PASSION IS NO ORDINARY WORD

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(Revitalizing the Lawyer-Poet: What Lawyers Can Learn From Rock and Roll. A Film Essay by Russell G. Pearce, Brian Danitz, and Romelia S. Leach (Louis Stein Center for Law and Ethics 2006)).

We’ve got new idols for the screen today.
Although they make a lot of noises they’ve got nothing to say.
I try to look amazed but it’s an act.
The movie may be new but it’s the same soundtrack.**

I. INTRODUCTION

In Revitalizing the Lawyer-Poet: What Lawyers Can Learn from Rock and Roll,1 Fordham Law School Professor Russell Pearce, and students Brian Danitz and Romelia S. Leach,2 have created an innovative film essay, based on the scholarship of Professor Pearce, which raises important questions about the practice of law and the contemporary legal profession, all set against a backdrop of sounds and images taken from “classic” rock and roll music.3 The film

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1 A transcript of the text from the film appears at Russell G. Pearce, et al., Revitalizing the Lawyer-Poet: What Lawyers Can Learn from Rock and Roll, 14 WIDENER L.J. 907 (2005) [hereinafter Transcript]. Copies of the film, along with a Teacher’s Guide, may be obtained from Fordham University Law School’s Louis Stein Center for Law and Ethics, while supplies last, by e-mailing lawyersrock@law.fordham.edu.

2 Id. at 907 n.***. The Teacher’s Guide identifies Danitz as a “Sundance Film Festival featured Director and Cinematographer of Academy and Emmy Award-winning films.” A copy of the Teacher’s Guide is on file with the author.

3 Beginning in the 1980s, FM radio stations, which had previously played music from a variety of sub-genres within the rock and roll category, began to segment according to such sub-genres. The “classic rock” radio format focused on artists who had achieved broad appeal...
contends that the contemporary legal profession is in crisis. The American public is dissatisfied with its lawyers, and its lawyers are dissatisfied with themselves. The film offers this crisis as evidence of the failure of the prevailing “professional” approach to lawyer regulation. The film also contends that replacing the current professional approach to lawyer regulation with a “business” approach would result in both greater public satisfaction with the legal profession and greater happiness and satisfaction among lawyers themselves. In addition, the film further suggests that lawyers turn to the example of rock and roll music as a way to lead them out of the current crisis and on the road to better days. The primary lesson that lawyers can draw from rock and roll relates to the passion that rock musicians bring to their music and to their performances.

I am a big admirer of Professor Pearce and his scholarship. The scholarship is provocative in the best sense that academic writing should be. It inspires strong reactions and further commentaries in both a supportive and critical vein. Indeed, the 1995 article in which Pearce laid the foundation for most of the views that appear in the film has been cited more than 140 times, including both ringing endorsements and strong denunciations. Moreover, Professor Pearce and I share common objectives in terms of increasing lawyers’ happiness and job satisfaction, increasing public satisfaction with lawyers, and improving access to justice for low and moderate income persons. However, we disagree regarding the

within the rock and roll audience between the mid-1960s and the late 1970s. The artists whose music and images appear in the DVD, including Jimi Hendrix, Bruce Springsteen, Elton John, and Billy Joel, are staples of the classic rock format. See generally HISTORICAL DICTIONARY OF AMERICAN RADIO 75 (Donald G. Godfrey & Frederic A. Leigh eds., 1998).


degree to which these objectives presently are met, and the means for further improvements.

Additionally, the film itself represents an innovative and accessible means by which to raise these issues of great import to law students and lawyers alike. Therefore, it succeeds on the level of pedagogy, one of its primary objectives. I highly recommend its use in law school classrooms and continuing legal education programs. It has inspired valuable discussions in my own classes, and I'm sure it will in yours as well. The film's authors have prepared a useful teacher's guide, which further aids their pedagogical objectives. Despite all of this praise, I disagree with many of the assertions made in the film and the implications that can be drawn from them. The following Essay will elaborate on some of these disagreements.

First, this Essay will challenge the notion that the legal profession is presently in a state of crisis. The view that the profession is in crisis may have peaked around the time Pearce wrote his initial article, and has abated to some degree in the following years. While this Essay will not contend that these are salad days for lawyers, it will suggest that many of the greatest challenges facing the profession are readily identifiable and readily addressed. The challenges discussed here include greed and overwork on the part of elite lawyers, and increased competition among non-elite lawyers.

By refuting the claim of a professional crisis, this Essay also refutes the claim that the “professional” approach to lawyer regulation has failed to deal with any such crisis or is inadequate to do so. Moreover, this Essay will contend that the film errs in the particular criticisms it makes of professionalism. The film ignores the writings of Pearce himself, as well as others who describe professionalism as representing a “social contract” or a “bargain” between members of the profession and the public. The film indirectly contends that this bargain has become unduly one-sided: the public reaps little, if any, benefit from the bargain, while lawyers receive a windfall. However, while the professional bargain between lawyers and the public may not be as robust as it once was, this Essay contends that the film both grossly underestimates the benefit to clients and the public that inures from the professional

8 See supra note 1.
9 See infra Part II.
10 See infra Part III.
bargain, and seriously overestimates the benefits to lawyers that flow from the bargain. This Essay thus concludes that professionalism remains a viable approach to lawyer regulation. Additionally, the Essay contends that the film fails to make a persuasive affirmative case as to why the business approach it proposes would in fact be preferable to the current “professional” approach.\footnote{See infra Part IV.}

Next, this review Essay turns to the film’s suggestions regarding what lawyers can learn from rock and roll music.\footnote{See infra Part V.} The film identifies three qualities of rock and roll music it suggests are particularly pertinent to lawyers. The first has to do with the passion rock musicians bring to their craft. The second has to do with the stance the music takes in relation to “the establishment.”\footnote{Transcript, supra note 1, at 916–17.} And the third involves the democratic nature of rock and roll music. While each of these points is well taken, the Essay contends that the film paints with too broad a brush in each instance, and that a more nuanced analysis of the music is necessary before conclusions can be drawn as to the music’s implications for the legal profession. Perhaps most importantly, the Essay contends that while there would be many advantages to lawyers bringing more passion to their work, the film both overestimates the opportunities for infusing the typical work of lawyers with passion, and underestimates the importance of other qualities besides passion necessary to help individual lawyers and the profession as a whole conquer whatever maladies presently afflict them. Thus, the Essay concludes by offering a summary of such qualities.\footnote{See infra Part VI.}

II. THE DECLINATION VIEW REVISITED

The film agrees with the notion that the legal profession is in a time of crisis. It describes lawyers as being “adrift.”\footnote{Transcript, supra note 1, at 913.} It points to public dissatisfaction with the legal profession,\footnote{Id. at 913 n.32.} and significant levels of dissatisfaction about their own work among lawyers.\footnote{Id. at 914.} Of course, it makes the obligatory references to the higher rates of
depression\(^\text{18}\) and substance abuse among lawyers as compared to the population at large.\(^\text{19}\) I have elsewhere referred to this perspective as the “declination view,” the idea that the legal profession is in a state of decline, or worse.\(^\text{20}\)

Indeed, at the time Pearce wrote his 1995 article,\(^\text{21}\) it may well have appeared to a conscientious observer that the legal profession was, in fact, in a state of crisis. The transcript to the film cites to the oft-cited troika of books which were published in the mid-1990s, one by a Harvard law professor, one by Yale’s former law school dean, and one by a prominent practitioner, each of which concurred with the diagnosis of a professional crisis.\(^\text{22}\) There were also the ubiquitous civility and professionalism committees of various courts and local bar entities, many of which drafted codes of conduct designed to rescue the failing profession.\(^\text{23}\) One commentator noted that by 1995, more than 100 jurisdictions had adopted some sort of code of this kind.\(^\text{24}\) Portrayals of lawyers in the popular media were unflattering, to say the least.\(^\text{25}\) Of course there were dissenters at this time to the declination view,\(^\text{26}\) but they were few and far

\(^{18}\) Id. at 914 & n.39.

\(^{19}\) Id. at 915.


\(^{21}\) See Pearce, Professional Paradigm, supra note 4.


\(^{23}\) See, e.g., Berenson, Conduct Codes, supra note 20, at 816–17.


\(^{25}\) Two popular movies around this time were LIAR LIAR (Universal Pictures 1997), in which a lawyer is unable to function because his son’s birthday wish prevents him from lying for twenty-four hours, and THE DEVIL’S ADVOCATE (Warner Bros. Pictures 1997), in which Al Pacino plays the devil himself, who has taken the form of a high-powered New York lawyer. See Robert L. Waring, The Devil’s Advocate, PICTURING JUSTICE, Nov. 1997, http://www.usfca.edu/pj/articles/devilsadv.htm (reviewing THE DEVIL’S ADVOCATE); Robert L. Waring, Swimming with the Bottom Feeders, PICTURING JUSTICE, Nov. 1997, http://www.usfca.edu/pj/articles/LiarLiar.htm (reviewing LIAR LIAR). Ally McBeal was the most popular lawyer show on the small screen at this time, and many of its characters were at best dysfunctional, and at worst certifiable. See, e.g., Lisa Friedman, Don’t Call Me Ally, PICTURING JUSTICE, Nov. 1997, http://www.usfca.edu/pj/ally-friedman.htm.

\(^{26}\) See, e.g., Mark Neal Aaronson, Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism, 8 ST. THOMAS L. REV. 113, 117 (1995) (arguing that the difficulties of the profession and not mere bad manners create the impression of decline); Atkinson, Dissenter, supra note 24, at 263 (offering a sympathetic view of lawyers); Stempel, supra note 7, at 25; David B. Wilkins, Practical Wisdom for Practicing
Despite the gloomy outlook in 1995, as one glances upward a dozen years later, one can’t help but notice that the sky has not fallen. First, individuals continue to choose to pursue careers in law, and have done so in increasing numbers over the past decade. According to Law School Admission Council (LSAC) data, 72,300 persons applied for admission to American Bar Association (ABA) approved law schools for the 1996–97 academic year. In 1995, 72,591 persons took bar examinations. By 2005, that number increased to 80,557. Of course, these numbers should not be read as indicating an increasing interest in entering the legal profession, particularly in the absence of corresponding data relating to population growth generally, and without examining the age cohorts at which persons are most likely to attend law school in particular. However, the numbers clearly belie any suggestion that a professional crisis is somehow inhibiting persons from entering the legal profession.

Additionally, it appears that public opinion regarding lawyers is improving, or at least has bottomed out. Of course, the ubiquitous lawyer jokes we’ve all gotten used to predated any crisis identified by the film. In 2005, in the infamous annual Gallop Poll in which members of the public are asked to rate different occupational groups in terms of their “honesty and ethical standards,” lawyers moved up to thirteenth out of twenty-one occupational groups, a significant increase in their standing from recent years. There is the occasional appearance of a tome that restates the declination view, or the announcement of a new civility or professionalism

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28 Id.


33 However, a review of the 100 top selling non-fiction books on Amazon.com on September 22, 2006 revealed only one “lawyer” book at all, and that was Harper Lee’s To Kill a
initiative,\textsuperscript{34} but the pace of such appearances has slowed dramatically.\textsuperscript{35} There also appears to be a slowdown in the new century of the presence of lawyer-villains in the movies of the type identified above.\textsuperscript{36} In fact, recent movies\textsuperscript{37} and television shows actually contain some positive portrayals of lawyers, to counterbalance the recent history of negative ones.\textsuperscript{38}

Finally, recently published research suggests that lawyers in general are quite content with their work. In a study by highly regarded sociologists of a large sample of Chicago lawyers, eighty-four percent of those surveyed indicated that they were either satisfied or very satisfied with their work.\textsuperscript{39} Though the authors of the study acknowledge the conflict between their study and the

\textit{Mockingbird}, which is neither recent, nor non-fiction for that matter, and certainly presents lawyers in a positive light. Moreover, even reviewing the top fifty best sellers in Amazon.com’s “law” category on the same date revealed no books that can be said to support the declination view (most of the books listed were “how to” books of various sorts).

\textsuperscript{34} For example, when Sheldon Stone was elected incoming California State Bar President for 2007, the State Bar Board of Governors agreed to provide funding for Stone’s “pet project,” an “Attorney Civility Task Force.” See Sloan’s Lawyer Civility Promotion Wins Go-Ahead, CAL. B.J., Sept. 2006, available at http://www.calbar.ca.gov (follow “Attorney Resources” hyperlink, then follow “California Bar Journal” hyperlink, then select September 2006 hyperlink, and finally select article title).


normative accounts cited above, they point out that their findings are consistent with the overwhelming weight of the empirical research that has been conducted regarding lawyer professional satisfaction.

This is not to say that these are the best of times for attorneys. It cannot be denied that many lawyers are unhappy with their work, and the statistics cited above regarding mental and physical health problems facing members of the profession cannot be ignored. The film mentions three common explanations for professional discontent—"changes in the market for legal services, increased diversity in the profession, and changes in legal education that devalued practice and ethics"—but dismisses these explanations as being "unpersuasive" by suggesting that similar changes have occurred in the past without causing a similar professional crisis. Instead, the film blames the 1960s for the loss of faith in both elites and the existence of expert knowledge which lead to a collapse in the ideology of professionalism.

I will have more to say about one of the above-described "common" explanations later in this Essay. I will also address later the causes the film ultimately does ascribe to the professional crisis it identifies. For the moment, however, I would like to discuss briefly three possible causes of professional discontent among lawyers that are not addressed directly in the film. This discussion will necessarily be truncated. This is because, as argued above, I do not believe there exists a full blown crisis in the legal profession. Also, the limited purpose of this Essay is to analyze the film, not the profession as a whole. Nonetheless, attention to these three possible causes would likely go a long way toward alleviating much of the discontent that currently afflicts the profession. These three issues are the related maladies of greed and overwork among elite practitioners, and increased competition within the non-elite bar.

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40 Id. at 256 (quoting KRONMAN, supra note 22, at 2).
41 Id. at 257. But see Transcript, supra note 1, at 914 n.37.
42 See supra notes 18–19 and accompanying text.
43 Transcript, supra note 1, at 910 & n.19.
44 Id. at 910 & n.20.
45 Id. at 910–911.
46 See infra notes 78–85 and accompanying text.
47 See infra notes 126–161 and accompanying text.
48 For purposes of this essay, elite lawyers will be defined as those who represent entities, such as businesses, and non-elite lawyers will be defined as those who represent individual clients. Though broad brush, this distinction was validated in the seminal study of Chicago
The film contends that the post 1960s realization that lawyers are just as greedy as everybody else was a contributing factor to the collapse of the professional approach to lawyer regulation. However, the more disturbing fact may be that certain lawyers are even greedier than everybody else. In his earlier writings, Professor Pearce identified the “Business Servant” as a threat to the professional approach to lawyer regulation. Pearce’s “Business Servant” threatens professionalism’s value of protecting the public interest by seeking to advance the particular interests of her wealthy clients at the expense of the public interest. However, in an earlier day, the idea of a lawyer being a “servant” of the businesses she represented may have had a much more benign connotation. Certainly, the idea of client service has always been a hallmark of professional ideology, though at an earlier time that idea would have been restrained by a vision of lawyer independence and professional obligations to the public interest. But given that the lawyer was the “servant” of the business person, the lawyer likely expected to have an income that was less than the client’s, given that the lawyer’s earnings were derivative of the business persons’.

But somewhere along the line, that perception may have changed for many lawyers. Perhaps lawyers came to believe that because they are just as smart as their business clients, they deserve incomes that are as great as those of their clients. Perhaps, on the other hand, given the explosion in executive compensation in recent years, business lawyers’ incomes have simply kept pace
proportionally. But in any event, it seems clear that the income expectations of elite lawyers have increased dramatically in recent decades.

For purposes of the following discussion, I will equate elite lawyers with those who practice at firms of greater than 100 lawyers. According to a recent salary survey conducted by the National Association of Law Placement (NALP), the median starting salary for a first year associate at a law firm with between 101 and 250 lawyers in 2004 was $100,000. That represented a sixty-seven percent increase over the fifteen year period from 1990. The median starting salary for first-year associates at firms with 251–500 lawyers was $116,000, a sixty-six percent increase over a fifteen year period. And, for first year associates in firms of more than 500 lawyers, the median starting salary was $125,000, a figure which increased seventy-nine percent over the past fifteen years. Over that same period, average wages in the American economy as a whole actually decreased.

In early 2007, New York’s largest law firms raised their starting salaries for new associates to $160,000 per year. The increases were even more dramatic in the ranks of partners. According to the most recent Am Law 100 survey, revenue earned per partner was $725,000 in 2006, an increase of 162 percent since the survey began twenty years earlier. Of course, revenues do not
equal income until expenses are deducted. Nonetheless, it is pretty clear that Am Law 100 partners are doing very well financially. Indeed, many other sources confirm the rapid increase in the incomes of partners at elite law firms in recent decades. In the 1995 Chicago lawyers survey, the median income for lawyers in firms of between 100 and 299 lawyers was $225,000, an increase of more than forty-four percent, in inflation adjusted dollars, from the results of the 1975 survey. Partners in firms of more than 300 lawyers had an average income of $350,000 in 1995. And the authors point out that the most dramatic increases in elite partner incomes in recent decades occurred during the economic boom of the late 1990s, and therefore are not captured in the figures cited here.

Of course, it is possible that these dramatic increases in elite lawyer incomes are not evidence of increasing greed. After all, it may be the case that such lawyers’ services are worth dramatically more than they were twenty years ago. In other words, we may be delivering so much more value to our clients that the increase in fees is justified. Somehow, however, I’m skeptical that our lawyering has improved that much. Also, it might be argued that lawyers have not sought these dramatic increases in income. Rather, it might be contended, lawyer incomes have so increased despite, rather than due to, lawyer efforts. However, there is contrary evidence suggesting that lawyers have made tremendous efforts in recent decades to market their services, attract clients, increase billable hours, improve leverage ratios, increase profitability, and generally turn law firm management into a science.

On the other hand, maybe greed is good for lawyers, just as Gordon Gekko asserted it was for financiers in the movie “Wall Street.” Yet scholars have persuasively contended that greed can have a number of pernicious effects on the practices of lawyers. First, it has been suggested that lawyers who are loathe to anger or

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64 See Heinz et al., supra note 39, at 166.
65 See id.
66 See id. at 167 tbl.7.2. Apparently, there was only one firm of this size included in the 1975 survey, so comparative data was not provided. Id. at 163 tbl.7.1.
67 See id. at 292.
68 See, e.g., id. at 305; Lerman, Slippery Slope, supra note 53, at 880; Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, 52 VANDERBILT L. REV. 871, 900–01 (1999) [hereinafter Schiltz, Unhappy Lawyers].
69 WALL STREET (TWENTIETH Century Fox 1987).
lose a high fee paying client are less likely to demonstrate the type of independence necessary to dissuade or deter clients from engaging in illegal, improper, or even imprudent conduct.\(^{70}\) Second, it has been amply demonstrated that the desire to generate high fees can lead to anything from mild dishonesty to outright fraud on the part of lawyers as far as their billing practices go.\(^{71}\) Additionally, the desire to generate high fees and incomes can lead to overwork, a subject I turn to next.

As recently as 1965, an ABA study showed that on average, partners billed 1200 to 1400 hours per year, and associates billed approximately 1400 to 1600 hours per year.\(^{72}\) Now, it is common for firms to expect associates to bill 2400 hours in a year.\(^{73}\) Moreover, there are often lucrative bonuses available for associates who bill more than the expected amount,\(^{74}\) and the increasingly elusive achievement of partnership\(^{75}\) is also often tied to above-average billings. Of course, not all attorney work time is billable. It is widely acknowledged that attorneys must spend on average three hours at work in order to bill two hours.\(^{76}\) Thus, in order to work the 3600 hours required to meet one’s billing targets, an attorney must spend nearly ten hours per day at the office every single day of the year. Take a day or two off every year or so, and the daily hours increase. No one can be happy working that kind of schedule, no matter how much passion you have for your work.\(^{77}\)


\(^{71}\) See, e.g., DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 168–74 (2000); Lawrence J. Fox, End Billable Hour Goals . . . Now, 17 THE PROF’L. LAW. No. 3, at 1, 4–5; Lisa G. Lerman, Blue Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers, 12 GEO. J. LEGAL ETHICS 205, 208 (1999); Lerman, Slippery Slope, supra note 53, at 903; Schiltz, Unhappy Lawyers, supra note 68, at 915.


\(^{73}\) See Lerman, Slippery Slope, supra note 53, at 885.

\(^{74}\) See Fox, supra note 71, at 1.


\(^{76}\) See Schiltz, Unhappy Lawyers, supra note 68, at 894.

\(^{77}\) It should be noted that there is at least some controversy regarding this overwork hypothesis. For example, the 1995 Chicago lawyers study found the median number of hours worked for associates in corporate firms was slightly more than fifty-three per week. HEINZ ET AL., supra note 39, at 130. And the 2006 Am Law 100 survey reported that partners at the most profitable thirty firms billed an average of “only” 1850 hours. See Am Law 100, supra.
At the other end of the spectrum from these elite lawyers, solo and small firm practitioners face equally difficult stresses of a different kind. Increased competition has caused such lawyers to work harder for a shrinking share of the economic pie available to them. According to the Chicago lawyer survey, while elite lawyers’ incomes increased dramatically between 1975 and 1995, solo practitioners’ median income actually decreased significantly—nearly thirty-five percent, from approximately $100,000 in 1975 to $55,000 in 1995. The authors of the Chicago study chalk this decline up primarily to increased competition among non-elite lawyers. They note that there was a tremendous increase in the supply of lawyers between 1975 and 1995. Yet graduation rates at elite law schools, whose graduates primarily go on to practice in the elite settings that were discussed above, were flat. Therefore, most of the growth in the bar was in the category of non-elite lawyers. On the other hand, the legal needs of the individual clients that non-elite lawyers serve, and those clients’ ability to pay for services, did not keep pace with the growth in the number of such lawyers. By contrast, demand for the services of elite lawyers grew significantly during the same period. The result, at the elite end, was a stable number of lawyers claiming increasingly large shares of a growing economic pie. At the non-elite end, the result was increasing numbers of lawyers competing for a stagnant economic pie. Naturally, the result was decreased incomes on the part of non-elite lawyers.

In addition to increased competition from other lawyers, non-elite lawyers also faced increased competition from non-lawyer legal assistance, a phenomenon that will be discussed in greater detail below. Note that the economic travails of non-elite lawyers were

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78 See supra notes 56–65 and accompanying text.
79 HEINZ ET AL., supra note 39, at 163 tbl.7.1.
80 See id. at 164.
81 See supra note 48.
82 HEINZ ET AL., supra note 39, at 158.
83 Id. at 164.
84 Id. at 283.
85 Id. at 164.
86 See infra notes 149–53 and accompanying text.
certainly not due to sloth. To the contrary, the Chicago lawyers study found that solo practitioners worked just as many hours as the hardest working elite lawyers.\textsuperscript{87} Naturally, working such long hours, for less and less pay, can be a sure fire route to discontent for non-elite lawyers.

The above-described problems of greed and overwork among elite lawyers, and increased competition among non-elite lawyers have been long in developing, are complicated, and belie easy solutions. Nonetheless, it is possible to envision at least some steps in the right direction that can prevent these problems from ripening into the type of full-blown crisis that the film sees.

With regard to the issue of avarice, an obvious response is moderation. As will be discussed in greater detail below,\textsuperscript{88} professional ideology has always accepted the fact that professionals may expect to earn a comfortable living in exchange for the professionals holding up their end of the professional “bargain.”\textsuperscript{89} It is only when professionals’ income expectations greatly exceed this comfort range that the problems begin. Moreover, recent research in the field of social psychology suggests lawyers’ expectations of extremely high incomes are a chimera. Professor Larry Krieger has convincingly demonstrated that where lawyers’ work objectives are driven by extrinsic rewards such as money, fame, or power, they are less likely to be satisfied in their work than if their objectives are driven by intrinsic rewards such as “self-understanding, close relationships with others, pro-social/helping outcomes, and community improvement.”\textsuperscript{90} In short, your grandmother was right when she told you that money can’t buy happiness.\textsuperscript{91}

Naturally, because the overwork problem is related to the greed problem, it should follow that if lawyers lower unreasonable income expectations, the overwork problem should abate as well. Other suggestions that have been made that relate specifically to the overwork problem are increased use of alternatives to hourly

\textsuperscript{87} Heinz et al., supra note 39, at 130.
\textsuperscript{88} See infra notes 123–25 and accompanying text.
\textsuperscript{89} See infra notes 123–25 and accompanying text.
\textsuperscript{91} There is evidence to suggest that up to a basic level of subsistence, increases in income do yield significant increases in happiness. See Ruut Veenhoven, Is Happiness Relative?, 24 SOC. INDICATORS RES. 1, 26–27 (1991). However, as the income figures cited above indicate, see Heinz et al., supra note 39, at 163 tbl.7.1, few lawyers experience this degree of poverty during their professional lives.
billing,\textsuperscript{92} and elimination of billable hour requirements for associates in firms.\textsuperscript{93} Though law firms have been slow effectively to implement them, both scholars and other advocates have amply demonstrated that firms can implement “balanced hour” policies that will allow the firms to succeed financially, while at the same time allowing their attorneys to achieve a better balance between their professional and their other commitments.\textsuperscript{94} Thus, with regard to combating the overwork problem, balance may be the key response.

The problem of increased competition among non-elite lawyers may be a more difficult one to address. As will be discussed below,\textsuperscript{95} in addition to competition from increasing numbers of lawyers, such lawyers must contend with competition from non-lawyer practitioners offering similar, if not identical, services. Nonetheless, a number of recent developments favor the ability of solo and small firm lawyers to succeed in their practices. Many of these relate to developments in technology. For example, electronic calendaring and conflict checking have greatly reduced malpractice hazards for many lawyers.\textsuperscript{96} Additional practice management, billing, and time keeping software allow non-elite lawyers to devote more time to billable activities and less to non-compensable administrative work.\textsuperscript{97} The internet and other new technologies also provide enhanced marketing and alternative practice options for non-elite lawyers.\textsuperscript{98} Listserves and other virtual communities allow non-elite


\textsuperscript{93} See Fox, supra note 71, at 1.


\textsuperscript{95} See infra notes 149–53 and accompanying text.


\textsuperscript{97} See FOONBERG, supra note 96, at 126; POLL, supra note 96, § 34.08; Trautz, supra note 96, at 316–17.

\textsuperscript{98} See, e.g., GREGORY H. SISKIND ET AL., \textit{THE LAWYER'S GUIDE TO MARKETING ON THE INTERNET} xiii (2002); Keith B. McLennan, \textit{Isn't It Time to Get a Web Page?}, in \textit{HOW TO CAPTURE AND KEEP CLIENTS} 162, 162 (Jennifer J. Rose ed., 2005) [hereinafter \textit{HOW TO CAPTURE}]; Nerino J. Petro, Jr., \textit{How Technology Can Help You Market Your Practice and
because non-elite lawyers have a high degree of autonomy regarding the nature of their work, it may be easier for such lawyers to take advantages of new opportunities for niche or specialty practices that result from the fast pace of change in our increasingly complex (legally and otherwise) society. Though none of this suggests that the lives of non-elite lawyers are likely to become easy in the near future, it does suggest that non-elite lawyers can have successful practices and earn incomes within the “comfort range” anticipated by the professional model, despite increases in competition among them, as long as they practice efficiently and effectively.

III. THE CONTINUING VITALITY OF LAWYER PROFESSIONALISM

The film’s claim of a failure of professionalism is largely derivative of its claim of a professional crisis. If, as I argue above, there is no genuine professional crisis, the failure of professionalism claim is necessarily rebutted. Nonetheless, the film also errs in failing to apprehend the writings of many scholars, including Pearce himself, regarding the true nature of the “bargain” that underlies professional ideology.

Scholars writing about the ideology of professionalism have generally identified three essential components of professionalism. I have described these components elsewhere as: 1) special knowledge; 2) public-spiritedness; and 3) self-regulation. A few words about each component are in order. The specialized knowledge component recognizes that there is a particular body of knowledge possessed by the members of the professional group that

99 For example, the ABA General Practice, Solo, and Small Firm Division sponsors an e-mail discussion list called Solosez “that has matured into a worldwide community of more than 1,800 solo and small firm practitioners.” See American Bar Association, About Solosez and How to Manage It, http://www.abanet.org/soloseznet/about.html#whatitis (last visited Jan. 1, 2008). The web site http://www.myshingle.com also acts as a virtual community for solo and small firm practitioners.

100 See HEINZ ET AL., supra note 39, at 118, 316.

101 See, e.g., Gary A. Munneke, Why Should You Specialize?, in FLYING SOLO, supra note 96, at 55, 55.

102 Berenson, Institutional Professionalism, supra note 7, at 72 (citing SULLIVAN, supra note 7, at 36); accord Pearce, Professional Paradigm, supra note 4, at 1238 (describing these categories as: 1) “esoteric knowledge”; 2) “altruism”; and 3) “autonomy”).
is not readily available to non-members. In the case of lawyers, this knowledge may amount to knowledge of substantive law, or it may amount to knowledge of the legal skills or processes that are necessary to the effective practice of law. Usually, this specialized knowledge is acquired through specialized education (law school) or apprenticeship, as well as through practice in the professional field. The existence of this specialized knowledge, however, creates certain problems or vulnerabilities for clients of the professional service. Because professionals have access to this special knowledge and laypersons do not, laypersons become dependent upon professionals for access to this knowledge. This dependence creates vulnerability. This vulnerability is enhanced by virtue of the importance of the specialized knowledge to laypersons. The legal issues one faces may be among the most important or challenging issues one may face in a lifetime. Additionally, it has been said that because they lack the relevant specialized knowledge, laypersons may lack the capacity to monitor effectively the services provided on their behalf by professionals. This further increases client vulnerability.

The public-spiritedness component of professionalism recognizes that professionals have obligations to the common good or public interest that go beyond those who practice non-professional occupations. In part, this component follows from the special knowledge component. Because people have a need for the special knowledge that professionals possess, yet the professionals have something of a monopoly on this knowledge, the professionals are deemed to have special responsibilities to share their learning broadly. This argument is often used to support the notion of obligations to perform pro bono legal services for those who cannot

103 See SULLIVAN, supra note 7, at 37; Pearce, Professional Paradigm, supra note 4, at 1239.
104 See SULLIVAN, supra note 7, at 210.
105 See id. at 37, 195.
106 See id. at 36–37; Pearce, Professional Paradigm, supra note 4, at 1239–40.
107 SULLIVAN, supra note 7, at 36–37; Pearce, Professional Paradigm, supra note 4, at 1239–40.
108 See Pearce, Professional Paradigm, supra note 4, at 1239–40.
109 SULLIVAN, supra note 7, at 23; Pearce, Professional Paradigm, supra note 4, at 1239.
110 But see infra notes 145–53 and accompanying text.
111 See, e.g., David Luban, Faculty Pro Bono and the Question of Identity, 49 J. LEGAL EDUC. 58, 63 (1999); Deborah L. Rhode, Cultures of Commitment: Pro Bono for Lawyers and Law Students, 67 FORDHAM L. REV. 2415, 2418 (1999); Deborah L. Rhode, Pro Bono in Principle and in Practice, 53 J. LEGAL EDUC. 413, 430 (2003) [hereinafter Rhode, Pro Bono in Principle].
afford to pay for them. Because the legal knowledge possessed by lawyers is necessary to provide access to justice, it is inequitable to restrict access to that knowledge to only those who can afford to pay for it.

Additionally though, the public-spiritedness component of professionalism recognizes that given the nature of much of the work performed by professionals, their work has an inevitable impact on the public interest, whether intended or not. This fact, in itself, imposes an important stewardship function on professionals. Thus, plumbers may possess similar expert knowledge to that of professionals, and their clients may exhibit similar vulnerabilities to those of professionals when the clients need plumbing services. However, we do not generally believe that the plumbers’ work has ramifications beyond those directly impacting the parties to the service contract, in contrast to the delivery of professional services.

The self-regulation component again relates to the expert knowledge component. Professionals assert that only they are competent to regulate themselves because only they possess the expert knowledge necessary to do so. The self-regulation component also provides assurance that professionals will in fact possess the expert knowledge necessary to serve their clients’ and the public interest. Thus, professionals set up entry requirements such as minimum education standards and licensing exams to measure the extent of entering professionals’ knowledge. Of course, professionals enjoy the autonomy that comes from self-regulation.

These three components lend themselves to a “bargain,” or a “social contract,” that forms the core of the ideology of professionalism. Professionals agree to use the expert knowledge they possess for the benefit of their clients and the public interest, rather than purely in pursuit of the professionals’ own self-interest. In exchange for this promise, professionals are granted

\[\text{See Rhode, Pro Bono in Principle, supra note 111, at 430–31.}\]
\[\text{Id.}\]
\[\text{See SULLIVAN, supra note 7, at 24.}\]
\[\text{Pearce, Professional Paradigm, supra note 4, at 1240.}\]
\[\text{See SULLIVAN, supra note 7, at 53; Pearce, Professional Paradigm, supra note 4, at 1240.}\]
\[\text{Pearce, Professional Paradigm, supra note 4, at 1238.}\]
\[\text{SULLIVAN, supra note 7, at 54.}\]
\[\text{See id. at 41; Pearce, Professional Paradigm, supra note 4, at 1238.}\]
the measure of self-regulation that they desire. However, professionals are also constrained in their exercise of their self-regulatory authority by the promise described above. Thus, professionals are expected to exercise their regulatory authority to advance their clients' and the public interest. As suggested earlier, this means enacting entry regulations that ensure that professionals possess the expert knowledge necessary to serve their clients' and the public interest. It also means enacting substantive regulations to ensure the primacy of client and public interest over lawyer self-interest.

It is an acknowledged result of this bargain, that by imposing such entry limits and substantive restrictions, the supply of professional services is somewhat inhibited. The law of supply and demand therefore results in an increase in the price of professional services. However, the professional bargain recognizes this increase as legitimate, as long as it is in pursuit of the other values described above. Thus, professionalism embodies the notion that professionals may expect to earn a comfortable living from their work. However, when professionals earn extremely high incomes, this may be evidence that the professionals have tipped the bargain in their own favor, using their autonomy to advance their own interests rather than their clients' or the public's.

In addition to suggesting that a crisis in the legal profession proves professionalism's inadequacy, the film also suggests that the professional bargain has broken down because the conditions that underlie it have failed. For example, the film contends that as a result of the questioning of all authority that emerged from the 1960s, we have lost faith in the expert knowledge component of professionalism. While I do not contest the general point that there was a loss of faith in authority following the 1960s and the Watergate scandal of the early 1970s, I disagree with the notion that this fact completely undermines the expert knowledge component of professionalism as far as lawyers are concerned. It strikes me as indisputable that as a result of their training and experience, lawyers do in fact possess both substantive knowledge,

120 SULLIVAN, supra note 7, at 54–55; Pearce, Professional Paradigm, supra note 4, at 1238.
121 See supra note 119 and accompanying text.
122 See supra note 116 and accompanying text.
123 SULLIVAN, supra note 7, at 54–55; Pearce, Professional Paradigm, supra note 4, at 1240.
124 SULLIVAN, supra note 7, at 55; Pearce, Professional Paradigm, supra note 4, at 1245.
125 See Berenson, Institutional Professionalism, supra note 7, at 72–73.
126 Transcript, supra note 1, at 910–11.
and knowledge of how to practice law, that is beyond the capacity of persons who lack such training and experience, and may be of great value to such persons.\footnote{127} Indeed, this fact is supported by the continuing robust demand for lawyer services, particularly in the elite sections of the bar that provide services to institutional clients.\footnote{128} Moreover, with regard to service to individual clients, there is now an ample body of research that makes clear that \textit{pro se} litigants who enter the legal system without legal representation, either because they absolutely cannot afford such representation or because they choose to forgo such representation as a result of a personal cost/benefit analysis, achieve much less favorable outcomes of their legal matters than is the case for persons who are represented by lawyers.\footnote{129} Additionally, the problem of self-representation in legal matters has become so widespread that the lack of available legal expertise has a public interest component, as well as an individual effect.\footnote{130} In short, lawyers absolutely possess expert knowledge that can be of great value to both their individual clients and the public interest.

The film expressly ties its critique of the expert knowledge component of professionalism to a critique of the notion that has most often been associated with Alexis de Tocqueville that lawyers make up some sort of American aristocracy or ruling class.\footnote{131} Indeed, other proponents of the declination view have similarly argued that the skills and values of lawyers make them ideally suited for positions of societal leadership, and have decried lawyers’ recent failures to live up to their promise in this regard.\footnote{132} As to its

\footnote{127} 1992’s groundbreaking MacCrate Report generated a list of ten fundamental skills necessary to the effective practice of law. See, e.g., Richard A. Matasar, \textit{Skills and Values Education: Debate about the Continuum Continues}, 19 N.Y.L. Sch. J. Hum. Rts. 25, 29 (2003) (citing Robert MacCrate, \textit{Legal Education and Professional Development—An Educational Continuum}, 1992 A.B.A. Sec. of Legal Educ. & Admissions to the B. 115, 121–24). It remains a matter of considerable controversy how well both law schools and the profession do in teaching these skills to lawyers. \textit{Id.} at 26–27. What seems inarguable is that lawyers are likely to possess these necessary skills to a considerably greater degree than untrained laypersons.

\footnote{128} \textit{Heinz et al., supra} note 39, at 282.


\footnote{130} See, e.g., Berenson, \textit{Family Law Residency Program}, supra note 129, at 130.

\footnote{131} \textit{Transcript, supra} note 1, at 910; see also \textit{Heinz et al., supra} note 39, at 205; Sullivan, \textit{supra} note 7, at 77, 79.

\footnote{132} See, e.g., Kronman, \textit{supra} note 22, at 364–65.
specific rejection of the “lawyers as ruling class” view, I am in agreement with the film. There is nothing special about lawyers that better suits them for public service than members of other professional and non-professional groups, and I bristle at the notion of lawyers representing a modern aristocracy as being undemocratic and anti-egalitarian. On the other hand, I do believe that lawyers are ideally situated to provide legal representation to their clients and to address the necessary public implications of their work in that capacity. In other words, I believe that the expert knowledge component of professionalism has content independent of the notion that lawyers are an elite ruling class and remains a valid basis for grounding an ongoing vision of professionalism on the part of lawyers in their work as lawyers.

The film also questions the viability of the public-spiritedness component of professionalism. It points out that lawyers are really no more public-spirited than anyone else. With this, I again agree. However, the film errs in collapsing the idea of public-spiritedness into a notion of pure altruism on the part of lawyers—the idea that lawyers must be “saints” to serve the public interest. There, the film ignores the professional “bargain” that the public-spiritedness component is a part of, and the idea of an exchange that is central to the notion of a bargain. Rather than representing pure altruism on the part of lawyers, public-spiritedness is something offered in exchange for the self-regulation or autonomy that lawyers seek. And, if the film is to be believed in terms of how well lawyers have made out in this bargain, it would be more appropriate to characterize lawyers as shrewd dealmakers than as saints. In any event, contrary to the film’s assertion, the public-spiritedness component of professionalism does not rely on the kind of pure altruism that the film suggests.

The film seems to recognize the fact that even the non-public-interest work performed by lawyers on behalf of “ordinary” clients

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133 However, as will be discussed in greater detail below, see infra note 159 and accompanying text, it does appear that lawyers are in fact disproportionately represented in positions within legislative, administrative, and judicial processes.

134 Transcript, supra note 1, at 911.

135 Id. at 911–12.

136 See supra notes 118–20 and accompanying text.

137 See infra notes 145–46 and accompanying text.

138 Accord Steven K. Berenson, A Cloak for the Bare: In Support of Allowing Prospective Malpractice Liability Waivers in Certain Pro Bono Cases, 29 J. LEGAL PROF. 1, 19 (2004–2005) [hereinafter Berenson, Liability Waivers] (arguing that a theory supporting a pro bono obligation on the part of lawyers need not rest on a vision of “pure charity”).
actually can have a great impact on the public interest. However, the film fails to acknowledge the fact that this type of impact should be recognized as fulfilling, at least in part, the public-spiritedness component of the professional bargain. Additionally, the film fails to recognize that even though lawyers as a class may be no more inherently public-spirited than any other group, the opportunity legal practice presents to have an impact on the public interest is an attraction to the profession for many. It seems that disavowing that attraction along with professional ideology would amount to the legal profession cutting off its nose to spite its face.

The film also fails to credit adequately the bar’s existing efforts to serve the public interest. The film suggests that most lawyers pass off their public interest obligations under the professional bargain on the “saints” who work in the field of public interest law and on minimal pro bono obligations. However, recent studies suggest that lawyers presently do significantly more pro bono work than I and other critics of the profession have previously acknowledged. In addition, while a few decades ago the public interest bar may have consisted of a small number of federally funded legal services lawyers, and a few full time legal advocacy organizations like the NAACP Legal Defense Fund and the ACLU, the film fails to recognize that the current public interest law movement is made up of a deep and complex web of partnerships between public and private lawyers, government and non-governmental entities, federal, state, local, and private foundation funds, and an

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139 Transcript, supra note 1, at 911, 921.
140 One of Professor Pearce’s self-professed heroes, Louis Brandeis, see Transcript, supra note 1, at 915–16, recognized this fact in a well known essay. LOUIS D. BRANDEIS, BUSINESS--A PROFESSION 329, 343 (William S. Hein & Co., Inc. 1996) (1914); accord Howard M. Erichson, Doing Good, Doing Well, 57 VAND. L. REV. 2087, 2123 (2004).
141 Transcript, supra note 1, at 911–12.
innumerable range of other service providers. Thus, the sharp distinction that the film draws between public interest and other lawyers no longer exists.

Implicit in the film’s critique of professionalism is a view that the professional bargain has become unduly one sided that lawyers are getting much more than they’ve given up in the deal. It was argued above that the film seriously underestimates what lawyers have contributed to the bargain, i.e., that there is in fact much more content to the expert knowledge and public-spiritedness components of professionalism than the film acknowledges, and that the client protection and the public interest promises are of much greater ongoing viability than the film suggests. On the other hand, the film seriously overestimates the benefits to lawyers that follow from the self-regulation component of the professional bargain.

The film states that lawyers enjoy “significant limits on market competition” as a result of their self-regulatory authority and implies that lawyers enjoy an economic windfall as a result therefrom. In general, I agree with the film, and other scholars who have advocated for a further loosening on limits on non-lawyer practice. On the other hand, one must acknowledge that such limitations have very few “teeth” at this point in time, and whatever formal restrictions remain have very little impact on lawyer incomes. First, as pointed out above, there has been a tremendous growth in the number of lawyers in recent decades, particularly those serving individual clients, and that fact, along with limited growth in demand for such services, has resulted in increased competition among non-elite lawyers. Consumers of legal


145 Transcript, supra note 1, at 909.


147 See supra note 85 and accompanying text.
services have been the beneficiaries of this increased competition, as evidenced by the dramatic decreases in non-elite lawyer incomes.148 Additionally, non-elite lawyers have at the same time faced dramatic increases in competition for clients from non-lawyer sources. First, the internet and other advances in technology have opened up a wide range of avenues for potential clients to access self-help and non-lawyer assistance resources.149 Also, in response to the explosion in self-represented litigants in the last decade and a half, courts have adopted simplified forms and other devices designed to make it easier for litigants to represent themselves in court.150 Third, document preparation and other “paralegal” services have proliferated.151 Additionally, neither the bar nor other legal authorities have much of an appetite for enforcing prohibitions on non-lawyer practice, except in the most egregious cases of fraud and deception.152 The latter may be the result of the fact that at least in many jurisdictions, the substance of the prohibition on non-lawyer practice is in fact quite narrow in scope.153 In any event, the

148 See supra note 79 and accompanying text.
150 See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 81, 85–86 (2004); Berenson, Family Law Residency Program, supra note 129, at 123.
151 RHODE, ACCESS TO JUSTICE, supra note 150, at 82. I recently represented the wife in a dissolution marriage action through a local bar association pro bono program. The husband was an enlisted member of the U.S. Navy, and thus had a modest income. He obtained representation in the matter through an “independent paralegal service.” Though an attorney was nominally associated with the service for purposes of the matter, and that attorney signed all pleadings, as far as I could tell, all of the work on the matter was performed by the “paralegal” over the nearly year long life of the case.
153 For example, in California, practice of law is confined to resolution of “difficult or doubtful legal questions . . . which . . . reasonably demand the application of a trained legal mind.” Agran v. Shapiro, 273 P.2d 619, 626 (Cal. App. Dep’t Super. Ct. 1954). Indeed, I recently served as an expert witness in a case where a lawyer had accused a non-lawyer competitor of unauthorized practice. Both parties assist commercial debtors in arriving at debt workouts with their creditors. My view is that the non-lawyer’s negotiations on behalf of debtors do not amount to the practice of law in California. As to other states’ definitions, see Johnstone, supra note 152, at 806–13; Soha F. Turfler, Note, A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law, 61 WASH. & LEE L. REV. 1903, 1914–15 (2004).
result of all of these developments is that non-elite lawyers face robust competition for clients from a wide variety of non-lawyer sources, which serves to drive down the prices that such lawyers can charge for their services.

What the film describes as “market shelters” for lawyers are also falling within the elite sectors of the bar. Though formal prohibitions on multidisciplinary practice remain in place despite efforts to remove them during the last round of revisions to the ABA’s Model Rules of Professional Conduct,\(^\text{154}\) it is clear that elite law firms have been transformed from pure providers of legal services to multifaceted entities that provide a broad range of legal and non-legal services to their clients.\(^\text{155}\) Moreover, large American law firms now operate within a global marketplace for their services, so even if they are formally prohibited from engaging in MDP, their economic behavior is constrained by competition from overseas enterprises that do not face such restrictions.\(^\text{156}\) In short, any suggestion that lawyers truly hold a monopoly on access to law or law related services is patently false.\(^\text{157}\)

Other windfalls that purportedly inure to lawyers as a result of their self-regulatory authority are also overstated. The film contends that all would be better off if authority for lawyer regulation were shifted from the profession itself to the government.\(^\text{158}\) However, the film also acknowledges that the legislative and administrative bureaucracies that would be responsible for creating and administering any governmental scheme for lawyer regulation are dominated by lawyers.\(^\text{159}\) This would be especially true of the legislative committees, administrative agencies, and their staffs, in whose domain lawyer regulation would likely fall. California presently employs something of a hybrid scheme of lawyer regulation, in which substantive lawyer regulations appear in both statutes and bar rules.\(^\text{160}\) Yet there is no evidence to suggest that the results of this

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\(^{154}\) See Berenson, Institutional Professionalism, supra note 7, at 93–94.

\(^{155}\) HEINZ ET AL., supra note 39, at 311–15.


\(^{157}\) Silver & Cross, supra note 142, at 1490.

\(^{158}\) Transcript, supra note 1, at 921.

\(^{159}\) Id. at 910 & n.15.

\(^{160}\) See, e.g., CAL. BUS. & PROF. CODE §§ 6000–6088 (West 2007); California Rules of Professional Conduct. However, the legislature has delegated enforcement authority over all
hybrid scheme differ significantly from those in states where the bar completely controls lawyer regulation. The film similarly presents no evidence at all to suggest that a government-run lawyer regulatory scheme would in fact differ significantly from, or function more effectively than, the schemes currently in place.\footnote{161} 

The film, therefore, seriously misjudges the ongoing vitality of the professional bargain. It both overestimates the value that lawyers receive from the bargain and underestimates the benefit that clients and the public interest gain as a result of the bargain. Though the bargain may not be as robust as it once was, or as it in theory might be, it still provides benefits to all participants to the contract that are worth preserving.

IV. THE BANKRUPTCY OF A BUSINESS APPROACH

Aside from the failure of its critique of lawyer professionalism, the film has little to offer in the way of a better alternative to the professional bargain. In his writings, Professor Pearce suggests replacing the professional approach to lawyer regulation with a business approach.\footnote{162} However, neither these writings nor the film offer a persuasive affirmative case in favor of a business approach.\footnote{163} The argument of the film seems to be largely that the professional approach has failed; therefore, a business approach must be preferable.

Both the film and Pearce’s writings seem to equate a business approach with the idea of laissez faire, or a totally unregulated market for the delivery of legal services. Yet in his writings, Pearce backs away from the full implications of laissez faire for lawyers, and instead offers a “Middle Range” approach.\footnote{164} Under the Middle Range approach, while lawyer regulations would be scrapped as they relate to certain aspects of legal practice, such as bans on non-
lawyer legal practice and limitations on litigation financing, regulations would remain in place regarding the lawyer-client relationship itself, including rules relating to confidentiality, some conflicts of interest, and control of legal representation.\textsuperscript{165} It seems to me that Pearce’s unwillingness to embrace the full implications of his call for a move to laissez faire seriously undermines the claims he and the film make on behalf of their business approach.

Additionally, some scholars would certainly question equating a business approach to issues addressed by professionalism, such as protecting the public interest, with laissez faire. In the wake of recent corporate scandals, Professor Rob Atkinson undertook to perform a comparative analysis of business and legal ethics.\textsuperscript{166} Though the details of Atkinson’s fine paper are beyond the scope of this review,\textsuperscript{167} he concludes that there are three largely overlapping schools of thought that currently define the fields of business and legal ethics, only one of which corresponds to Pearce’s version of laissez faire.\textsuperscript{168} Indeed, a second school identified by Atkinson supports incorporation of professional values into business contexts.\textsuperscript{169} So a business approach, properly defined, might embrace professionalism just as easily as laissez faire.

There is certainly no affirmative case for a business approach to legal ethics to be derived from the most recent round of corporate scandals. The film offers these scandals as evidence of the failure of the professional approach to legal ethics.\textsuperscript{170} Yet it is widely acknowledged that at least this time around, corporate executives and accountants were more blameworthy for the wrongdoing that occurred than lawyers.\textsuperscript{171} Indeed none of the twenty-four persons convicted of crimes in conjunction with the Enron scandal as of this writing were lawyers.\textsuperscript{172} This is not to say that lawyers’ behavior in

\textsuperscript{165} Id. at 1269–70. Pearce would shift authority for enforcing such regulations from the bar to the government, but as discussed earlier, see supra notes 158–161 and accompanying text, I do not believe such a shift would have much of an impact on the content of such regulations or on the manner in which they are enforced.

\textsuperscript{166} See Atkinson, Business Ethics, supra note 163, at 473.

\textsuperscript{167} A very brief synopsis of Atkinson’s findings can be found at Berenson, Institutional Professionalism, supra note 7, at 92 n.182.

\textsuperscript{168} See Atkinson, Business Ethics, supra note 163, at 484.

\textsuperscript{169} Id.

\textsuperscript{170} Transcript, supra note 1, at 913–14.


conjunction with the scandal was exemplary. On the contrary, the report of the Examiner appointed by the court in Enron’s bankruptcy case did find that there was sufficient evidence to conclude that certain of the company’s lawyers had committed either malpractice or had aided and abetted the officers’ breaches of fiduciary duties. The point here is simply that there is nothing in this sordid affair to support the film’s business approach.

Interestingly, one of the primary criticisms the film offers of lawyers is that they have become unduly partisan, “hired guns” rather than wise counselors. But even if the professional bargain were scrapped, lawyers would still have duties to advance their clients’ interests, as a result of agency and fiduciary principles. What would fall, however, would be the public-spiritedness prong of the professional bargain. No similar set of binding obligations would insure that lawyers protect interests beyond the narrow ones of their clients. The result would be more partisanship rather than less.

Additionally, the film ignores many countervailing trends moving in the opposite direction from the hired gun mentality. First, though one can question the effectiveness of the civility movement discussed above, there is no doubt that it represents a countervailing trend to excessive partisanship. The tremendous expansion and growth of alternative dispute resolution likewise demonstrates a movement away from partisanship. Though legal ethics scholars may have placed more importance on the movement of the “duty” of “zealous” representation from Cannon to Comment when the ABA’s Model Code of Professional Responsibility was replaced by its Model Rules of Professional Conduct than was warranted, combined with the other movements discussed in this paragraph, this fact at least dispels any notion of a movement toward greater partisanship. Indeed, at least two prominent scholars have argued forcefully that the problem with legal representation presently is not too much zeal, but rather too


\[174\] Transcript, supra note 1, at 911.

\[175\] See supra notes 23–24 and accompanying text.


little. It should be mentioned that probably the most influential scholarship regarding legal ethics and lawyer professional responsibility in the last thirty years has focused on arguing that lawyers have duties that go beyond those owed to their particular clients, but rather extend to third parties and the public at large as well. Though it is possible that there has been movement in the past few years back in the direction of advocating a more client-centered form of legal representation, an entire generation of law school professional responsibility teachers was raised and nurtured on the above-described writings. It seems clear to me that students graduating from law schools today are likely to do so with a much broader perspective on the role and responsibilities of lawyers than the excessive partisanship argument would suggest.

In the end, the film’s support of laissez faire for lawyers is based on an untested assumption about human nature: that lawyers are more likely better to serve the public interest if left to their own designs, i.e., their individual moral sensibilities, than if obligations to serve the public interest are imposed on them by virtue of their professional affiliation (whether in the form of mandatory or aspirational pro bono requirements or other parts of the professional bargain). I am skeptical that once the “profits at all costs” mentality of the business world is adopted as a code by lawyers, individual lawyers will prove to be so public spirited. Though perhaps we won’t know whether the above assumption is accurate unless the film’s business approach is adopted, it seems to me that the burden of proof should lie with those who would dismantle the fundamental basis for attorney regulation over the past century and a half. The film fails to carry that burden.

V. IS ROCK AND ROLL THE ANSWER TO WHAT AILS LAWYERS?

The film at least implicitly concedes that there is no content to the business approach to lawyer ethics by turning to rock and roll music to provide guidance to lawyers in conceiving their proper

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178 See Bernstein, supra note 177, at 1165; Hodes, supra note 177, at 46.
179 See, e.g., Berenson, Institutional Professionalism, supra note 7, at 97–98 (discussing the scholarship of David Luban and William Simon).
181 See Berenson, Institutional Professionalism, supra note 7, at 92.
professional role. Personally, no one is a bigger rock music fan than I, and if lawyers can find inspiration in the music, more power to them. Nonetheless, I believe the film also makes some missteps in its analysis of both rock and roll music itself, and the lessons it contends lawyers can learn from the music. The film offers three virtues of rock and roll it asserts can be particularly instructive for lawyers. First, it contends that rock and roll music is played with passion.182 Next, it argues that rock and roll musicians simultaneously critique and collaborate with the establishment.183 Finally, the film describes rock and roll music as being democratic.184 I will discuss each of these virtues in turn.

It is true that at its best, rock music is played with passion. The film’s primary example is Jimi Hendrix’s well known rendition of the national anthem,185 which was immortalized in the film version of the Woodstock Music and Arts Fair.186 The present film seems to suggest that lawyers should bring the same passion to all of their work that Hendrix brought to that stirring, albeit brief, performance. However, it is simply unrealistic to expect lawyers to generate the same excitement that characterized that unique performance, in that extraordinary setting,187 at that heady time in our country’s history, in all of the many relatively mundane tasks that characterize much of lawyers’ work. Indeed, in focusing exclusively on Hendrix’s stirring performance, the film overlooks the many less stirring and passionate aspects of the vocation, career, or occupation of being a rock and roll musician. Indeed, leading up to Hendrix’s virtuoso performance were years devoted to solitary practice on the guitar, months on the road in tour buses, airplanes, and cheap hotel rooms, weeks in studios recording and rerecording track after track after track, and days in negotiations with managers, record labels, and promoters.188 None of that work was likely glamorous, and much of it must have lacked the passion the film seeks.189

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182 Transcript, supra note 1, at 916.
183 Id.
184 Id. at 918.
185 Id. at 917.
186 WOODSTOCK (Warner Bros. 1970).
187 Though nearly a half million people were present at the beginning of the festival, by the time Jimi Hendrix played the Star Spangled Banner in the middle of his festival-closing set, no more than 40,000 remained. CHARLES R. CROSS, ROOM FULL OF MIRRORS: A BIOGRAPHY OF JIMI HENDRIX 268, 271 (2005).
188 See generally id.
189 Id.
It seems to me that the closest legal analogue to Hendrix’s performance of the Star Spangled Banner might be an impassioned closing argument delivered to a jury. But would it be right to hold up even a virtuoso performance in that forum as a model fix for whatever ails the legal profession? After all, most lawyers are not trial lawyers, and even for those who are, an increasingly small sliver of cases actually make it to closing argument. Moreover, just as was the case with Hendrix performance, the individual closing argument represents a culmination of years of training, months of pre-trial work and negotiations on the case, weeks of preparation for trial, days devoted tasks such as billing, client meetings, returning phone calls, and e-mails, and maybe even a few sleepless nights leading up to trial. Again, it is unrealistic to expect lawyers to experience passion and excitement in each and every one of those tasks. Of course, it is not unrealistic to expect lawyers to perform these tasks with dedication, competence, integrity, and even (gasp) professionalism. However, my own sense is that a good portion of professional dissatisfaction, at least on the part of new lawyers, results from unrealistic expectations as to what the practice of law will actually be like. New lawyers expect it all to be closing arguments and Star Spangled Banners. It isn’t and can’t be. Though I have nothing against passion, I think a dose of realism may be more important in combating lawyer dissatisfaction.

Moreover, passion has a price. As pointed out above, the film makes the obligatory nod to the heightened incidences of alcoholism, depression, and suicides that afflict the legal profession. However, if any occupation has higher incidences of these maladies than lawyer, it is rock and roll musician. Lest we forget, Hendrix, a rampant abuser of alcohol and a variety of illegal drugs, died at twenty-seven from choking on his own vomit. A trial lawyer who had been practicing well before the current “crisis” of professionalism arose once confided in me that he didn’t know a single trial lawyer who didn’t have a “drinking problem” back in the day. Of course, we take a much less benign view of alcohol abuse today than we did back then. In any event, this is another reason to
be skeptical of the impassioned guitar solo or closing argument as the foundation for building a new vision of professional identity.

The next virtue of rock music the film identifies is that rock musicians both critique the establishment and collaborate with it. However, some do neither, some do both, and some do only one or the other. To start, we must acknowledge that much of the “best” rock music is about sex, booze or other drugs, cars, or some combination thereof. Maybe such songs challenged the establishment back in Elvis’ day, but they don’t anymore. Led Zeppelin’s music has been used to sell Cadillacs. The Rolling Stones’ music is used to sell just about everything else. We also have to acknowledge that a lot of passionate rock music contains lyrics that many of us would find to be abhorrent, if we took the time to think about it. I’m always embarrassed when I catch myself singing along with Hendrix’s version of “Hey Joe.” The music is undoubtedly stirring, but it seems equally clear to me that it glorifies domestic violence.

The film is certainly right that some rock musicians collaborate with record companies and other examples of “the establishment” in order to make lots of money. But again, many of the best rock musicians in my book don’t, and really don’t seem to care that much about making money. The visual images in the film suggest that many of its makers’ rock and roll heroes came out of the 1960s and 1970s. Many of my rock and roll heroes, by contrast, came out of the “post punk,” “indie-rock,” or underground rock movement of the

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193 See supra note 183 and accompanying text.
196 This is not to suggest that I support censorship of music lyrics.
197 JIMI HENDRIX EXPERIENCE, Hey Joe, on ARE YOU EXPERIENCED? (MCA 1967).
198 In part, the first verse of the song goes as follows: Hey Joe, where you goin’ with that gun in your hand? . . . I’m going to shoot my old lady,
You know I caught her messin’ ‘round with another man,
199 See supra note 183.
200 See supra note 3 and accompanying text.
mid-1980s. For the most part, bands like the Replacements, Husker Du, and the Minutemen did eventually sign contracts with major labels, though they didn’t last very long with them or make very much money. But at the height of their powers, these bands released their music on small, independent record labels, didn’t make much money, and didn’t seem to care. The communities that they created with their relatively small but intensely loyal fan bases were all about critiquing the establishment and not much about collaborating with it. The film might offer the same disdain for these largely anti-establishment bands that it does for the “saints” who practice public interest law, who, at least historically, were also much more focused on changing the establishment than on collaborating with it or making lots of money. Nonetheless, just like my indie rock heroes, I believe that some of the figures from within the early public interest law movement, such as Thurgood Marshall or Gary Bellow, are just as inspiring as Hendrix, if not more so.

The final quality of rock music that the film identifies as being of interest to lawyers is the fact that rock music is democratic—anyone can pick up a guitar and play. While the latter point may be true, it is certainly not the case that just anyone can pick up a guitar and play it like Hendrix. Arguably, no one can play the guitar like Hendrix. And while just about anyone, with enough practice, can learn to play a recognizable version of the Star Spangled Banner on guitar, Hendrix’s version will not be duplicated.

Returning to my closing argument analogy, while anyone, with enough practice and preparation can deliver a professionally competent closing argument, not everyone can deliver one like Johnnie Cochran’s famous closing in the O.J. Simpson trial, or Paul Newman’s stirring closing in the movie the Verdict. I suppose there is nothing earth shattering in this point. However, it

201 Ok, I’m dating myself too, but at least I don’t go back quite so far as Woodstock.
202 For detailed accounts of these, and other celebrated bands from within this movement, see generally MICHAEL AZERRAD, OUR BAND COULD BE YOUR LIFE: SCENES FROM THE AMERICAN INDIE UNDERGROUND 1981–1991 (2001).
203 Id. at 4–7.
204 Id.
205 Transcript, supra note 1, at 911–12.
206 See supra note 90.
207 See Berenson, Primer, supra note 143, at 606–07.
209 THE VERDICT (20th Century Fox 1982).
seems to me that such genius in any endeavor can be equally inspiring or inhibiting. Indeed, another rock guitar icon, Mike Bloomfield, is said to have vowed to give up playing guitar after the first time he heard Hendrix play.210

Such genius performances are neither inspiring nor inhibiting to me. While I appreciate them and admire them when I see them, they simply have no impact on my future conduct. I will never play guitar like Hendrix, nor give a closing argument like Cochran. So what? The important question is what am I going to do with whatever talents I have? It seems to me that aspiring to be a professionally competent lawyer is not necessarily aiming too low.

VI. CONCLUSION

The title for this review Essay is taken from a song by English pub-rocker Graham Parker, from his seminal 1979 record, “Squeezing Out Sparks,”211 which is one of my all time favorites.212 Though his earliest work predated the English punk rock movement by a couple of years, Parker is often lumped in with other “angry young men” to emerge from that movement, including Elvis Costello and Joe Jackson.213 Despite the critical acclaim that was heaped on his early work, Parker never achieved much commercial success.214 He never had a gold record, and his best selling song in the U.S. topped out at number 39 on the Billboard charts.215

Despite these facts, Parker has continued to make vital and vibrant music pretty much without pause for more than thirty years.216 This music is undeniably passionate, though the anger of

211 See supra note **.
214 Id.
215 Id.
his earlier works has settled into something of a simmering unease. However, Parker’s music demonstrates much more than passion. His words are witty, acerbic, and highly literary.\textsuperscript{217} The instrumentation displays high levels of musicianship and songwriting craft. The melodies are catchy and memorable.

It is certain that this full panoply of skills and talents are necessary to sustain a career of the length and quality of Parker’s over the long haul. Lawyers need a similar range of skills in order to have careers of like success. Passion alone will not suffice. In addition to the commitment, craft, and technical skills demonstrated by Parker, some other qualities lawyers need to succeed that have been discussed throughout this Essay include moderation,\textsuperscript{218} balance,\textsuperscript{219} efficiency,\textsuperscript{220} and realism.\textsuperscript{221} While none of these qualities presents the allure of passion, they are equally important to lawyer success.

It makes little sense to me that in pursuing careers characterized by these qualities, either individual lawyers or lawyers as a whole should abandon the values of professionalism in favor of the vague and arguably illusory promises of a business approach or rock stardom. The above Essay has argued that the professional bargain has much more vitality left than the film acknowledges. Though problems undoubtedly exist, many can be readily identified and addressed. It is undeniable that in many instances, professionalism has well served lawyers, their clients, and the public as a whole. Until a clearly superior alternative emerges, it makes sense for lawyers to dance to their own drummer.

\textsuperscript{217} Indeed, Parker has also published a novel and a collection of short stories. \textit{See Graham Parker, Carp Fishing on Valium: And Other Tales of the Stranger Road Traveled} (2000); \textit{Graham Parker, The Other Life of Brian} (2003).

\textsuperscript{218} \textit{See supra} notes 88–91 and accompanying text.

\textsuperscript{219} \textit{See supra} note 94 and accompanying text.

\textsuperscript{220} \textit{See supra} notes 96–101 and accompanying text.

\textsuperscript{221} \textit{See supra} note 187–92 and accompanying text.