

2012

Law Firms, Global Capital, and the Sociological Imagination

Christine Parker

Tanina Rostain

Recommended Citation

Christine Parker and Tanina Rostain, *Law Firms, Global Capital, and the Sociological Imagination*, 80 Fordham L. Rev. 2347 (2012).
Available at: <http://ir.lawnet.fordham.edu/flr/vol80/iss6/3>

This Symposium is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

LAW FIRMS, GLOBAL CAPITAL, AND THE SOCIOLOGICAL IMAGINATION

Christine Parker* & Tanina Rostain**

INTRODUCTION

Between 2001 and 2003, one of Australia's "oldest, richest and proudest corporations,"¹ James Hardie Industries, restructured itself into a global corporation headquartered in the Netherlands.² In so doing, it reduced its tax liability. It also "separated itself" from its two original Australian subsidiaries and the huge liabilities stemming from the business that had been the basis for its success from 1917 up until the 1980s, but which was also killing many of its employees and customers.³ That business was the manufacture and sale of the material that quite literally "built" a nation: "fibrous asbestos cement."⁴

By the mid-1980s, the James Hardie group had already stopped manufacturing asbestos and was focused on other businesses.⁵ In 2001, it had grown into a global corporation, with most of its business in the United States and Europe. At least parts of the corporate group would, however, continue to face significant asbestos liabilities in Australia for years to

* Professor, Centre for Regulatory Studies and Law Faculty, Monash University.

** Professor and Research Director, Center for the Study of the Legal Profession, Georgetown University Law Center. The authors are grateful to Mitt Regan, Rob Rosen, Susan Silbey, and participants at the Fordham University School of Law's colloquium on Globalization and the Legal Profession for helpful comments.

1. GIDEON HAIGH, *ASBESTOS HOUSE: THE SECRET HISTORY OF JAMES HARDIE INDUSTRIES*, back cover (2006).

2. In 2010, James Hardie Industries Ltd. (JHIL) moved its headquarters to Ireland. *Shareholders Approve James Hardie Move from Netherlands to Ireland*, NEWS.COM.AU (June 3, 2010, 9:04 AM), <http://www.news.com.au/business/breaking-news/shareholders-approve-james-hardie-move-from-netherlands-to-ireland/story-e6frfkur-1225874842377>.

The version of the James Hardie story that appears in this Article is based on a compilation of sources. See HAIGH, *supra* note 1; Richard Ackland, *Irresistible Charms*, BUS. REV. WKLY., Sept. 29, 2004, at 50; DAVID F. JACKSON, REPORT OF THE SPECIAL COMMISSION OF INQUIRY INTO THE MEDICAL RESEARCH AND COMPENSATION FOUNDATION, vol. 1 (2004), available at <http://pandora.nla.gov.au/tep/45031>; Elisabeth Sexton, *Hardie Writhes in Self-Made Circles of Hell*, THE AGE (Aug. 21, 2004), <http://www.theage.com.au/articles/2004/08/20/1092972742166.html>. The Hardie episode was the basis of an earlier case study published by one of the authors in CHRISTINE PARKER & ADRIAN EVANS, *INSIDE LAWYERS' ETHICS* 237-41 (2007).

3. See HAIGH, *supra* note 1, at 1-22.

4. James Hardie began its asbestos production in 1917. *Id.* at 18. The first known death of a Hardie employee due to asbestos occurred in about 1961. See MATT PEACOCK, *KILLER COMPANY: JAMES HARDIE EXPOSED* 49-52 (2009). The first asbestos compensation claim was filed against James Hardie in 1939. See *id.* at 54.

5. See JACKSON, *supra* note 2, Annex J, at 117-18, 121.

come. James Hardie's asbestos manufacturing business had been enormously successful, and Australians had become the highest per capita users of asbestos in the world.⁶ One out of three domestic dwellings built before 1982 is thought to contain asbestos. By 2001, approximately two thousand asbestos compensation claims had been made against James Hardie. Due to a long latency period, however, there are estimates that asbestos-related disease in Australia will not peak until 2020, with about 13,000 cases of mesothelioma (a deadly cancer of the pleural lining of the lungs caused only by asbestos) and 40,000 cases of other asbestos-related lung cancer.⁷

Lawyers were of course needed to construct this global corporation. Their assignment was to formulate a series of legal transactions, designed to ensure that upon completion, James Hardie could legitimately announce to the market that it had "resolved" its asbestos liabilities and could now "focus entirely on growing the company for the benefit of all shareholders."⁸ When it later became obvious that inadequate provision had been made for the long tail of asbestos claims against the former James Hardie group companies—the funding provided to satisfy claims was predicted to have a shortfall of somewhere between A\$800 million and \$1.5 billion—there was a large public outcry, and the legality of this announcement was disputed.

The liability of a number of directors and officers of the James Hardie parent for making a misleading statement with this announcement—and hence, in one sense, the ultimate success or failure of the legal work done by James Hardie's lawyers—is still being determined in an appeal to the highest court in Australia.⁹ In another sense, it is already clear that the

6. *See id.* at 117.

7. Peta Spender, *Blue Asbestos & Golden Eggs: Evaluating Bankruptcy and Class Actions as Just Responses to Mass Tort Liability*, 25 SYDNEY L. REV. 223, 234 (2003).

8. *See* Press Release, James Hardie, James Hardie Resolves Its Asbestos Liability Favourably for Claimants and Shareholders (Feb. 16, 2001), in JACKSON, *supra* note 2, at 29, ¶ 2.35 (announcing the creation of the Medical Research Compensation Foundation (MRCF), an entity which would be responsible for all asbestos-related liabilities, stating, "The Foundation has sufficient funds [through a one-time provision of funding from the parent] to meet all legitimate compensation claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL."). Commissioner David Jackson later described this announcement as "seriously misleading." *See id.* at 10, ¶ 1.15. In Commissioner Jackson's view, the James Hardie CEO and General Counsel had breached their duties as James Hardie officers "by encouraging the Board to act on the Trowbridge Report in forming a view that the Foundation would be 'fully funded.'" *See id.* at 420, ¶ 24.82.

9. The Australian Securities and Investments Commission commenced civil proceedings in relation to this matter in 2007. In 2009, the New South Wales Supreme Court found that seven former directors, three former company officers, and the former General Counsel of JHIL and James Hardie Industries NV (JHINV), had breached various duties under the Corporations Act in relation to disclosures made concerning the adequacy of funding made available in 2001 for asbestos-related litigation. *See Austl. Sec. & Invs. Comm'n v Macdonald* [2009] NSWSC 287 (Austl.). In 2010, the New South Wales Court of Appeal dismissed the appeal by JHINV, upheld the appeals by the non-executive directors, and dismissed in part and upheld in part the appeals by the executive officers. *See Morley & Ors v Austl. Sec. & Invs. Comm'n* [2010] NSWCA 331 (Austl.); *Shafron v Austl. Sec. &*

lawyers failed. The legal work these lawyers so carefully did to distance the James Hardie parent from its subsidiaries, and from any shareholder perception that it was still tainted by large future liabilities, was all undone when Bernie Banton (a social justice campaigner and victim of asbestosis and mesothelioma), the unions, and the New South Wales government succeeded in getting the parent to pay the shortfall, despite the company's not being legally required to do so. James Hardie fought the pressure to cover the remaining claims kicking and screaming.¹⁰

James Hardie's outside lawyers were among those criticized by the special government commission of inquiry (Commission) set up to scrutinize James Hardie's actions. During hearings convened to investigate the incident, Commissioner David Jackson wondered aloud: "Why didn't someone stand back and say, 'This is just too hot'?"¹¹ He concluded in his report that it was "disturbing" that none of Hardie's professional advisors and officers, especially its outside advisors, "expressed any view of the merits [or rightness] of the underlying transaction[]" and that none of them had informed their client that "separation was unlikely to be successful unless the [Medical Research and Compensation Foundation (MRCF), established to cover asbestos-related claims] was fully funded, and that this was required to be rigorously checked."¹² Jackson was surprised that lawyers from Allens Arthur Robinson (Allens), a large and well-respected corporate firm, did not raise the question of the adequacy of the funding earlier than they did. Ultimately Jackson concluded that James Hardie's law firm had not engaged in intentional wrongdoing and had therefore not breached any law or professional conduct rule, although they may have been negligent and in breach of their duty of care to James Hardie.¹³ Nevertheless he appeared to harbor some vestige of hope that a

Invs. Comm'n [2011] NSWCA 110 (Austl.). Both the Australian Securities and Investments Commission and the two executive officers sought leave to appeal to the High Court of Australia (the highest court in Australia). This was granted in May 2011 and arguments were heard in October 2011. Judgment is pending at the time of this writing.

10. See Helen Anderson, *Veil Piercing and Corporate Groups—An Australian Perspective*, 2010 N.Z. L. REV. 1, 7–8; Paul von Nessen & Abe Herzberg, *James Hardie's Asbestos Liability Legacy in Australia: Disclosure, Corporate Social Responsibility and the Power of Persuasion*, 26 AUSTL. J. CORP. L. 1, 36 (2011) (describing the pressure that needed to be brought to bear by the New South Wales government, unions, asbestos disease sufferers and the general public before the James Hardie group "accepted that the desired elimination of its asbestos legacy had been unsuccessful"). As a result of the Commission of Inquiry, the New South Wales government threatened to legislate to make the James Hardie group liable unless they were able to negotiate a satisfactory arrangement for compensation of everyone. Unions threatened a boycott of James Hardie products, and James Hardie received bad publicity from the campaigning of unions, and asbestos disease sufferers and their families before an arrangement was finally negotiated. On December 1, 2005, the company effectively agreed to undo its 2001–02 restructuring and reestablish its liability to compensate victims of asbestos. See Marcus Priest, *Buck Stops with New Local Unit*, AUSTL. FIN. REV., Dec. 2, 2005, at 5.

11. Elisabeth Sexton, *Allens Warned on Supine Behavior*, SYDNEY MORNING HERALD (July 11, 2004), <http://www.smh.com.au/articles/2004/07/11/1089484242541.html?from=storylhs>.

12. JACKSON, *supra* note 2, at 547–48, ¶¶ 29.14, 29.16.

13. *Id.* at 456, ¶ 25.91.

corporation's advisors, especially its lawyers, would demonstrate some professional autonomy and ethical judgment, and would resist succumbing to its client's commercialism and profit-orientation. Jackson appeared to believe that lawyers would act consistent with their ethical concerns about their client's activities, even when such actions were not required by professional conduct rules.

This Article considers whether this faith in professional autonomy is feasible or forlorn. We do not consider this question from a normative or ethical point of view, but rather from a sociological perspective. As we show, arguments for reform (or renewal) of the professional ethics of commercial lawyers assume a particular sociology of the legal profession—one that sees professionalism as a distinct set of institutional arrangements for an ethical professional community with unique advantages over markets, business organizations, and government bureaucracies¹⁴—albeit one that might be deplorably in decline.

This is in contrast to an alternative, critical sociology of the legal profession that explains the rise of *professionalism* as going hand in hand with the rise in fortunes of the business of law and of global capital itself. Indeed, in this account, the discourse of professionalism and the business of law are interdependent, and the relations between the profession of law and global capital mutually constitutive.

We embark on this task with a conceit: we take as our starting point C. Wright Mill's humanistic vision for sociology—to educate individuals to avoid being “falsely conscious of their social positions.”¹⁵ Mills argues that, while individuals often feel that the circumstances of their daily life are their own problems alone, the “sociological imagination” connects their personal troubles to public issues so that they can understand that their personal problems are shared by others and can only be solved by change to the structure of the groups and societies in which they live.¹⁶

We begin by considering the sociology of the legal profession through the eyes of one of James Hardie's outside lawyers, David Robb, a junior partner at Allens, who was on several occasions deeply disturbed by how “hot” the deal was. The conceit we propose is that he might be interested in using the “sociological imagination” to deal with his misgivings about James Hardie's actions. In order to denote when we enter the world of speculation, we will refer to him by his initials, DR, only. In this Article, we do not seek to explain what might motivate a lawyer in David Robb's situation to develop and use a sociological imagination. Our interest in this Article is what the sociological imagination would reveal about this situation, assuming someone is motivated to use it.¹⁷

14. See Julia Evetts, *The Sociological Analysis of Professionalism: Occupational Change in the Modern World*, 18 INT'L SOC. 395, 403–04 (2003).

15. C. WRIGHT MILLS, *THE SOCIOLOGICAL IMAGINATION* 5–8 (1959).

16. *Id.* at 171–87.

17. Some to whom we presented this Article urged us to investigate what might motivate or drive DR to become a sociological citizen. This may be a fruitful line of inquiry, but not one we pursue here.

In Part I, we outline two occasions during which Robb tried, unsuccessfully, to exercise professional autonomy. We then describe the frustrations that could motivate someone in his position to engage the “sociological imagination”—to reconsider his role as a lawyer and the options available to him. In Parts II and III, we outline two alternative sociologies of the legal profession—a sociology of expert community as the source of professional autonomy, and a critical sociology of the discourses of professionalism and their interdependence with the business of law—that might enlighten our protagonist’s personal troubles, and how they would apply to this situation.

In Part IV, we argue that while there are insights to be gained from both sociological accounts of the predicament of contemporary commercial lawyers like DR, it is the second version that provides a more accurate, and therefore ultimately more empowering, version of the social milieu in which DR finds himself enmeshed.

I. THE SOCIOLOGICAL IMAGINATION AND THE LAWYER WHO FOUND HIS PROFESSIONAL ROLE TOO “HOT” TO HANDLE

A. *Too Hot to Handle?*

Between February 2001 and March 2003, James Hardie’s corporate management restructured its family of companies so that all the group’s asbestos liabilities would end up vested in a separate entity, the MRCF, together with a fixed amount of funding for compensating asbestos claims.¹⁸ At two points during this period, David Robb attempted to raise concerns about the adequacy of the funding.

The first occasion arose in February 2001, when Allens lawyers, including David Robb, attended a crucial meeting at which the company’s Board approved isolating James Hardie’s asbestos liabilities in the MRCF. Subsequently, the foundation was cut adrift from the James Hardie group without adequate funding to compensate all those who would be legally entitled to compensation. During the fateful February meeting, James Hardie’s Chief Executive Officer, Peter Macdonald, and General Counsel, Peter Shafron, urged the Board to vote to create the MRCF. At the time, the company’s officers permitted the Board to make its decision based on a

18. Before February 2001, the James Hardie group’s main legal responsibilities for asbestos compensation related to claims against two subsidiary companies owned by the parent company, JHIL. These two companies, Amaba Pty Ltd. and Amaca Pty Ltd., had made asbestos products from 1937 until 1987 (under various names). In February 2001 JHIL transferred ownership of Amaba and Amaca to a new trust, the MRCF. They also gave the MRCF A\$293 million to meet future compensation claims. At the same time, Amaba and Amaca indemnified JHIL for any further asbestos liabilities. See JACKSON, *supra* note 2, at 8, ¶ 1.7. This meant that JHIL would not be liable in the future for asbestos-related claims. There is controversy about the exact extent to which JHIL, as the holding company would nevertheless have been liable in relation to the asbestos claims, since the asbestos was produced and sold by its subsidiaries (Amaca and Amaba). But JHIL had accepted that it had some responsibility to provide for asbestos compensation claims, at least as long as it still owned Amaba and Amaca.

flawed report that understated potential future claims and withheld important data that would have given the Board a more realistic idea of the funding the MRCF was likely to need.¹⁹

Immediately before the meeting, David Robb discovered that the James Hardie parent company had not provided Trowbridge, the actuarial firm charged with calculating future liabilities, with the most recent claim numbers to use for its calculations.²⁰ A cautious lawyer by disposition, Robb's "mind began racing."²¹ He wondered how Trowbridge's report could be current without including the most recent figures.

Robb, a junior partner new to James Hardie's account, phoned Shafron, a former partner with Allens himself. Shafron assured him that the new data would not make any difference.²² Although Robb was dissatisfied with Shafron's response, he did not do the "logical thing"²³ and go directly to the actuarial consultants. Instead he spoke to his senior partner, Peter Cameron, and together they called Macdonald.²⁴ During the call, Shafron was in Macdonald's office, and joined the conversation. Shafron simply reiterated his earlier position, that Trowbridge had indicated that it did not need the most recent numbers.²⁵ Macdonald, meanwhile, assured Cameron that the foundation would be fully funded.²⁶

Despite Robb and Cameron's concerns, the outside lawyers said nothing during the board meeting. The presence of the company's outside counsel at the meeting was essential to give the Board's decision legitimacy. During his subsequent testimony before the Commission, Shafron commented that the Board had insisted on hearing external advice in favor of each step in the process, and did not completely trust its internal lawyer and the other company officers. Throughout the meeting, as the Board discussed and then approved the transaction, the lawyers failed to voice their concerns about relying on the Trowbridge report. Robb considered raising the issue, but decided not to after consulting Cameron. His position

19. The Board's decision to fund the Foundation with A\$293 million was based on the Trowbridge Report, an actuarial report, estimating the likely amount needed to cover the James Hardie asbestos liabilities. However, this report was based on dated data and other inaccurate methodologies, and \$293 million would not be enough to pay out all of Amaba and Amaca's asbestos liabilities. Shafron had an updated "draft" report, and was aware of the problems with the Trowbridge Report, but chose not to make this information available to the Board. Allens' lawyers advised JHIL on creating the Foundation, and raised concerns about the Trowbridge Report's old data, but Shafron and Macdonald asserted that the report was adequate, and the Foundation would be sufficiently funded. *See* HAIGH, *supra* note 1, at 262–63, 269–71, 281–82.

20. *Id.* at 262–65.

21. *See id.* at 262–63 (including various notes from Robb's own files, which had been read during the Jackson inquiry). It is unclear whether Haigh's account is based only on the Jackson inquiry transcripts, or whether he interviewed Robb himself. Haigh gives a lot of detail from Robb's point of view; Robb has not given evidence of any of these matters in subsequent court hearings, or publicly commented since the Jackson Inquiry.

22. *Id.*

23. *Id.* at 262.

24. *Id.* at 263.

25. *Id.*

26. *Id.*

was that the Allens lawyers were present in the event questions arose. “We were available for questions to be asked of us. No questions were asked of us and so we did not say—we did not raise it.”²⁷

In subsequent months, Cameron and Robb went about creating the legal transactions and notices necessary to implement the Board’s decision. All the while, Robb continued to “fret that Trowbridge’s update had been anything but up-to-date.”²⁸ Robb attempted on a second occasion to raise concerns in late 2002, when James Hardie’s corporate restructuring severing the James Hardie parent from the foundation was complete, and the foundation was left unable to obtain further funds from the James Hardie parent.

In the summer of 2001, six months after the MCRF had been established, it was already apparent to its directors that it was facing a substantial shortfall in the funds available to cover the asbestos liabilities of the James Hardie subsidiaries, due to its initial underfunding. As the directors of the MCRF obtained updated information on recent claims, they realized that the original amount allocated to the foundation had been based on incomplete claims data, and that the shortfall had been predictable at the time the foundation had been created. Although the original agreement had contemplated that the MCRF would cover asbestos-related claims through the next two decades, it now looked as if the foundation would be insolvent within nine, or even as little as four, years.²⁹ MCRF’s directors insisted that James Hardie needed to contribute additional funds. In response, James Hardie claimed that the directors were not properly managing the Foundation and “was adamant that no further substantial funds would be made available to the Foundation, and that it had taken all proper steps at the establishment of the Foundation.”³⁰

Between October 2001 and March 2003, the James Hardie group continued to restructure itself. To reduce the company’s tax liabilities, the James Hardie parent group assets were transferred to a new parent company based in Amsterdam, James Hardie Industries NV (JHINV). The former parent company, James Hardie Industries Ltd. (JHIL) was left as a non-operating shell company, with net assets of A\$20 million. As part of the restructuring, JHIL also issued partly paid shares to JHINV, the new Dutch parent. These shares gave JHIL the ability to call on funds up to the value of A\$1.85 billion from JHINV, and would be available to cover the Foundation’s shortfall if it prevailed in its claim that, under the original agreement, the Foundation had been underfunded.³¹

In the lead up to the restructuring, however, Allens and JHIL had discussed the possibility that these partly paid shares would be cancelled at some time in the near future. According to Commissioner Jackson, while there was no “fixed intention” to cancel the partly paid shares at this stage,

27. *Id.* at 269.

28. *See id.* at 281.

29. *See id.* at 295.

30. JACKSON, *supra* note 2, at 12, ¶ 1.22.

31. *See* HAIGH, *supra* note 1, at 284–86.

“it was, in effect, the ‘operating assumption’ on which both management and the Board were proceeding” that it would occur within a year or so of the restructure.³²

The agreement between JHIL and JHINV had to be approved by the N.S.W. Supreme Court in order to ensure that the interests of shareholders and creditors of JHIL were protected (under N.S.W. law, this was a “scheme of arrangement”).³³ In court, JHIL’s lawyers stated that the A\$20 million and the funds available from the partly paid shares would be available to the MRCF to meet the asbestos liabilities of JHIL’s former subsidiaries if necessary.³⁴ Allens and JHIL did not mention to the court the concerns about the MRCF’s solvency that had already been voiced, nor the possibility that the partly paid shares would be cancelled. Permission for the restructure was granted.

In the fall of 2002, the decision was made to cancel the partly paid shares and sever the relationship between the two companies completely. Robb began to fret again. He became concerned that Justice Santow, who had approved the transaction, had been misled. Robb himself had assured Santow that the partly paid shares would be available “at any time in the future and from time to time.”³⁵ Now the shares were going to be eliminated.

Robb was so worried that he did something completely out of the ordinary: he drafted an unsolicited memo to the parent company’s officers discussing the implications of having informed Santow that the shares would be available to cover future liabilities of the company, so that these considerations would be taken into account in the decision to cancel the partly paid shares. Before Robb could finalize his opinion letter, he went on vacation. He left the draft to his partners to complete.

When he came back, his unsolicited and highly unusual advice had been changed beyond recognition. The final document reassured the James Hardie executives that the risks of canceling the shares were minimal.

B. The Sociological Imagination and the Socially Educated Agent

At this point, let us imagine that DR, still fretting about what he could have done differently, turns to scholarly writing on the role of the contemporary legal professional. Vaguely remembering that first year sociology had taught him something about how the “sociological imagination”³⁶ could help him reevaluate his “private troubles” as “public issues” with broader explanations (and perhaps solutions) than those available inside his own individual capacity, he turns to the sociology of the legal profession, and to socio legal writing on large law firms in particular.

32. See JACKSON, *supra* note 2, at 453, ¶ 25.80.

33. See *id.* at 559, ¶ 30.27.

34. See HAIGH, *supra* note 1, at 286; JACKSON, *supra* note 2, at 431–33, ¶¶ 25.21, 25.22.

35. See JACKSON, *supra* note 2, at 428–29, ¶ 25.16.

36. See generally MILLS, *supra* note 15.

Some might see this as an attempt to rationalize his actions: “Society made me do it.” But we shall interpret his attempt to find an understanding (and perhaps an answer) in this direction more charitably—it is part of the impulse to understand how the individual fits with his or her social milieu and the wider society.³⁷

DR shows the instincts of the “reflective practitioner.”³⁸ He realizes that sustainably excellent individual professional practice involves a constant process of reflection and learning in action, in order to reframe, re-imagine, and constantly seek to improve one’s own judgments and practices.³⁹ DR’s instinct tells him, however, that this is not a matter merely of reflection on, and reframing of, his own individual practice. Rather, his situation is a matter of the collective practices of others in his law firm, with the practices within the client corporation, and the broader history and social structure in which both firm lawyers and James Hardie executives are situated.

This is a good test of sociological theory: can it illuminate and provide understanding for the individual dilemma of DR if he were willing to engage with it? And does it provide an account that will empower DR to go beyond understanding to action, while still recognizing the relationally interdependent nature of individual capacity for action?

II. DEPROFESSIONALIZATION: “CAPITAL AS TEMPTER”

A. *Professional Community and Professional Autonomy*

DR finds a considerable “handwringing” literature in scholarly writing on the ethics of the legal profession decrying the descent of corporate lawyers and law firms into crass commercialism under the “temptation” of global competition and global capital.⁴⁰ In this literature, “capital is cast as the villain, subverting the professional from the true exercise of his or her calling. Lawyering in itself is conceived as good and pure, but as distorted by a growing association with and dependence on big business.”⁴¹ Commercial lawyers are therefore exhorted to show ethical judgment, moral courage, and above all, professional autonomy to reverse the moral decline evident in their relations with clients, their relations with professional colleagues within firms, and in their moribund attempts at professional self-regulation.

37. *See id.* at 8; *see also* ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* 19 (1984).

38. *See generally* DONALD A. SCHON, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 4–20 (1983).

39. *Id.*

40. *See, e.g.*, ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 4–7 (1993); Robert W. Gordon, *Portrait of a Profession in Paralysis*, 54 *STAN. L. REV.* 1427, 1454 (2002) (reviewing DEBORAH RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000)); *see also infra* notes 56–59 and accompanying text.

41. Maureen Cain, *The Symbol Traders*, in *LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION* 15, 25 (Maureen Cain & Christine Harrington eds., 1994).

In reviewing this literature, DR notes that it assumes a special function for lawyers—and professionals more generally—in modern society. In decrying the corrupting influence that commercial values have on professionalism, this literature implicitly opposes the moral regulation of a professional community to the chaos and self-interest of the market—a theme that was earlier conceptualized by Émile Durkheim in his posthumously published essay on professional ethics.⁴² This theme was further developed by Talcott Parsons,⁴³ and most recently by Eliot Freidson and others who counterpose professional interactions not only to market logic but also to bureaucratic rationality.⁴⁴ In juxtaposing professionalism to markets and bureaucracies, these foundational accounts of professionalism in social theory conceptualize professionalism as an institution that cultivates ethical responsibility, and autonomy, in a way that these other forms of organizing work cannot do.

*B. Sociology of Professional Community Beyond Market and the State:
Durkheim, Parsons, Freidson*

Durkheim provided one of the best arguments for this approach in his lectures on professional ethics. Durkheim's thesis was that we cannot trust market forces, or state regulation, to inculcate ethics.⁴⁵ Ethics must be the concern of sufficiently cohesive self-regulating occupations, which teach their members to look away from their own self-interest, and rather, toward the whole community, and thus develop the general disinterestedness on which moral activity is based.⁴⁶

Durkheim argued that self-regulatory communities, which socialize people into ethical behavior and discipline undesirable conduct, are the best means to achieve the regulation necessary. According to Durkheim, this was precisely how craft guilds have been historically organized. When large-scale industry emerged in the nineteenth century, however, it fell outside the guild. At the time Durkheim gave his lectures on professional ethics and civic morals, the only remnants of the moral regulation of the guilds were the self-regulating professional communities.

Durkheim suggested that this professional, or guild, genre of institution be extended to the whole of economic life as a solution to the evils of unrestrained capitalism. Under his approach, the state would sponsor and oversee new cooperatives that would be responsible for industry regulation.

42. See generally ÉMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS xxv (Cornelia Brookfield trans., 1958).

43. See generally *id.*; Talcott Parsons, *The Professions and Social Structure*, in ESSAYS IN SOCIOLOGICAL THEORY 34 (1954) [hereinafter Parsons, *The Professions*]; Talcott Parsons, *A Sociologist Looks at the Legal Profession*, in ESSAYS IN SOCIOLOGICAL THEORY, *supra*, at 370 [hereinafter Parsons, *A Sociologist*].

44. See ELIOT FREIDSON, PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY (1994); ELIOT FREIDSON, PROFESSIONALISM: THE THIRD LOGIC (2001). See generally MARK TRAVERS, THE NEW BUREAUCRACY: QUALITY ASSURANCE AND ITS CRITICS 139, 151–55 (2007).

45. See DURKHEIM, *supra* note 42, at 12–13.

46. See *id.* at 23–24.

Durkheim argued that the state would encourage public-interest-oriented industry regulation or co-regulation that would allow civic communities, such as those that survived among the professions, to develop in all fields of work. Although Durkheim emphasized the need for state regulation in every occupation, he was mindful that such state initiatives would also play a role in shoring up traditional professional communities, which, he recognized, were highly vulnerable to penetration by market logic.

Durkheim did not single out professions as a special site for the development of a public-minded ethos. Rather, he assumed that there was, or should be, a “craft” behind all worthwhile activities in economic life, and that in order to sustain the integrity and inherent morality of that craft, there needed to be something akin to a professional community regulating it. Durkheim saw his challenge as re-conceptualizing the institutions underlying occupation-based communities of pre-industrial society to respond to the novel demands of industrialization. For Durkheim, there was no question of returning to historical guilds or applying traditional professional institutions to organize spheres of work. The professions, he recognized, were relics of a bygone age. Durkheim argued instead for the need to adapt the features of traditional civic communities to address the rapidly evolving conditions of post-industrial society. While often read through a conservative lens, Durkheim was proposing that citizens engage in a self-conscious project to re-design the institutions of the state and society to meet new social needs.⁴⁷ As we suggest below, this type of innovative spirit, which recognizes that social institutions need to respond to changing historical circumstances, should animate any efforts to refashion the institutions of law practice in a post-industrial age.

Later social theorists drew on Durkheim’s account to understand professions as an alternative mode of occupational organization, situated between market relations and government bureaucracy. They departed from Durkheim in viewing certain occupations as having special expertise that made them uniquely suited to a professional mode of organization, based on principles of self-regulation. Applied to the legal profession, this theory held that the state had struck an implicit bargain with the legal profession, under which it was permitted to regulate itself. Self-regulation, it was claimed, was necessary because it was lawyers who understood the educational needs and workplace arrangements that were best suited to the application of legal expertise.

The view that professions had a special occupational status was most fully developed in the work of Talcott Parsons. For Parsons, professionals were different from members of other occupations or markets because they were “trained in and integrated with, a distinctive part of our cultural tradition, having a fiduciary responsibility for its maintenance, development and implementation.”⁴⁸ Since professions were responsible for, and learned

47. See Thomas L. Haskell, *Professionalism Versus Capitalism: R.H. Tawney, Emile Durkheim, and C.S. Peirce on the Disinterestedness of Professional Communities*, in *THE AUTHORITY OF EXPERTS* 180 (W. Haskell ed., 1984).

48. Parsons, *A Sociologist*, *supra* note 43, at 381.

in, bodies of knowledge and practice of great value to society they were entitled to regulatory prerogatives to ensure they are suitably trained and certified to interpret, develop, improve and practically apply this tradition for the benefit of others.⁴⁹ As Julia Evetts explained, “Parsons recognized, and was one of the first theorists to show, how the capitalist economy, the rational-legal social order (of Weber), and the modern professions were all interrelated and mutually balancing in the maintenance and stability of a fragile normative social order.”⁵⁰

More recently, Eliot Freidson has sought to rehabilitate the idea of professionalism as a bulwark not only against the market but also against the bureaucratic modes of organization that characterize private business and the state. Freidson argues that the knowledge developed and applied by professions, anchored in the exercise of discretionary judgment, continues to be important to solving the complex social problems of our day. According to Freidson, the monopolistic tendencies of professions—their insistence on controlling educational and training requirements and the organization of the workplace—are necessary conditions for the deployment of professional expertise. Permitting professions to control the markets for their services, Freidson suggests, will allow them to develop forms of expertise and service orientation so that they may fruitfully address the practical issues that are arising at the turn of the twentieth century.

C. *Applying the Sociology of Professional Community to Law*

A number of sociologists of the legal profession have adopted a similar approach to the sociology and ethics of the profession. They argue that society through the state does, and indeed must, enter into a “social bargain” with the legal profession in which the profession can define its own professional expertise and maintain its own professional autonomy. In return the legal profession takes primary responsibility, as it must, for sustaining and advocating the integrity of the legal process and the rule of law.⁵¹ The state and civil society might enter into dialogue with the profession to make adjustments to the social bargain from time to time, but overall the value of professional community must be recognized for its role in preserving the rule of law and the justice system.⁵²

The most sociologically nuanced and in-depth empirical studies of the legal profession from this broad perspective have come from the long term collaborative and comparative project led by Terence Halliday and Lucien

49. *See id.* at 372.

50. Evetts, *supra* note 14, at 400.

51. *See generally* TERENCE C. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT 370–71 (1987); Andrew Boon, *Professionalism Under the Legal Services Act 2007*, 17 INT’L J. LEGAL PROF. 195 (2010); Alan Paterson, *Self-Regulation and the Future of the Profession*, in LAW’S FUTURE(S): BRITISH LEGAL DEVELOPMENTS IN THE 21ST CENTURY 29 (David Hayton ed., 2000).

52. *See* CHRISTINE PARKER, JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE 140–73 (1999) (assessing this literature and suggesting a revision to the approach it takes, in order to make the legal profession more accountable to broader access to justice concerns).

Karpik to study the ways in which the legal occupations (which they call “the legal complex” to include lawyers, judges, and others) in different countries and globally have influenced the development of political liberalism and the promotion of basic legal freedoms.⁵³ DR notes that this strand of social theory assumes a professional mode of relations with clients, a form of workplace organization, and a self-regulatory regime that can be distinguished from capitalist, commercial, bureaucratic, or hierarchical business modes of work organization. It sees “professionalism as a normative value system in the socialization of new workers, in the preservation and predictability of normative social order in work and occupations, and in the maintenance and stability of a fragile normative order in state and increasingly international markets.”⁵⁴

DR appreciates the appeal of this traditional account; it was implicit, if inchoate, in his decision to pursue law and occasionally surfaced in broad outline as he pursued his studies and began practice. He wonders, however, whether it continues to be viable in the early twenty-first century in the context of corporate practice.⁵⁵ He considers relations between clients and their lawyers, the structure of large firms, and the possibility of a robust self-regulatory regime to determine whether they afford opportunities for the independent expert judgments that are the mark of “professionalism.”

D. Relations with Clients

DR observes that in his relations with clients, there is not much space for him to exercise discretionary judgment. Looking back on his experience as a transactional lawyer, he has difficulty recalling instances when he played a broader counseling role, or saw more senior partners assume this role.⁵⁶ Clients made clear that they were not interested in such advice, and lawyers were consequentially not eager to give it. DR also thinks back on the pressures within the firm to develop a book of business, increase profits,

53. See generally FATES OF POLITICAL FREEDOM: THE LEGAL COMPLEX IN THE BRITISH POST-COLONY (Terence Halliday & Lucien Karpik eds., 2011); FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM (Terence Halliday et al. eds., 2007); LAWYERS AND THE RISE OF WESTERN POLITICAL LIBERALISM: EUROPE AND NORTH AMERICA FROM THE EIGHTEENTH TO TWENTIETH CENTURIES (Terence Halliday & Lucien Karpik eds., 1997); cf. YVES DEZALAY & BRYANT GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996); RONEN SHAMIR, MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL (1995).

54. See Evetts, *supra* note 14, at 404.

55. See Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 415–20 (1985).

56. See generally ROBERT NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988); Robert Nelson, *The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-economic Factors that Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation*, 67 FORDHAM L. REV. 773 (1998); Robert Eli Rosen, *Problem-Setting and Serving the Organizational Client: Legal Diagnosis and Professional Independence*, 56 U. MIAMI L. REV. 179 (2001); William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 YALE J. ON REG. 1 (2005).

and keep the most important clients happy.⁵⁷ This anxiety makes it difficult to give unwelcome advice to clients. They want to hear how to do what they want, not that they cannot.

Reading the literature on recent trends in corporate practice, DR observes that his firm is not atypical. Increased competition for clients has created intense pressures for lawyers to breach their duties to the court, the law, and the wider public interest for the sake of clients. Contemporary commercial law firm attorneys have increasingly become handmaids to (global) capital. Firms are profit-oriented, competitive, and, in some cases, over-dependent on a small number of powerful, rich clients.⁵⁸ Increasing external competition among law firms to attract and retain clients may lead to law firm cultures where at least some lawyers might feel they can only achieve partnership, financial rewards, and social esteem by proving how aggressively they can represent clients in litigation, or, in transactional lawyering, by designing innovative ways to get around the law and to protect partisan client interests.⁵⁹ If mid-twentieth-century corporate lawyers ascribed to professional ideologies tied to furthering broader social ends, by the turn of the twenty-first century, the dominant approach was undiluted partisanship on behalf of the client. Single-minded commitment to furthering client interests fit well with the market and organizational conditions of corporate practice. In the current competitive atmosphere, a long-term client that was a steady source of substantial fees called the shots.

57. See MILTON C. REGAN, *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 291–324 (2004); Kimberly Kirkland, *Ethical Infrastructures and De Facto Ethical Norms at Work in Large US Law Firms: The Role of Ethics Counsel*, 11 *LEGAL ETHICS* 181, 195–98 (2008); Suzanne Le Mire, *The James Hardie Case and Its Implications for the Teaching of Ethics*, in *INNOVATION IN CLINICAL LEGAL EDUCATION: EDUCATING LAWYERS FOR THE FUTURE* 25, 25–33 (Bronwyn Naylor & Ross Hyams eds., 2007); Milton C. Regan, *Taxes and Death: The Rise and Demise of an American Law Firm*, in 52 *STUDIES IN LAW, POLITICS AND SOCIETY: LAW FIRMS, LEGAL CULTURE, AND LEGAL PRACTICE* 107 (Austin Sarat ed., 2010); Milton C. Regan, *Teaching Enron*, 74 *FORDHAM L. REV.* 1139, 1148–49 (2005).

58. See Camille Cameron, *Hired Guns and Smoking Guns: McCabe v British American Tobacco Australia Ltd.*, 25 *U.N.S.W. L.J.* 768, 779–88 (2002); Gordon, *supra* note 40, at 1432; David J. Luban, *The Ethics of Wrongful Obedience*, in *ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION* 94, 96–97 n.5 (Deborah L. Rhode ed., 2000) (citing STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974)); Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 *STAN. J.L. BUS. & FIN.* 9, 25–26 (2002); Simon, *supra* note 56, at 1; Eli Wald, *Lawyers and Corporate Scandals*, 7 *LEGAL ETHICS* 54, 54–58 (2004). See generally Marc Galanter & William Henderson, *The Elastic Tournament: The Second Transformation of the Big Law Firm*, 60 *STAN. L. REV.* 1867 (2008); Gerard Hanlon, *A Profession in Transition?—Lawyers, The Market and Significant Others*, 60 *MOD. L. REV.* 798 (1997).

59. See John Flood, *Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice*, 3 *INT'L J. LEGAL PROF.* 169, 182 (1996) (describing lawyers in big city law firms); Doreen McBarnet, *Legal Creativity: Law, Capital and Legal Avoidance*, in *LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION* 73, 73–84 (Maureen Cain & Christine Harrington eds., 1994); Robert Eli Rosen, *We're All Consultants Now: How Change in Client Organizational Strategies Influences Change in the Organization of Legal Services*, 44 *ARIZ. L. REV.* 637, 639 (2002) (describing the changing use of lawyers by clients).

The close relations between lawyers from Allens, the in-house lawyer at James Hardie (an ex-Allens partner) and the executive management of James Hardie exemplified this dynamic well. Allens had done legal work for James Hardie for over one hundred years. The in-house lawyer was working with the CEO to manipulate the shape of the advice given by the external lawyers (and other professional advisors). The focus was on shareholders and the place of James Hardie in a global network of business and shareholding, rather than on its embeddedness in the Australian community and its responsibilities to generations of workers, homeowners (renovators), and building occupiers who might be damaged by its products. James Hardie's conceptualization of its relations with its asbestos liabilities (through the CEO and in-house lawyer) was an issue to be "risk manage[d]"⁶⁰ through legal and actuarial strategies in order to present a good investment to the global market.

E. Relations Within Firms

DR considers whether his law firm is organized to permit lawyers to engage in discretionary judgment. Despite being a partnership, Allens has a fairly robust bureaucracy; and lawyers are divided into groups with relatively narrow subspecialties.⁶¹ Here, too, DR notes that the organization of his firm reflects a trend. Large corporate law firms organize and manage themselves increasingly like the large commercial firms they represent, creating a new mentality and institutions of lawyering focused on commercial and managerial rationality rather than value rationality and ethical judgment.⁶²

Reviewing the literature, DR notes that current law firm organization is the result of a historical trend in the last decades of the twentieth century. During this period, law firms grew significantly and became geographically

60. See generally Robert E. Rosen, *Risk Management and Corporate Governance: The Case of Enron*, 35 CONN. L. REV. 1157, 1160 (2003). In the papers for the relevant board meeting, the CEO was quoted as saying,

We have developed a comprehensive solution to critical issues that James Hardie has been facing for over five years. The solution should be implemented now to maximise improvements in shareholder value. Although the plan is not risk free, it is recommended as providing the best outcome from the alternatives that are possible. The objective is to position James Hardie for future growth and to eliminate legacy issues that would otherwise continue to detract from value creation.

HAIGH, *supra* note 1, at 261.

61. See ALLENS ARTHUR ROBINSON, <http://www.aar.com.au/index.htm> (last visited Apr. 21, 2012). There is a page showing the firm's specializations. *People*, ALLENS ARTHUR ROBINSON, <http://www.aar.com.au/experts/index.htm> (last visited Apr. 21, 2012).

62. See KRONMAN, *supra* note 40, at 271–314; Andrew Boon, *From Public Service to Service Industry: The Impact of Socialisation and Work on the Motivations and Values of Lawyers*, 12 INT'L J. LEGAL PROF. 229, 252 (2005); James Faulconbridge & Daniel Muzio, *Organizational Professionalism in Globalizing Law Firms*, 22 WORK, EMP. & SOC'Y 7, 8 (2008); Hilary Sommerlad, *The Commercialisation of Law and the Enterprising Legal Practitioner: Continuity and Change*, 18 INT'L J. LEGAL PROF. 73, 74–77 (2011); Margaret Thornton & Joanne Bagust, *The Gender Trap: Flexible Work in Corporate Legal Practice*, 45 OSGOODE HALL L.J. 773, 774–77 (2007).

dispersed. To manage these large far-flung organizations, firms imposed bureaucratic forms of control.⁶³ These included setting up practice groups with hierarchical reporting structures and assigning nonlawyers to managerial positions. As the focus on financial returns increased, law firms adopted controls to track individual lawyer and practice group performance, measured by number of hours billed, revenue earned, and profitability by partner. Over time, the meaning of professionalism “shifted from the accumulation of incommensurable professional accomplishments to the currency of ranking in metrics of size, profit, and income that signif[ied] importance, success, and power and [were], at most, indirectly correlated with achievements measured by avowed professional values.”⁶⁴

Increased bureaucratization and compartmentalization narrowed the zones within which lawyers might be able to exercise expert discretion. Even if lawyers like DR imagined that they might want to act as independent counselors and provide ethically grounded advice, the material and organizational resources to do so have all but disappeared.⁶⁵ In regulating the minutiae of the delivery of professional services, hierarchical structures have eroded the discretionary space necessary to allow their lawyers to function as autonomous professionals. The ascendancy of managerialism has “deprofessionalized” legal work and colonized the space in which lawyers might otherwise have been trusted to act in contextually appropriate ways using professional judgment and values.⁶⁶

It was true that David Robb was a partner, not merely an associate, in a law firm pyramid beholden to the bidding of senior lawyers with more clout.⁶⁷ Nevertheless he was a very junior partner; in 2001 he had been a

63. Tanina Rostain, *Self-Regulatory Authority, Markets, and the Ideology of Professionalism*, in THE OXFORD HANDBOOK OF REGULATION 169, 187 (Robert Baldwin et al. eds., 2010). See generally Faulconbridge & Muzio, *supra* note 62, at 8; Flood, *supra* note 59, at 182.

64. Galanter & Henderson, *supra* note 58, at 1882; see also text accompanying *infra* note 98.

65. David M. Brock, *The Changing Professional Organization: A Review of Competing Archetypes*, 8 INT'L J. MGMT. REVS. 157, 157–64 (2006); Christine Parker et al., *The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour*, 31 U.N.S.W. L.J. 158, 173 (2008).

66. See TRAVERS, *supra* note 44, at 35–58; Sommerlad, *supra* note 62, at 74; Hilary Sommerlad, *The Implementation of Quality Initiatives and the New Public Management in the Legal Aid Sector in England and Wales: Bureaucratisation, Stratification and Surveillance*, 6 INT'L J. LEGAL PROF. 311, 313–14 (1999) [hereinafter Sommerlad, *Implementation*]; Hilary Sommerlad, *Managerialism and the Legal Profession: A New Professional Paradigm*, 2 INT'L J. LEGAL PROF. 159, 159–85 (1995) [hereinafter Sommerlad, *Managerialism*]; see also Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of Risk Management*, 94 GEO. L.J. 1909, 1910–12 (2006); cf. Ashly Pinnington & Timothy Morris, *Archetype Change in Professional Organizations: Survey Evidence from Large Law Firms*, 14 BRIT. J. MGMT. 85, 85–88 (2003). See generally Timothy J. Hargrave, *Moral Imagination, Collective Action, and the Achievement of Moral Outcomes*, 19 BUS. ETHICS Q. 87 (2009).

67. See Lillian Corbin, *How “Firm” Are Lawyers’ Perceptions of Professionalism?*, 8 LEGAL ETHICS 265, 277–78 (2005); Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 252–53 (2000); Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 665–68 (2005).

partner for less than a year and was relatively new to the lucrative James Hardie account. Robb knew that his fortunes within the firm presumably depended on his billings and on keeping clients happy; even as a partner, he was still very much part of a hierarchy.

Before the fateful board meeting of 2001, DR did not feel that he had the authority within the firm's reporting structure to check the actuarial figures without consulting with his senior partner, Cameron. Cameron was similarly constrained. Despite being there to provide independent outside advice to the company, when a question about the adequacy of the information provided to the Board arises, he was not emboldened to go directly to Trowbridge, but feels compelled to work through James Hardie's CEO and in-house lawyer.⁶⁸

When Robb tried to provide broader ethically informed advice to alert his client of the risks of cancelling the partially funded shares, his memorandum was subsequently revised to shift its focus. An anodyne version was provided to the client that contained enough discussion to protect the law firm should the Board's decision backfire, but reassured the client that the path it wanted to pursue was acceptable. The memo's revision foreclosed the possibility of discussing the broader ramifications of leaving the Foundation substantially underfunded. Despite being a partner, Robb was still a cog in a much bigger law firm machine.

F. Professional Organization and Self-Regulation

At this stage in his exploration, it is clear to DR that current competitive pressures—which have lawyers subservient to corporate client demands and have transformed law firms into mirror images of the corporations they represent—render it impossible for him to provide broad ethical advice to his clients. DR is skeptical that he can counteract these trends acting alone; his experience has shown him otherwise. He considers, however, whether there might be some practical power in a broader conception of the independent advisor at the level of the organized bar. Perhaps professional regulation might be reshaped, he wonders, to give this role greater prominence. Recognizing the need to counteract market forces, lawyers might collectively decide to advance self-regulatory initiatives that safeguard spheres for discretionary decision making, and shift the emphasis from single-minded partisan norms to public minded counseling.

Surveying the landscape does not give DR much reason to be optimistic that the organized bar will be able to use self-regulatory mechanisms to enhance the counseling role. For one, the history of the organized bar suggests that it has been ineffective in imposing or enforcing ethics standards that went against lawyers' commercial interests. More importantly, in recent years, DR notes, self-regulation has increasingly been supplanted with regulation by government authorities. In some instances, new government mandates have limited the capacity to engage in discretionary decision making by turning professional aspirations into

68. See *supra* notes 22–27 and accompanying text.

legally binding requirements and imposing specific mandates. In addition, as the global reach of law firms expands, lawyers may be increasingly treated as generic “service providers” under international trade agreements.⁶⁹ With increased global competition and the assertion of jurisdiction over corporate legal services by transnational regulators, the ties between corporate practice and the domestic self-regulatory regimes under which corporate lawyers had traditionally practiced are likely to weaken.

To stave off regulatory threats by external authorities and keep bar authorities at bay as well, corporate law firms have attempted to institute internal self-regulatory systems.⁷⁰ These have included appointing law firm general counsel, creating opinion committees, and imposing ethical “infrastructures.”⁷¹ DR has some doubts about how effective these mechanisms have been. He recalls the wake of the McCabe tobacco litigation scandal, during the course of which firm lawyers were discovered to have destroyed important documents that were relevant to litigation. Large law firms and professional associations in Australia announced a campaign for large law firms to respond by making sure they had ethics partners in place⁷²—something most large law firms claimed to already have. According to Parker’s research, however, a significant disconnect exists between the views of law firm partners, who believe they have ethics partners and open-door ethics policies; and the views of more junior lawyers who are not aware of these ethics management systems within law firms and do not feel empowered to use them.⁷³ To DR, self-regulation at the firm or organized bar level does not offer a promising avenue. While a large literature exists calling for ways to reinvigorate professional community and self-regulation at the firm and professional level as a

69. See Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers,”* 2008 J. PROF. LAW. 189, 189–93; Laurel S. Terry, *GATS’ Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT’L L. 989, 1005–06, 1048 (2001).

70. John Flood, *The Re-landscaping of the Legal Profession: Large Law Firms and Professional Re-regulation*, 59 CURRENT SOC. 507, 516–17 (2011).

71. Ethical infrastructure refers to how law firms’ formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice influence and constrain ethical practice. The term “ethical infrastructure” was coined in Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 S. TEX. L. REV. 245, 246 (1998). For further development of this idea, see Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335 (2003); see also Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691 (2002); Parker et al., *supra* note 65.

72. See PARKER & EVANS, *supra* note 2, at 15–16, 67, 213; Cameron, *supra* note 58, at 793–95; Christine Parker, *An Opportunity for the Ethical Maturation of the Law Firm: The Ethical Implications of Incorporated and Listed Law Firms*, in RE-AFFIRMING LEGAL ETHICS 96, 111 (Kieran Tranter et al. eds., 2010).

73. See generally Christine Parker & Lyn Aitken, *The Queensland “Workplace Culture Check”: Learning from Reflection on Ethics Inside Law Firms*, 24 GEO. J. LEGAL ETHICS 399, 418–25 (2011).

bulwark against commercialism,⁷⁴ DR doubts that attempts to resurrect professional norms of the past are likely to succeed given the realities of twenty-first century practice.

III. DISCOURSES OF PROFESSIONALISM: SUPPORTING THE BUSINESS OF LAW AND THE BUSINESS OF CAPITAL

A. *Critical Sociologies of Professional Work*

DR searches further and finds another strand of more critical sociological literature that explains the rise of “professionalism” as going hand in hand with the rise in fortunes of the business of law, and of global capital itself. As this scholarship argues, the discourse of professionalism and the business of law are interdependent, and the relations between the profession of law and global capital mutually constitutive.

This critique of the profession was first set out in the *market control theory* developed by Magali Larson,⁷⁵ and adapted and applied by Richard Abel⁷⁶ to the American and English legal professions. During the 1970s and 1980s, this was the dominant sociological perspective on the professions. This approach saw the professions as autonomous collective organizations devoted to securing the economic and social interests of their members by controlling entry into the profession, and competition from within and outside the profession. Lawyers deployed the ideology of professionalism as a discursive strategy to ground their authority to delineate a realm of expert practice, impose educational barriers and ethical standards and prevent competition by nonlawyers.⁷⁷ Under market control theory, the “professional project” is a collective mobility project to gain economic power and social status.⁷⁸ Traditional professional claims of disinterested public service and of a social bargain mandating self-regulation form part of an ideology that justifies and obscures the social structural inequalities caused by professionalism and inspires individual professionals in their efforts. The profession provides a clear educational and career path for individual members to achieve power and prestige

74. See, e.g., Parker et al., *supra* note 65, at 172–73; Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273 (1998); see also TANINA ROSTAIN & MILTON C. REGAN, JR., *CONFIDENCE GAMES: LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER MARKET 1994–2004* (Forthcoming M.I.T. Press 2013).

75. MAGALI SAFRATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* xvi (1977).

76. See generally RICHARD L. ABEL, *AMERICAN LAWYERS* (1989); RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* (1988); 1 *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* (Richard L. Abel & Philip S. C. Lewis eds., 1988); 2 *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* 22–26 (Richard L. Abel & Philip S. C. Lewis eds., 1988); 3 *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* 80–153 (Richard L. Abel & Philip S. C. Lewis eds., 1989); PAT O’MALLEY, *LAW, CAPITALISM AND DEMOCRACY: A SOCIOLOGY OF AUSTRALIAN LEGAL ORDER* (1983) (applying the market control theory to the legal profession in Australia); DAVID WEISBROT, *AUSTRALIAN LAWYERS* (1990).

77. TERENCE J. JOHNSON, *PROFESSIONS AND POWER* 45 (1972).

78. LARSON, *supra* note 75, at xvi.

within a tightly regulated structure that ensures, through socialization and material and nonmaterial rewards, lawyers' continued contributions, deliberate or not, to the collective project and their ongoing commitment to a unified profession.⁷⁹

With the elimination of anti-competitive barriers in the 1980s and 1990s in the United Kingdom, United States, and Australia, and the accelerated competition among law firms for corporate clients, the professional monopoly account seems less apposite. DR does not feel that there is that much insulation from competition in his job at Allens. Within the firm, there is ruthless competition to be among the top billers, and to be put in the best sections to work with the best (most lucrative) clients. The firm as a whole is well aware of the imperative to compete for these lucrative clients who can change law firms whenever they please.

Yet the discourse of "professionalism"—its claims to specialist knowledge, to normative value and autonomy, and to the centrality of discretionary judgments based on expertise—remains powerful. A number of more recent sociologies of professions (each from a different theoretical perspective) take seriously one or another of the ways that discourses of expertise, normative value, and autonomy around claims to professionalism are deployed to serve the goals of global capital and, more recently, neo-liberal governance, and are in turn constituted and shaped by them.

Each of these critical sociologies of the professions also take seriously the micro-sociology of professionals' work lives. They examine what professionals do on a day-to-day basis and seek to connect micro-level social action with the broader social structures of the profession and its relations with capital and the state.⁸⁰

Again DR considers how these theories illuminate lawyers' relations with clients, with colleagues within the firm, and in terms of professional organization and self-regulation: in each case, there is a critical story about how professionalism is not what it makes itself out to be. "Professionalism" does not necessarily provide the disinterested, communal basis for ethical practice that the Durkheim/Parsons/Freidson approach assumes. Rather, professionalism is socially constructed in order to help achieve the interests of lawyers themselves, their clients and/or their employers. Achieving these insights may mean forsaking the "professional" norms to which DR at one time aspired. But in recognizing the ways in which professionalism is socially constructed and inevitably tainted, there is the possibility for DR to see the ways in which his own agency, together with others, is involved in making what the profession is and does, and can therefore be involved in re-making what it does and what interests it serves. Pursuing the critique of traditional professionalism,

79. *Id.* at 70–74.

80. On the importance of this sort of micro-macro linkage in theories of the legal profession, see Sida Liu, *Legal Profession as a Social Process: A Theory on Lawyers and Globalization* (Nov. 2011) (unpublished paper presented at Berkeley Center for the Study of Law Fiftieth Anniversary Conference) (on file with the Fordham Law Review).

moreover, provides a more realistic basis for re-thinking what professionalism can mean.

*B. Relations with Clients:
Lawyers as “Conceptive Ideologists” for Global Capital*

In criticizing professionalism in corporate practice as having succumbed to crass commercial values, the hand-wringing literature assumes that there is an inherent positive normative value to lawyering and does not critique the notion of professionalism itself. Maureen Cain questions this fundamental premise. As she observes, it precludes

any serious questioning of the law as such or of the role of lawyers as traders in legal symbols. Certainly there could be no room for a suggestion that the relationship with capital is constitutive of lawyering. Rather, reforms may be necessary, after which lawyering will be back on tracks for social good. By not questioning the commodity to be purveyed by law work, the approach reinforces the assumption that it is an obvious and unquestionable good.⁸¹

Cain switches the game by seeing lawyers as “traders in legal symbols” who translate “the objectives and demands of clients into an acceptable legal discourse” and, in doing so, “expand [and tilt] that discourse.”⁸²

Cain⁸³ argues that lawyers’ work is creative. They invent abstract categories and relationships within which clients can achieve their particular objectives. According to Cain, because the legal profession has grown up with capital and largely serves capital as its clients, the law itself is largely tilted toward the interests of capital. Professionalism and professional autonomy were created to bolster and legitimate the law business.⁸⁴ Through this process, lawyers were able to take the specific interests of capital and frame them in objective universalistic terms. As Cain further observes, “[P]rofessionalism secures the legitimacy and ‘neutrality’ of authoritative legal inventions on behalf of capital, as it makes professional ideal discursive goers between two key configurations: capital and the state, the economy and the polity.”⁸⁵

Applying Cain’s insight to his own experience, DR recognizes that—as a lawyer and along with other lawyers—he is involved in constituting the system that is causing the problem for him. A lawyer may give advice to James Hardie that the law is clear that it can use limited liability to shield itself from liability. But the law of limited liability and the circumstances in which it can and cannot be used have been created by lawyers in the course of acting on behalf of their clients and in the course of their more general law reform work. Lawyers create corporations (and limited liability) and schemes of arrangement, and they draft the documents and

81. Cain, *supra* note 41, at 25–26.

82. *Id.* at 32.

83. *Id.* at 33.

84. See generally SHAMIR, *supra* note 53.

85. Cain, *supra* note 41, at 37.

representations that apply them to particular cases, including the James Hardie case. It is the creative work of lawyers in the past that has created the legal strategies that allow James Hardie to do what it now does to “separate” itself from its liabilities. It is also this creative work and the way it has already tilted⁸⁶ the law toward the interests of a client like James Hardie that imposes “professional” constraints on DR. Having taken on the James Hardie representation, DR is obligated by professional norms to represent the company to the limits of the law. If it is possible to use and create legal strategies that defer to its wish to shed as best it can its liability for its historical role in producing asbestos in its quest to become a global company, then DR feels professionally constrained to do so.

At the same time, DR recognizes that James Hardie’s success was not guaranteed by the creative work of its lawyers. Indeed, James Hardie (and its lawyers) was called to account for its failures to abide by social expectations that it would compensate victims of asbestos exposure. DR further recognizes that his own role as a conceptive ideologist for capital is not inevitable. The ultimate failure of the James Hardie scheme suggests that there is space and resources for critical agency.

C. *Relations Within Firms: Discipline and Governmentality*

Cain’s analysis shows how the content and substance of the work that lawyers do as apparently autonomous professionals is tilted toward the interest of capital as their major clients. Recent critical scholarship in the sociology of the professions focuses on the ways that the organization and governance of professional work serves bureaucratic or capitalist goals. Professionalism may appear to provide an alternative to market and bureaucracy, as Durkheim, Parsons, and Freidson argued. This literature, applying Foucault’s insights on discipline⁸⁷ and governmentality,⁸⁸ argues, however, that the discourse of “professionalism” is used to govern the conduct of those who are defined as professionals as a regulatory technology of self-control.⁸⁹ Whereas Cain uncovered how “professionalism” is constructed by the profession itself in order to be able to serve capital, this Foucaultian perspective reveals the ways that the contemporary meaning of professionalism is being reconstructed by some

86. See Timothy Kuhn, *Positioning Lawyers: Discursive Resources, Professional Ethics and Identification*, 16 ORGANIZATION 681, 697 (2009) (noting the “tilt” toward orthodox acceptance of commercialism and corporate power in the array of discursive resources about their professional identity available to junior lawyers in a large commercial law firm).

87. See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1977).

88. See generally THOMAS LEMKE, FOUCAULT, GOVERNMENTALITY, AND CRITIQUE (2011); THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY (Graham Burchell, Colin Gordon & Peter Miller eds., 1991); Peter Miller & Nikolas Rose, *Governing Economic Life*, 19 ECON. & SOC’Y 1 (1990); Nikolas Rose, Pat O’Malley, & Marianne Valverde, *Governmentality*, 2 ANN. REV. L. & SOC. SCI. 83, 83 (2006).

89. See generally Valerie Fournier, *Stories of Development and Exploitation: Militant Voices in an Enterprise Culture*, 5 ORGANIZATION 55 (1998); Christopher Grey, *Career As a Project of the Self and Labor Process Discipline*, 28 SOC. 479 (1994); Sommerlad, *supra* note 62.

within the profession—partners, managers, supervisors, and the human resources managers who are entering law firms—to control other professionals such as employee lawyers and junior partners like DR.

Evetts and Fournier apply this analysis to the experience of “new professions” such as social service workers in government bureaucracies and management consultants in hierarchically organized private services firms.⁹⁰ They argue that in these occupations, employers use the discourse of professionalism, and its association with the complex discretionary judgment and autonomy exercised by traditional well-established professions such as medicine and law, to motivate employees to discipline themselves and to bring about occupational change and rationalization that further an organization’s interests.⁹¹ Thus the discourse of professionalism “serves to inculcate ‘appropriate’ work identities, conducts and practices,” and thus brings with it a “disciplinary logic which inscribes ‘autonomous’ professional practice within a network of accountability.”⁹²

According to Evetts, the promise that this “professionalism” will bring the opportunity for discretion and autonomy is illusory:

[I]n most if not all organizations, the reality of professionalism that is actually envisaged in new and existing occupations includes financial constraints and budgetary devolution; often a reduction in personnel but a work force which is disciplined and more highly trained and credentialized; an enlarged and expanded work role and the need to demonstrate the achievement of externally (and often politically) defined targets.⁹³

Evetts suggests that this “organizational” professionalism—that is, “professionalism” that is a “discourse of control” aimed at managing workers to meet organizational goals—applies largely in the new professions, especially in health and education where “new public management” is common. She explains that “[i]t incorporates rational-legal forms of decision-making, hierarchical structures of authority, the standardization of work practices, accountability, target-setting and performance review and is based on occupational training and certification.”⁹⁴ Evetts further suggests that traditional “occupational professionalism” involving trust relations between clients and professionals, complex discretionary decision making, and control over work conditions, continues to exist in historically well-established professions such as law and medicine. Evetts contrasts this discourse of “occupational professionalism,” which she suggests continues to be created and controlled by professionals themselves, with the discourse of “organizational”

90. Evetts, *supra* note 14, at 395–415; Julia Evetts, *Short Note: The Sociology of Professional Groups: New Directions*, 54 *CURRENT SOC.* 133, 138–40 (2006); Fournier, *supra* note 89, at 55–80.

91. Evetts, *supra* note 90, at 139.

92. Evetts, *supra* note 14, at 406 (citing Valerie Fournier, *The Appeal to “Professionalism” as a Disciplinary Mechanism*, 47 *SOC. REV.* 280, 280 (1999)).

93. Evetts, *supra* note 14, at 408.

94. Evetts, *supra* note 90, at 140–41.

professionalism, deployed as a governance mechanism by the organization to further its interests.⁹⁵

The evidence suggests, however, that organizational professionalism has already penetrated spheres once considered to be the bastions of occupational professionalism.⁹⁶ In large law firms, as we have already suggested above, there is a pervasive governmentality that has taken the form of an exclusive focus on competition and economic profit as the measures of value, through technologies of control such as time-based billing (with junior lawyers often explicitly competing against each other for billing the most hours at the highest rates for the most lucrative clients) and profits per partner (with league tables published in financial newspapers and the legal media showing how different firms compare).⁹⁷ As far as the individual employee lawyer or junior partner is concerned, this rationality of governance is felt in a series of disciplinary practices that monitor and control the minutiae of their every working minute—or every six minutes in the case of billing sheets. Billable hours and profits per partner become commensurable⁹⁸ and professionalism expressed through a particular conceptualization of the type of service the client requires.

“Professionalism” is a resource in this technology of control. The governance of conduct is constructed through professional ethical obligations to clients. As Sommerlad observes, “[T]he customer-service ethic is also the main lever in the harmonization of employee interests with those of the employer, rationalizing and legitimating a suite of demands on labour . . .”⁹⁹ Quoting an interview subject, she notes that demands on junior lawyers include an open-ended commitment to “take the work and the client very seriously and absolutely kill themselves to deliver a good service” regardless of the personal sacrifices required.¹⁰⁰

Thus the pervasive ideology of “serving the client” and “adversarial advocacy” as “professional” pursuits¹⁰¹ combine with the disciplinary controls of time sheets and billable hour rankings to colonize the meaning of professionalism for junior lawyers. Sommerlad suggests that young lawyers internalize a sense of the entrepreneurial professional self-driven by

95. *Id.*

96. See generally Sommerlad, *supra* note 62; Sommerlad, *Implementation*, *supra* note 66 (discussing managerialism and the over-regulation of legal aid practice in the United Kingdom); Sommerlad, *Managerialism*, *supra* note 66; Hilary Sommerlad, *Some Reflections on the Relationship Between Citizenship, Access to Justice, and the Reform of Legal Aid*, 31 J.L. & SOC'Y 345 (2004); Thornton & Bagust, *supra* note 62.

97. See Faulconbridge & Muzio, *supra* note 62; Galanter & Henderson, *supra* note 58; Christine Parker & David Ruschena, *The Pressures of Billable Hours: Lessons from a Survey of Billing Practices Inside Law Firms*, 9 U. ST. THOMAS L.J. (forthcoming 2012).

98. See Wendy Nelson Espeland & Mitchell Stevens, *Commensuration as a Social Process*, 24 ANN. REV. SOC. 313, 315–18 (1998).

99. See Sommerlad, *supra* note 62, at 86.

100. See *id.*

101. See PARKER & EVANS, *supra* note 2, at 225. See generally William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 30–32.

rational calculus and single-minded commitment to client interests.¹⁰² Sommerlad's work on the recruitment practices of large commercial law firms shows how this plays out in the selection and training of young lawyers, including their dress, their table manners, and their ability to engage in appropriate social chit chat, all essential to possessing the right social capital to "serve" elite clients and fit in at the law firm.¹⁰³

Even as professionalism is constructed by supervisors as a technology of control, the "organizational" version of professionalism (to adopt Evetts's term) may still be contested by lawyers who seek to deploy a more traditional conception of professionalism as a resource to act autonomously and engage in action that furthers justice.¹⁰⁴ We explore this possibility in greater depth through a third strand of critical sociology in Part IV of this Article.

*D. Professional Self-Regulation and Organization:
Contests over Professional Expertise and Jurisdiction*

Whereas a "social bargain" approach inspired by Durkheim, Parsons, and Freidson assumes a fairly stable ethical role for the legal profession in advancing the rule of law in society, critical sociologies of the professions suggest that the ethical and political roles of the profession are defined in ongoing contests within and among professions over the suitability of different forms of expertise to solve particular problems and change over time and place. On this view, the meaning of professionalism is the result of complex interactions between the ambition for commercial success and the competition to define "professional" expertise and the values or "symbolic capital" that attach. Applying Bourdieu's insights, Andrew Abbott has shown that different professions construct their expertise, and hence their professional "jurisdiction" over a particular field of work, through competition with other professions over the applicability of their expertise to social and personal problems.¹⁰⁵ The symbolic capital of each profession—who is deemed to be an expert in a field and therefore can profit from it—is derived from these jurisdictional contests among professions.

A number of scholars have used a Bourdieusian lens to study the role of lawyers in constructing and restructuring legal regimes. Pursuing this approach, Yves Dezalay and Bryant Garth have investigated contests over the discourses through which legal work and the legal field is framed in the

102. Sommerlad, *supra* note 62, at 74–75; *see also* Boon, *supra* note 62, at 252.

103. *See* Sommerlad, *supra* note 96; Hilary Sommerlad, *Minorities, Merit, and Misrecognition in the Globalized Profession*, 80 *FORDHAM L. REV.* 2481, 2504 (2012) *see also* DEZALAY & GARTH, *supra* note 53, at 18–19; Yves Dezalay & Bryant Garth, *The Economy of Legal Practice as Symbolic Market*, 10 *ECON. SOC.: EURO. ELECTRONIC NEWS.* 8, 10–11 (2009).

104. This is what the literature cited in the previous section does. *See supra* notes 40, 56–74. This "handwringing" literature in effect engages in the internal contestation over the meaning of professionalism rather than externally observing what is going on.

105. *See generally* ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS* (1988); PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* (1980).

emerging area of international commercial arbitration.¹⁰⁶ In the same vein, they have explored the professional and political contests among lawyers and economists to shape the export of neoliberal economics and human rights laws to Latin American and Asian states,¹⁰⁷ and considered competition over global legal markets between accounting and law firms.¹⁰⁸

Similarly, Robert Rosen's research on the interactions among in-house lawyers, external lawyers, and in-house corporate business managers working to address a corporation's legal problems demonstrates how contests between and among these three groups end up framing situations as involving legal problems or business problems.¹⁰⁹ Although Rosen does not explicitly use Bourdieusian analysis, consistent with this approach, his research shows that the characterization of a particular problem is fluid over different contexts and contingent on the results of power struggles among the different professionals serving the corporation.

In a historical study, Ronen Shamir adopts a Bourdieusian approach to investigate the construction of elite lawyers' professional jurisdiction during the New Deal. Echoing Cain's account of corporate lawyers as conceptual ideologists for capital,¹¹⁰ Shamir argues that lawyers functioned as "double agents"¹¹¹ protecting the prerogatives of capital through "their defense of their own perceived autonomous domain."¹¹² Lawyers' ability to represent their clients "depends on the degree to which they are able to

106. See DEZALAY & GARTH, *supra* note 53, at 4.

107. See generally YVES DEZALAY & BRYANT GARTH, *ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE* (2010); YVES DEZALAY & BRYANT GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002). John Flood's work on global law firms fits well into this style of analysis, although Flood explicitly uses institutional theory rather than Bourdieusian analysis. See generally Flood, *supra* note 70. For an analysis that explicitly combines institutional theory with Abbott's Bourdieusian style analysis of the role of professional work in institutional change, see Roy Suddaby and Thierry Viale, *Professionals and Field-Level Change: Institutional Work and the Professional Project*, 59 *CURRENT SOC.* 423, 425–26 (2011).

108. Yves Dezalay & Bryant Garth, *The Confrontation Between the Big Five and Big Law: Turf Battles and Ethical Debates as Contests for Professional Credibility*, 29 *LAW & SOC. INQUIRY* 615, 616 (2004).

109. See generally ROBERT ELI ROSEN, *LAWYERS IN CORPORATE DECISION-MAKING* (2010); Rosen, *supra* note 56.

110. SHAMIR, *supra* note 53, at 169–71. As Shamir and Cain were writing at the same time as each other, they do not refer to each other's work.

111. *Id.* at 62. Shamir cites Gordon here for this term. See Robert W. Gordon, *The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 53 (Gerard W. Gawalt ed., 1984).

112. SHAMIR, *supra* note 53, at 171. He goes on to comment:

It was the structural bias of this autonomous system, not substantive ideological inclinations, that created the bond between the court-centered legal system and laissez faire capitalism. The assertion of law's autonomy—with its ever-present tendency to depoliticize social relations—systematically denied law's sociohistorical roots, the unequal social accessibility to legal remedies, the prominence of corporate and business law in legal education, and the structural advantages of corporate lawyers in developing areas of the law in ways that reflected the demands and interests of their corporate clients.

Id.

appear as guardians of the law and as experts who are responsible for ensuring the ordered functioning of the legal system as a whole,”¹¹³ and not as “mere hired guns.”¹¹⁴

Shamir emphasizes, however, that in defending the value of the legal domain they controlled, lawyers were not simply advancing the interests of their clients. Rather, in asserting the boundaries of a distinct legal field to which they laid claim, lawyers were furthering their own collective interests in drawing material and non-material benefits from the exercise of expert authority. As Shamir notes, “lawyers must constantly persuade relevant audiences—clients, legislators, state authorities, and the public at large—that they own a distinct form of symbolic capital.”¹¹⁵

Lawyers’ attempt to create symbolic capital around an apolitical expert field, whose discourse is framed in neutral legal values, is of necessity in an unstable relationship with their commitment to serving the demands of capital. As Shamir shows, this strain can become visible during times of crisis, such as the New Deal, when a competing administrative law regime was proposed to deal with the economic and social disruption precipitated by the stock market crash and the Great Depression. Shamir suggests that corporate lawyers’ resistance to “the dejudicialization of the legal system,” which was framed in terms of rule of law values, “was fueled not only by their individual obligations to corporate clients but also by their collective interest in arresting the tendency of the state’s legislative and administrative apparatuses to usurp law-producing and law-controlling functions.”¹¹⁶ In arguing for the centrality of courts in the American legal system, corporate lawyers sought to protect their own symbolic capital, which would allow them to continue effectively to represent corporate clients while at the same time distancing themselves from the particular interests of their clients.¹¹⁷ In defending the traditional American judicial system, the corporate bar locked horns with academic lawyers whose symbolic capital was tied up with creating and implementing novel administrative processes to address the unprecedented problems of the day.

Shamir’s approach illuminates recent corporate ethics scandals, which reveal a similar strain for lawyers between serving corporate interests and

113. *Id.* at 62.

114. *Id.* at 170.

115. *Id.* at 62–63; see also Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77, 80 n.13 (2006).

116. SHAMIR, *supra* note 53, at 171.

117. *Id.* at 38 (“Whenever lawyers advance a cause in the name of law their identification with clients becomes a burden. But when they try to transcend strict legalistic arguments, they immediately risk blurring the fragile line that separates law and politics, which at other times they are at pains to uphold. Two basic tactics were used through which lawyers tried to symbolically distance themselves from their clients’ causes: their rhetorical attempt to frame arguments in the name of public good and their attempt to mobilize the formal organs of the bar, presumably independent of client control, in order to articulate arguments in the language of value-free legal expertise.”).

creating symbolic capital around neutral legal expertise.¹¹⁸ These scandals exposed the instrumental purposes to which the law is put by large corporations—often in the most public and political style in the media and legislatures. Jackson’s criticism in the James Hardie case of the professionals for failing to provide ethical advice can be read as suggesting that the professions involved, and the legal profession in particular, needed to work to shore up their symbolic capital, which had been weakened. In the United States, Congress’s enactment of the Sarbanes-Oxley Act¹¹⁹ in response to a wave of corporate scandals in the early twenty-first century, suggests that the corporate bar’s symbolic capital had been so diminished that it could no longer plausibly assert the claim that it was in a position to safeguard legal values. The statute eliminated corporate lawyers’ discretion to address potentially fraudulent conduct by a corporate client, substituting a mandatory reporting up scheme.¹²⁰

Further, Shamir’s analysis shows that the expertise, jurisdiction, and symbolic capital of the legal profession is socially constructed by the profession as a group. It is always unstable and open to strain, and it is constructed as a result of contests both within the profession itself and in relation to other professions, clients, governments, and the public. Although Shamir’s approach emphasizes the contests among professional groups, his account suggests that despite structural constraints, there may be space to maneuver and engage in concerted action. When mobilized, lawyers may be able to act to strengthen the symbolic capital of their profession.

Thinking back on his experience, DR realizes that a source of his frustration was that within the hierarchy of the firm and relations with in-house counsel for the client, there was little opportunity for him as an individual lawyer, a junior partner, to act to protect the symbolic capital of the profession. The senior partners and in-house counsel with whom he worked seemed to have a slightly greater capacity to act on behalf of the profession to preserve its symbolic capital, but the critical sociologies of the profession give DR little scope to see his own experience of and aspiration toward “professionalism” as something that he can meaningfully engage with in the context in which he works. At least one interpretation the critical sociologies of the profession, which emphasize the structural conditions of practice, suggests that his experience as a corporate lawyer was mostly foreordained. Any motivation he has toward “professionalism” is illusory. DR wonders whether the Durkheimian ideal of professional community, despite its lack of fit with current realities, would not be a more inspiring perspective for him to adopt in seeking ethical autonomy as a legal professional.

118. For example, take the analyses and critiques of the role of lawyers in various corporate ethics scandals. *E.g.*, Cameron, *supra* note 58 (Tobacco litigation document destruction case).

119. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 5, 11, 12, 15, 18, 28, 29, and 49 U.S.C.)

120. *See* Rostain, *supra* note 63, at 189–90.

IV. THE PROFESSIONAL AS SOCIOLOGICAL CITIZEN

The sociology of professional community appears to motivate and inspire an ideal of ethical autonomy, but it inadequately describes the nature of the power relations—or the power of the discourses—at work in the field of corporate power, and is therefore unrealistic. The critical sociologies of the legal profession, on the other hand, illuminate important aspects of DR's work life, but they are easily read as disempowering and dehumanizing. They do not account for the possibility that within the micro relationships of legal practice, DR feels some capacity to act—to write an unusual letter, to raise awkward questions.

As DR reflects further, he begins to wonder whether he can combine both approaches to find, in Foucaultian terms, “possibilities of resistance” in the micropolitics of his everyday professional life.¹²¹ This means paying particular attention to critical sociologies of the legal profession in order to illuminate the relationship between DR's problem and the way power is exercised within the specific domains he inhabits.¹²² It also means deploying the discourses of professionalism made available by the sociology of professional community as a resource. The critique of professionalism points out that “professionalism” was created to bolster and justify the law business. Nevertheless, because professionalism draws on an autonomous legal realm, it also provides resources for lawyers to act creatively to resist and re-work power relations.

In considering this possibility, DR turns to more recent research in regulation studies that suggests that actors can effectively use their embedment in relationships and networks for successful problem solving. In particular, DR considers the idea of the “sociological citizen,” which Susan Silbey offered to describe how sociological imagination might be used in practice to address various regulatory challenges.¹²³ Interested in applying the concept to his work life, DR begins to explore the conditions under which it might be possible for a corporate lawyer to use his or her sociological imagination to act as a sociological citizen.

Silbey and her co-authors develop the concept of “sociological citizen” to describe “the capacity to see relational interdependence and to use this systemic perspective to meet occupational and professional obligations.”¹²⁴

121. See Jonathan Simon, *Between Power and Knowledge: Habermas, Foucault, and the Future of Legal Studies*, 28 LAW & SOC'Y REV. 947, 954 (1994); see also Cain, *supra* note 41, at 41 (“One reading of Foucault says . . . wherever there is power there is resistance; at all points in the web of discursively constituted relations resistance is possible, changes can be made.”).

122. See Simon, *supra* note 121, at 957 (1994). In discussing Foucault, Fournier emphasizes that in his view, “subjects are not just constituted through the strategies deployed from above” but “subjectivities, meanings and dispositions” can be “re-appropriated and transformed; they are liable to tactual realignment in the process of being consumed from below.” Fournier, *supra* note 89, at 74 (using the example of “militant” computing and information service graduates on the “periphery” of a professional services firm).

123. See generally Susan Silbey et al., *The “Sociological Citizen” Relational Interdependence in Law and Organizations*, 59 L'ANNEE SOCIOLOGIQUE 201 (2009).

124. *Id.* at 203.

Contrary to Mills, Silbey argues that the capacity to think systematically and relationally is not only available to the trained sociologist but is found among lay persons who are able to deploy institutional resources and engage with co-workers and colleagues to solve novel problems. As she and her co-authors observe, “[T]he sociological citizen realizes that whatever the current configuration of that world, it is the outcome of human actions, connections, links among persons and things. As a consequence, sociological citizens experience a sense of freedom to try things, experiment, intervene in organizations and arrangements where others would hesitate.”¹²⁵

In reflecting on the sociological citizen, DR realizes that the concept bridges the divide between traditional accounts of professionalism, which assume that properly educated and socialized, and under appropriate organizational conditions, professionals can construct social institutions that serve human needs and critical sociologies that reveal the existing power relations that constrain human action. More broadly, the concept links accounts of professional action based on methodological individualism—in which lawyers are characterized as either rational market actors or professionalized socialized experts—and those that rely on social structure—the firm or the professional community. A sociological citizen understands her work and herself as a “link[] in a complex web of interactions and processes.”¹²⁶ She is able to reach beyond scripted responsibilities precisely by understanding the relationships, links, interdependencies, and collectivities that construct her world (and that we might pessimistically see as constraining it).¹²⁷ At the same time, she also understands that her social world and the scripts that frame it are continually created and re-created by momentary as well as continuing human relations.¹²⁸

A sociological citizen’s focus on the sociology of her situation—that is, the social links that make up her world—therefore make it possible for her to imagine the possibility of change because she sees dimensions of time and space in her social world. In other words, she sees the way her social world has been constructed over time, and the way it differs from place to place in space.¹²⁹ As Silbey emphasizes,

Sociological citizens experience a sense of freedom to try things, experiment and intervene in organizations and arrangements. . . . They are enabled by the awareness of human capacity as they may be simultaneously appreciating the constraints (on themselves and others) of the web of embedded relationships . . . by recognizing one’s location in an extended network of associations, a sociological citizen has an extended,

125. *Id.* at 203, 223.

126. *Id.* at 203. For a different approach to analyzing the way legal professionals utilize their links and connections to achieve organizational goals, see EMMANUEL LAZEGA, *THE COLLEGIAL PHENOMENON: THE SOCIAL MECHANISMS OF COOPERATION AMONG PEERS IN A CORPORATE LAW PARTNERSHIP* (2001).

127. Silbey et al., *supra* note 123, at 223.

128. *Id.* at 203.

129. *Id.* at 204–05.

rather than constricted, set of opportunities (resources, schemas, persons) with which to fashion solutions to local problems.¹³⁰

Silbey and her co-authors identify sociological citizens among organizational actors who are assigned the task of devising workable solutions to regulatory challenges. In one example, they describe “Brian Jones,” an environmental risk manager at a research university. Brian is assigned the task of designing a containment system for chemistry experiments that responds to two seemingly contradictory regulatory imperatives: the first requires researchers working with chemicals to use large overflow containers to contain spillage; the second imposes minimum airflow requirements within the workspace to ensure ventilation. As Silbey and her co-authors report, none of the high-level environmental experts to whom Brian reports takes responsibility for the problem or offers constructive solutions. Brian, in contrast, is willing to experiment with different materials, shapes, and approaches. After talking to colleagues and engaging in a little bricolage, he devises a prototype for a container stand using objects commonly found in the trash. In his willingness to draw on organizational resources and engage in trial and error to find a solution, Brian acts as if his mission is synonymous with the university and its mission, in this case to pursue scientific research, while ensuring environmental health and safety.¹³¹

In their second example, Silbey and her co-authors describe the actions of effective prosecutors working in the Brazilian *Ministério Público*. Unlike prosecutors in the United States and Australia, these prosecutors enjoy a broad mandate to address civil, regulatory, and criminal matters, and significant autonomy from other branches of the state to effectuate their mission to “protect society, democratic values, and the Constitution.”¹³² Although many prosecutors frame their assigned cases as “business as usual,” occasionally a prosecutor will solve a multifaceted problem by drawing on legal resources, professional networks, and institutional mandates.¹³³ In one such instance, a prosecutor solved a problem with a squatter settlement by inducing a petrochemical producer who had engaged in illegal dumping to provide fencing materials to limit the spread of the settlement and persuading the squatters to dig ditches to obtain a consistent and much-needed water supply. In another case, this same prosecutor used her connections to a local judge to order the transfer of squatters who had been occupying an environmentally sensitive area to a newly completed housing unit.

Intrigued by these descriptions, DR wonders whether he might have been more successful at his firm if he had enlisted colleagues in the networks in

130. *Id.* at 223. In a similar vein, Cain argues that we must remember that discourses “have constitutive potency but not primacy over relationships. Relationships constitute but do not cause discursive practices. It is necessary instead to think of reciprocal constitution and partially independent potencies.” Cain, *supra* note 41, at 45.

131. Silbey et al., *supra* note 123, at 210.

132. *Id.* at 210–11.

133. *Id.*

which he was embedded. In writing his letter, Robb tried to behave as an autonomous individual professional, but did not do much at all to get other players in the situation on board with his concerns. Instead, he acted alone, and within the normal hierarchical relationship with his own senior partner.

Sociological citizens, DR observes, draw on relationships, networks, and organizational resources to devise solutions to seemingly intractable problems. In order to exercise this sort of sociological action in corporate practice, it would be necessary for a lawyer like DR not only to have the sociological understanding and awareness of the power relations he lives with (to be sociologically “educated,” in Mills’s language) but also to know, understand, and be able to draw on the discourses and networks that “overflow” the micro-hegemonies in which he works. On an organizational level, Robb might have been successful had he been able to mobilize the relationships within his firm. His efforts might also have benefited from connections in the community, and with government officials, union leaders, and even lawyers for the opposing side.¹³⁴ These linkages might have provided discursive resources to reframe the problem of James Hardie’s asbestos liabilities to arrive at a more satisfactory solution.

As he ponders these unrealized possibilities, DR wonders whether certain organizational settings facilitate “sociological citizenship” more than others. He notes that in Brian’s work setting, there is a “strong culture of collaborative decisionmaking [and] the hierarchical privileges and constraints that often impede individual initiative are muted.”¹³⁵ The Brazilian *Ministério Público* enjoys a broad mandate and is politically independent of other government agencies. These circumstances allow prosecutors to see “the interconnect[ed], nested relations that constitute the social problem.”¹³⁶ As members of a professional community with a common mission, they can share “information, experience and tactics across cases to build both local and more general solutions.”¹³⁷

More fundamentally, DR notes, Silbey’s account of the sociological citizens is premised on the existence of “heterogeneous processes and modes of action” within an organization. “Sociological citizens work among others who do the same jobs differently; the combination of divergent approaches serves as a check on the excesses of each.”¹³⁸

134. Cf. Kuhn, *supra* note 86, at 699.

135. Silbey et al., *supra* note 123, at 221.

136. *Id.* at 222.

137. *Id.*

138. *Id.* at 206–07. Michel Callon makes a complementary argument from the point of view of the agent about the mechanisms by which heterogeneous networks facilitate the agent’s ability to act autonomously:

The capacity of an agent to make autonomous choices, that is to say, to make decisions which do not merely fall in line with the decisions made by other agents, is not inscribed in her nature; it coincides with the morphology of her relationships. When she finds herself at the intersection of two networks which scarcely, if at all, overlap, the range of available options affords her with a large margin of manoeuvre. She is even endowed with the possibility of considering action in terms of alternative choices and her

Delving more deeply into recent organizational literature, DR observes that Silbey's account resonates with David Stark's thesis that innovation in organizations requires "generative friction" among multiple "orders of worth."¹³⁹

As Stark observes, human beings are constantly confronted with decisions involving incommensurable frameworks. "What counts? . . . What is valuable and by what measures?" are recurring questions in our daily lives.¹⁴⁰ Stark argues that innovation arises in organizations that foster competing frameworks of valuation. Such organizations have "heterogeneous criteria of organizational 'goods.'"¹⁴¹ Stark refers to these organizations as "heterarchies," distinguishing their mode of governance from "a hierarchy of command and a conceptual hierarchy of cognitive categories."¹⁴² Based on three workplace ethnographies, conducted in a machine shop in Budapest, a new media startup in Manhattan, and an arbitrage trading room, Stark argues that organizations that encourage their workers to engage in ongoing debates of worth "facilitate the work of reflexive cognition." According to Stark, the capacity to articulate "alternative conceptions of what is valuable" is a key adaptation for organizations to evolve to address changing circumstances. In the case of the trading room he studies, Stark suggests that it made higher than industry average profits, "not by access to better or timelier information but by fostering interpretive communities in the trading room."¹⁴³

For Stark, as for Silbey, the resources required for organizational innovation are material as well as discursive. Investigating an arbitrage trading room, Stark observes that each desk is "an intensely social place." Desks, which specialize in different types of trades, are placed adjacent to each other in one large room without partitions to encourage "active association among desks."¹⁴⁴ Arbitrage trading requires "situated cognition," which traders achieve by "drawing on the multiple sensors (both human and instrumental) present within the room."¹⁴⁵ In a similar spirit, Brian arrives at his solution to the hood ventilation problem by first talking to colleagues and then surveying the "offices, labs and spaces around the university."¹⁴⁶

Whereas organizations once relied on rationalization rooted in "processes of classification," Stark argues that this logic is being augmented, and even

faculty for arbitration is enhanced. If, however, the relations are redundant, the agent is deprived of all ability to make choices.

Michel Callon, *Introduction: The Embeddedness of Economic Markets in Economics*, in *THE LAWS OF THE MARKETS* 1, 9 (Michel Callon ed., 1998).

139. DAVID C. STARK, *THE SENSE OF DISSONANCE: ACCOUNTS OF WORTH IN ECONOMIC LIFE* 11, 19, 220 (2009).

140. *Id.* at 6.

141. *Id.* at 5.

142. *Id.*

143. *Id.* at 124.

144. *Id.* at 137.

145. *Id.* at 135.

146. Silbey et al., *supra* note 123, at 209.

supplanted, by the “alternative logic” of search. Stark proposes search—like classification, a fundamentally human activity—as an adaptive strategy for increasingly complex organizations to deal with increasingly complex environments and unpredictable change. Stark emphasizes that “the most critical searches for organizations are the kinds that cannot be powered by search engines.”¹⁴⁷ Search, in Stark’s sense, discovers the world only in the process of transforming it. “In the most innovative of inquiries, there is not something out there waiting to be found.”¹⁴⁸ The process of search, Stark proposes, is grounded in “reflexive cognition.” As Stark emphasizes, this type of cognition is not that of the solitary thinker reflecting on her situation, nor is it an exercise involving distance or standing apart. “It is a collective, collaborative, and sometimes conflictual social process that occurs in a situation The situation provides the materials for reflexive cognition not because I rise above it but because I mix it up.”¹⁴⁹ In Stark’s research, productive action occurs when people in organizations can generate new ideas by recognizing and recombining elements of plural, dissonant discourses, networks or frameworks of worth. The difficulty—and the key—is keeping these plural resources available despite their friction.

DR finds Stark’s conception of organizational innovation attractive, even beguiling. Although he fully recognizes that traditional corporate firms are not likely sites to foster innovation, he concludes that legal practice affords multiple “orders of worth” rooted in professionalism and business.¹⁵⁰ He can imagine a firm that provides the discursive and material resources to promote creative friction among these orders and foster innovative solutions to the novel issues of the day—maybe.

At a minimum, DR realizes that the account of law seduced by capital, offered by the handwringing literature, is superficial and wrong in its analysis of his “problem.” The deeper issue is the narrowing of the range of discourses about both “business” and “professionalism” that may be available to individual professionals to come to grips with the situations in which they find themselves.¹⁵¹ As DR sees, this impoverishment of discursive resources is exacerbated by the structure of corporate practice

147. STARK, *supra* note 139, at 174.

148. *Id.* at 175.

149. *Id.* at 187.

150. Faulconbridge and Muzio use institutional theory to argue that professionals can retain some autonomy in the interstices between managerialism, commercialism, and professionalism. Their investigation of very large, commercial law firms based in the United Kingdom challenged a “marked process of managerialization and commercialization threatening and displacing traditional notions of professional autonomy and discretion.” Faulconbridge & Muzio, *supra* note 62, at 10. Instead they found that professional law firms were becoming “managed professional businesses” with layers of professionalism, commercialism, and bureaucracy “sedimented” together in productive ways. This sedimentation included space for substantial professional autonomy, including in relation to traditional professional ethical concerns.

151. See Rostain, *supra* note 63, at 188 (“Whereas lawyers had at one time invoked a variety of professional ideologies, some of which were tied to furthering collective goods, the dominant ideology in corporate practice has become one of undiluted partisanship.”).

itself. If DR is serious about his concerns, DR needs to develop his own capacities in this direction—the opportunities to draw on plural discourses and connections. Whether these resources can be developed on an organizational level is an open question. Moreover, there is no guarantee that they will not be manipulated by constituencies with different interests.¹⁵²

CONCLUSION

We conclude that the sociological understanding that will help DR is not the first alternative *simpliciter*. That is, it is not a matter of whether law has become a business or a bureaucracy as opposed to a professional community. Rather, the issue is the narrowing of the range of social connections and links that he and his colleagues experience in their everyday work lives, and the consequent narrowing of ideologies and discourses about both “business” and “professionalism” available to individual professionals to come to grips with the situations in which they find themselves. That problem is not one of professionalism, but of agency. It is the diminishing opportunities for agency and structure to interact where discourses or orders of worth are singular rather than plural and relationships are few.

152. For example, Faulconbridge and Muzio seem to see a balancing out between commercialism and professionalism as possible and functional. See Faulconbridge & Muzio, *supra* note 62, at 10. This “balancing” approach, however, is too naïve about the power of micro-hegemonies within law firms.