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Thinking About the Business of Practicing Law

Michael J. Kelly*

Reading Patrick Schiltz's advice to law students brought to mind a passage from Montaigne that has always represented for me one of the virtues of legal discourse: "What stings, touches and arouses us better than what pleases."¹ Montaigne continues:

I could stand to be rudely jarred by my friends: "You're a fool, you're dreaming." I like to see people speak up bravely . . . and to see the words go where the thought goes. We should strengthen and toughen our ears against this tenderness toward the ceremonious sound of words. I like a strong, manly fellowship and familiarity, a friendship that delights in the sharpness and vigor of its intercourse . . . It is not vigorous and generous enough if it is not quarrelsome, if it is civilized and artful, if it fears knocks and moves with constraint. *For there can be no discussion without contradiction* [Cicero].²

Whether Schiltz's powerful, passionately argued advice turns out to generate a constructive conversation, and even whether it is a conversation at all and not a confusing series of accusations, defenses, and counter-charges, remains to be seen. Less hyperbole—from the title through the barbeque scene—might lend itself to a healthier, more constructive discussion, at the cost, of course, of blunting the instrument, the vigor, and the strength of Schiltz's position which *demand*s a response.

One of Schiltz's important pieces of advice to law students is to look at what lawyers do, not what they say. This seems a useful guide to evaluating his opening salvos about unhealthiness (which is more akin to what lawyers do) and unhappiness (largely what lawyers say). The high rates of mental illness and substance abuse and other

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1. MICHEL DE MONTAIGNE, *Of the Art of Discussion*, in THE COMPLETE WORKS OF MONTAIGNE 703, 703 (Donald M. Frame trans., Stanford Univ. Press 1957).

2. *Id.* at 705 (emphasis in original).

problems in the profession cited by Schiltz³ are deeply disturbing, even if the evidence is somewhat uneven. I find it harder to interpret the unhappiness data, on which Schiltz focuses considerable attention. Lawyers have traditionally displayed an enormous capacity for self-critical reflection about the decline or moral failings of the profession. Indeed, anyone who has spent much time with lawyers knows how critical they are of judges, other lawyers, and, if it makes a good story, themselves. The nagging question I have when confronted with all this evidence of discontent is to ask for some evaluative comparison. Schiltz's citation of data on depression and mental illness, for example, is powerful because law is ranked with other occupations. All the unhappiness data is solely confined to lawyers. If, for example, lawyers were not that much more unhappy than people inside their corporate clients, or physicians struggling with the transformation of the health care industry, would it worry us as much as it does Schiltz? And if we were to postulate that both law and medicine are undergoing significant change, would it not be entirely understandable that young people commencing their careers with expectations of a large degree of autonomy are distressed at the increasing "corporatization" or dominance by the organizations of practice in their professions?

The core of Schiltz's argument with which I most disagree is that large firms are all alike, or, to put it in its more modest, plausible, and compelling form, that big firms and big-firm lawyers are *becoming* more alike.⁴ The claim of what academics call isomorphism—in this case, that large-firm practices converge ultimately in similarity—is his principal descriptive claim. It is also the primary rhetorical device that allows Schiltz to attack large law firms as if they were one, to transpose the caricature of the managing partner in his third marriage to all large law practices. Schiltz's convergence thesis does not mean that all firms *are* alike, but that they are being driven by the competitive forces and motivations Schiltz describes to a fundamental identity. So, what might otherwise be deemed internal con-

3. This information needs somehow to find its way into law school formal or informal curricula, although how to achieve this without sounding either preachy or terrifying would need to be carefully calibrated. I'd suggest asking students how best to approach these subjects. The American Bar Association, to its great credit, has published *Living with the Law: Strategies to Avoid Burnout and Create Balance*, which includes advice to lawyers about responding to stress and anxiety, balancing work and family, and coping with severe depression and chemical abuse. LIVING WITH THE LAW: STRATEGIES TO AVOID BURNOUT AND CREATE BALANCE (Julie M. Tamminen ed., 1997).

4. See Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND L. REV. 871, 920 (1999).

traditions of the article—his suggestions, for example, that there are firms he recommends to students⁵ and there are ways to find and screen the better firms⁶—are resolved because the better firms are only a temporary phenomena. Ultimately even the better firms, he would argue, will succumb to relentless social and economic forces. It is this claim that requires law students and lawyers in any form of private practice to move beyond the rhetorical flourishes of the tamed trophy wife and the home never seen in daylight and ask themselves whether there is any truth to his argument.

I cannot disprove Schiltz's claims about the convergence occurring in large law firms. After all, there is evidence and intelligent speculation that supports it.⁷ Galanter and Palay's hypothesis, cited by Schiltz,⁸ is that in a culture that values autonomy, money is the one measure of the many goods of a practice upon which it is easiest to agree (or the least difficult to avoid) and therefore emerges as the prime focus of most partnership understandings. The vast majority of formulae or weighting systems for compensation in law firms reward those who strengthen the business and deploy to its full potential the firm's leverage by bringing in clients and servicing or retaining important clients. Schiltz's analysis of the relationship among billing rates, billable hours, and partnership compensation⁹ seems to me entirely accurate as an explanation of the pressure on firms to increase billable hours.

So why am I so skeptical of the convergence thesis? One response is perhaps only temperamental: I am deeply suspicious of iron laws, particularly when it comes to organizations. Firms are human constructs. The character of an organization is determined by people, not solely by competitive pressures to which people respond. Who is to say that the better firms, presumably the exceptions to the model Schiltz describes, will not thrive? Imagine, for a moment, that the system that drives Schiltz's analysis—the economics of leveraging the billable hour—undergoes change, not unlike the transformation now occurring in health care from fee-for-service billing to managed care imposed rates or capitation contracts. And think of the following not

5. See *id.* at 918.

6. See *id.* at 943-49.

7. In fact, an anecdote I cite later in this comment against Schiltz's one-sided depiction of law firm economics—a scene illustrating law students' lack of long-term commitment to large law firms—could support the convergence thesis.

8. See Schiltz, *supra* note 4, at 945 (citing MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 128 (1991)).

9. See *id.* at 900-02.

implausible scenario: corporate clients, outraged at the preposterous costs of litigation and using the threat of accounting/consulting firms for transactional legal services, insist on fixed prices for work. The billable hour incentive structure would have to give way to rewarding those lawyers capable of the most efficient and well-managed methods to deliver quality services.¹⁰ Would all large law firms suddenly change in character? Of course not, even though the need, and the rewards, for racking up long hours could be significantly changed. In fact, most of the young lawyers unhappy with large firms with whom I've spoken complain less about excessive hours than about ugly internal politics, the unpleasantness of the places, or the unfulfilling nature of the work. Perhaps, as I am sure Schiltz would argue, these complaints are merely symptoms of excessive hours, but the fact remains that organizations develop different characters even in a situation of responding to the same economic pressures.¹¹

Let me draw my objection on a larger, historical canvas. One of the most striking features of the professionalism movement in the organized bar, as well as the several books by lawyers bemoaning the decline in the profession, is how reminiscent it is of the vocabulary of concern of the Progressive movement in the early years of the twentieth century. The complaints are similar: the decline of individual responsibility, the rise of large impersonal organizations, the relentless pursuit of enormous profits, and the exploitation of labor. In an important sense, the legal profession escaped the transformations the larger economy experienced around the turn of the century until developments—particularly the rise of a highly competitive marketplace—overtook the profession in the late 1970s and 1980s. American business after the Progressive era has been a scene of enormous differentiation, even in the same industries with similar competitive pressures. Business organizations continue to display huge variations in the way they manage themselves, generate profits, respond to their customers and the public, and harness the creative energies of their employees. It is likely that similar differentiation will occur in the world of law practice.

Schiltz makes an effort to provide a balanced, if negative, assessment of the merits of large-firm practice in terms of the training,

10. I am indebted to Larry Hirshhorn and Robert Gutman for this insight. See Larry Hirshhorn & Robert Gutman, *The Future of Large Law Firms* (1995) (unpublished manuscript, on file with author) (exploring in great depth the implications of such a development).

11. One should not completely dismiss the possibility that Schiltz's article attracts enough notice to make a difference in the thinking and actions of lawyers.

work, collegiality, and opportunities it may or may not provide.¹² His analysis of the economic structure of large-firm practice is, in contrast, peculiarly unbalanced. Take, for example, his analysis of the “skim”—the way the senior lawyers in a large firm, he argues, exploit new associates and other junior lawyers. He ignores the responsible arguments that can be made for such a system in terms of the historic contribution of the senior people to the reputation, the client base, and the structure of human capital of the practice. But even assuming the worst of instrumental motives, as Schiltz does, my reading of the situation is much more in terms of mutual exploitation. Law students understand in general terms the role they will play in leveraging the compensation of senior lawyers. If there is cynicism, it is widely shared. I recently participated in a seminar for third-year students at a law school that sends a very high proportion of its graduates to large law firms. When asked who expected to make his or her career at these firms, one student rather tentatively raised his hand. Perhaps the response derived from an understanding of the difficulties beyond their control of making partner, or a sense that they are only “punching their ticket” for resume purposes. But this small incident strongly suggests that, whatever the causes of this behavior, the circle of those who use large law firms for their own purposes is not confined to the rainmakers.

One of the reasons the Schiltz article is likely, in my judgment, to receive attention is that the efforts of the organized bar to deal with some of the issues he raises have proven to be so ineffectual. Schiltz cites, and appropriately eviscerates, a small portion of the numerous reports of the American Bar Association and state and local bar associations about professionalism and the quality of professional life.¹³ These are well-meaning efforts by people genuinely concerned about the future of the profession. Most of these special commissions on professionalism have bemoaned the decline of professionalism, but as

12. See Schiltz, *supra* note 4, at 926-38. One glaring exception to my characterization of “balance” is his preposterous contrast of challenging work at a large firm researching securities law versus work at a small firm helping a client realize her dream of opening a small business. See *id.* at 929. Corporate clients are not abstractions; they are people within an organization, sometimes in as much distress as an “ordinary” person. While it may be true that the first-year associate in a number of large firms doesn’t have access to many clients, relationships between lawyers and individuals within corporate clients quickly develop and are important sources of work satisfaction in corporate practice.

13. See generally Roh Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995).

best I can determine, have had little impact or effect.¹⁴ Why is this? One reason is that they suffer from a flawed understanding of the profession. They fail to acknowledge that during the past thirty years the organizations of practice—legal services units, in-house corporate law departments, government legal divisions, and private firms—have become stronger, usually larger, and certainly more dominant in the work lives of their lawyer constituents. This “vertical professionalism”¹⁵ of the professional entity that houses a practice profoundly affects the nature of available work, modes of client responsiveness, rewards and incentives, style of self-presentation in a fiercely competitive marketplace, and the career development of lawyers. The set of ideas and regulatory structures applicable to all lawyers to which the organized bar appeals, which could be called “horizontal professionalism,” is no longer the engine of change and action in law. One of the great virtues of the Schiltz article is that he takes as his audience students who are not socialized in the profession and launches his attack, taking aim at one of the most visible manifestations of verticle professionalism, the large corporate law firm.

And Schiltz does another service which the organized bar has been unable to do—to cut through the “ceremomious sound of words” and identify the pervasive use of professional ideals as a form of mar-

14. I was party to one of these efforts, sponsored by the Maryland State Bar Association in the late 1980s. See generally MARYLAND STATE BAR ASS'N, REPORT BY THE SPECIAL COMMITTEE ON LAW PRACTICE QUALITY (Dec. 30, 1988). That report described a randomly sampled, independently administered survey of lawyers in Maryland and observed, on the basis of the survey that “the personal lives of all attorneys seem to be adversely affected by the demands of their professional lives.” *Id.* at 9. Seventy-two percent of the lawyers interviewed for the study logged from 1,800 to 2,400 or more billable hours per year, with “surprisingly slight” variations by age, status, and seniority (for example, partners or associates at small, medium, or large firms). *Id.* at 9-10. The Committee concluded that “a large segment of the lawyers who were surveyed had a relatively high level of satisfaction with their own professional lives.” *Id.* at 12. “The pressures generated by such work demands are putting significant pressures on the domestic lives of all the lawyers,” the Committee explained. *Id.* at 10. And in a passage that I believe would appeal to Patrick Schiltz, the Committee concluded that:

The situation [discontentment with the overall quality of the lawyer's life] might be likened to that of an alcoholic or other substance abuser, knowing that his or her habits are ultimately destructive, but enjoying the temporary and illusory benefits of the abuse to such an extent as to be unable to stop. As with the alcoholic or other substance-abuser, change can only come about through a realization of the addiction and its destructive potential combined with a conscious commitment to change.

Id. at 13.

A 1998 membership survey of the Maryland State Bar Association generated rather positive results, with 74% of respondents rating the quality of their professional life as good or very good, and 90% saying they are able to balance work and family time demands “some or all of the time.” Maryland State Bar Ass'n, *1998 Membership Survey* 6.

15. I am indebted to Robert Post for this metaphor.

keting. As someone who has spent many hours trying systematically to read and analyze law firm brochures—a mind-numbing form of research that I would recommend to no one—I am sympathetic with Schiltz's brute dismissal of the near universal claims of wonderful clients, superb support, great training, and the like that dominate virtually every piece of literature designed to lure new associates to a firm. He calls them lies. I would call them a profound failure of imagination.

The advice Schiltz gives to law students, whether you agree with his diagnosis of large law firms or not, addresses thoughtfully the huge reality law graduates face—that the law firm *is* their profession and represents, enforces, and rewards the values that will determine the future of their career. His dissection of the billable hour¹⁶ and particularly the precise meaning of the number, or what counts toward the billable hour target,¹⁷ as well as his repeated warnings about the seductive relationship between lawyer and timesheet¹⁸ touches accurately and profoundly on a key element of organizational life for a young lawyer. I would encourage someone trying to learn about a firm¹⁹ to ask an interviewer to describe the leader of the firm. Is the leader the rainmaker extraordinaire, the most dominating personality, the most accomplished lawyer, someone with a sense of vision and direction for the firm, or someone with strong management skills? The person who heads the practice, at a time when organizational leadership is so critical to the future of law practice organizations, should speak volumes about the nature, let alone the future, of the firm. A riskier set of questions, probably best left to the time when an offer is in hand, could also be revealing. No firm of any size is likely to be free of conflict. Are people in the firm willing to discuss its internal conflicts, and describe how, if at all, they are resolved? Are people in the firm willing to talk about mistakes the firm has made? Current problems? Whether they do so and how they go about it would tell the questioner much about the self-confidence, character, and transparency (i.e., openness) of the organization, particularly if the candidate has done some other homework Schiltz recommends, such as asking other lawyers in the community about the firm.

Finally, in the category of what I like about this article is Schiltz's comments about three kinds of ethics implicated in practice.

16. See Schiltz, *supra* note 4, at 893-94.

17. See *id.*

18. See *id.* at 917-19.

19. For Schiltz's advice on this issue, see *id.* at 943-49.

The first two, compliance with the rules and developing the day-to-day habits of what might be called an ethical sensibility,²⁰ are put in proper relationship and seem to me both sound and thoughtful. The argument that is important but not entirely successful is his third category, that it is unethical to spend so much time at work because by doing so the lawyer violates his or her obligations to family, friends, community, and God.²¹ Structuring this claim in terms of a set of duties seems to me mistaken. Is an unmarried new associate in a strange city less "unethical" for working obscenely long hours under this analysis than a married associate whose firm is located in her home town? We are not a great tally board or calculus by which we somehow define and measure ourselves in terms of rights and responsibilities, consents, and entitlements in connection with clients, colleagues, and the legal system (our professional side) and friends, family, and other communities (the private side). There is a fundamental distinction to be made between making decisions about specific situations where one can assess matters of rules and principles and obligations (issue ethics, which includes most of what is generally conceived of as legal ethics) and questions about leading a meaningful and worthy life that commands respect (let's call it developing integrity or a wholeness of character).²² Schiltz's entire article challenges law students to imagine and address the latter, an elaboration of the biblical injunction, "What does it profit them if they gain the whole world, but lose or forfeit themselves?"²³ He weakens his case by posing it in terms of a cadre of obligations out there competing with the lineup of obligations at work. A "rights and duties" analysis is not how we put together our lives. The "ethics" he is trying to describe is the large, ancient, profound, and unnerving question everyone faces, which is who do you want to *be*?

Although Schiltz addresses many critical issues in the profession more incisively and certainly more aggressively than the organized bar is capable of doing, he does share, I think, their ambivalence about the private practice of law. Law is, and always has been, a

20. See *id.* at 908-10. Schiltz takes a strong stand about the tensions law practice creates in drawing a lawyer away from ordinary ethical intuitions. This may be an issue of peculiar saliency in litigation practice, which was Schiltz's specialty. Other specialties, such as estates and trusts practice, or certain forms of corporate transactions, do not, I think, pose as stark a set of "honesty" problems as litigation. Indeed, the variety of practices within a firm tends often to ameliorate a billable-hours-driven culture typical of a litigation department.

21. See *id.* at 910.

22. See CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* 14-18 (Cambridge Univ. Press 1992) (1989).

23. *Luke* 9:25 (New Revised Standard).

business as well as a profession. Lawyers have, for most of American history, made good livings, and many have made fortunes.²⁴ The refusal to examine law with a “storeoscopic perspective,”²⁵ to keep both of these dimensions of law practice in view, is the special myopia of the efforts of the organized bar to lead a revival of “professionalism.”²⁶ Once one escapes from the clutches of thinking of “profession” and “business” as dichotomies, and comes to terms with the fact that, whether we like it not, they are joined at the hip in private practice, a refreshing set of possibilities reveals itself. Virtually none of the criticisms or problems posed by Schiltz—imposed workaholic regimens, distorted compensation structures, unhappy professionals used and viewed in totally instrumental ways by management—are unique to large law firms or the private practice of law. If even a portion of law firms fit (more or less) the picture of the convergence model Schiltz describes, there is much to be gained by thinking of these organizations as businesses that may be profitable to their owners but have serious long-term problems. Law schools have not thought much about these issues, but a world of relevant writing exists on these subjects, both scholarly and practical, by business leaders, consultants,²⁷ and academics who have struggled with many of Schiltz’s issues. Let me briefly mention just a few of what could be literally scores of examples. Collins and Porras in *Built to Last* analyze and compare successful and unsuccessful companies in a wide variety of industries over a number of decades and argue that the stronger, more successful firms build a core mission and ideology that transcends financial performance.²⁸ Bartlett and Ghoshal describe the relentless determination of creative business executives to instill a

24. See, e.g., 2 THE PAPERS OF DANIEL WEBSTER, LEGAL PAPERS, THE BOSTON PRACTICE 119-74, 265-75 (Alfred S. Konefsky & Andrew J. King eds., 1983), for data and commentary on the lucrative economics of Webster’s law practice in the early nineteenth century.

25. This is Jeffrey Stout’s useful phrase in his analysis of the medical profession. See JEFFREY STOUT, ETHICS AFTER BABEL 279 (1990).

26. See, for example, the definitions of professionalism in AMERICAN BAR ASSOCIATION, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10 (1986); AMERICAN BAR ASSOCIATION, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES, 87-101 (1992); AMERICAN BAR ASSOCIATION, TEACHING AND LEARNING PROFESSIONALISM 5-7 (1996). None of these even suggest that making a living is an element of professionalism. A far more sophisticated approach is represented by the American Bar Foundation’s efforts to explore the dilemmas of contemporary “professionalism.” See generally LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION (Robert L. Nelson et al. eds., 1992).

27. More often than not, the business literature reflects the experience and sophistication of consultants helping firms address these issues.

28. JAMES C. COLLINS & JERRY I. PORRAS, BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES (1994).

common purpose and build organizational consensus around the values and objectives of the organization. These business leaders focus as much time on the top human resources executive as the chief financial officer.²⁹ Handy writes about the vital "new" importance of trust and community as technology does much to free work from the constraint of location. He argues that "[a] sense of belonging is something humans need if they are to commit themselves to more than simple selfishness."³⁰ Friedman, Christensen, and DeGroot describe effective ways corporate managers are addressing what they call the "work-life" balance.³¹

Much of this literature suggests the possibility that thinking creatively about the business of private law practice could strongly—and realistically—support the enhancement of professional values. A sound business strategy entails a sustained and serious conversation that confronts the threats of drift and opportunism, "the pursuit of immediate, short-run advantages in a way inadequately controlled by considerations of principle and ultimate consequence."³² Understanding the business better and taking creative action to improve the business may ultimately prove the most fruitful approach to developing happy, healthy, and ethical lawyers.

29. See Christopher A. Bartlett & Sumantra Ghoshal, *Changing the Role of Top Management: Beyond Systems to People*, HARV. BUS. REV., May-June 1995, at 132, 136; see also Christopher A. Bartlett & Sumantra Ghoshal, *Changing the Role of Top Management: Beyond Strategy to Purpose*, HARV. BUS. REV., Nov.-Dec. 1994, at 79.

30. Charles Handy, *Trust and the Virtual Organization*, HARV. BUS. REV., May-June 1995, at 40, 49.

31. See Stewart D. Friedman et al., *Work and Life: The End of the Zero-Sum Game*, HARV. BUS. REV., Nov.-Dec. 1998, at 119, 119.

32. PHILIP SELZNICK, *LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION* 143 (1957).