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## Legal Malpractice in a Changing Profession: The Role of Contract Principles

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# LEGAL MALPRACTICE IN A CHANGING PROFESSION: THE ROLE OF CONTRACT PRINCIPLES

VINCENT R. JOHNSON\*

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#### I. ETHICAL CHALLENGES IN A CHANGING PROFESSION

In little more than four decades,<sup>1</sup> the field of American legal ethics has been transformed from an unimportant backwater into a mighty river of legal principles that drives the practice of law in countless respects. Today, this complex matrix of substantive provisions and enforcement mechanisms ensures, to a great extent, that clients are protected from unnecessary harm, that lawyers are safeguarded from improper accusations,<sup>2</sup> and that the provision of legal services is consistent with the public interest.

However, the fabric of legal ethics is threatened by a looming transformation of the legal profession.<sup>3</sup> That potential restructuring may revolutionize the delivery of legal services by replacing what is essentially a unified<sup>4</sup> American legal profession that has monopoly powers and corresponding responsibilities with a diverse range of legal services providers, some of whom may not be lawyers at all,<sup>5</sup> others of whom may not be fully licensed,<sup>6</sup> and none of whom will enjoy an exclusive franchise. Such changes, if they come to pass, will undercut the foundations upon which the law of modern legal ethics is founded. It will then be necessary to reconstitute an effective legal ethics regime for a world of disaggregated legal services.

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<sup>1</sup> See *infra* Part II.

<sup>2</sup> For example, the legal malpractice principles under the law of negligence protect lawyers from liability based on the reasonable exercise of judgment. A lawyer cannot be held liable merely because some other lawyer would have charted a different course in dealing with complex facts or uncertain legal principles. A lawyer may be found to be negligent only if the lawyer did what no reasonable lawyer could have done or failed to do what every reasonable lawyer was obliged to do. See *Cosgrove v. Grimes*, 774 S.W.2d 662, 664-65 (Tex. 1989) (“If an attorney makes a decision which a reasonably prudent attorney could make in the same or similar circumstance, it is not an act of negligence even if the result is undesirable.”).

<sup>3</sup> See *infra* Part III.

<sup>4</sup> The legal profession in other parts of the world is different. See Steven Alan Childress, *Lawyers*, in 2 *ENCYCLOPEDIA OF LAW & SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 930, 934 (David S. Clark ed., 2007) (“Many countries do not share any broad and unifying conception of the legal profession or do not have a clear and formal definition of legal practice as does the United States.”).

<sup>5</sup> See Thomas D. Morgan, *Professional Malpractice in a World of Amateurs*, 40 *ST. MARY’S L.J.* 891, 892-94 (2009) (arguing that the “increase in nonlawyer delivery of what have traditionally been seen as legal services . . . is a trend that . . . is destined only to accelerate” and providing examples).

<sup>6</sup> See Debra Cassens Weiss, *In Washington State, “Legal Technicians” Will be Allowed to Help Civil Litigants*, A.B.A. J., June 19, 2012 (“Washington State’s top court has approved a new rule [effective September 1, 2012] allowing licensed legal technicians to help civil litigants navigate the court system.”).

*A. Basic Assumptions and Established Practices*

The current model of American legal ethics is animated by three important assumptions, each of which is now under attack. The first is that legal services are ordinarily provided only by fully licensed lawyers.<sup>7</sup> The second is that lawyers are members of an exclusive profession<sup>8</sup> which is subject to special obligations both to clients and the public.<sup>9</sup> And the third is that entry into the legal profession requires extensive educational preparation during which all new lawyers are introduced to fundamentals, including the rules of professional responsibility.

Today, all lawyers in any American jurisdiction must comply with a mandatory ethics code,<sup>10</sup> which regulates both on-the-job and off-the-job conduct.<sup>11</sup> With

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<sup>7</sup> One indication that the legal profession's monopoly over the provision of legal services is being challenged is the difficulty that the organized bar encounters in attempting to enforce provisions against the unauthorized practice of law. *See, e.g.*, *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956, 956 (5th Cir. 1999) (vacating an injunction against the sale of Quicken Family Lawyer software because, after the trial court ruled, the Texas legislature passed a statute "providing that 'the practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney"); *see also* THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 77-78 (2010) ("When the State Bar of Texas tried to enjoin accounting firm Arthur Andersen from providing what were arguably legal services, . . . the Bar ultimately had to give up for lack of funds."); Jonathan J. Bates, *Say No to High Court Endorsement of Pro Se Forms*, *TEX. LAW.*, Aug. 6, 2012 (arguing that "the Texas Supreme Court should not give its imprimatur to legal forms for pro se litigants").

<sup>8</sup> *See* MORGAN, *supra* note 7, at 20 (asserting that the "use of the idea of a 'profession' to understand the world of lawyers obstructs clear thinking about what lawyers actually do and how they are likely to have to respond to the world they face"); *id.* at 21 ("[L]awyers in America are not now a profession and—over most of their history—they never have been one"); *id.* at 55-56 ("[T]he American view of law as a profession is at most a little more than a century old and, more realistically, a project of the 1950s and 1980s"). *But see* Neil Hamilton, *The Profession and Professionalism are Dead?: A Review of Thomas Morgan, the Vanishing American Lawyer (2010)*, 20 *PROF. LAW.* 14, 14 (2010) (challenging the idea that the concepts of "profession" and "professionalism" are dead, even though "we could do a great deal better in realizing them").

<sup>9</sup> *See* Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 *ST. MARY'S L.J.* 909, 966 (2009) (arguing that "what lawyers do is a 'limited agency,' which requires serving constituencies other than clients and striking a balance between loyalty to clients and loyalties to the legal system and the public.").

<sup>10</sup> *See* Business Organizations, Professions, Rules of Professional Responsibility (Statutes) (Thompson Reuters/West May 2012), available at [https://a.next.westlaw.com/Link/Document/Blob/Iaa42991f5ae711de9b8c85032338889.pdf?targetType=surveys-statpdf&originati onContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentImage&contextData=\(s c.History\\*oc.Search\)](https://a.next.westlaw.com/Link/Document/Blob/Iaa42991f5ae711de9b8c85032338889.pdf?targetType=surveys-statpdf&originati onContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentImage&contextData=(s c.History*oc.Search)) (offering a detailed fifty-one jurisdiction compilation).

<sup>11</sup> *See* Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 *ST. MARY'S J. LEGAL MALPRACTICE & ETHICS* 1, 6 (2011) ("Professional responsibility rules can effectively be divided into two categories: rules that apply to lawyers when they are acting in the role of lawyer, and rules that apply to all lawyers at all times, regardless of whether those lawyers are engaged in the practice of law.").

limited immunities,<sup>12</sup> those same lawyers are also subject to malpractice liability under basic legal standards,<sup>13</sup> such as the principles of negligence<sup>14</sup> and fiduciary duty.<sup>15</sup> There are other enforcement mechanisms such as fee forfeiture,<sup>16</sup> civil sanctions,<sup>17</sup> criminal penalties,<sup>18</sup> and exacting judicial scrutiny of lawyer-client

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<sup>12</sup> For example, lawyers who represent criminal defendants are largely immunized from malpractice liability by the rule that requires a convicted client to prove exoneration or innocence as a condition to suing for malpractice. See Vincent R. Johnson, *The Unlawful Conduct Defense in Legal Malpractice*, 77 UMKC L. REV. 43, 63-69 (2008).

In virtually all states, lawyers enjoy absolute immunity for communications that are made in the regular course of judicial proceedings. Cf. *Bochetto v. Bigson*, 860 A.2d 67, 72-73 (Pa. 2004) (holding that the publication of material in an allegedly defamatory complaint filed with a trial court was absolutely privileged, but that the faxing of a copy of the complaint to a news reporter was only potentially qualifiedly privileged).

In some jurisdictions, public defenders are often protected from malpractice liability by some form of absolute or qualified statutory immunity. See, e.g., *Osborne v. Goodlet*, No. M2003-03118-COA-R3-CV, 2005 WL 1713868, at \*1 (Tenn. Ct. App. July 22, 2005) (finding that a public defender was absolutely immune under a state statute which provided that “[s]tate officers and employees are absolutely immune from liability for acts or omissions within the scope of the officers or employee’s office or employment, except for willful, malicious, or criminal acts or omissions or for acts or omissions done for personal gain” and under another statute which provided that “[n]o court in this state has any power, jurisdiction or authority to entertain any suit against . . . any public defender . . . for any act of negligence”); see also *Powell v. Wood Cnty. Comm’n*, 550 S.E.2d 617, 620-21 (W. Va. 2001) (holding that a statute conferring immunity on court-appointed criminal defense counsel logically required a county to indemnify appointed counsel with respect to costs incurred in defending against a malpractice claim).

<sup>13</sup> But see Leigh Jones, *Survey Maps Malpractice Law from Sea to Shining Sea*, NAT’L L.J., July 13, 2012 (“All states recognize a claim of legal malpractice as a claim sounding in tort, contract or both—except Alabama. In Alabama, a claim for legal malpractice exists only under statute, the Alabama Legal Services Liability Act.”).

<sup>14</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 48 (2000) (discussing professional negligence).

<sup>15</sup> See, e.g., *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 199 (Tex. 2002) (“Our courts have long recognized that certain fiduciary duties are owed by . . . an attorney to a client.”). See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) (discussing breach of fiduciary duty).

<sup>16</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000) (discussing fee forfeiture based on “clear and serious violation of duty” to a client). But see Jeffrey A. Webb & Blake Stribling, *Ten Years After Burrow v. Arce*, 40 ST. MARY’S L.J. 967, 972 (2009) (“[F]orfeiture, while sought with increasing regularity in recent years, has not actually been awarded in the vast majority of those instances.”).

<sup>17</sup> See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 431-32 (8th ed. 2009) (discussing the dramatic increase in judicial sanctions of lawyers over the past three decades because of the 1983 implementation of Rule 11 of the Federal Rules of Civil Procedure); see also Stephen D. Brody & David K. Roberts, *The Ethical Difficulties of Court-Ordered Inspections of Social Networking Accounts*, in ETHICS IN CONTEXT: SUMMER 2012 ch. 12, at 263 (Practicing Law Institute (PLI) June 2012) (discussing a Virginia case where an attorney and his client were sanctioned for intentionally deleting damaging

contracts<sup>19</sup> and transactions.<sup>20</sup> It is nevertheless indisputable that professional discipline and malpractice lawsuits form the essential backbone of modern legal ethics.

If the practice of law fragments and the now-unified profession is replaced by diverse specialized legal callings, it will be difficult or impossible for discipline and malpractice to play the same critical roles in guiding the conduct of, and holding accountable, the persons who serve clients as legal advisors and learned intermediaries. This is true because in a less unified professional world it will be more difficult to frame an appropriate standard of care for malpractice actions, less likely that there will be comprehensively developed ethics codes for each variety of practice, and harder to insist that the practice of law is a fiduciary, rather than a market-place, endeavor.<sup>21</sup>

### B. Professional Accountability and Regulatory Effectiveness

The basic architecture of American legal ethics is now so well established and firmly in place<sup>22</sup> that it is difficult to consider that the entire structure may be in

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Facebook photographs that the opposing party had requested); *Lester v. Allied Concrete Co.*, 80 Va. Cir. 454 (Ct. App. 2010) (ordering monetary sanctions).

<sup>18</sup> See Chad Bray, *Ex-NY Lawyer Pleads Guilty in Client Theft*, WALL ST. J. BLOG (May 3, 2012, 5:38 PM), <http://blogs.wsj.com/law/2012/05/03/ex-ny-lawyer-pleads-guilty-in-client-theft/> (discussing a guilty plea arising from theft of nearly \$140,000 from long-time clients).

<sup>19</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 18 (2000) (discussing client-lawyer contracts); see also James M. Parker, Jr. & J.K. Leonard, *Why Your Secretary is Really Worth a Million Dollars: Exploring the Harsh Penalty for Not Proofreading Your Fee Agreements in Anglo-Dutch Petroleum v. Greenberg Peden*, 2 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 104, 132 (2012) (discussing whether, in the context of lawyer fee agreements, the requirement of “reasonable clarity actually means something closer to strict liability”).

<sup>20</sup> See, e.g., *Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007) (holding that business transactions with clients that are not standard commercial dealings are presumptively fraudulent); *McMahon v. Eke-Nweke*, 503 F. Supp. 2d 598 (E.D.N.Y. 2007) (denying summary judgment to a lawyer, in a client’s breach of a fiduciary duty action, because there was a question of fact as to whether the client had been informed of all material circumstances related to the lease of space by the client to the lawyer); see also Vincent R. Johnson, “Absolute and Perfect Candor” to Clients, 34 ST. MARY’S L.J. 737, 772 (2003) (indicating that business transaction between a lawyer and client “will not survive scrutiny unless the lawyer proves that the highest standards of disclosure and fair dealing were observed.”).

<sup>21</sup> See Part IV.B.

<sup>22</sup> For example, there are no less than twenty textbooks on attorney professional responsibility currently published by the five major law book presses (Aspen (Wolters Kluwer), Carolina Academic Press, Foundation Press, LexisNexis, and West). While some authors uniquely define the relevant substantive material (see, e.g., DANIEL R. COQUILLETTE, R. MICHAEL CASSIDY & JUDITH A. MCMORROW, *LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY* (2d ed. 2010) (focusing on moral development and virtue)), the topics covered in most textbooks suggest that there is an established “canon” that defines what constitutes the law of professional responsibility (which includes, among a host of widely shared topics, conflicts of interest, confidentiality, competence, client perjury, and attorney disclosure obligations).

jeopardy. Moreover, it is hard to doubt the durability of the current legal ethics regime because the relevant rules and processes seem to work reasonably well, probably better than at any point in American history,<sup>23</sup> and often better than in other countries.<sup>24</sup>

Today, in the United States, errant lawyers routinely are held accountable for their misconduct.<sup>25</sup> Aggrieved clients have a fair chance at compensation via actions for damages or restitution,<sup>26</sup> if they have meritorious claims.<sup>27</sup> Moreover, the legal system generally operates honestly and in accordance with established legal principles. Judicial decisions are usually based on legitimate factors aired in

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<sup>23</sup> Cf. David Gialanella, *Technology Credited with Hike in Disposition of Ethics Cases*, N.J. L.J., July 6, 2012 (“The [New Jersey] Disciplinary Review Board adjudicated and docketed more cases in 2011 than it had in any year since the mid-2000s, thanks largely to increased technological efficiency.”).

<sup>24</sup> See, e.g., Katarina Lewinbuk, *Perestroika or Just Perfunctory? The Scope and Significance of Russia’s New Legal Ethics Laws*, 35 J. LEGAL PROF. 25, 77-79 (2010) (discussing obstacles to an effective legal ethics regime in Russia); William P. Alford, *Of Lawyers Lost and Found: Searching for Legal Professionalism in the People’s Republic of China*, in RAISING THE BAR: THE EMERGING LEGAL PROFESSION IN EAST ASIA 287, 292-93 (William P. Alford ed., 2007) (discussing widespread corruption of legal processes in China and noting that “the expansion of the Chinese bar has been accomplished by increasing corruption, with lawyers at times a conduit for, if not the instigators of, such behavior”).

<sup>25</sup> See Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROF. 209 (2011) (offering detailed state-by-state statistical information for the years 1998 through 2008 on grievances filed, resulting formal charges, and discipline imposed); see also STATE BAR OF TEX. COMM’N FOR LAWYER DISCIPLINE, ANNUAL REPORT: JUNE 1, 2010—MAY 31, 2011 (2011), available at <http://www.texasbar.com/Content/NavigationMenu/ForLawyers/GrievanceInfoandEthicsHelp/line/CDC-AnnualReport.pdf> (gathering statistics on lawyer discipline in Texas).

<sup>26</sup> The completion of the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (2011) seems certain to invigorate thinking about remedies for lawyer misconduct. “Restitution is a remedy which measures the plaintiff’s entitlement to redress based not on what the plaintiff lost (damages), but on what the defendant improperly gained.” VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW IN A NUTSHELL 260 (2011).

<sup>27</sup> Of course, the obstacles to proving that one has a meritorious malpractice action are formidable, including the difficult “trial-within-a-trial” causation requirement. See *Suder v. Whiteford, Taylor & Preston, LLP*, 992 A.2d 413, 420 (Md. 2010) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 53b (2000), which provides that “[a]ll the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff’s former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action.”); see also Leigh Jones, *Survey Maps Malpractice Law from Sea to Shining Sea*, NAT’L L.J., July 13, 2012 (quoting the editor of *A 50-State Survey of Legal Malpractice Law*, published by the American Bar Association, as stating that “in virtually every state, the element of causation is determined by the case-within-a-case test . . . . [w]hile Louisiana employs that test, the burden is placed on the attorney to prove that the plaintiff would not have prevailed. It seemingly shifts the burden to the attorney to disprove causation.”); Jeffrie D. Boysen, Comment, *Shifting the Burden of Proof on Causation in Legal Malpractice Actions*, 1 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 308, 311 (2011) (discussing a “significant minority of jurisdictions” that allow the burden of proof on causation to shift under some circumstances).

adversarial settings, not on personal relationships,<sup>28</sup> bribes,<sup>29</sup> secret communications,<sup>30</sup> or political manipulation.<sup>31</sup> The public expects lawyers<sup>32</sup> and

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<sup>28</sup> See Vincent R. Johnson, *America's Preoccupation with Ethics in Government*, 30 ST. MARY'S L.J. 717, 720-23 (1999) (contrasting American practices with the Chinese tradition of using "guanxi"—gifts and special relationships—to influence official decisions); see also *In re Hill*, 8 S.W.3d 578 (Mo. 2000) (suspending a judge who should have recused himself from a case involving daughter of a mayor, with whom judge had a dispute); *In re Eplin*, 416 S.E.2d 248 (W. Va. 1992) (suspending a judge who accorded special treatment to a criminal defendant in order to gain the favor of an elected official); Mary Pat Gallagher, *Judge Who Helped Girlfriend in Legal Case Denies Wrongdoing*, N.J. L.J., June 25, 2012 (describing ethics charges against a judge).

<sup>29</sup> But see Assoc. Press, *More Judicial Corruption Emerges*, SAN ANTONIO EXPRESS-NEWS, July 2, 2012, at A12 ("A dozen people, half lawyers, have been indicted as part of a federal probe into what some observers call the most wide spread case of judicial corruption they've ever seen.").

<sup>30</sup> See CODE OF JUDICIAL CONDUCT R. 2.9 (2012) (prohibiting ex parte communications); *In re Henriksen*, C.J. Nos. 1 & 2, 2011, 2012 WL 1672242 (Del. May 3, 2012) (upholding removal of a judge based in part on improper ex parte communications); *In re Cotton*, 939 N.E.2d 619, 623 (Ind. 2010) (suspending an attorney who made an improper ex parte communication and engaged in conduct prejudicial to the administration of justice); see also Vincent R. Johnson, *Corruption in Education, A Global Legal Problem*, 48 SANTA CLARA L. REV. 1, 34-35 (2008) (discussing the dangers posed by ex parte communications in academic contexts).

<sup>31</sup> See Vincent R. Johnson & Stephen C. Loomis, *The Rule of Law in China and the Prosecution of Li Zhuang*, 1 CHINESE J. COMP. L. 66, 72-76 (2013) (discussing the prosecution of a prominent lawyer in China); but see JUSTICE IN JEOPARDY, 2003 REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 31-36 (July 2003), available at <http://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf> (describing "a number of recent episodes in which altercations between the political branches and their respective judiciaries have culminated in threats to the judiciary's budget or jurisdiction or in other proposals to exert greater control over the judiciary as an institution"). For a comparative perspective, see Vincent Robert Johnson, *The French Declaration of the Rights of Man and Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris*, 13 B. C. INT'L & COMP. L. REV. 1, 22-24 (1989) (describing how the abuses perpetrated by the Revolutionary Tribunal of Paris during the French Revolution were caused in part by political interference with the performance of judicial duties).

<sup>32</sup> See, e.g., *Disciplinary Counsel v. Longino*, 945 N.E.2d 1040 (Ohio 2011) (ordering disbarment of an attorney for misappropriating settlement funds, forging signatures, and supplying false information).

judges<sup>33</sup> who fall short of the standards of conduct to be held accountable,<sup>34</sup> and typically those expectations are not disappointed.<sup>35</sup>

### C. *New Realities*

The question then is this: What happens to American legal ethics if the foundational assumptions change? How will clients be protected, and how will the administration of justice operate legitimately, if legal services are not only provided by lawyers, if legal services providers are not treated as members of the profession, or if the practice of law is not preceded by extensive professional education? Can anything replace disciplinary and malpractice actions as vehicles for deterring bad practices and holding malefactors accountable?

This Article examines the options for restructuring legal ethics if the American legal profession changes in fundamental ways that make it difficult or impossible for negligence and fiduciary-duty malpractice principles and legal ethics codes to play the same important roles they currently perform.<sup>36</sup> Part II briefly discusses the recent history and current state of American legal ethics. Part III considers why and how the American legal profession may fundamentally change in the near future, with particular reference to Professor Thomas D. Morgan's recent book, *The Vanishing American Lawyer*.<sup>37</sup> Part IV evaluates the main nonprofessional option for regulating the conduct of legal services providers who are either not fully licensed or not lawyers at all, namely the legal principles governing contracts. Part V offers concluding thoughts about whether those principles, together with laws against deception (tort actions for fraud and negligent misrepresentation and deceptive trade practices laws), can effectively ensure that diverse legal services providers act in a manner consistent with the best interests of clients and the proper administration of justice.

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<sup>33</sup> See, e.g., Mary Pat Gallagher, *Discipline Sought for Judge Who Acquitted Acquaintance on Ticket*, N.J. L.J., July 12, 2012 (reporting that a former municipal judge faced "censure and banishment from the bench for allegedly fixing a traffic ticket for his daughter's ex-teacher").

<sup>34</sup> See David Gialanella, *N.J. Attorney Ethics Complaints Keep on Rising*, N.J. L.J., July 31, 2012 (discussing recent statistics); see also Johnson, *supra* note 28, at 724 ("Americans today expect that the law can, should, and will be used to ensure that a level playing field in public life exists by eliminating, insofar as possible, any unfair advantage that might be gained through the use of special connections to those who exercise the power of government.").

<sup>35</sup> See, e.g., R. Robin McDonald, *Judge Parrott Retires When JQC Launches Ethics Probe*, DAILY REP., May 22, 2012 (discussing alleged abuse of the prestige of judicial office); R. Robin McDonald, *Embattled N. Georgia Magistrate Resigns*, DAILY REP., Aug. 17, 2012 (discussing a judge's resignation following an investigation into whether he distributed pre-signed, blank arrest and search warrants to police officers); see also R. Robin McDonald, *The Hot Seat: Lawyers and Judges in Trouble*, WWW.LAW.COM (July 18, 2012), <http://www.law.com/jsp/article.jsp?id=1202561519667&slreturn=20120620151747> (collecting numerous news stories about allegedly unethical conduct by lawyers and judges).

<sup>36</sup> See generally Vincent R. Johnson, *The Virtues and Limits of Codes in Legal Ethics*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 25, 29-40 (2000) (discussing how legal ethics codes protect clients, foster equality of treatment, promote ethical discourse, perform an important declarative function, and facilitate re-examination of ethical choices).

<sup>37</sup> MORGAN, *supra* note 7.

## II. THE RISE AND REACH OF THE CURRENT REGIME

A. *The Clark Report and Watergate*

It is important to remember that the modern American legal ethics is a relatively recent invention, not even fifty years old.<sup>38</sup> The revolution began in earnest with the work of an American Bar Association committee chaired by former Supreme Court Justice Tom C. Clark.<sup>39</sup> In 1970, that committee declared that lawyer disciplinary processes were scandalously deficient and required immediate attention.<sup>40</sup> Followed soon by the Watergate Crisis, which exposed widespread lawyer wrongdoing at the highest levels of government,<sup>41</sup> the Clark Report catalyzed a professional restructuring that is still underway.<sup>42</sup> Thirty years into that process, the reform efforts reached a plateau with the American Law Institute's promulgation of the *Restatement (Third) of the Law Governing Lawyers*.<sup>43</sup> That work of professional scholarship left no doubt about the importance of legal ethics as an area of contemporary American law.

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<sup>38</sup> Of course, the roots of American legal ethics go much deeper. See 1 DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* (2d ed. 1836); GEORGE SHARSWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* (1854); see also MICHAEL S. ARIENS, *LONE STAR LAW: A LEGAL HISTORY OF TEXAS 184-87* (Gordon Morris Bakken et al. eds., 2011) (discussing the development of ethical standards in Texas); Michael S. Ariens, *Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 349-451 (2008) (discussing American legal ethics from the 1800s to early twenty-first century); Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1454 (2004) ("The basic elements of the medieval provisions—fairness in litigation, competence, loyalty, confidentiality, reasonable fees, and public service—continue to be the central principles of modern legal ethics."); Thomas L. Shaffer & Robert F. Cochran, Jr., *"Technical" Defenses: Ethics, Morals, and the Lawyer as Friend*, 14 CLINICAL L. REV. 337, 340-45 (2007) (discussing Hoffman and Sharswood). However, until recent times, attorney standards of conduct were never broadly enforced through a wide range of legal sanctions, including those imposed by professional discipline and legal malpractice actions.

<sup>39</sup> See Vincent R. Johnson, *Justice Tom C. Clark's Legacy in the Field of Legal Ethics*, 29 J. LEGAL PROF. 33, 35 (2005) ("The Report was the starting point in a revolution which, over ensuing decades, has wholly reshaped the field of legal ethics."); see also MIMI CLARK GRONLUND, *SUPREME COURT JUSTICE TOM C. CLARK: A LIFE OF SERVICE* 249-51 (2009) (discussing the work of the Clark Committee).

<sup>40</sup> See AM. BAR ASS'N SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1* (Final Draft 1970) ("After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession.").

<sup>41</sup> See Kathleen Clark, *Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 673 (2000) (quoting former White House counsel John Dean as stating, "[H]ow in God's name could so many lawyers get involved in something like this?").

<sup>42</sup> See Mark Curriden, *The Lawyers of Watergate*, A.B.A. J. 36, 42 (2012) (quoting John Dean as stating, "When I took the elective course in ethics at law school, it was one-quarter of a credit. Legal ethics and professionalism played almost no role in any lawyer's mind, including mine. Watergate changed that—for me and every other lawyer.").

<sup>43</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000); see also AM. LAW INST., *A CONCISE RESTATEMENT OF THE LAW GOVERNING LAWYERS* (2007).

### B. *The Legal Ethics Revolution*

Today, with the benefit of hindsight, it is possible to see how thoroughly the field of legal ethics was transformed during the past half century. In vivid contrast to the era that ended in 1970, attorney professional responsibility is now the subject of required law school courses,<sup>44</sup> academic specialization,<sup>45</sup> bar examinations,<sup>46</sup> continuing education programs,<sup>47</sup> burgeoning literature,<sup>48</sup> advisory resources,<sup>49</sup>

<sup>44</sup> See Deborah L. Rhode, *Legal Ethics In Legal Education*, 16 CLINICAL L. REV. 43 (2009) (indicating that to restore public confidence in the legal profession in the aftermath of the Watergate scandal, in 1974, the American Bar Association (ABA) mandated that accredited schools “require for all students . . . instruction in the duties and responsibilities of the legal profession . . . . [Currently almost] all schools require courses in professional responsibility.”).

<sup>45</sup> Cf. Andrew M. Perlman, Margaret Raymond & Laurel S. Terry, *A Survey of Professional Responsibility Courses at American Law Schools in 2009* (2009), <http://www.legalethicsforum.com/files/pr-survey-results-final.pdf> (indicating that 66.3% of 105 respondents teaching at 77 law schools taught a course in professional responsibility at least once each academic year and that “the vast majority of respondents regularly teach professional responsibility.”).

<sup>46</sup> See *The MPRE*, NAT’L CONFERENCE OF BAR EXAM’RS, <http://www.ncbex.org/multi-state-tests/mpre/> (last visited Apr. 10, 2013) (“The MPRE is required for admission to the bars of all but three U.S. jurisdictions (Maryland, Wisconsin, and Puerto Rico.”); see also Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 FORDHAM L. REV. 1299, 1299 (2003) (“In the span of two decades, we have thus seen the flowering of a remarkable phenomenon: the establishment of a national bar examination on legal ethics in a country in which the states purportedly control bar admission.”).

<sup>47</sup> See LAWYERS MANUAL ON PROFESSIONAL CONDUCT 21:3004 (American Bar Association/Bureau of National Affairs 2010) (“All of the mandatory continuing legal education jurisdictions earmark at least one hour each year for ethics education. Some jurisdictions consider ethics and professionalism to be interchangeable; some impose a separate professional requirement.”); see also GILLERS, *supra* note 17, at 687 (2010) (indicating that “more than 40 American jurisdictions have mandatory continuing legal education (CLE) requirements . . . [and that most] jurisdictions require that two or three of these hours be in legal ethics.”).

<sup>48</sup> For example, some law journals now focus on issues of lawyer professional responsibility. These include the *Georgetown Journal of Legal Ethics*, the University of Alabama’s *Journal of the Legal Profession*, and the *St. Mary’s Journal on Legal Malpractice & Ethics*. Other law journals frequently publish articles on legal ethics topics. See Martha Pagliari, *Recent Scholarship*, AALS PROF. RESP. SEC. NEWSL., Spring 2012, at 33-37 (Professional Responsibility Section of the Association of American Law Schools (AALS)) (listing more than seventy articles published between January 1 and May 4, 2012); see also Robert M. Jarvis, *Book Review*, J. LEGAL. PROF. 111, 112 (2008) (noting that “the library of legal malpractice materials has expanded at a rapid rate during the past three decades”).

Lawyer magazines, such as the *ABA Journal*, often contain a monthly ethics column. In addition, some lawyer publications, such as *National Law Journal*, *law.com*, *New Jersey Law Journal*, and *Texas Lawyer*, devote considerable coverage to ethics issues, such as disputes between lawyers and clients, law firm breakups, and court rulings related to the practice of law.

<sup>49</sup> In many states, lawyers can obtain free advice by phone about ethical issues that arise in the practice of law. For example, in Texas, a lawyer can call a toll-free number and talk to

professional associations,<sup>50</sup> widespread news coverage,<sup>51</sup> malpractice litigation,<sup>52</sup> and vigorous professional discipline.<sup>53</sup> Moreover, in the wake of expanded civil liability for lawyers, “malpractice insurance companies became some of the most important reviewers and regulators of lawyer conduct.”<sup>54</sup>

Professional ethical prescriptions which were once merely aspirational principles for good professional deportment have been transformed into legally enforceable obligations.<sup>55</sup> Today, errant lawyers are regularly held liable for misconduct in actions seeking damages, disqualification, civil sanctions, fee forfeiture, and professional discipline. Moreover, the principles of American legal ethics reign not just at home but, in some cases, abroad. The American model of legal ethics is

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a professional who specializes in answering questions related to the disciplinary rules. *See Grievance and Ethics Information*, STATE BAR OF TEX., [http://www.texasbar.com/AM/Template.cfm?Section=Grievance\\_Info\\_and\\_Ethics\\_Helpline&Template=/CM/HTMLDisplay.cfm&ContentID=15697#toll](http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/HTMLDisplay.cfm&ContentID=15697#toll) (last visited Apr. 10, 2013) (discussing the service).

The American Bar Association offers a free service called ETHICSearch. *See* ETHICSearch, AM. BAR ASS’N., available at [http://www.americanbar.org/groups/professional\\_responsibility/services/ethicsearch.html](http://www.americanbar.org/groups/professional_responsibility/services/ethicsearch.html) (last visited Apr. 10, 2013). Available to lawyers and legal support personnel, ETHICSearch helps users promptly locate citations to relevant ABA rules, advisory ethics opinions, and other resources, usually without a cost.

<sup>50</sup> The American Bar Association’s Association of Professional Responsibility Lawyers (APRL) operates an active listserv and regularly holds continuing education conferences that draw attendees representing all segments of the professional responsibility bar and academia. *See* ASS’N OF PROF’L RESPONSIBILITY LAWYERS, <http://www.aprl.net/> (last visited Apr. 10, 2013). The National Organization of Bar Counsel (NOBC) is a professional organization of lawyers who investigate and prosecute grievances against lawyers. *See* NAT’L ORG. OF BAR COUNSEL, <http://www.nobc.org/> (last visited Apr. 10, 2013). *See generally* *Overview*, AM. BAR ASS’N CTR. FOR PROF’L RESPONSIBILITY, [http://www.americanbar.org/groups/professional\\_responsibility/resources/professionalism/professionalism\\_codes.html](http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html) (last visited Apr. 10, 2013) (providing links to prominent legal organizations that have adopted professionalism standards, creeds, codes, and policies).

<sup>51</sup> *See, e.g., Big-Time Lawyer Who's Imprisoned for Keeping a Teen Sex Slave Suspended From Practice*, BUS. INSIDER, July 12, 2012 (discussing a New York lawyer who worked in Moscow, Russia); John Sullivan, *In New Jersey, Rogue Lawyers are on the Rise*, N.Y. TIMES, Oct. 19, 2003, at 4 (“To many, the words legal and ethics fit together like an elephant in a bikini, but state courts take attorney discipline seriously.”); Duff Wilson, *Prosecutor in Duke Case Disbarred by Ethics Panel*, N.Y. TIMES, June 17, 2007 (discussing the necessity of disbarment).

<sup>52</sup> *See* AM. BAR ASS’N, PROFILE OF LEGAL MALPRACTICE CLAIMS: 2004-2007 (2008) (offering a statistical analysis of legal malpractice claims).

<sup>53</sup> *See, e.g.,* Donald R. Lundberg, *Chief Justice Randall T. Shepard: An Appreciation, Reminiscence and Retrospective*, RES GESTAE, Jan./Feb. 2012, at 17 (discussing twenty-seven years of lawyer discipline in Indiana under Chief Justice Shepard).

<sup>54</sup> *See* MORGAN, *supra* note 7, at 79.

<sup>55</sup> *See* Johnson, *supra* note 28, at 746-48 (asserting that during the twentieth century the professional ethics of lawyers, judges, politicians, and civil servants shifted from being “largely personal matters,” where individuals “relied primarily upon religious beliefs and social mores,” to a very different situation where rules of conduct are “routinely codified in uniform terms and strictly enforced”).

routinely exported around the world<sup>56</sup> by a host of Rule of Law initiatives.<sup>57</sup> For example, the American Bar Association conducts legal and judicial ethics training in places as far flung as Mongolia, Moldova, Indonesia, and Morocco.<sup>58</sup> Yet, while the rise and the reach of American legal ethics are undeniable, so are the signals that there may be trouble ahead.

### III. THE GATHERING STORM IN THE LEGAL PROFESSION AND LEGAL EDUCATION

#### A. *The Tipping Point*

There is abundant evidence that the American legal profession (and with it, American legal education) is at a tipping point, which, if passed, may result in a significant re-configuration of how, and by whom, legal services are delivered. The portents are everywhere.<sup>59</sup> On the one hand, many persons believe that American law schools are graduating too many new lawyers<sup>60</sup> at too high a price<sup>61</sup> with degrees

<sup>56</sup> See James E. Moliterno, *Exporting American Legal Ethics*, 43 AKRON L. REV. 769, 769 (2010) (“Over the past decade or so, a massive exportation of U.S. lawyer ethics law, primarily to emerging democracies, has been taking place.”).

<sup>57</sup> Cf. Vincent R. Johnson, *The Rule of Law and Enforcement of Chinese Tort Law*, 34 T. JEFFERSON L. REV. 43, 45-46 (2012) (noting that today “volunteers in nongovernmental programs, such as those conducted by the American Bar Association, the Open Society Institute, and the Salzburg-based Center for International Legal Studies, fan out across the globe to build the Rule of Law.”).

<sup>58</sup> See *ABA Rule of Law Initiative*, AM. BAR ASS'N, [http://www.americanbar.org/advocacy/rule\\_of\\_law.html](http://www.americanbar.org/advocacy/rule_of_law.html) (last visited Apr. 10, 2013) (discussing programs in foreign countries).

<sup>59</sup> See Karen Sloan, *One More Task Force on the Legal Profession's Problems*, NAT'L L.J., Aug. 8, 2012 (describing an American Bar Association task force to examine changes “roiling the law profession and legal education”); Lauren K. Robel, *American Association of Law Schools Presidential Address 2012*, AALS NEWS, Feb. 2012, at 1 (A Quarterly Publication of the Association of American Law Schools (AALS)) (reporting that nine of the top ten law school news stories of 2011 “were arrayed along a fairly narrow spectrum from dreadful to horrible: breaches of data integrity; calls for Congressional hearings about law school debt or graduate unemployment; declining applications; high and rising law school costs; lawsuits by graduates; and claims that legal academics . . . neglect to teach their students how to practice law”).

<sup>60</sup> See Steven J. Harper, *The Next Debt Crisis*, AM. LAW DAILY, July 27, 2012 (asserting that “the nation’s law schools are turning out more than twice the number of lawyers as there are law jobs”); Lincoln Caplan, Editorial, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 14, 2012 (opining that “law schools . . . have been churning out more graduates than the economy can employ”); see also MORGAN, *supra* note 7, at 80 (“Over the past thirty-five years, the American bar has grown more rapidly . . . than in any comparable-length period in history.”). But see Carole Silver, *Book Review*, 61 J. LEGAL EDUC. 691, 691 (2012) (noting that “[c]ritics charge that law school is too expensive, that the three years required to earn the typical J.D. degree is too long, and that law schools are admitting too many students,” but arguing that, viewed from outside the U.S., American legal education is a model for reform).

<sup>61</sup> See Karen Sloan, *Law School—Still a Dodgy Investment, Analysis Suggests*, NAT'L L.J., Aug. 3, 2012 (quoting Vanderbilt University law professor Herwig Schlunk as stating that today “[l]aw school is a very risky (and expensive) investment”); Karen Sloan, *Think Law School's Expensive? You Don't Know the Half of It*, NAT'L L.J., May 2, 2012 (detailing projections of student loan debt); Karen Sloan, *It Gets Worse—Organization Underestimated*

leading to too few jobs.<sup>62</sup> On the other hand, practicing lawyers, including nascent ones laboring under mountains of student loan debt,<sup>63</sup> must compete not only with the endless supply of American lawyers<sup>64</sup> and other professionals (e.g., accountants<sup>65</sup> and real estate brokers<sup>66</sup>), but with various entities (e.g., software companies<sup>67</sup> and

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*Law School Debt*, NAT'L L.J., May 4, 2012 (discussing law schools that "low-balled the cost-of-living figures").

<sup>62</sup> See Karen Sloan, *ABA: Only 55 Percent of Law Grads Found Full-Time Law Jobs*, NAT'L L.J., June 18, 2012 ("Slightly more than half of the class of 2011—55 percent—found full-time, long-term jobs that require bar passage nine months after they graduated."); see also Karen Sloan, *A Dismal Job Market for Law Grads*, NAT'L L.J., June 7, 2012 ("Employment rates for the law school class of 2011 hit an 18-year low."); Ashby Jones, *New Lawyers, Seeking Jobs, are Advised to Think Small*, WALL ST. J., June 22, 2012 (noting that jobs "have been hard for law graduates to land in recent years due to a nationwide glut of lawyers and a slump in the legal industry since the 2008 financial crisis."); David Gialanella, *U.S. Law School Applications Fall as Legal Job Opportunities Seen Waning*, N.J. L.J., Apr. 10, 2012 (quoting Wendy Margolis of the Law School Admissions Council as suggesting that the weak legal "job market and economy help explain the downtrend in law school applications"); cf. David Gialanella, *Uncertainty Leads More Firms to Abandon Summer Programs*, N.J. L.J., May 25, 2012 (discussing firms electing to jettison summer associate positions).

The slow down in the American legal job market is similar to problems in other countries. Even in China, "college graduates are having trouble finding jobs." *Beijing Model Under Stress, China Lacks a Way to Turn Discontent into Mandate for Reform*, WALL ST. J., June 13, 2012.

<sup>63</sup> See David Segal, *For 2nd Year, a Sharp Drop within Law School Entrance Tests*, N.Y. TIMES, Mar. 19, 2012 (noting the "spreading view that the legal market in the United States is in terrible shape" and observing that "many new lawyers are struggling with immense debt"). "American students are now more than \$1 trillion in debt for their [undergraduate and graduate] studies." Alan G. Walker, *Keeping Tuition in Reach*, READ. UNIV. BUS., June 13, 2012.

<sup>64</sup> See Caplan, *supra* note 60 ("In 2009, twice as many people passed bar exams as there were legal openings."); cf. Karen Sloan, *Starting Salaries Continue to Slide as Big Firm Opportunities Dry Up*, NAT'L L.J., July 12, 2012 (reporting a "dramatic three-year decline in starting salaries for recent law graduates").

<sup>65</sup> See Elijah D. Farrell, Note, *Accounting Firms and the Unauthorized Practice of Law: Who is the Bar Really Trying to Protect?*, 33 IND. L. REV. 599, 602 (2000) ("[S]ome in the legal profession insist that in many cases their accounting firm counterparts are already practicing law."); see also Katherine D. Black & Stephen T. Black, *A National Tax Bar: An End to the Attorney-Accountant Tax Turf War*, 36 ST. MARY'S L.J. 1, 17-23 (2004) (evaluating precedent holding that preparation of tax returns does not constitute the practice of law).

<sup>66</sup> See ARIZ. CONST. art. 26, § 1 (1962) ("Any person holding a valid license as a real estate broker or a real estate salesman regularly issued by the Arizona State Real Estate Department when acting in such capacity as broker or salesman for the parties, or agent for one of the parties to a sale, exchange, or trade, or the renting and leasing of property, shall have the right to draft or fill out and complete, without charge, any and all instruments incident thereto.").

<sup>67</sup> See STANDARD LEGAL, <http://www.standardlegal.com/> (last visited Apr. 10, 2013) (offering do-it-yourself legal forms).

outsourcing providers<sup>68</sup>) who offer law-related services or products, both in the United States and abroad.<sup>69</sup> At the same time, ever-faster modes of communication and the trend toward globalization are increasing and transforming the demands of clients and, as a result, the way that law is practiced.<sup>70</sup> As the business of law metamorphoses, lawyers face unprecedented challenges,<sup>71</sup> such as how to comply with professional obligations when client tasks are outsourced to India and other parts of the globe,<sup>72</sup> when confidential information is stored in the “cloud,”<sup>73</sup> when building a law practice is done through social networking,<sup>74</sup> when even firms without a media presence must have social media policies,<sup>75</sup> or when relegated to performing only a limited range of tasks<sup>76</sup> for clients in a world of “unbundled” legal services.<sup>77</sup>

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<sup>68</sup> Foreign outsourcing providers supply law-related services (e.g., legal document drafting and litigation assistance) and general office support (e.g., billing and document management). See generally PANGAEA3, <http://www.pangea3.com/> (last visited Apr. 10, 2013) (offering the services of Indian, U.S., and U.K. attorneys and scientists and claiming to be the “most experienced provider of high-quality legal outsourcing solutions to Fortune 1000 companies and Am Law 200 law firms”).

<sup>69</sup> See MORGAN, *supra* note 8, at 86-87 (explaining how globalization multiplies competitive pressure on lawyers and clients).

<sup>70</sup> Cf. James Podgers, *Come the Evolution: Ethics 20/20 Proposals Seek to Adapt Existing Professional Conduct Rules*, A.B.A. J., July 2012, at 26 (discussing proposals to revise professional conduct rules to account for impact of the recent technology revolution and globalization on law practice).

<sup>71</sup> See Joe Dysart, *A Discovery: Study Tech-Aided Review Before it's an Ethics Issue*, A.B.A. J., July 2012, at 32 (speculating that failure to stay current on e-discovery technology “may soon be considered an ethical violation”).

<sup>72</sup> See generally Vincent R. Johnson & Stephen C. Loomis, *United States*, in 33a COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS 283 (2012) (discussing the ethical issues related to the outsourcing of legal work from the United States).

<sup>73</sup> Cf. Catherine Dunn, *The Importance of Knowing Where in the World Cloud Data is Stored*, CORP. COUNSEL, June 7, 2012 (noting privacy and human rights implications). See generally DAVID THOMSON, *LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE* (2008) (describing the challenges and opportunities for legal education created by modern technology).

<sup>74</sup> See Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It*, 41 U. MEM. L. REV. 355, 389-98 (2010) (discussing social networking by practitioners and related ethical issues); see also Craig Estlinbaum, *Social Networking and Judicial Ethics*, 2 ST. MARY'S J. LEGAL MALP. & ETHICS 1, 28 (2012) (“Because the canons [of judicial ethics] are imprecise and subject to fact-based applications post hoc, judges must use extraordinary caution and judgment before participating in an online community.”).

<sup>75</sup> See Kenneth L. Hardison, *Avoid Social Media Pitfalls*, TRIAL, July 2012, at 28, 34 (outlining key directives “for both postings on the firm’s social media sites and employees’ personal postings that could be attributed to the firm”); see also John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 476-78 (2011) (discussing pertinent ethics opinions).

<sup>76</sup> See MORGAN, *supra* note 7, at 157 (“While firms will prefer to have clients employ several of its practice groups at once to deal with a matter, firms are likely to find themselves offering partial or ‘unbundled’ services as an alternative to traditional legal representation.”); *id.* at 158 (“Unbundling is likely to seem unsettling to lawyers who formerly did a job from

Adding to these challenges, “much of the information lawyers have traditionally sold is now freely available on the Internet.”<sup>78</sup>

Clients forced to match the low prices of international competitors in a “flattened” world<sup>79</sup> are forcing law firms to reduce the costs of legal services.<sup>80</sup> The comfortable salaries of transactional lawyers, particularly those in elite law firms, are an appealing target for business clients fixed on cutting expenses.<sup>81</sup> Developments in the Far East may hold lessons for the West. The cost-cutting pressures faced by American law firms practicing in Asia have made it “very, very hard for firms to make money in the region.”<sup>82</sup>

In the recent recession, it became increasingly necessary for large law firms to sue their clients to collect their fees.<sup>83</sup> Until lately, that extreme step was usually

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start to finish, but unbundled services will take maximum advantage of the lawyer specialization that seems likely to be inevitable.”)

<sup>77</sup> See Michele N. Struffolino, *Taking Limited Representation to the Limits: The Efficacy of Using Unbundled Legal Services in Domestic-Relations Matters Involving Litigation*, 2 ST. MARY’S J. LEGAL MALP. & ETHICS 166, 188-89 (2012) (As Professor Struffolino explains: “The tasks [in legal representation] typically include: (1) gathering facts, (2) advising the client, (3) discovering facts of the opposing party, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating, and (7) representing the client in court. . . . Unbundling can be either horizontal or vertical. Horizontal unbundling includes limiting the representation to tasks necessary to accomplish one objective in the pending matter, such as obtaining child support. Vertical unbundling occurs when the attorney is retained to perform only one or more tasks from the bundle, such as offering advice or drafting a pleading.”).

<sup>78</sup> MORGAN, *supra* note 7, at 95.

<sup>79</sup> See THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 6–7 (2005) (arguing that “the world is flat” in the sense that, in selling goods and services, businesses must compete with counterparts in other countries).

<sup>80</sup> See Alan Cohen, *Six Big Law Firms Get Serious About Legal Project Management*, N.J. L.J., Aug. 8, 2012 (discussing how clients push firms for efficiency and cost predictability).

<sup>81</sup> See Shannon Green, *Crunching Law Department Numbers to Reduce Outside Counsel Spending*, CORP. COUNSEL, June 15, 2012 (discussing a program that broadly implemented flat fees in lieu of hourly fees); “Entry” Fee, A.B.A. J., July 2012, at 33 (“Since the recession, in-house counsel have been increasingly reluctant to pay fees for entry-level associates.”).

<sup>82</sup> Anthony Lin, *Still Hungry*, ASIAN LAW., May 1, 2012 (“M&A deals are . . . usually competitively bid and handled on flat fees far lower than comparable billables on a stateside deal.”).

<sup>83</sup> See John Council, *Bonus Time? Former Client Alleges He Never Signed Contract to Pay Performance Incentive Bonus*, TEX. LAW., Apr. 11, 2012 (discussing a law firm’s claims for breach of contract, fraud, and fraudulent inducement); John Council, *BAM! Counsel Win \$21 Million in Fees From Clients Who Wouldn’t Pay*, TEX. LAW., Jan. 30, 2012, at 1 (discussing litigation involving “lawyers who did a fantastic job for a client and a client who didn’t want to pay and alleged everything in the book to get out of paying”); Brenda Sapino Jeffreys, *Texas Firms File Suits to Pursue Legal Fees*, TEX. LAW., Sept. 12, 2011 (discussing several lawsuits to collect fees); Lynne Marek, *Chicago Firm Sues Client Over \$747,500 in Fees*, NAT’L L.J., Jan. 21, 2010 (opining that “every firm has its limits” when it comes to nonpayment of fees); see also *Former Lawyer for Detroit Mayor Claims Unpaid Fees*, NAT’L L.J., Aug. 28, 2008 (discussing a lawsuit to collect fees).

avoided at all costs for fear of triggering a retaliatory legal malpractice claim.<sup>84</sup> However, many law firms have concluded that such risks must be incurred to deal with recalcitrant clients who are unwilling to pay.<sup>85</sup>

It is not fanciful to ask whether lucrative and seemingly secure portions of the American legal profession could vanish. That has happened in other fields.<sup>86</sup> In recent decades, the once vibrant Main Streets of American cities and towns were rendered obsolete by the advent of shopping centers, malls, and discount stores.<sup>87</sup> Highly paid industrial workers saw their jobs shipped overseas, as the country's manufacturing base was decimated.<sup>88</sup> The once-mighty American railroads, at least in the passenger sphere, disappeared in most places or became living anachronisms.<sup>89</sup> A corporation no less than Eastman Kodak, an erstwhile American icon, plummeted faster and farther than anyone could have imagined.<sup>90</sup> All this occurred in just a few short decades.

No one who follows current events can doubt that, in terms of economics, the world is now highly interconnected and that developments on one side of the globe can have consequences on the other.<sup>91</sup> Moreover, there is no reason to think that the

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<sup>84</sup> Cf. Andrew Longstreth, *Ex-Debevoise Client Raises Nasty Counterclaims in Unpaid Bills Case*, AMLAW LITIG. DAILY, Jan. 13, 2010 (discussing a malpractice counterclaim seeking \$55 million in damages that was filed in response to a claim for \$6 million in unpaid legal bills).

<sup>85</sup> Cf. Ben Present, *Judge Criticizes Woman Who Tried to Avoid Attorney Fees*, LEGAL INTELLIGENCER, June 12, 2012 (referring to “a strongly worded opinion in favor of a Northeastern Pennsylvania plaintiffs attorney whose clients . . . tried to avoid paying his contingency fee on a \$4.6 million settlement by, among other things, filing a complaint with the Office of Disciplinary Counsel and threatening to call the police”).

<sup>86</sup> Cf. Jeff Selingo, *Fixing College*, N.Y. TIMES, June 25, 2012 (stating that “information industries, from journalism to music to book publishing, . . . have been transformed by technology, resulting in the decline of the middleman—newspapers, record stores, bookstores and publishers”).

<sup>87</sup> See Peter L. Kilborn, *Another Tumble in the Decline of Main Street*, N.Y. TIMES, Nov. 4, 1993 (“[A]long most Main Streets, grand old names . . . and scores of one-of-a-kind speciality shops are long gone, either dead or flown to the shopping centers.”). *But see* Jonathan O’Connel, *Main Street Making a Comeback at the Expense of the Shopping Mall*, WASH. POST, Nov. 11, 2011 (contrasting the recent lack of development of new shopping centers with a resurgence of interest in “[o]utdoor town center concepts . . . evoking the Main Streets of yore”).

<sup>88</sup> See PETER HESSLER, *COUNTRY DRIVING: A JOURNEY THROUGH CHINA FROM FARM TO FACTORY 60* (2010) (describing how an automobile factory was moved from Pennsylvania to China).

<sup>89</sup> See generally Billy Colorado, *Disappearing Railroad Blues*, DAILY KOS (Jan 30, 2011), <http://www.dailykos.com/story/2011/01/30/939949/-Disappearing-Railroad-Blues> (discussing the decline of the American railroad).

<sup>90</sup> See Simon Waldman, *Kodak: Why the Moment has Passed*, GUARDIAN, Jan. 19, 2012 (noting that Kodak had filed for Chapter 11 bankruptcy after “teeter[ing] on the brink of collapse for the best part of a decade”).

<sup>91</sup> Of course, the idea that the world is economically interconnected is not new. During the Taiping Uprising in Qing Dynasty China (1851-64), “Britain’s neutrality in the U.S. Civil War came at the expense of abandoning it in China.” STEPHEN R. PLATT, *AUTUMN IN THE*

American legal profession is any more immune to the tides of economic change than lawyers in other countries, such as England, where there have recently been radical changes.<sup>92</sup>

Some law schools have already begun to downsize. “[E]xperts say that the planned reductions by at least 10 of the roughly 200 laws schools accredited in the U.S. suggest a new reality is sinking in: The legal profession may never return to its prerecession prosperity.”<sup>93</sup> Legal education and the legal profession may be experiencing what amounts to a “big structural shift.”<sup>94</sup> According to Dean Frank Wu of the University of California Hastings College of Law, “This is Detroit in the 1970s: change or die.”<sup>95</sup>

The Supreme Court of Washington recently adopted a “Limited Practice Rule for Limited License Legal Technicians.”<sup>96</sup> The Rule permits persons with training as a paralegal or legal assistant, who have experience working under the supervision of a lawyer, to become licensed as a legal technician to perform certain tasks for clients.<sup>97</sup> Those tasks include a limited, albeit broad, range of services, such as obtaining relevant facts, informing the client of applicable procedures and deadlines, providing the client with self-help materials, reviewing and explaining documents and exhibits, selecting and advising the client about forms, performing legal research and drafting (subject to review and approval by a Washington lawyer), explaining what other documents the client may need, and assisting the client in obtaining necessary documents.<sup>98</sup>

It would be useless to argue that the legal profession should seek to maintain the status quo because the law of lawyering has matured to the point where legal ethics standards of conduct and enforcement mechanisms are now reasonably effective. However, it is very appropriate to ask: how will the goals so thoughtfully advanced

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HEAVENLY KINGDOM: CHINA, THE WEST, AND THE EPIC STORY OF THE TAIPING CIVIL WAR xxiv (2012). This was taken as “evidence that the empire at the end of the world was now connected to the economic and political systems of the West.” *Id.* at 10. “Karl Marx, in 1853, a London correspondent for the *New-York Daily Tribune* . . . [.] considered the rebellion in China to be a sign . . . that demonstrated the interconnectedness of the industrial world.” *Id.*

<sup>92</sup> See MORGAN, *supra* note 7, at 90 (discussing the Legal Services Act of 2007).

<sup>93</sup> Joe Palazzolo & Chelsea Phipps, *Law Schools Apply the Brakes*, WALL ST. J., June 20, 2011, at B1.

<sup>94</sup> See *id.* (quoting Professor William Henderson of Indiana University).

<sup>95</sup> Caplan, *supra* note 60; see also Karen Sloan, *It's a Buyers' Market at Law Schools*, NAT'L L.J., June 25, 2012 (“Law schools experienced a 25 percent decline in applicants nationwide during the past two years, . . . [and many] have responded by accepting a larger percentage of applicants and sweetening their scholarship packages.”).

<sup>96</sup> See *In re the Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians*, Order No. 25700-A-1005, 2012 WA REG TEXT 300583 (NS) (Wash. June 15, 2012), available at <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf> (New Admission to Practice Rule 28: Limited Practice Rule for Limited License Legal Technicians).

<sup>97</sup> WASH. CT. R. ANN. R. 28(D)(3) (effective Sept. 1, 2012) (stating education and experience requirements).

<sup>98</sup> *Id.* R. 28(F) (describing the scope of practice authorized by the limited practice rules).

by the current regime be effectively promoted if the now-unitary legal profession fragments into a multitude of legal services providers? Presumably, in that kind of world, not every provider will be bound by the same ethics code or subject to the same malpractice principles.

### B. *The Vanishing American Lawyer*

Professor Thomas D. Morgan's provocatively named new book, *The Vanishing American Lawyer*,<sup>99</sup> offers a commanding and perceptive analysis of the gathering storm in both American legal education and the American legal profession. One of the greatest strengths of that volume, published by Oxford University Press, is that the intellectual sweep of Morgan's argument is accompanied by abundant citations. His description of the forces that are reshaping the American legal profession is backed by evidence, both contemporary and historical. In many instances, the facts that are mustered in support of the author's analysis span decades or even centuries.

The key premise of *The Vanishing American Lawyer* is that "lawyers are facing fundamental changes in both what they will be asked to do and whether the work they once did will continue to be done by lawyers at all."<sup>100</sup> Morgan asserts that "the 'lawyer' role known by generations of Americans and others is vanishing."<sup>101</sup> His thesis is grounded in a careful examination of the "the expansion in the number of lawyers, the prohibition of many [traditional] anti-competitive professional practices, the globalization of lawyer work, and the transformation of that work by new forms of technology."<sup>102</sup> Morgan also considers "the rising power of in-house counsel"<sup>103</sup> and the "declining significance of licensure and protective regulatory standards."<sup>104</sup> "It is in the context of these developments that the vision of the lawyer the world once knew is vanishing."<sup>105</sup>

Morgan acknowledges that "[l]egal regulation is not vanishing."<sup>106</sup> He says that, "indeed, as society becomes more complex, the place of law in regulating conduct is likely to increase."<sup>107</sup> Yet he asserts that "it does not follow that a system based on law requires lawyers, as we now know them, to run effectively."<sup>108</sup>

#### 1. Increasing Complexity and Specialization

Morgan argues that "the interaction of law with increasingly complex economic and social issues will make distinctively legal questions less common and make

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<sup>99</sup> MORGAN, *supra* note 7.

<sup>100</sup> *Id.* at 3.

<sup>101</sup> *Id.* at 12.

<sup>102</sup> *Id.* at 99.

<sup>103</sup> *Id.* at 112-20.

<sup>104</sup> *Id.* at 127.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 13.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 26.

many of the skills now honed in law schools less relevant.”<sup>109</sup> “[R]eality may require that more persons, not fewer, have some legal training, but the training of most such persons will almost certainly not be today’s three-year graduate program designed to produce an all-purpose legal generalist.”<sup>110</sup> Amplifying this point, Morgan predicts that “lawyers will likely have to focus their work in those fields where they can be known as among the best,”<sup>111</sup> and that “few lawyers will likely stray far from the kinds of work they know how to perform extremely well.”<sup>112</sup>

“Today’s lawyers,” Morgan argues, “will not be unemployable, but for at least significant parts of their careers, they will be required to develop specialized expertise both in an area of substantive law, and in the non-legal aspects of their clients’ problems.”<sup>113</sup> More ominously, Morgan ventures, “[t]he future American lawyer is likely to spend his or her career in a perpetual tournament trying to stand out among a collection of diverse service providers, each offering to contribute more to a client than they can charge the client for their service.”<sup>114</sup>

In one of many memorable turns of phrase,<sup>115</sup> Morgan asserts that “the concept of a lawyer we have known will become a part of history, along with the knights and mercenaries who were hired to fight the battles of others in earlier times.”<sup>116</sup> While he maintains that the “direction of change seems inevitable,” he concedes that the “rate of change is harder to predict.”<sup>117</sup> Nevertheless, Morgan predicts that “a major transformation of the American legal profession can be expected within the next decade or so.”<sup>118</sup>

## 2. Educational Heterogeneity

Regarding changes in legal education, Morgan argues that the “homogeneity” represented by the standard three-year juris doctorate program “should end.”<sup>119</sup> He speculates, for example, that “[a] one-year program involving thinking like a lawyer, legal research and writing, and perhaps negotiation, . . . might be worked into an undergraduate college program . . . [or] might represent a first year of post-graduate

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<sup>109</sup> *Id.* at 15; *see also id.* at 134.

<sup>110</sup> *Id.* at 15.

<sup>111</sup> *Id.* at 130.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 15.

<sup>114</sup> *Id.* at 129.

<sup>115</sup> *See, e.g., id.* at 123 (“[M]any lawyer-client relationships are likely to remain less like marriages and more like one-night stands.”); *see also id.* at 128 (“[N]ot too many years ago, one of the most secure jobs available was that of a toll booth operator. . . . Now, toll booths are largely empty as an electronic EZ Pass collects the tolls. . . . Lawyers have no choice but to try to avoid a similar fate.”).

<sup>116</sup> *Id.* at 16.

<sup>117</sup> *Id.* at 17.

<sup>118</sup> *Id.* at 217.

<sup>119</sup> *Id.* at 198.

study leading to a masters of arts degree.”<sup>120</sup> He suggests that “[g]raduates of such a program would be unlikely to hold themselves out as legal advisors, but such an education might be highly useful . . . to business people trying to understand the way law impacts their activities.”<sup>121</sup> While the latter point is beyond doubt, the former is far from clear. What would be more natural, in a world where it is difficult for the bar to police the unauthorized practice of law, and where many persons think that legal services cost too much, than for a nonlawyer with some significant measure of legal training to offer legal advice at a lower price?

Morgan, a former law school dean at Emory University and former president of the Association of American Law Schools, now teaches at George Washington University. He suggests that law schools should once again consider offering a two-year law degree.<sup>122</sup> Some law schools have already taken steps to accelerate completion of a juris doctorate degree, which has traditionally taken three years to earn.<sup>123</sup> While those schools have not reduced the number of credit hours required for graduation, there may come a point where the American Bar Association,<sup>124</sup> perhaps because of the soaring cost of legal education,<sup>125</sup> may be willing to endorse

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<sup>120</sup> *Id.* at 213.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 214 (asserting that the Carnegie Commission’s 1971 recommendation “deserves another look”).

<sup>123</sup> See Gina Passarella, *Drexel University’s Law School to Offer Two-Year J.D. Program*, LEGAL INTELLIGENCER, Apr. 1, 2013 (“Drexel will start its ‘Fast Forward’ program, a two-year J.D. that costs the same and requires the same amount of credits as its three-year program. The benefit, the school says, is that those in the accelerated program get to join the workforce a year sooner and live off of student loans one less year.”); *Accelerated JD*, NW. LAW, <http://www.law.northwestern.edu/academics/ajd/> (last visited Apr. 10, 2013) (noting that students in the accelerated program complete the same number of credits as students in the traditional program); *SCALE Curriculum*, SW. LAW SCH., <http://www.swlaw.edu/academics/jd/scale/curriculum> (last visited Apr. 10, 2013) (showing that the curriculum for the two-year J.D. program requires eighty-seven units); *Earn Your J.D. in Two Years*, UNIV. OF DAYTON SCH. OF LAW, [http://www.udayton.edu/law/academics/jd\\_program/two\\_year\\_program.php](http://www.udayton.edu/law/academics/jd_program/two_year_program.php) (last visited Apr. 10, 2013) (showing that ninety credit hours are required for the University’s two-year J.D. program); *Fast Track Accelerated Option Leads to Graduation in Two Years*, WASHBURN U. SCH. OF LAW, <http://www.washburnlaw.edu/admissions/fasttrack> (last visited Apr. 10, 2013) (same).

<sup>124</sup> Cf. MORGAN, *supra* note 8, at 215 (suggesting that, at least in some cases, new programs providing legal education—e.g., at the undergraduate or mid-career level—“almost certainly” should not be subject to accreditation by the American Bar Association); *id.* (“Accreditation should be understood to be a process of protecting the public from deception about the quality of the education offered, and while the A.B.A. has largely done a conscientious job, the time has come to pass the responsibility to others.”).

<sup>125</sup> See *Legal Education Costs More than \$200,000, Study Finds*, NAT’L JURIST (May 11, 2012, 11:31 AM), <http://www.nationaljurist.com/content/legal-education-costs-more-200000-study-finds-0> (discussing a study by Law School Transparency that shows that the “non discounted cost” of a legal education (including tuition, living expenses, and finance expenses) exceeds \$200,000).

an “Executive J.D.”<sup>126</sup> or similar academic credential that requires something closer to 60 semester credit hours for graduation, rather than the standard eighty-three to ninety credit hours.<sup>127</sup> In fact, Morgan’s idea may be gaining traction. A recent editorial in *The New York Times* asserted that “some law schools are earnestly considering two-year J.D. programs.”<sup>128</sup>

Morgan argues that “[e]ven without formal recognition of a two-year degree, . . . such education might be recognized as a basis for certification to give legal advice and appear before particular specialized courts.”<sup>129</sup> This idea, too, may be plausible. There is precedent in the administrative sphere. An Executive Order issued by President Bill Clinton encouraged federal agencies to permit nonlawyers to represent other persons in proceedings before them.<sup>130</sup> Some federal agencies now do so,<sup>131</sup> and the same is true in several states.<sup>132</sup>

Elaborating on the possibilities for fundamentally restructuring legal education—which include specialization during the third-year of law school,<sup>133</sup> significant attention to “non-legal subjects such as languages, finance, and science,”<sup>134</sup> and mid-career certificate programs<sup>135</sup>—Morgan explains: “The three-year program might remain the legal education gold standard, at least until two-year graduates prove their success in the marketplace.”<sup>136</sup> “Almost inevitably, the nation will need far fewer

<sup>126</sup> Some law schools not accredited by the American Bar Association offer executive J.D. programs. See *The Juris Doctor Executive Track Program*, TAFT LAW SCHOOL, <http://www.taftu.edu/tls/lw2.htm> (last visited Apr. 10, 2013).

<sup>127</sup> See *2011-2012 Standards and Rules of Procedure for Approval of Law Schools*, AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, available at [http://www.americanbar.org/groups/legal\\_education/resources/standards.html](http://www.americanbar.org/groups/legal_education/resources/standards.html) (last visited Apr. 10, 2013) (mandating accredited law schools to require students to complete a minimum of 58,000 minutes—or eighty-three semester hours for law schools using a conventional semester system—as a condition for obtaining a J.D. degree).

<sup>128</sup> Caplan, *supra* note 60.

<sup>129</sup> MORGAN, *supra* note 7, at 214.

<sup>130</sup> See Exec. Order No. 12988, 3 C.F.R. 157, 161 (1996), reprinted in 28 U.S.C. § 519 (2006); see also *id.* § 4 (“All Federal agencies should review their administrative adjudicatory processes and develop specific procedures to . . . facilitate self-representation where appropriate . . . [and] to expand non-lawyer counseling and representation where appropriate.”). See generally Jeffrey S. Lubbers, *Civil Justice Reform—Take 2*, 21 ADMIN. & REG. L. NEWS 5 (Summer 1996), available at <http://apps.americanbar.org/adminlaw/news/vol21no4/cjreform.html> (discussing the executive order and the new initiative relating to nonlawyer representation).

<sup>131</sup> See Charles H. Koch, Jr., *Representation by Non-Lawyers*, in 2 ADMINISTRATIVE LAW AND PRACTICE. § 6:24 (3d ed. 2005) (discussing agencies permitting representation by nonlawyers).

<sup>132</sup> See Morgan, *supra* note 5, at 895 and n.10 (citing cases from California and Pennsylvania).

<sup>133</sup> See MORGAN, *supra* note 7, at 215 (discussing “training beyond the second year”).

<sup>134</sup> *Id.*

<sup>135</sup> See *id.* at 214-15 (discussing training in a new field not resulting in a new degree).

<sup>136</sup> *Id.* at 214.

law schools . . . or at least most will need to transform themselves and their offerings if they want to survive.”<sup>137</sup>

### 3. Durable Areas of Practice

Despite the title of Morgan’s book, it seems clear that American lawyers will not vanish, at least not entirely. Indeed, some segments of the bar are likely to prosper by traversing the same familiar paths. This may be true of those members of the legal profession who specialize in criminal or domestic relations law, staff government offices, or handle run-of-the-mill tort claims for plaintiffs (to the extent that such claims are still viable after ubiquitous “tort reform”<sup>138</sup>). In those areas, it is unlikely that there will be a lack of clients. It is also improbable that such work will be outsourced to another country<sup>139</sup> or delegated to persons not licensed to practice law, at least in matters that involve litigation.<sup>140</sup> Cost-cutting pressures may not fundamentally transform these types of law practice. Morgan himself opines that “[n]egotiation and litigation of contested matters is likely to remain one of the last places from which American lawyers will vanish.”<sup>141</sup>

However, other varieties of lawyering may radically change. The most obvious candidate is business representation, particularly as it relates to commercial matters. It is in that area that the cost-cutting pressures of globalization will be the greatest.

## IV. RESTRUCTURING LEGAL ETHICS

### A. *The Goals of Legal Ethics*

Although some of the rules of American legal ethics, such as the restrictions on lawyer advertising and solicitation, may have originated in a desire to discriminate

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<sup>137</sup> *Id.* at 216.

<sup>138</sup> See, e.g., Joanna M. Shepard, *Tort Reforms’ Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 906 (2008) (noting that “hundreds of medical malpractice tort reforms have been enacted” over the last several decades); David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 3 (2007) (stating that in Texas, “[a]lmost every session of the legislature [during the preceding 30 years] has considered legislation restricting tort liability, and a great deal of it has passed.”); see also Vincent R. Johnson, *On Race, Gender, and Radical Tort Reform: A Review of Martha Chamallas & Jennifer B. Wriggins, The Measure of Injury: Race, Gender, and Tort Law*, 17 WM. & MARY J. WOMEN & L. 591, 609 (2011) (noting “the efforts of ‘tort reformers’ decrying lawsuit ‘abuse’”).

<sup>139</sup> But see Vincent R. Johnson & Stephen C. Loomis, *Malpractice Liability Related to Foreign Outsourcing of Legal Services*, 2 ST. MARY’S J. LEGAL MALP. & ETHICS 262, 276-81 (2012) (discussing the wide range of outsourced tasks and the many varieties of outsourcing structural arrangements).

<sup>140</sup> However, it may make sense to outsource research and drafting related to complex tort claims to lower-cost providers in other countries. See Cassandra Burke Robertson, *A Collaborative Model of Offshore Legal Outsourcing*, 43 ARIZ. ST. L.J. 125, 125-26 (2011) (discussing a libel suit in California where the drafting of the motion for summary judgment and appellate brief were outsourced to lawyers in India).

<sup>141</sup> MORGAN, *supra* note 7, at 134.

against minorities<sup>142</sup> or to protect established lawyers from competition,<sup>143</sup> the present regime contains few traces of that past. The relevant provisions of modern legal ethics have been debated so vigorously, so often, and in so many fora during the past forty years<sup>144</sup> that virtually every rule that has survived scrutiny and is currently in force can be justified on multiple legitimate grounds.

Before the Clark Report and Watergate,<sup>145</sup> legal ethics reform was a low profile endeavor, often screened from public view.<sup>146</sup> The current era stands in sharp contrast. Legal ethics reform today operates with a high degree of transparency.<sup>147</sup> Disclosure and public scrutiny of proposals are used as means for ensuring that the substantive provisions of the law of lawyering are consistent with the public interest, just as reporting requirements in government ethics,<sup>148</sup> and statutes mandating open meetings and open records,<sup>149</sup> are used today to promote good government.

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<sup>142</sup> See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 42-48 (1976) (discussing restrictions on advertising, solicitation, and contingent fees).

<sup>143</sup> See Ariens, *supra* note 38, 353-63 (discussing how early tracts in the field of legal ethics were a conservative reaction to Jacksonian Democracy).

<sup>144</sup> See Robert E. Lutz, *An Essay Concerning the Changing International Legal Profession*, 18 SW. J. INT'L L. 215, 219 (2011) (“[T]he ABA has embarked on a number of efforts to address the changing legal profession by primarily using the special commission approach. Noteworthy have been: the Commission on Multidisciplinary Practice (1998-2000); Ethics 2000 (1997-2002); the Commission on Multijurisdictional Practice (2000-2002); and, currently, the Commission on Ethics 20/20 created in 2009 with a three-year deadline. The 20/20 Commission is tasked with conducting a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of technology and global legal practice developments.”); Johnson, *supra* note 39, at 63 (opining that “the reform of ethics rules has become an apparently permanent feature of the American legal profession. At any moment, it seems that either the American Bar Association is drafting a new model, States are deciding whether to implement the new model, or amendments are being proposed to make changes to either the ABA model or state variations.”).

<sup>145</sup> See *supra* Part II.A.

<sup>146</sup> See MORGAN, *supra* note 7, at 78 (“The Model Code [of Professional Responsibility promulgated by the ABA in 1969] came out of confidential meetings of its drafting committee, so there was no public debate . . . . Indeed, most state supreme courts adopted it verbatim, without so much as hearing or debate.”).

<sup>147</sup> See Lillian Hardwick, *A Supreme Collaboration*, 74 TEX. B.J. 50, 51 (2011) (discussing the importance of public comments in shaping legal ethics reform proposals in Texas).

<sup>148</sup> See Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 SETON HALL L. REV. 715, 753 (2006) (“The effectiveness of periodic reporting requirements depends upon public and governmental scrutiny of the reported information.”). *But see* Vincent R. Johnson, *Regulating Lobbyists: Law, Ethics, and Public Policy*, 16 CORNELL J.L. & PUB. POL’Y 1, 18 (2006) (“While conceptually appealing, disclosure requirements are hard to implement because it is difficult to determine what information should be reported, who should be required to report, and how that information can be made available to the public in a timely fashion. As a result, some disclosure schemes are exceedingly complex and, as a result, lack the ethical clarity and efficacy that simpler rules might provide.”).

<sup>149</sup> See, e.g., *Doolan v. Bd. of Coop Educ. Servs.*, Second Supervisory Dist. of Suffolk Cnty., 398 N.E.2d 533, 533 (N.Y. 1979) (“Meeting the public’s legitimate right of access to

The complex rules of American legal ethics are animated by a variety of important concerns. Those goals and objectives are so numerous, nuanced, and intertwined that it is not possible to specify a definitive comprehensive list.<sup>150</sup> Nevertheless, it is clear beyond question that the law of professional responsibility includes standards which are intended to (1) protect clients from unnecessary harm, (2) encourage legal resolution of disputes, (3) ensure client control of legal representation, (4) promote honesty and fairness in public and private affairs, and (5) assure the proper functioning of the justice system.

For example, clients are protected from harm by the disciplinary rules which mandate lawyer competence<sup>151</sup> and diligence,<sup>152</sup> prohibit conflicts of interest,<sup>153</sup> regulate fee arrangements,<sup>154</sup> limit in-person solicitation,<sup>155</sup> require safekeeping of property,<sup>156</sup> and address the special interests of clients with diminished capacity.<sup>157</sup> More broadly, legal malpractice actions based on negligence and fiduciary-duty principles are intended to protect clients from deficient practices by lawyers that cause injuries.

Persons are encouraged to resolve disputes through legal channels—legitimate, peaceful means, not force or violence—in many ways. These avenues include the ethics rules that enable clients to obtain accurate information about the terms and availability of legal services,<sup>158</sup> that make legal services more readily available to the poor,<sup>159</sup> and that encourage clients to consult lawyers by guaranteeing that their information will be treated as confidential.<sup>160</sup>

Client control of legal representation is facilitated by the ethics rules that allow clients to limit the scope of representation,<sup>161</sup> require lawyers to communicate

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information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds.”).

<sup>150</sup> *But see* Andrews, *supra* note 38, at 1454 (identifying “fairness in litigation, competence, loyalty, confidentiality, reasonable fees, and public service” as core concepts of legal ethics).

<sup>151</sup> *See id.* R. 1.1 (“Competence”).

<sup>152</sup> *See id.* R. 1.3 (“Diligence”).

<sup>153</sup> *See id.* R. 1.7 (“Conflict of Interest: Current Clients”); *id.* R. 1.8 (“Conflict of Interest: Current Clients: Specific Rules”); *id.* R. 1.9 (“Duties to Former Clients”); *id.* R. 1.10 (“Imputation of Conflicts of Interest: General Rule”); *id.* R. 1.11 (“Special Conflicts of Interest for Former and Current Government Officers and Employees”).

<sup>154</sup> *See id.* R. 1.5 (“Fees”).

<sup>155</sup> *See id.* R. 7.3 (“Direct Contact with Prospective Clients”).

<sup>156</sup> *See id.* R. 1.15 (“Safekeeping Property”).

<sup>157</sup> *See id.* R. 1.14 (“Client with Diminished Capacity”).

<sup>158</sup> *See id.* R. 7.1 (“Communications Concerning a Lawyer’s Services”); *id.* R. 7.2 (“Advertising”); *id.* R. 7.4 (“Communication of Fields of Practice and Specialization”); *id.* R. 7.5 (“Firm Names and Letterheads”).

<sup>159</sup> *See id.* R. 6.1 (“Voluntary Pro Bono Publico Service”).

<sup>160</sup> *See id.* R. 1.6 (“Confidentiality of Information”).

<sup>161</sup> *See id.* R. 1.2 (“Scope of Representation and Allocation of Authority Between Client and Lawyer”).

material information,<sup>162</sup> and limit the terms upon which a law practice may be sold.<sup>163</sup> The same objective is furthered by the ethical provisions which oblige lawyers to clarify their allegiances when dealing with entity constituents.<sup>164</sup>

Honesty in public and private affairs is the basis for numerous ethics rules.<sup>165</sup> These include the standards that require candor to tribunals<sup>166</sup> and truthfulness in statements to others,<sup>167</sup> including statements to bar admission and disciplinary authorities.<sup>168</sup>

The proper functioning of the administration of justice is fostered by the ethics rules which promote judicial impartiality by prohibiting improper communications with judges.<sup>169</sup> Confidence in the administration of justice is also advanced by the rules imposing special obligations on prosecutors,<sup>170</sup> limiting trial publicity,<sup>171</sup> prohibiting frivolous litigation,<sup>172</sup> mandating reporting of misconduct,<sup>173</sup> and requiring fair treatment of third persons.<sup>174</sup>

These five objectives—(1) protecting clients from unnecessary harm, (2) encouraging legal resolution of disputes, (3) ensuring client control of legal representation, (4) promoting honesty and fairness in public and private affairs, and (5) assuring the proper functioning of the justice system—are major goals of American legal ethics. They reflect public policy concerns of continuing importance. If the legal profession changes in ways that make it difficult or impossible for professional discipline and malpractice liability to effectively promote these goals, then any substitute regime for holding legal service providers

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<sup>162</sup> See *id.* R. 1.4 (“Communication”).

<sup>163</sup> See *id.* R. 1.17 (“Sale of Law Practice”).

<sup>164</sup> See *id.* R. 1.13 (“Organization as Client”).

<sup>165</sup> See generally *id.* R. 8.4(c) (defining “dishonesty, fraud, deceit, or misrepresentation” as misconduct).

<sup>166</sup> See *id.* R. 3.3 (“Candor to the Tribunal”).

<sup>167</sup> See *id.* R. 4.1 (“Truthfulness in Statements to Others”).

<sup>168</sup> See *id.* R. 8.1 (“Bar Admission and Disciplinary Matters”).

<sup>169</sup> See *id.* R. 3.5 (“Impartiality and Decorum of the Tribunal”).

<sup>170</sup> See *id.* R. 3.8 (“Special Responsibilities of a Prosecutor”).

<sup>171</sup> See *id.* R. 3.6 (“Trial Publicity”).

<sup>172</sup> See *id.* R. 3.1 (“Meritorious Claims and Contentions”).

<sup>173</sup> See *id.* R. 8.2 (“Judicial and Legal Officials”); *id.* R. 8.3 (“Reporting Professional Misconduct”); Vincent R. Johnson, *Legal Malpractice Litigation and the Duty to Report Misconduct*, 1 ST. MARY’S J. LEGAL MALP. & ETHICS 40, 82-87 (2011) (explaining why, in some cases, sound public policy allows delayed reporting of lawyer misconduct).

<sup>174</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.18 (2012) (“Duties to Prospective Client”); *id.* R. 2.3 (“Evaluation for Use by Third Persons”); *id.* R. 2.4 (“Lawyer Serving as Third-Party Neutral”); *id.* R. 3.4 (“Fairness to Opposing Party and Counsel”); *id.* R. 4.2 (“Communication with Person Represented by Counsel”); *id.* R. 4.3 (“Dealing with Unrepresented Person”); *id.* R. 4.4 (“Respect for Rights of Third Persons”).

accountable<sup>175</sup> must be judged by how well it furthers these same objectives. To paraphrase Professor Neil Hamilton, “[t]he ultimate question is not whether the concepts of a ‘profession’ and ‘professionalism’ in actual practice are flawed, but whether the alternative . . . is more flawed in serving the public good.”<sup>176</sup>

### *B. The Challenges Posed by Professional Disunification*

The American legal profession today remains largely unified. In general, law is still practiced only by lawyers who, because of their monopoly (or near-monopoly) status, are subject to special obligations and held accountable in disciplinary and malpractice actions. However, if the profession is transformed by the increasing rendition of legal services by nonlawyers, or by the emergence of new categories of lawyers who are not fully licensed, the efficacy of the current legal ethics regime will be seriously challenged.

#### 1. Obstacles to Discipline

Professional discipline can be effective in deterring bad practices and holding deficient practitioners accountable only if there are clearly developed standards of conduct that can be used as the basis for education and imposition of sanctions. Moreover, the deterrent effect of possible disciplinary action is credible only when there is an enforcement authority with adequate resources and power to thoroughly investigate complaints of misconduct and ensure that sanctions are imposed regularly and consistently.<sup>177</sup>

The rendition of legal services by nonlawyers poses obvious problems for the use of professional discipline as a mechanism for protecting clients and assuring the proper operation of the legal system. In many instances, as regards nonlawyer practitioners, there will be no well-developed code of professional conduct, no authorized and adequately resourced investigative authority, and no power to impose discipline. Nonlawyers practicing before agencies and tribunals may be obliged to adhere to codes of conduct adopted by those entities to guide the conduct of persons who appear in a representative capacity.<sup>178</sup> Yet, it seems likely that such standards will focus only on the most obvious problems, and that agencies will have limited procedures and resources for the investigation of complaints. Sanctions are likely to be imposed only in the clearest cases.

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<sup>175</sup> See Matthew Huisman, *Courts See Increase in Bankruptcy Filing Abuse by Nonlawyers*, LEGAL TIMES, June 18, 2012 (“There has been an increase in the number of complaints against non-lawyers preparing bankruptcy filings for a fee, according to . . . the Administrative Office of the U.S. Courts. . .”).

<sup>176</sup> Hamilton, *supra* note 8, at 15-16 (discussing the failures of business schools in answering similar questions).

<sup>177</sup> See AM. BAR ASS’N SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 19 (Final Draft 1970) (finding that “[I]ack of adequate financing [was] the most universal and significant problem in disciplinary enforcement”).

<sup>178</sup> See Koch, *supra* note 131, § 6:24 (“Agencies which permit representation by non-lawyers may establish standards of conduct for them, including the same standards as applied to lawyers. Such agencies may also discipline non-lawyers for violating their standards of conduct.”).

The provision of legal services by persons who are not fully licensed poses different problems than practice by nonlawyers for the maintenance of an effective disciplinary regime. A process might be structured so that those practitioners not fully licensed would be subject to some, but not all, of the obligations that bind fully licensed lawyers. The arrangement might be similar, in certain respects, to that embodied in the terms of the Code of Judicial Conduct, which imposes on part-time judges only some of the many obligations that comprise the law of judicial ethics.<sup>179</sup> However, it would be difficult to decide which of the important obligations in the Model Rules of Professional Conduct, or more accurately in the parallel state enactments, should not be binding on lawyers who are not fully licensed. (Confidentiality? Competence? Reasonable fees? Conflict of interest?) The consumer-friendly course might be to hold all lawyers licensed by a jurisdiction, in whatever capacity, to the full range of ethical obligations, though certainly those not enjoying a full license might have grounds to object.

The Supreme Court of Washington's "Limited Practice Rule for Limited License Legal Technicians,"<sup>180</sup> imposes some, but not all, of the obligations traditionally found in legal ethics codes on legal technicians who are not fully licensed to practice law. A limited license technician must return client documents,<sup>181</sup> protect the confidentiality of client information,<sup>182</sup> and refrain from promising "special influence with any court or governmental agency"<sup>183</sup> or misleading the client about the legal technician's professional skills.<sup>184</sup> The Rule further provides that "Limited License Legal Technicians shall be held to the ethical standards of the Limited License Legal Technicians' Rules of Professional Conduct, which shall create an . . . IOLTA program for the proper handling of funds coming into the possession of the Limited License Legal Technician."<sup>185</sup> The new code for limited license legal technicians has not yet been written.<sup>186</sup> "There is no other state with a similar LLLT rule."<sup>187</sup>

## 2. Obstacles to Malpractice

In the absence of clearly tortious conduct, such as stealing a client's money,<sup>188</sup> lying to a client about material matters,<sup>189</sup> or sexually abusing a client,<sup>190</sup> the viability

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<sup>179</sup> See CODE OF JUDICIAL CONDUCT, Notes on Application Preceding Canon 1 (2011).

<sup>180</sup> See *In re the Adoption of the New APR 28*, *supra* note 96.

<sup>181</sup> WASH. CT. R. ANN. R. 28(G)(3)(c), (H)(3).

<sup>182</sup> WASH. CT. R. ANN. R. 28(G)(3)(e).

<sup>183</sup> WASH. CT. R. ANN. R. 28(H)(1).

<sup>184</sup> WASH. CT. R. ANN. R. 28(H)(4).

<sup>185</sup> WASH. CT. R. ANN. R. 28(K)(2).

<sup>186</sup> *Limited License Legal Technicians, Admission to Practice Rule 28*, WASH. STATE BAR ASS'N (Sept. 23, 2012), <http://www.wsba.org/Licensing-and-Lawyer-Conduct/Admissions/Limited-Licenses-and-Special-Programs/Non-Lawyers-and-Students/Legal-Technicians> (discussing the formation of the Board that will "go about the business of creating and drafting the operational details for the LLLT program").

<sup>187</sup> *Id.*

<sup>188</sup> See *Morris v. Zimmer*, No. 10 CV 4146(VB), 2011 WL 5533339, at \*7 (S.D.N.Y. Nov. 10, 2011) (holding that plaintiffs properly stated a claim for conversion by alleging that their

of a malpractice action normally turns upon establishing both what the standard of care required on the facts of the case, and that the standard was violated. In many malpractice actions, the former point is a hotly debated issue on which expert testimony is elicited by the parties to the dispute.<sup>191</sup> In the absence of persuasive testimony as to what the standard of care demanded, a legal malpractice action will fail.<sup>192</sup>

The standard of care for a malpractice suit can be articulated only by reference to practices and principles so well established that they form a dependable guide for the exercise of judgment by a jury. It is because of difficulties in establishing an alternative standard of care that lawyers practicing law in large firms are not held to a different standard of care than solo practitioners, and that lawyers with twenty years of experience are not held to a different standard than those who recently entered the profession.<sup>193</sup> In most circumstances, there is no reliable way of establishing what a reasonably prudent large-firm lawyer would do that can be confidently distinguished from what a reasonably prudent solo practitioner would do, or what a reasonably prudent lawyer with twenty years experience would do differently than a reasonably prudent lawyer with less experience.

Suing nonlawyers for malpractice under traditional principles of negligence and fiduciary duty would, in most instances, be impracticable because ordinarily it would be impossible to establish how much care a nonlawyer would use in a particular situation (not to mention the fact that the relationship between a nonlawyer and a client might not be deemed to be fiduciary). Except in the context of representing clients before agencies or tribunals that have adopted standards of conduct for nonlawyers,<sup>194</sup> there would often be no code of ethics that could be used as a point of reference for determining what a reasonably prudent *nonlawyer* would do.<sup>195</sup> Moreover, any effort to qualify a witness as a testifying expert on nonlawyer practices and obligations would presumably run into serious difficulties as judges

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attorney “improperly retained settlement proceeds belonging to them and used those proceeds in his business without their permission”).

<sup>189</sup> See *Valentine v. Watters*, 896 So. 2d 385, 395 (Ala. 2004) (holding that expert testimony was not necessary in a malpractice action where the defendant lawyer purportedly lied to a client about his experience in handling previous breast implant litigation).

<sup>190</sup> See *Kling v. Landry*, 686 N.E.2d 33, 41 (Ill. App. Ct. 1997) (holding that a plaintiff who alleged that her attorney sexually abused her properly stated a claim of battery).

<sup>191</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2) cmt. g (2000) (discussing expert testimony).

<sup>192</sup> See *Moore v. Crone*, 970 A.2d 757, 760 (Conn. App. Ct. 2009) (affirming a grant of summary judgment to a lawyer because the plaintiff client failed to adduce expert testimony to establish the standard of care in a legal malpractice action arising from criminal representation).

<sup>193</sup> See JOHNSON, *supra* note 26, at 87-88 (discussing de facto specialists and large firm lawyers).

<sup>194</sup> See *supra* Part IV.B.1.

<sup>195</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 52(2) cmt. g (2000) (explaining the relevance of ethics rules in malpractice actions).

perform the important “gatekeeping” function that requires them to exclude from the courtroom unreliable evidence.<sup>196</sup>

An alternative would be to hold nonlawyers rendering legal services liable for malpractice if they fall short of the standard of care that would be observed by lawyers. There is some precedent<sup>197</sup> and scholarship<sup>198</sup> supporting this view. However, requiring nonlawyers to adhere to the same exacting standards that bind lawyers may be unfair in cases where the nonlawyer has not pretended to be a lawyer or promised to render equivalent services.<sup>199</sup>

Professor Morgan notes that, “[e]ven today, malpractice insurance companies have an incentive to audit lawyer compliance with professional standards more rigorously than lawyer disciplinary commissions will ever do.”<sup>200</sup> However, it is doubtful that the insurance market will play the same role with respect to legal practice by nonlawyers or lawyers not fully licensed. Nonlawyers are unlikely to purchase malpractice insurance. And even if professional insurance becomes common for lawyers who are not fully licensed, it is doubtful that insurance companies will play the same loss prevention function. If it is more difficult to articulate the standard of care for a malpractice action based on negligence or fiduciary-duty principles, there will be less risk of liability being imposed. Therefore, there will be reduced reasons for insurers to counsel lawyers who are not fully licensed to adopt risk-reducing practices.

### C. Alternative Contract Principles

Professor Morgan minimizes the importance of professional discipline in the emerging legal world. He opines that “private actions against lawyers who fail to meet the promised standard are likely to replace formal discipline as the principal regulator of lawyer activity.”<sup>201</sup>

In a recent article in the *St. Mary’s Law Journal*, Morgan suggested that contract principles can provide an appropriate legal regime for holding nonlawyers

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<sup>196</sup> See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)) (indicating that trial judges, in admitting expert testimony, have a gatekeeping responsibility to ensure “that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand”).

<sup>197</sup> See Thomas D. Morgan, *Professional Malpractice in a World of Amateurs*, 40 ST. MARY’S L.J. 891, 900 and n.32 (2009) (citing *Jones v. Allstate Ins. Co.*, 45 P.3d 1068, 1070 (Wash. 2002); *Buscemi v. Intachai*, 730 So. 2d 329, 330 (Fla. Dist. Ct. App. 1999); *Webb v. Pomeroy*, 655 P.2d 465, 468 (Kan. Ct. App. 1982)) (discussing cases that have held nonlawyers engaged in legal services to the same professional standard of care as lawyers).

<sup>198</sup> See Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer*, 2007 UTAH L. REV. 87, 91 (2007) (arguing that non-licensed persons “who engage in the compensated practice of law” should be held to the same standard of care imposed on licensed attorneys).

<sup>199</sup> See Morgan, *supra* note 5, at 903 (arguing that while “[a]nyone who impersonates a lawyer should be held to the standard of a lawyer[,]” nonlawyers should not otherwise be held to the same standard of care); *id.* at 904 (citing *Bland v. Reed*, 67 Cal. Rptr. 859, 862 (Ct. App. 1968) (“[W]e consider it improper to hold a non-lawyer practicing before the Commission to a lawyer’s degree of care . . . .”)).

<sup>200</sup> MORGAN, *supra* note 7, at 231 n.35.

<sup>201</sup> *Id.* at 231.

accountable for deficient conduct.<sup>202</sup> This proposal merits careful consideration, not only because it comes from one of the most respected legal ethics scholars, but because it has a certain natural appeal insofar as tort law and contract law are both part of the law of private obligations.<sup>203</sup> On one hand, obligations are imposed by law, while on the other they are voluntarily assumed. There are many instances where even though a remedy is not available under tort law, contract law will provide a basis for redress.<sup>204</sup>

### 1. Private Ordering and Its Limits

As the law of legal ethics is presently configured, contract principles play an important, but limited role in affording protection to consumers of legal services. Most significantly, lawyers and clients are afforded great latitude in defining the scope of the professional relationship and the extent of a lawyer's obligations. The parties to the representation can agree, for example, that the lawyer will be obliged to review whether a document accurately reflects the terms of an agreement reached by the client and another party, but has no duty to evaluate and advise the client upon the wisdom of the terms of the settlement.<sup>205</sup> A lawyer and client may also agree, in many instances, that the lawyer has no duty to advise the client on the tax consequences of actions with legal significance.<sup>206</sup> Similarly, a lawyer and client may contractually provide that the lawyer will handle only one of several matters for which the client might logically decide to engage legal representation.<sup>207</sup>

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<sup>202</sup> See Morgan, *supra* note 5, at 903 (“Instead of holding nonlawyers to a tort standard that treats them as if they were lawyers, I suggest we move toward a contract-based standard that asks what the nonlawyer purported to be competent to do and whether she met a client's reasonable expectations about the services to be provided. The burden of proof would initially be on the plaintiff client, and the nonlawyer defendant could show specific disclaimers of experience or limits on work to be done.”).

<sup>203</sup> See Lucinda Ferguson, *Family, Social Inequalities, and the Persuasive Force of Interpersonal Obligation*, 22 INT'L J.L. POL'Y & FAM. 61, 64 (2008) (listing formation of a contract and injuring another through negligence as examples of events that trigger private law obligations).

<sup>204</sup> See, e.g., *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 876 (1986) (holding the pure economic losses resulting from damage to a product by a component part are compensable under contract law, but not in a tort action for negligence or strict liability).

<sup>205</sup> See *Lerner v. Laufer*, 819 A.2d 471, 484 (N.J. Super. Ct. App. Div. 2003) (holding that a lawyer did not breach the standard of care by not performing discovery or investigatory services related to the fairness of a property settlement agreement because the scope of representation was limited to exclude those services and there was no dispute relating to the client's “competence, her general knowledge of the family's financial and personal affairs, or the voluntariness of her actions”).

<sup>206</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.2 (2012) (permitting a lawyer and client to limit the scope of representation); Morgan, *supra* note 5, at 907 (“If a lawyer wishes to help a client get a divorce but not take responsibility for tax implications of the settlement, for example, [Model] Rule 1.2(c) expressly permits that arrangement.”). *But see* 4 RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* § 35:4 (2012 ed.) (noting that failure to stipulate “whether tax advice is within the scope of the engagement” is a recurring error frequently leading to legal malpractice claims).

<sup>207</sup> See Struffolino, *supra* note 77, at 188-89 (discussing vertical and horizontal “unbundling”).

The power of the lawyer and client to order the terms of the relationship between them is limited in significant respects. The terms of a lawyer-client agreement will be void as against public policy if they are unlawful,<sup>208</sup> unethical,<sup>209</sup> or unreasonable in light of the fiduciary nature of the relationship.<sup>210</sup> Thus, a lawyer and client may not agree that the lawyer will assist the client in a fraudulent enterprise,<sup>211</sup> tamper with witnesses or evidence,<sup>212</sup> conceal client perjury,<sup>213</sup> or so severely limit the scope of performance as to render incompetent services.<sup>214</sup>

## 2. Promises are Not Default Principles

While contract law allows for private ordering of the lawyer-client relationship, it does little to supply default principles to guarantee adequate performance of legal services. As in most other contexts, the buyer must think about the risks and bargain for desired protection.<sup>215</sup> In the absence of an express promise by the provider, there is little chance that the recipient will be able to sue for breach of contract.<sup>216</sup> A claim

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<sup>208</sup> See *Keliin v. Petrucelli*, 499 N.W.2d 360, 363 (Mich. Ct. App. 1993) (stating that attorney-client agreements solicited in violation of Michigan law are void).

<sup>209</sup> Cf. *Fair v. Bakhtiari*, 125 Cal. Rptr. 3d 765, 776-783 (Ct. App. 2011) (holding that an attorney's conflict of interest and other ethical violations were sufficient to render an attorney-client agreement void).

<sup>210</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19(1)(b) (2000) (“[A] client and lawyer may agree to limit a duty that a lawyer would otherwise owe to a client if . . . (b) the terms of the limitation are reasonable in the circumstances.”); *In re Egwim*, 291 B.R. 559, 574 (Bankr. N.D. Ga. 2003) (holding that, in bankruptcy proceedings, an “attorney’s representation ordinarily must extend to all matters relating to the relief sought by the chapter 7 debtor, and particular services required to pursue that relief normally cannot be excluded”).

<sup>211</sup> Cf. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2012) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”).

<sup>212</sup> Cf. *Former Prince George’s County Executive Disbarred in D.C.*, BLOG OF LEGAL TIMES (July 13, 2012), <http://legaltimes.typepad.com/blt/2012/07/former-prince-georges-county-executive-disbarred-in-dc.html> (reporting that a lawyer was disbarred based on attempted extortion and witness tampering).

<sup>213</sup> Cf. MODEL RULES OF PROF’L CONDUCT R. 3.3(b) (2012) (“A lawyer who represents a client in an adjudicative proceeding and who knows that a person . . . has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”).

<sup>214</sup> Cf. *id.* R. 1.2 cmt. 7 (“[A]n agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation.”).

<sup>215</sup> See Jay M. Feinman, *The Economic Loss Rule and Private Ordering*, 48 ARIZ. L. REV. 813, 813-26 (2006) (“[I]ndividuals are the best judges of their own interests; individuals maximize those interests through contracts; the expectation and reliance interests created by contracts deserve protection; promoting private contracting produces a social benefit; contract law provides the framework through which the individual and social benefits are realized in practice.”).

<sup>216</sup> See MALLEN & SMITH, *supra* note 206, § 8:6 (listing breach of an express promise as a requirement for a breach of contract cause of action); see also *G.K. Las Vegas Ltd. P’ship v. Boies Schiller & Flexner LLP*, 947 N.Y.S.2d 29, 30-31 (App. Div. 2012) (denying recovery

against a lawyer may be based on nonperformance of an implied promise,<sup>217</sup> but that possibility is more theoretical than real. Few malpractice actions for breach of contract have been founded upon obligations not proven to have been expressly stated.<sup>218</sup>

Occasional judicial decisions have allowed jurors leeway in deciding what was promised by a lawyer to a client. For example, in *Pierce v. Cook*,<sup>219</sup> a lawyer, who was jointly representing a husband, wife, and child on personal injury claims, commenced an affair with the wife during the representation. The Supreme Court of Mississippi allowed the husband and child to recover a substantial malpractice judgment based in part on a breach of contract theory, holding that it was for the jurors to decide what promises had been made by the defendant lawyer.<sup>220</sup> However, decisions like *Pierce* are notable not because they are common, but because they are so rare. A client who fails to bargain for particular performance by a lawyer typically has little chance of prevailing in a contract-based malpractice action.

### 3. Deficiencies in the Contract Model

The question then is whether contract law principles, which are so seldom a basis for lawyer liability, might somehow play an important role in assuring that nonlawyers and lawyers who are not fully licensed are deterred from causing harm to clients and held accountable for deficient conduct. A negative answer to this query is strongly suggested by five factors, including the unrealistic prospect of clients bargaining for protection,<sup>221</sup> the absence of implied warranties for services,<sup>222</sup> problems of proof,<sup>223</sup> limited damages,<sup>224</sup> and inconsistent client treatment.<sup>225</sup>

#### *a. Unrealistic Bargaining*

It would be difficult or impossible—not to mention prohibitively expensive—for clients to bargain with legal services providers for the level of protection currently afforded by the law of negligence. This is true for several reasons.

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for “breach of an alleged oral agreement to have a particular attorney . . . serve as lead counsel . . . [because] the client failed to preserve its arguments that the law firm did not meet its burden of demonstrating that the client fully understood the terms of the parties’ retainer agreement”).

<sup>217</sup> See MALLEN & SMITH, *supra* note 206, § 8:7 (discussing implied contracts in the context of legal malpractice claims).

<sup>218</sup> See *id.* § 8:6 (“The prevailing rule is that there is no cause of action for breach of an express contract unless the wrong sued for is breach of a specific promise.”).

<sup>219</sup> *Pierce v. Cook*, 992 So. 2d 612 (Miss. 2008).

<sup>220</sup> *Id.* at 618.

<sup>221</sup> See Part IV.C.3.a.

<sup>222</sup> See Part IV.C.3.b.

<sup>223</sup> See Part IV.C.3.c.

<sup>224</sup> See Part IV.C.3.d.

<sup>225</sup> See Part IV.C.3.e.

The reasonable care standard that is the centerpiece of the law of negligence incorporates, through expert testimony, many of the numerous professional obligations that are articulated in ethics codes.<sup>226</sup> Those duties include, but are certainly not limited to, competence,<sup>227</sup> communication,<sup>228</sup> confidentiality,<sup>229</sup> loyalty,<sup>230</sup> safekeeping of client property,<sup>231</sup> and transactional fairness, relating both to fees<sup>232</sup> and other pecuniary matters.<sup>233</sup> It would be the rare client who thought to address all of those matters in a contract with a legal services provider.<sup>234</sup> And even if client knew that those matters are important, the bargaining process would be excessively tedious and costly. Merely addressing the numerous varieties of conflict of interest that can threaten a legal services provider's loyalty to the client would be an exhausting undertaking. Quite likely, in the wide range of circumstances, important matters would be unaddressed, and there would be no promise by the provider that could form the basis for a suit for breach of contract.

Holding nonlawyers, or lawyers not fully licensed, to a "do what you promise"<sup>235</sup> standard would, in many instances, amount to hollow protection.<sup>236</sup> In proposing that standard, Morgan seems to be thinking more about what constitutes professional competence than about what comprises the broad fabric of ethical obligations that amount to such a large part of what protects clients from harm. Morgan recognizes

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<sup>226</sup> See Douglas R. Richmond, *Why Legal Ethics Rules are Relevant to Lawyer Liability*, 38 ST. MARY'S L.J. 929 (2007) (explaining why disciplinary rules are highly relevant to any assessment of what the standard of care requires).

<sup>227</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2012) ("Competence").

<sup>228</sup> See *id.* R. 1.4 ("Communication").

<sup>229</sup> See *id.* R. 1.6 ("Confidentiality of Information")

<sup>230</sup> See *id.* R. 1.7-1.10 (dealing with conflicts of interest).

<sup>231</sup> See *id.* R. 1.15 ("Safekeeping Property").

<sup>232</sup> See *id.* R. 1.5 ("Fees").

<sup>233</sup> See *id.* R. 1.8(a) (dealing with business transactions between lawyers and clients).

<sup>234</sup> *But see* MORGAN, *supra* note 7, at 25 (arguing that "many clients today are able to—and do—evaluate and direct their lawyers").

<sup>235</sup> See Morgan, *supra* note 5, at 905.

<sup>236</sup> The question of whether contract-based malpractice actions can effectively replace tort-based malpractice actions is related to the debate that has been raging recently around the so-called "economic loss rule." The question there is whether purely economic losses should be remedied only under contract law and not under tort principles. In that debate I have argued that:

Tort law can offer a more efficient path than contract law to deterring and compensating some forms of economic harm. . . . Relegating persons to exclusively contract remedies for purely economic losses will effectively immunize defendants from liability in a wide range of cases. This is undesirable for, in many cases, unnecessary economic harm should be deterred through legal principles that create an incentive for safe practices through risk of liability.

Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 WASH. & LEE L. REV. 523, 582-83 (2009).

the possible disadvantage for clients, but sees the alternative as worse. Morgan states, “The fact is that lawyers can often do a sufficiently better job than nonlawyers and my standard may leave some clients with a reduced standard of protection. I suggest—and leave to others’ evaluation—however, that nonlawyer representation will, on balance, tend to be better than no representation at all. And the latter, I fear, will be many potential clients’ only realistic alternative to nonlawyer assistance.”<sup>237</sup>

*b. Absence of Implied Warranties*

It seems doubtful that the law of warranties could fill the gap in legal protection left by the failure of clients to bargain for protection with a legal services provider. First, American law generally distinguishes between goods and services. Warranties are implied for goods, but not for services.<sup>238</sup> For example, the Uniform Commercial Code (UCC), which imposes warranties for merchantability<sup>239</sup> and fitness for a particular purpose,<sup>240</sup> applies only to sales of goods.<sup>241</sup> The UCC protections do not apply to sales of services,<sup>242</sup> or even to mixed sale-service transactions, if those transactions are predominantly for the provision of services, not goods.<sup>243</sup>

While there may be some commodity-like aspects to the rendition of legal services, what providers do characteristically involves the exercise of judgment<sup>244</sup>—judgment about which facts are relevant, what legal principles apply, or how best to protect or advance the interests of the client.<sup>245</sup> Thus, it is highly unlikely that a

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<sup>237</sup> Morgan, *supra* note 5, at 906-07.

<sup>238</sup> Compare U.C.C. §§ 2-314, 315 (2012) (providing implied warranties for goods), with 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 9-2 (5th ed. 1996) (“Code provisions on warranties and related obligations do not apply to contracts which are purely for services.”). See also *Rocky Mountain Helicopters, Inc. v. Lubbock Cnty. Hosp. Dist.*, 987 S.W.2d 50, 53 (Tex. 1998) (noting that an implied warranty for services will not be found “in the absence of a demonstrated, compelling need”); BARKLEY CLARK & CHRISTOPHER SMITH, 1 THE LAW OF PRODUCT WARRANTIES § 2:18 (2011) (“[T]here are no implied warranties for service contracts outside Article 2 [of the U.C.C.]”). But see *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*, 594 N.E.2d 459, 465 (Ind. Ct. App. 1992) (“Courts in a number of jurisdictions have recognized an implied warranty in service contracts.”).

<sup>239</sup> U.C.C. § 2-314 (2012).

<sup>240</sup> U.C.C. § 2-315 (2012).

<sup>241</sup> U.C.C. § 2-102 (2012).

<sup>242</sup> See, e.g., *Ins. Co. of N. Am. v. Cease Elec. Inc.*, 688 N.W.2d 462, 469 (Wis. 2004) (“[T]he U.C.C. does not apply to service contracts.”).

<sup>243</sup> See *Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974) (noting that contracts are excluded from the UCC if the predominant factor of the contract is “the rendition of service”).

<sup>244</sup> Cf. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 3, 61 (1993) (asserting that “it is this quality of judgment that the ideal of the lawyer-statesman values most” and explaining “excellence of judgment”).

<sup>245</sup> See Paul F. Kirgis, *The Knowledge Guild: The Legal Profession in an Age of Technological Change*, 11 NEV. L.J. 184, 197 (2010) (“The output of lawyers is a stew of intangibles consisting of expertise, judgment, process skills, and the like. These ‘knowledge goods’ are different from tangible goods.”).

lawyer or other legal services provider would be held liable to a client for breach of an implied warranty under principles<sup>246</sup> such as those embodied in the UCC, or its international transaction counterpart, the Convention on the International Sale of Goods,<sup>247</sup> to which the United States is a party.<sup>248</sup>

Moreover, even if legal services providers were held liable for “unmerchtable” services, there would be a myriad of unanswered questions as to what that means. Are law-related services “unmerchtable” if the provider has a conflict of interest, or fails to disclose material facts, or is unaware of relevant legal principles? The law of legal ethics presently talks about these issues under malpractice rubrics drawn from the law of negligence and fiduciary duty, but virtually never under the language of warranty. Consequently, there is no existing body of legal services warranty precedent that could even begin to inform how warranty principles could be applied to nonlawyers or lawyers not fully licensed.

*c. Problems of Proof*

Relegating clients to remedies under contract principles would also entail problems of proof. An aggrieved client would bear the burden of proving that a promise was in fact made.<sup>249</sup> However, clients—particularly, unsophisticated clients—often do not think about the advisability of memorializing the terms of the contract in writing. Absent such corroborating documentary evidence, a breach of contract action will be nothing more than the word of the client against the provider. This reality would not only undercut the efficacy of contract law remedies for individual clients, but the likelihood that a judgment would deter bad practices by other legal services providers.

Presumably, sophisticated clients, such as corporations, would be able to anticipate the need to bargain for contractual assurances and memorialize such obligations.<sup>250</sup> Yet, an effective legal ethics regime cannot be built on the assumption that all clients will be sophisticated and able to engage in adequate self-protection.

Civil liability remedies which require clients to prove that promises were made are far inferior to current malpractice principles. Under the present configuration of

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<sup>246</sup> Cf. *Call v. Czaplicki*, No. 09-6561 (RBK/AMD), 2011 WL 2532712, at \*2 (D. N.J. June 23, 2011) (discussing an amended complaint where the plaintiffs abandoned a breach-of-warranty claim and restated a breach-of-contract claim as a claim for breach of fiduciary duty against lawyer defendants).

<sup>247</sup> U. N. Convention on Contracts for the International Sale of Goods art. 35, Apr. 11, 1980, 19 I.L.M. 668.

<sup>248</sup> U.S. Ratification of 1980 United Nations Convention for the International Sale of Goods: Official English Text, 52 Fed. Reg. 6262-02 (Mar. 2, 1987).

<sup>249</sup> See Morgan, *supra* note 5, at 903 (“I suggest we move toward a contract-based standard that asks what the nonlawyer purported to be competent to do and whether she met a client’s reasonable expectations about the services to be provided. The burden of proof would initially be on the plaintiff client, and the nonlawyer defendant could show specific disclaimers of experience or limits on work to be done.”).

<sup>250</sup> Cf. SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 26-27 (1994) (“Consumers have no way to know whether a lawyer can promise (let alone deliver) value for money”).

legal malpractice law, lawyers owe a wide range of important duties to clients,<sup>251</sup> even if those duties were never discussed or the subject of bargaining. Moreover, in certain situations, such as business transactions between lawyers and clients, the lawyer bears the burden of proving that the transaction was fair and reasonable.<sup>252</sup>

*d. Limited Damages*

Another disadvantage of relegating clients to contract law remedies is the fact that contract law damages are typically less adequate than recoveries under tort law. In many instances, consequential damages are deemed to be insufficiently foreseeable to be awarded under contract principles, even though the same damages might be levied in a tort action under ordinary rules of proximate causation. Consequently, clients may be undercompensated if forced to seek redress in an action for breach of contract.

Punitive damages are almost never recoverable under contract law.<sup>253</sup> Yet, despite a host of relatively recent state<sup>254</sup> and federal<sup>255</sup> law restrictions, punitive

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<sup>251</sup> See JOHNSON, *supra* note 26, at 58 (“A lawyer’s duty of reasonable care extends to all aspects of the client’s representation, including, for example, interviewing, counseling, research, drafting, advocacy, litigation, and dispute resolution. However, at a general level, there are at least two overarching obligations encompassed by the duty of reasonable care: competence and diligence”).

<sup>252</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 cmt. a (2000) (discussing business transactions between a lawyer and a client and stating that “[i]n any civil proceeding between a lawyer and a client . . . , the lawyer has the burden of persuading the tribunal that [the terms and circumstances of the transaction are fair and reasonable to the client]”).

<sup>253</sup> See, e.g., *Grams v. Milk Prods., Inc.*, 699 N.W.2d 167, 171, 171 n.4 (Wis. 2005) (“Tort law generally offers a ‘broader array’ of damages than contract. . . . For example, punitive damages and attorney fees are sometimes available in tort actions, but generally cannot be had in breach of contract claims.”); 22 AM. JUR. 2D *Damages* § 574 (“Punitive damages are not available as a remedy for breach of contract, without an underlying tort.”).

<sup>254</sup> Some jurisdictions set a high threshold for an award of punitive damages. For example, a Texas statute provides: “(a) . . . [E]xemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence . . . . (d) Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.” TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West 2012); see *Smith v. O’Donnell*, 288 S.W.3d 417, 423 (Tex. 2009) (finding no evidence that a law firm that gave allegedly defective advice to an estate executor intended to cause injury or acted with actual awareness of an extreme risk of harm, and that therefore there was no basis for a punitive award).

Many jurisdictions have capped the amount of punitive damages that may be recovered from a defendant, either in tort actions generally or in legal malpractice suits in particular. Alaska generally restricts a punitive award to the greater of three times compensatory damages or \$500,000. See, e.g., ALASKA STAT. ANN. § 09.17.020(f) (West 2012) (ordinarily allowing three times compensatory damages or \$500,000); COLO. REV. STAT. ANN. § 13-21-102 (West 2012) (providing that punitive damages may not exceed actual damages or, if there are aggravating circumstances, three times the amount of actual damages).

damages still play an important role in tort litigation arising from egregious conduct.<sup>256</sup> Any diminution in the exposure of legal services providers to punitive damages liability would undercut the deterrent effect of the law in terms of discouraging abusive practices by other providers.

The replacement of the present workhorse malpractice cause of action for negligence with contract-based liability would have little effect on the availability of punitive damages because ordinary negligence is never a predicate for a punitive damages award.<sup>257</sup> Presumably, under a reconfigured liability regime, legal services providers would still be subject to tort liability for highly blameworthy conduct, such as fraud, conversion, and the tort of outrage.<sup>258</sup> However, in some jurisdictions, such as Texas,<sup>259</sup> gross negligence is a sufficient basis for an award of punitive damages. If the substitution of contractual recovery for negligence liability eliminates the ability of clients to hold legal services providers liable for gross negligence under circumstances not amounting to another tort that warrants an award of punitive damages, that would make the law less effective in protecting clients.

*e. Inconsistent Client Treatment*

One of the great virtues of American legal ethics is that the rules tend to ensure a minimum level of performance in the rendition of legal services and consistent treatment of clients. Thus, for example, under the present regime, even without bargaining for it, every client enjoys safeguards related to the handling of personal information<sup>260</sup> and property,<sup>261</sup> and every lawyer must measure up to the standard of competent performance.<sup>262</sup> This not only increases the chances of individual client

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<sup>255</sup> See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (stating that defendant's reprehensibility is "[t]he most important indicium of the reasonableness of a punitive damages award").

<sup>256</sup> See, e.g., *McDonald's Corp. v. Ogborn*, 309 S.W.3d 274 (Ky. Ct. App. 2009) (upholding the punitive award of five million dollars to a young employee who was forced to strip in front of McDonald's managers as part of a hoax).

<sup>257</sup> See 1 STEIN ON PERSONAL INJURY DAMAGES § 4:11 (3d ed. 1997) ("What is manifestly evident from the authorities is that mere or ordinary negligence will not support an award of punitive damages.").

<sup>258</sup> See generally Alex B. Long, *Lawyers Intentionally Inflicting Emotional Distress*, 42 SETON HALL L. REV. 55, 56 (2012) ("While most IIED claims against attorneys fail, predicting whether a particular attorney's actions will be determined to have crossed the line into 'extreme and outrageous' conduct is sometimes at least as difficult as it is with respect to other defendants").

<sup>259</sup> See TEX. CIV. PRAC. & REM. CODE ANN. § 41.003 (West 2012) (requiring "(1) fraud; (2) malice; or (3) gross negligence"); see also *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 662 (Tex. 2012) ("In a typical negligence case like medical malpractice, to recover exemplary damages a plaintiff must simply prove that the defendant was not merely negligent, but was grossly negligent or acted intentionally in causing the serious harm that is the subject of the cause of action.").

<sup>260</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2012) ("Confidentiality of Information").

<sup>261</sup> *Id.* R. 1.15 ("Safekeeping Property").

<sup>262</sup> *Id.* R. 1.1 ("Competence").

satisfaction by reducing the opportunities for poor performance and abuse, it also builds confidence in the legal system.

Clients know that lawyers must play by the “rules of the game,” even though those clients may have little understanding about what those rules provide. As the result of the existence of disciplinary and malpractice principles, clients can and do expect, at least in a vague and imprecise way, that unless a special bargain has been struck, every lawyer-client relationship comes with all of the “standard equipment.” One consequence of this arrangement is that the legal system tends to be viewed as legitimate. In a very real sense, clients enjoy a degree of equality before the law because everyone’s lawyer must conform to the same standards and operate within the same restrictions.

The legitimacy of the legal system is crucial for many reasons. Among other things, it facilitates the peaceful resolution of disputes, reduces the transaction costs of hiring an attorney, and builds respect for the judgments of the courts.

Under a legal ethics regime based predominately on contract law principles—rather than negligence and fiduciary-duty law and disciplinary standards of conduct—it would be considerably more difficult for legal principles to ensure that the clients would be treated equally. The applicable admonition would be “buyers beware.” In that environment, it would be harder for the legal system to operate in a way that enjoys the confidence and respect of the citizenry.

#### V. CONCLUSION

Despite its apparent vitality and comprehensive structure, the field of American legal ethics is vulnerable to the forces of change. A looming transformation of the legal profession, catalyzed in large measure by technological innovations and globalization, threatens to undermine the central pillars of the current legal ethics regime, discipline and malpractice.

If legal services are increasingly provided to clients by nonlawyers, or by lawyers who are not fully licensed, it will be ever more difficult for the legal system to rely on disciplinary codes and malpractice actions to hold those who provide legal services accountable and to deter improper practices. And, if ethics rules or the legal principles governing negligence and fiduciary duty are rendered less operative than they are today, it may be necessary to find a substitute legal regime for protecting clients from harm and facilitating the proper operation of the justice system.

It seems doubtful that contract law principles can meet this developing challenge. Contract law offers no great repository of client protection principles, but rather an array of rules which do as much to limit obligations by lawyers to clients as to create them. Weak and unsophisticated clients are unlikely to be protected by contractual principles from practitioners who are incompetent or more loyal to other interests.

Clients’ rights under contract law would, of course, be supplemented by the important tort causes of action that impose liability for deception via suits for fraud and negligent misrepresentation. Those torts would undoubtedly provide some protection from serious forms of harm. Yet, it must be remembered that it is difficult to plead and prove fraud.<sup>263</sup> Relevant principles often provide no remedy,

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<sup>263</sup> Rule 9(b) of the Federal Rules of Civil Procedure requires a complaint alleging fraud to state “the circumstances constituting fraud . . . with particularity.” FED. R. CIV. P. 9(b). Similar requirements are imposed at the state level. *See, e.g., Lazar v. Super Ct.*, 909 P.2d 981, 989 (Cal. 1996) (opining that the “particularity requirement necessitates pleading facts which ‘show how, when, where, to whom, and by what means the representations were

even to victims who have been deliberately deceived.<sup>264</sup> So, too, actions for negligent misrepresentation allow only a narrow range of recovery.<sup>265</sup> Statutory alternatives are not much better. Deceptive trade practices acts, which were originally intended to simplify the requirements of parallel common law principles, have been reformed in many states in ways that limit their application to harm arising from the provision of legal services.<sup>266</sup>

Any weakness in the ethical rules applicable to nonlawyers, or to lawyers who are not fully licensed, is sure to have a corrosive effect on the standards of conduct applicable to fully licensed lawyers. It is difficult and expensive to maintain the current legal ethics regime. Why should lawyers bother with such troubles if other persons rendering varieties of legal services are not held similarly accountable?

Indeed, the middle ground may succumb to the pressures at the ends. Corporate counsel representing wealthy, sophisticated clients already argue that they should be freed from the nettlesome requirements of the conflict of interest rules,<sup>267</sup> and that broad advance waivers of conflicts should be deemed valid.<sup>268</sup> At the other end of

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tendered”). Many jurisdictions say that the burden of proof regarding allegations of fraud is higher than the ordinary preponderance of the evidence standard, and thus fraud often must be established by clear and convincing evidence or by a “clear preponderance of the evidence.” *Tapestry Vill. Place Indep. Living, L.L.C. v. Vill. Place at Marion, L.P.*, No. 9-112/08-1018, 2009 Iowa App. LEXIS 331, at \*7-8 (Iowa Ct. App. May 6, 2009).

<sup>264</sup> See Andrew R. Simank, *Deliberately Defrauding Investors: The Scope of Liability*, 42 ST. MARY'S L.J. 253, 256 (2010) (explaining that the reason-to-expect-reliance standard has been subject to different interpretations by state and federal courts and interpreted very narrowly by the Texas Supreme Court).

<sup>265</sup> See *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110, 118 (N.Y. 1985) (applying a near-privity requirement).

<sup>266</sup> In Texas, the state deceptive trade practices act does not apply to high-dollar legal representation “arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than \$500,000.” TEX. BUS. & COM. CODE ANN. § 17.49(g) (West 2012). The Texas DTPA also does not apply to “a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill,” unless there was “an express misrepresentation of a material fact” that cannot be characterized as advice, judgment, or opinion; a failure to disclose certain types of information intended to induce a consumer to participate in a transaction; an “unconscionable action or course of action that cannot be characterized as advice, judgment, or opinion”; or a “breach of an express warranty that cannot be characterized as advice, judgment, or opinion.” TEX. BUS. & COM. CODE ANN. § 17.49(c) (West 2012). *But see Amalfitano v. Rosenberg*, 572 F.3d 91, 92 (2d Cir. 2009) (imposing treble damages attempted deception under the New York attorney misconduct statute).

<sup>267</sup> See James W. Jones & Anthony E. Davis, *In Defense of a Reasoned Dialogue About Law Firms and Their Sophisticated Clients*, 121 YALE L.J. ONLINE 589, 589-91 (2012) (discussing the “Proposals of Law Firm General Counsel for Future Regulation of Relationships Between Law Firms and Sophisticated Clients [2011]” under which “sophisticated clients and their outside lawyers could agree to permit . . . [b]inding advance waivers of conflicts”).

<sup>268</sup> See Jonathan A. Kohl & Philip D. Weller, *Drafting Advance Waivers of Conflicts of Interest*, ST054 A.L.I.-A.B.A. 1631 (2012) (arguing that “[a]dvance waivers serve a vital role

the spectrum, voices urge that the some of the least sophisticated clients, those who cannot afford to hire a fully licensed lawyer, should be able to enable secure legal assistance from nonlawyers, or from lawyers who are not fully licensed, even if that assistance comes with less ethical and quality-control safeguards. If both the wealthiest and poorest clients can do without some of the protection currently afforded by the law governing lawyers, why should lawyers serving clients between those two extremes be required to comply with a full set of ethical rules under which compliance both costly and complex? Would a reduced, less expensive, level of client protection not be enough?

The field of American legal ethics faces many challenges. If the twin pillars on which it stands—malpractice and disciplinary liability—are seriously weakened, it is not clear what legal substitutes could effectively take their place. That unanswered challenge will need to be addressed by lawyers, judges, and scholars with the same energy and dedication with which the current matrix of substantive standards and enforcement mechanisms was built, largely from scratch, during the past fifty years.<sup>269</sup> Presumably, if the challenge could be met once, it can be met again. However, in another fifty years, the field of American legal ethics may look quite different than it does today.

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in making sure that the resulting tangle of conflicts of interests will not unnecessarily dissuade lawyers from taking on new clients”).

<sup>269</sup> See Part II.