for doctors. Although liberal education is not essential to the proper exercise of doctors' defining professional virtue, it has a value in our society that is both deeper and broader. The value of liberal education is deeper, because it is not just the foundation of the virtue of any particular profession, no matter how essential that profession to our society. Liberal education is, rather, the foundation of what we take to be a fully realized human character, the fullest possible knowledge of oneself and one's world. To paraphrase Socrates, it is what we need both to know ourselves and to live an examined life.

The neo-classically republican element of our society teaches us to see wisdom not just as the essential virtue of those who make and apply our law, but as the highest human virtue as well. A neo-classical republic must ensure that its lawyers are liberally learned, in order to serve justice. But that justice entails the maximum cultivation of all human talent. And so, in a proper republic, even as we as a society need our doctors to be careful, in order to be good doctors, we will also want them to be liberally learned, to make them the best possible people. And this societal norm has implications at the personal level as well. We as individuals want those who hold our lives in their hands to be wise as well as careful, even as those who do not need liberal learning in their professional lives nonetheless value it in their personal lives.

The value of liberal education is also broader than any other value served by even the most important profession, for it is the ultimate guarantor of truly republican self-government. In a proper republic, not just lawyers and judges, but every full citizen, would both know the public good and be committed to its advancement. The revolutionary excesses of the French Jacobins have made "Republic of Virtue" something of a byword; it was our own Federalists, no Francophiles and certainly no radicals, who said, "The aim of every political Constitution is or ought to be first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue the common good of the society; and in the next place, to take the most effectual

¹⁷⁴ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chicago Press 2000) (1835).

precautions for keeping them virtuous, whilst they continue to hold their public trust.¹⁷⁵

And this is the final lesson we can draw from our paradigm professions for our fuller society. If our society is to be meaningfully, not just nominally, republican, it must do more than simply allow every citizen to express his or her personal preferences in public fora and political elections. It must give every citizen the fullest possible opportunity to gain the kind of cultural knowledge and self-understanding that is the essential foundation of the legal profession. We need doctors to be liberally educated, not because our health depends upon them as professionals, but because our republic depends upon them as citizens. And this implies, ultimately, that the rulers of our Republic must be both as caring as doctors and as learned as lawyers:

Therefore the first and weightiest commandment of God to the rulers is this – that more than aught else they be good guardians of and watch zealously over the offspring.¹⁷⁶

¹⁷⁵ THE FEDERALIST NO. 57, at 370 (Alexander Hamilton or James Madison) (Modern Library ed., 1937).

¹⁷⁶ PLATO, THE REPUBLIC 44 (A.D. Lindsay trans., Everyman's Library ed. 1992).