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The Judicial Rejection Of Professional Ideology In Labor And Employment Law

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I. INTRODUCTION

This essay tells the story of how courts in America first embraced, and then largely rejected, the "ideology of professionalism." The term "ideology of professionalism" refers to a set of claims and beliefs used to justify the substantial degree of autonomy that professionals – physicians, lawyers and others – have traditionally enjoyed in their work.[1] This ideology rests on the core idea that professionals do not work primarily for gain, but for the greater good of the public or those they serve.[2] It emphasizes the distinction between professional norms aimed at this greater good and the profit-maximizing norms of the marketplace.

This notion that professionals are not profit-driven may sound quaint to modern ears. But it laid the groundwork in the early twentieth century for certain legal doctrines, including most notably the corporate practice doctrine, which prohibits business corporations from employing professionals to serve others. In 1910, for example, the New York Court of Appeals held in *In re Co-operative Law Company* that a business corporation could not employ staff attorneys to provide legal services to third parties, since the corporation's goal was "simply to make money," and the control that it would exert over the lawyers in its employ would jeopardize the lawyers' professional relationship with the third parties they served.[3]

In the latter half of the twentieth century, the ideology of professionalism came under attack from two competing points of view. The first, "consumerism," denied that the interests of

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[1] *See* ELIOT FREIDSON, PROFESSIONALISM, THE THIRD LOGIC: ON THE PRACTICE OF KNOWLEDGE 105-06 (2001). This essay borrows the term "ideology of professionalism" from Freidson, who was a leading scholar in the sociology of the professions.

[2] *See id.* at 217.

[3] *In re* Co-operative Law Co., 92 N.E. 15, 16 (N.Y. 1910).

professionals were distinct from those of business and claimed that professionals should be more exposed to the forces of the market.[4] Consumerism manifested itself in landmark court decisions subjecting professionals to antitrust scrutiny and also striking down restrictions on advertising by professionals, which induced greater competition between them.[5]

While many saw (and see) consumerism as having had a salutary impact on the professions, it weakened professional ideology and paved the way for a second assault, by "managerialism."[6] Like consumerism, managerialism seeks to reduce the autonomy and privilege of professionals, but it applies in the context of professionals employed by organizations, such as business corporations, and claims that the professionals' work should be subject to the control of the management of the organization.[7] To justify such bureaucratic control over the work of professionals, managerialism denies any divergence between the interests of the professionals and those of the businesses that employ them.

This essay argues that certain decisions in labor and employment law can be explained by many courts' resistance to the ideology of professionalism and their corresponding acceptance of managerialism. One example, in labor law, is the Supreme Court's 1994 decision in *NLRB v. Health Care & Retirement Corp.*, a decision which cast doubt on whether professional workers are employees protected by the National Labor Relations Act (NLRA).[8] There, the Court denied that certain nurses had an interest in patient care separate from the interest of the for-profit nursing home chain that employed them.[9] Conflating the interests of the nurses and their employer, the Court concluded that the nurses were part of the employer's supervisory apparatus and, as supervisors, did not enjoy labor law protection.[10]

In the field of employment law, judicial acceptance of managerialism over professional ideology has resulted in courts generally rejecting an exception to the employment-at-will doctrine that would protect professionals from being fired for refusing to violate professional norms. An example is the 2003 decision of the New York Court of Appeals in *Horn v. New York Times*, which denied a cause of action to an in-house physician who claimed that her corporate employer fired her for refusing to disclose to management confidential medical information about the employees of the corporation whom she treated.[11] In dismissing her suit, the court emphasized that when treating the corporation's employees, the physician was serving the interest of her employer.[12] *Horn* represents a full turnabout from the same court's decision nearly a century earlier in *Co-operative Law Company*. Whereas the earlier decision saw the profit-driven interests of the employer as potentially at odds with the professionals' interest in serving the good of the client, the latter decision effectively denied any divergence in interest between employer and professional.

This essay argues further that the swing of the pendulum over the last century from one extreme to the other – from judicial embrace, to judicial rejection, of professional ideology – has

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[4] *See* FREIDSON, *supra* note 1, at 188-90.

[5] *See infra*, notes 37-43 and accompanying text.

[6] *See* FREIDSON,, *supra* note 1, at 106.

[7] *See id*.

[8] NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 584 (1994).

[9] *See id*.

[10] *See id*.

[11] Horn v. New York Times, 790 N.E.2d 753, 759 (N.Y. 2003).

[12] *See id.* at 758-59.

practical consequences: it makes it far less likely that professional norms will be implemented and enforced in the workplace over countervailing management imperatives.

One way to enforce professional norms in the workplace is through collective bargaining; unions representing professionals typically negotiate contracts that serve professional interests. For example, unions often bargain for minimum staffing levels to ensure that, despite management cost-containment measures, each professional employee has time to serve his or her patients or clients adequately.[13] Labor law cases that conflate employer and professional interests, and hold that professionals are part of management, hinder the ability of professionals to unionize, and thus to protect professional norms through collective bargaining.

Individual professionals, acting alone, can assert professional norms against countervailing demands of their employers. But employment law cases that deny professionals a cause of action, if they are fired for asserting professional norms, make it far less likely that they will do so. Indeed, these cases increase the chance that the employer will feel free to make demands on professionals – as the employer allegedly did in *Horn* – that disregard professional standards of conduct. The result is an under-enforcement of professional norms – for example, protecting patient privacy, upholding accuracy in accounting, maintaining journalistic integrity – when management sees these norms as an impediment to the achievement of its economic goals.

Part II of this essay examines the concept of the ideology of professionalism. Part III looks at how courts in the early twentieth century embraced this ideology. Part IV analyzes how the ideology of professionalism gave ground in courts decisions in the latter half of the twentieth century. Part V examines this decline of professional ideology in labor law and employment law decisions. Part VI concludes by assessing the practical consequences of this decline.

II. THE IDEOLOGY OF PROFESSIONALISM

By virtue of their skills, expertise and academically acquired body of knowledge, professionals have traditionally exercised significant control and discretion over their work.[14] Professionals generally work without immediate supervisory constraint, decide how to perform necessary tasks, and conduct themselves in a manner consistent with their ethics and training.[15] Sociologist Eliot Freidson defines the "ideology of professionalism" as the set of "claims, values, and ideas" used to justify this relatively privileged position that professionals enjoy.[16] According to Freidson, the core idea behind professional ideology is that professionals work not to maximize economic gain, but for a greater good:

> The ideology of professionalism asserts above all else devotion to the use of disciplined knowledge and skill for the public good. Individual disciplines are concerned with different aspects of that good, in some cases the immediate good of individual patients, students, or clients, in others of firms and groups, and in others the general good. But such service must always be judged and balanced against a still

[13] *See* David M. Rabban, *Is Unionization Compatible With Professionalism?*, 45 INDUS. & LAB. REL. REV. 97, 103 (1991).

[14] The NLRA defines a "professional employee" as an employee whose work, among other things, is "predominantly intellectual and varied in character," involves "consistent exercise of discretion and judgment" and requires knowledge customarily acquired through long study. 29 U.S.C. § 152(12)(a) (2006).

[15] *See* Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT L. REV. 543, 550 (2004).

[16] FREIDSON, *supra* note 1, at 105.

> larger public good, sometimes one anticipated in the future. Practitioners and their associations have the duty to appraise what they do in light of that larger good, a duty which licenses them to be more than passive servants of the state, of capital, of the firm, of the client, or even of the immediate general public good.[17]

Freidson posits two ideologies that compete with professional ideology. Consumerism emphasizes the material self-interest of professionals over their dedication to service or good work, and claims that professionals should be subject to the control of market forces.[18] Managerialism also downplays the notion of professionals serving a higher good and claims that professionals, who are employed by companies or other organizations, should be subject to the control of the management of those organizations.[19]

III. THE COURTS' EMBRACE OF THE IDEOLOGY OF PROFESSIONALISM IN THE EARLY TWENTIETH CENTURY

Professional ideology held sway in the courts in the early twentieth century, when judges emphasized the difference between what they saw as the goals of professionals, serving a greater good, and the goals of business corporations, making money. An example of this judicial embrace of professional ideology can be seen in *In re Co-operative Law Co.*,[20] a 1910 case in which the New York Court of Appeals decided whether it was lawful for a business corporation to engage in the practice of law. The corporation had hired a staff of attorneys who worked under the supervision of the corporation's board of directors and who, among other things, prosecuted and defended suits and drafted contracts for the corporation's customers, who were referred to as "subscribers."[21] Articulating the basis for what became known as the "corporate practice of law" doctrine,[22] the court held that a corporation had no right to engage in such a business because a corporation could not satisfy the requirements for practicing law.[23]

> The practice of law is not a business open to all, but a personal right, limited to a few persons of good moral character, with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. The right to practice law is in the nature of a franchise from the state conferred only for merit . . . . No one can practice law unless he has taken an oath of office and has become an officer of the court, subject to its discipline, liable to punishment for contempt in violating his duties as such, and to suspension and removal. It is not a lawful business except for members of the bar who have complied with all the conditions required by the

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[17] *Id*. at 217; *see also* Crain, *supra* note 15, at 550 ("Professionals are expected to prioritize their patients' and clients' interests above their own . . . .").

[18] FREIDSON, *supra* note 1, at 106, 188.

[19] *See* FREIDSON, *supra* note 1, at 116-17.

[20] *In re* Co-operative Law Co., 92 N.E. 15, 16 (N.Y. 1910).

[21] *Id*. at 15.

[22] *See* Grace Giesel, *Corporations Practicing Law Through Lawyers: Why The Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 151 (2000).

[23] *In re* Co-operative Law Co., 92 N.E. at 16.

> statute and the rules of the court. As these conditions cannot be performed by a corporation, it follows that the practice of law is not a lawful business for a corporation to engage in.[24]

Of course, the fact that the corporation *itself* could not satisfy the requirements for practicing law did not explain why it could not hire lawyers to serve its customers, as long as the lawyers were properly trained, morally competent, and admitted to the bar. After all, a corporation cannot hold a driver's license, but no one would argue that a corporation could not employ truck drivers to make deliveries to its customers.[25] The court nonetheless concluded that if a corporation "cannot practice law directly, it cannot indirectly by employing competent lawyers to practice law for it . . . ."[26] The court explained that a lawyer employed by a corporation would answer only to the corporation, not the client, and that the interest of the corporation – "simply to make money" – would be at odds with the lawyers' professional interest "to aid in the administration of justice."[27] The court concluded that the administration of justice, and not profit seeking, was "the highest function of the attorney."[28]

The years following *Co-operative Law* saw a general acceptance of the corporate practice doctrine. It was applied to the medical field to prohibit corporations from employing physicians to serve the public, since, according to one 1942 decision, the corporate employment of doctors would put "undue emphasis on mere moneymaking, and commercial exploitation of professional services" and "would ultimately wipe out or blight those characteristics which distinguish the business practices of the professions from those of the marketplace."[29] The corporate employment of dentists was similarly prohibited.[30]

The doctrine even reached occupations which had only barely achieved professional status. For example, in a 1937 case, the Supreme Judicial Court of Massachusetts acknowledged a split in authority on whether optometry was a profession.[31] Nonetheless, the court concluded that a commercial enterprise could not employ optometrists to serve its customers.[32] The next year the Pennsylvania Supreme Court followed suit, holding that it would violate public policy for a department store to employ optometrists in its eyeglass department.[33] The court reasoned:

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[24] *Id*.

[25] Giesel, *supra* note 22, at 176.

[26] *In re* Co-operative Law Co., 92 N.E. at 16.

[27] *Id.* at 16.

[28] *Id.*

[29] Barton v. Codington, 2 N.W.2d 337, 346 (S.D. 1942) (finding that medical clinic that employed physicians was contrary to public policy); *see also* People v. United Med. Serv., 200 N.E. 157, 163 (Ill. 1936) (forbidding employment of physicians by for-profit medical clinic).

[30] *See* Winslow v. Bd. of Dental Examiners, 223 P. 308 (Kan. 1924) (upholding revocation of license of dentist employed by a corporation to perform dentistry for corporation's customers); *see also* Taber v. Bd. of Registration & Examination in Dentistry, 59 A.2d 231 (N.J. Ct. Errs. & Apps. 1948) (upholding constitutionality of statute prohibiting employment of a dentist by unlicensed person).

[31] McMurdo v. Getter, 10 N.E.2d 139, 142 (Mass. 1937).

[32] *Id.* at 142-43.

[33] Neill v. Gimble Brothers, Inc., 199 A. 178, 182 (Pa. 1938).

> One who practices a profession is apt to have less regard for professional ethics and to be less amenable to regulations for their enforcement, when he has no contractual obligations to the client, does not fix or receive the fees, and is under the control of an employer whose commercial interest is in the volume of sale of merchandise.[34]

The advent of the corporate practice doctrine was not the only manifestation of the judicial embrace of professional ideology in the first half of the twentieth century. Accepting the view that professional work was far removed from a moneymaking trade, the Supreme Court interpreted the "restraint of trade" provision of the Sherman Act as not applicable to learned professions, and thus exempted those professions from antitrust regulation.[35]

The Supreme Court also held that it was constitutional to prohibit advertising by professionals, since advertising would bring market forces to bear on professional work.[36] In upholding an Oregon statute that regulated even truthful advertising by dentists, the Court explained that advertising would lead to "unseemly" competition among dentists, which would be incompatible with the maintenance of professional standards of conduct.[37]

> The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the marketplace. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public particularly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities for the least scrupulous.[38]

IV. PROFESSIONAL IDEOLOGY YIELDS TO CONSUMERISM

The latter half of the twentieth century witnessed a weakening of the ideology of professionalism as the competing ideologies gained ground.[39] Growing acceptance of consumerism led the Supreme Court to reverse its position on the constitutionality of bans on advertising by professionals.[40] Earlier, the Court had accepted the view, consistent with professional ideology, that the competition between professionals induced by advertising would degrade professional standards, to the detriment of those they served.[41] Now, the Court saw the competition induced by advertising

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[34] *Id.*

[35] *See* Atlantic Cleaners & Dyers v. U.S., 286 U.S. 427, 435-37 (1932); *see also* FTC v. Raladam Co., 283 U.S. 643, 653 (1931) (asserting that doctors "follow a profession and not a trade").

[36] Semler v. Bd. of Dental Examiners, 294 U.S. 608, 611 (1935).

[37] *Id.* at 612.

[38] *Id.*

[39] FREIDSON, *supra* note 1, at 188, 220.

[40] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976).

[41] *See, e.g.*, *Semler*, 294 U.S. at 612.

as beneficial to the public. For example, in the 1976 decision *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.* the Court struck down as violative of the First Amendment a pharmacy board's regulation prohibiting pharmacists from advertising the prices of prescription drugs.[42] The Court rejected the argument made by the pharmacy board that price advertising would "destroy the pharmacist-customer relationship" by inducing consumers to seek only low-cost, low-quality drugs from whomever offered them.[43] The Court concluded that price advertising benefits consumers, who "will perceive their own best interests if only they are well enough informed."[44]

Consumerism, with its promotion of control by the market, also led to a series of Supreme Court decisions holding professionals subject to antitrust scrutiny.[45] These decisions made clear that the Court would no longer tolerate efforts by professionals to shield themselves from the market's competitive forces. In the 1975 decision *Goldfarb v. State Bar*, for example, the Court struck down a bar association's minimum fee schedule for lawyers' services as price-fixing in restraint of trade.[46] The Court rejected the bar association's argument, grounded in the ideology of professionalism, that "competition is inconsistent with the practice of a profession because enhancing profit is not the goal of professional activities; the goal is to provide services necessary to the community."[47] In holding that the minimum fee schedule for lawyers violated the Sherman Act, the Court abandoned its prior emphasis on the distinction between professional work and business, and instead emphasized the overlap between the two, noting the "business aspect" of lawyers' work and the extent to which "lawyers play an important role in commercial intercourse."[48]

The new judicial emphasis on the overlap, rather than divergence, between professional and business interests has also led to an erosion of the corporate practice doctrine.[49] For example, a 1987 decision by the Supreme Court of Missouri held it lawful for an insurance company to have lawyers in its employ defend the company's customers in lawsuits.[50] The dissent argued that the attorney employed by the insurance company faced an intolerable conflict of interest between his duties to the insured as his client and his duties to his employer: "[c]ontrol ultimately lies with the attorney's superiors, presenting a risk if the supervisor has corporate responsibilities other than for the insured's representation."[51] However, unlike courts in the first half of the twentieth century,

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[42] 425 U.S. 748, 773 (1976).

[43] *Id*. at 769.

[44] *Id*. at 770. *See also* Bates v. State Bar, 433 U.S. 350, 368, 374-75 (1977) (striking down on First Amendment grounds prohibition on attorney advertising, rejecting argument that advertising would hurt the attorney-client relationship and concluding that the public is "sophisticated enough" to understand and benefit from advertising).

[45] *See* Arizona v. County Med. Soc'y, 457 U.S. 332 (1982) (finding price-fixing agreement by doctors violates Sherman Act); Nat'l Soc'y of Prof. Eng'rs v. U.S., 435 U.S. 679 (1978) (holding that prohibition on competitive bidding adopted by engineers' association violates Sherman Act); Goldfarb v. State Bar, 421 U.S. 773 (1975) (holding bar association's minimum-fee schedule violates Sherman Act).

[46] *Goldfarb*, 421 U.S. at 783.

[47] *Id*. at 786.

[48] *Id.* at 788.

[49] *See, e.g.*, Jeffrey Chase-Lubitz, *The Corporate Practice of Medicine Doctrine: An Anachronism In The Modern Health Care Industry*, 40 VAND. L. REV. 445, 478 (1987) (noting "demise of the corporate practice of medicine doctrine"); *see also* E. Haavi Morreim, *Playing Doctor: Corporate Medical Practice and Medical Malpractice*, 32 U. MICH. J.L. REFORM 939, 948 (1999).

[50] *In re* Allstate Ins. Co., 722 S.W.2d 947, 953 (Mo. 1987).

[51] *Id*. at 956.

which had highlighted the need for professionals to be independent of profit-driven corporations because of the potential divergence of corporate and professional interests, the Missouri Supreme Court found no problem in the corporation employing attorneys to represent others. Other courts followed this trend, by not only permitting insurance companies to employ lawyers to defend lawsuits against their customers,[52] but also permitting the employment of physicians by for-profit hospitals despite case law prohibiting corporations from practicing medicine.[53]

V. MANAGERIALISM TRUMPS THE IDEOLOGY OF PROFESSIONALISM IN LABOR AND EMPLOYMENT LAW

Consumerism weakened professional ideology by emphasizing the overlap between the interests of professionals and business and by asserting the need for market control of professional work. By discrediting professional ideology, consumerism paved the way for managerialism, which also emphasized the need for external control of professional work, but by management-controlled bureaucracy as opposed to by market forces. Managerialism, like consumerism, belittled claims regarding the need to maintain independent professional standards and emphasized the confluence between professional and business interests.

In recent years, courts have accepted the view that professionals employed by corporations properly serve the corporations' interests, not separate professional interests.[54] In labor law, this managerialist approach has led to decisions holding that professionals are indeed part of corporate management, and therefore, have no right to unionize.[55] In employment law, it has led courts to deny professionals a right to refuse management directives that conflict with professional norms.[56]

A. Labor Law

The National Labor Relations Act of 1935 broadly defined "employee" to include "any" employee (except those in categories, not relevant here, who were explicitly excluded from coverage).[57] The statute thus granted professional employees the right to organize and bargain collectively. The 1947 Taft-Hartley amendments made it explicit that professional employees were covered by the NLRA, stating that professional workers were to have separate bargaining units unless they voted to be included in a unit of non-professionals.[58] Congress' decision to allow professional employees to opt for separate bargaining units reflected an acceptance of professional

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[52] *See, e.g.*, Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151, 160 (Ind. 1999) (not violation of corporate practice doctrine for insurance company to have staff attorney represent insured); Petition of Youngblood, 895 S.W.2d 322, 331 (Tenn. 1995) (same).

[53] *See* Berlin v. Sarah Bush Health Ctr., 688 N.E.2d 106, 110, 113 (Ill. 1997) (dismissing concerns about "the dangers of lay control over professional judgment, the division of the physician's loyalty between his patient and his profitmaking employer, and the commercialization of the profession."); *St. Francis Reg'l Med. Ctr. v. Weiss*, 869 P.2d 606, 618 (Kan. 1994) (permitting both profit and nonprofit hospitals to employ physicians).

[54] Horn v. New York Times, 790 N.E.2d 753, 758 (N.Y. 2003).

[55] *See, e.g.*, NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 584 (1994).

[56] *See Horn*, 790 N.E.2d at 759.

[57] Nat'l Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449, 450 at §2(3) (1935) (codified as 29 U.S.C. §152(3) (2006)).

[58] Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136, 143 at §9(b)(1) (1947) (codified as 29 U.S.C. §159(b)(1) (2006)).

ideology, namely, the view that professionals enjoy and deserve a status distinct from other employees.[59]

This embrace of professional ideology, however, did not last. Managerialism made its mark on the Supreme Court's 1980 decision in *NLRB v. Yeshiva University*, which held that university faculty were managerial employees who had no right to unionize under the NLRA.[60] University faculty have authority to make decisions concerning academic matters such as course content, course offerings and course scheduling, and also have certain authority, through faculty committees, regarding personnel matters like faculty hiring and promotion, salaries, and the awarding or denial of tenure.[61] The issue before the Court in *Yeshiva* was whether the faculty exercised this authority in their own professional interest or in the interest of the university that employed them.[62] Employees are only managerial if they exercise their authority on behalf of or in the interest of the employer.[63] Indeed, the NLRA defines a "supervisor" as an individual with authority to exercise certain supervisory and personnel functions "in the interest of the employer."[64]

A university is governed not by the faculty, but by a university administration answerable to the university's board of trustees.[65] The administration constitutes a bureaucratic structure that, like the administration of any organization, faces pressures to contain costs and increase efficiencies.[66]

A decision by the Court based on professional ideology would have highlighted the divergence between the administration's concerns with bureaucratic and economic matters and the faculty's professional concerns, such as promoting quality teaching and scholarship. Indeed, the record in *Yeshiva* contained evidence of numerous disputes between the faculty and the administration, with the administration rejecting, on the basis of cost constraints or other managerial grounds, recommendations by the faculty on issues such as faculty hiring and academic standards.[67]

The Court, however, rejected an approach based on professional ideology. In holding that the faculty were managerial employees excluded from NLRA protection, the Court found that "the faculty's professional interest – as applied to governance at a university like Yeshiva – cannot be

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[59] *See* David Rabban, *Distinguishing Excluded Managers From Covered Professionals Under The NLRA,* 89 COLUM. L. REV. 1775, 1797 (1989) (noting that the Taft-Hartley Act "incorporated the prevailing view that the characteristics of professional employees distinguish them from clerical and industrial workers as well as from supervisors").

[60] 444 U.S. 672, 691 (1980).

[61] *Northeastern Univ.*, 218 N.L.R.B. 247, 257 (1975) (Kennedy, J., concurring in part and dissenting in part); *see Yeshiva*, 444 U.S. at 677.

[62] *See Yeshiva*, 444 U.S. at 686.

[63] *Yeshiva*, 444 U.S. at 695 (Brennan, J., dissenting).

[64] The definition provides that

> [t]he term "supervisor" means any individual having authority, *in the interest of the employer,* to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. §152(11) (emphasis added).

[65] *Northeastern Univ.*, 218 N.L.R.B. at 257; *see Yeshiva*, 444 U.S. at 674-76.

[66] 444 U.S. at 703 (Brennan, J., dissenting); *see also Northeastern Univ.*, 218 N.L.R.B. at 257.

[67] 444 U.S. at 702 (Brennan, J., dissenting).

separated from those of the institution."[68] Ignoring the actual and potential conflicts between the administration's bureaucratic concerns and the faculty's efforts to fulfill their professional mission, the Court simply stated that "[t]he 'business' of a university is education," and the faculty's promotion of "academic excellence" was part of that business.[69]

In its 1994 decision in *NLRB v. Health Care & Retirement Corporation*, the Supreme Court extended the rationale of *Yeshiva* to a case involving nurses.[70] The nurses were employed at a nursing home by a for-profit corporation that operated a chain of 140 facilities in 27 states.[71] The nurses were fired after complaining to management about certain concerns they had, including a lack of adequate staffing.[72] The question before the Court was whether the fired nurses, who as part of their duties directed the work of nurses aides, were, by virtue of giving such direction, supervisors not protected from termination under the NLRA.[73] The NLRB found that although the nurses directed others in the workplace, they did not do so "in the interest of the employer," as that phrase is used in the statute's definition of the term "supervisor." [74] As the administrative law judge explained, the nurses gave direction in order to provide care for the residents of the nursing home: "[T]he nurses' focus is on the well-being of the residents rather than of the employer . . . ."[75]

This notion that the nurses' interest was in the well-being of those they served, and was different from the interest of the profit-driven corporation that employed them, is fully consistent with the ideology of professionalism. The Court, however, brushed it aside, concluding that the nurses acted "in the interest of the employer" and were therefore supervisors.[76] Citing its refusal in *Yeshiva* to recognize a distinction between the faculty's professional interests and the interests of the university, the Court in *Health Care* rejected as a "false dichotomy" the idea that acts by nurses to care for patients could be distinct from acts taken in the interest of the employer: "Patient care is the business of a nursing home, and it follows that attending to the needs of the nursing home patients, who are the employer's customers, is in the interest of the employer."[77] Indeed, the Court expressed its opinion that the corporation that employed the nurses cared as much about treating the patients as the nurses did: "The welfare of the patient, after all, is no less the object and concern of the employer than it is of the nurses."[78]

By conflating the interests of professional employees with those of their employer, the Supreme Court in *Health Care*, like in *Yeshiva*, rejected the core tenet of the ideology of

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[68] 444 U.S. at 688.

[69] *Id*. For an application of the *Yeshiva* decision's rationale to physicians and dentists, see FHP, Inc., 274 N.L.R.B. 1141 (1985) (finding physicians and dentists employed by health maintenance organization to be managers excluded from NLRA coverage because they established medical policy and engaged in peer review).

[70] NLRB v. Health Care & Retirement Corp., 511 U.S. 571, 580 (1994).

[71] Health Care & Retirement Corp., 306 N.L.R.B. 63, 68 (1992). The case does not identify the employer, Health Care and Retirement Corporation, as a for-profit company but media reports make clear that it was. *See, e.g., Health Care And Retirement Corp. Announces Earnings*, BUSINESS WIRE (July 17, 1997).

[72] *Id*. at 63, 73.

[73] 511 U.S. at 576, 584.

[74] 306 N.L.R.B. at 63 n.1, 70.

[75] *Id*. at 70.

[76] 511 U.S. at 579-80, 584.

[77] *Id*. at 577.

[78] *Id*. at 580.

professionalism, namely that professionals serve a higher interest. The Supreme Court's position in *Health Care*, that a profit-driven corporation that employs professionals cares as much about the patients as the professionals themselves do, constitutes a complete reversal from the view expressed by courts in the early twentieth century.[79] In *Co-operative Law Company*, for example, the court saw the corporation that employed the lawyers as "organized simply to make money;" it was the lawyers, bound by their professional standards, whose role and duty it was to serve the clients' interests.[80] This clear distinction between the goals and concerns of the corporate employer and those of the professionals – a cornerstone of professional ideology – evaporates in the *Health Care* decision.[81]

B. Employment Law

A similar embrace of managerialism can be seen in employment law. In particular, increased judicial resistance to professional ideology has resulted in a general unwillingness by courts to give a cause of action to professionals who are fired for refusing to breach their code of professional conduct.[82]

In recent decades, courts have crafted exceptions to the employment-at-will doctrine, giving employees in certain circumstances a claim for improper discharge.[83] One such exception has been the "public policy exception," which prohibits employers from firing at-will employees for a reason deemed to violate public policy.[84] However, most state judiciaries have limited this exception to cases where the discharge violates a policy rooted in constitutional or statutory language, as opposed to in a professional code of conduct.[85] Moreover, even when courts have been willing to look to professional codes of conduct they have done so grudgingly, insisting for example that only specific, rather than general language, setting forth professional standards can be used as a check on an employer's right to fire.[86] Accordingly, only in exceptional cases have courts applied the public

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[79] *In re* Co-operative Law Comp., 92 N.E. 15, 16 (N.Y. 1910).

[80] *Id.*

[81] *See Health Care*, 511 U.S. at 580-81. Following the Supreme Court's *Health Care* decision, the NLRB tried another tactic to establish that nurses are not engaged in supervisory conduct when they give direction to less skilled staff. Under this approach, the NLRB held that the professional judgment used by nurses in giving such direction is not "independent judgment" as that term is used in the NLRA's definition of supervisory activity. In NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001), the Supreme Court closed this loophole, finding such an interpretation of the statute to be unlawful. *See id.* at 721.

[82] For an argument that courts should fashion such a cause of action, see Seymour Moskowitz, *Employment-At-Will And Codes of Ethics: The Professional's Dilemma*, 23 VAL. U. L. REV. 33, 34, 56 (1988).

[83] *See* Clyde Summers, *Employment At Will In The United States: The Divine Right Of Employers*, 3 U. PA. J. LAB. & EMPLOY. L. 65, 70-72 (2000); Moskowitz, *supra* note 82, at 48-49; Susan Gornik, *An Exception to the Employment-At-Will Doctrine for Nurses*, 2 HEALTH MATRIX 89, 95 (1992).

[84] *See, e.g.*, Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 509 (N.J. 1980); *see also* Summers, *supra* note 83, at 70-71; Moskowitz, *supra* note 82, at 49-50; Gornik, *supra* note 83, at 96.

[85] *See* Summers, *supra* note 83, at 73; Nadjia Limani, *Righting Wrongful Discharge: A Recommendation for the New York Judiciary to Adopt a Public Policy Exception to the Employment At-Will Doctrine*, 5 CARD. PUB. L. POL'Y & ETHICS J. 309, 318 (2006); *see also* Rocky Mountain Hosp. & Med. Serv. v. Mariani, 916 P.2d 519, 524 (Colo. 1996) (noting "[j]urisdictions are split as to whether to recognize non-legislative sources of public policy"); Green v. Ralee Eng'g Co., 960 P.2d 1046, 1054 (Cal. 1998) (limiting source of public policy to constitutional and statutory provisions).

policy exception to give a professional employee a cause of action based on his or her code of professional conduct.[87]

Another exception to the employment-at-will doctrine adopted in some states has been the "implied contract" exception, which gives at-will employees the protection of contract terms deemed implicit in their employment arrangement.[88] This exception, however, has rarely been employed to protect professional employees from termination for insisting on compliance with professional codes of conduct.[89]

The 2003 decision of the New York Court of Appeals in *Horn v. New York Times* exemplifies this judicial resistance to reading into an employment contract an understanding that the professional employee will work only in compliance with professional codes of conduct.[90] In *Horn*, a physician who worked as part of the in-house medical staff of the New York Times claimed that the newspaper fired her for refusing to violate her professional obligation to maintain patient confidentiality.[91] She alleged that her primary duty was "to provide medical care, treatment and advice" to the newspaper's employees.[92] Among other things, she determined whether injuries that employees suffered were work-related, "thus making the employees eligible for Worker's Compensation payments."[93] The plaintiff alleged that the newspaper's "Labor Relations, Legal and Human Resources Departments directed her to provide them with confidential medical records of employees without the employees consent or knowledge."[94] The plaintiff alleged that her supervisors also "instructed her to misinform employees whether their injuries and illnesses were work-related, so as to curtail the number of workers compensation claims filed against the newspaper."[95] She claimed that the newspaper fired her for refusing to comply with management's demands.[96]

The Court of Appeals held that these allegations failed to state a cause of action,[97] rejecting the plaintiff's argument that her employment contract with the newspaper provided implicitly that

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[86] *See Rocky Mountain*, 916 P.2d at 524; *see also, e.g.*, Lampe v. Presbyterian Methodist Ctr., 590 P.2d 513, 516 (Colo. Apps. 1978) (upholding medical center's discharge of head nurse who alleged she was fired because she refused to reduce work hours of nurses in intensive care unit, believing such reduction would jeopardize the care of the patients; plaintiff's claim was based on general language in nursing statute regarding nurse's obligation to protect patient health and safety).

[87] *See, e.g.*, *Rocky Mountain*, 916 P.2d at 528 (ordering trial on accountant's claim that she was fired for objecting to her employer's allegedly improper accounting practices); Kalman v. Grand Union Co., 443 A.2d 728 (N.J. Super. 1982) (giving pharmacist right to proceed to trial on claim that he was fired for insisting on compliance with, *inter alia*, his professional code of conduct).

[88] *See* Moskowitz, *supra* note 82, at 53-55; Gornik, *supra* note 83, at 95.

[89] *See, e.g.*, Bartel v. NBC Universal, Inc., 543 F.3d 901 (7th Cir. 2008) (declining to recognize implied contract claim of journalist allegedly fired for refusing to work on television program that she believed violated standards of journalistic ethics).

[90] 790 N.E.2d 753 (2003).

[91] *Id*. at 754.

[92] *Id*.

[93] *Id*.

[94] *Id*.

[95] *Id*.

[96] *Id*.

[97] *Id*. at 759.

she would work "in accordance with the ethical standards of the medical profession."[98] In reaching this conclusion, the court emphasized that in performing her duties as a physician, the plaintiff was not just working for the patients who consulted her but also for the corporation which employed her:

> When Horn made assessments as to whether a Times employee had suffered a work-related illness or injury, she was surely calling upon her knowledge as a physician, but *not just* for the benefit of the employee. Rather, she was applying her professional expertise in furtherance of her responsibilities *as a part of corporate management* . . . .[99]

In concluding that professional standards of ethics did not form an implicit part of the physician's employment contract, the court emphasized that the corporate employer was not bound by such standards.[100] It distinguished *Horn* from its 1992 decision in *Wieder v. Skala*, in which the court held that implicit in a law firm's employment of an associate was the understanding that such employment would be conducted consistent with standards of legal ethics.[101] The court reasoned that no such shared professional obligation existed between the newspaper and physician.[102]

Horn represents a remarkable reversal from the acceptance of professional ideology by the same New York Court of Appeals in its 1910 *Co-operative Law Company* decision. The court held in *Co-operative Law Company* that a business corporation could not employ lawyers to serve others because such an employment arrangement would necessarily compromise the independence of the lawyer and his devotion to his client.[103] There, the court feared that the client's interests might be impaired if the professional had to answer to a profit-driven employer not bound by standards of professional conduct.[104] The plaintiff in *Horn* alleged exactly the type of situation feared by the court in *Co-operative Law Company*: the professional having to betray the interests of those she serves in order to satisfy her employer's demands. Yet the court in *Horn* saw no basis for intervening to protect the professional's autonomy.[105] Indeed, it emphasized that, in exercising her duties, the professional acts as part of corporate management.[106] Such a managerialist view of the professional's role is fully consistent with the Supreme Court's position in *Health Care & Retirement Corp.*[107]

It is particularly ironic that the court in *Horn* rested its holding on the fact that the corporate employer itself had no obligation to comply with medical ethics. At least in a case like *Wieder*, where the employer too is bound by professional standards of conduct, a check exists on the employer

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[98] *Id*. at 754 (citation omitted).

[99] *Id*. at 758 (emphasis added).

[100] *Id.* at 759.

[101] 609 N.E.2d 105, 108 (N.Y. 1992). In *Wieder*, the court described the "unstated but essential compact that in conducting the firm's legal practice both plaintiff and the firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession." *Id*. at 109-10 (emphasis added).

[102] *Horn,* 790 N.E.2d at 759.

[103] *See In re* Co-operative Law Co., 92 N.E. 15, 16 (N.Y. 1910).

[104] *See id*.

[105] *Horn,* 790 N.E.2d at 759.

[106] *Id.* at 758.

[107] *See* NLRB v. Health Care & Ret. Corp. of Am., 511 U.S. 571, 584 (1994).

asking the professional to act in a manner that is inconsistent with professional standards.[108] When the employer is bound by no professional standards of conduct, but driven only by financial imperatives, this poses the greatest risk to the integrity of the relationship between the employed professional and the clients (or patients) the professional serves. The New York Court of Appeals recognized this in *Co-operative Law Company* but seemed completely blind to it in *Horn*. That change, in a nutshell, tells the story of how the judiciary went from embracing to rejecting the ideology of professionalism.

VI. HOW THE JUDICIAL EMBRACE OF MANAGERIALISM UNDERMINES THE ENFORCEMENT OF PROFESSIONAL NORMS

The primary goal of this essay has been to trace how the judiciary first accepted and later rejected the ideology of professionalism. The essay would not be complete, however, without some discussion of the practical consequences that this change has on the implementation and enforcement of professional norms in the workplace.

In short, the courts' rejection of the ideology of professionalism has produced decisions that make it less likely that professional norms will prevail in the workplace over countervailing management imperatives – a result that can be harmful to the public and those the professionals serve. One way that professional norms are enforced in the workplace is through collective bargaining by unions that represent professional workers. As David Rabban has explained,

> Unions representing professional employees increasingly stress that they seek legal protection for traditional professional values. These values include participation in developing organizational policy, significant responsibility for personnel decisions about fellow professionals, the establishment of professional standards, and the commitment of organizational resources to professional goals. Doctors and nurses attempt to influence the nature of health care in hospitals, musicians want to serve on the audition committees of symphony orchestras, professors seek guarantees of academic freedom in universities, and legal aid attorneys negotiate for adequate space to counsel their clients in privacy.[109]

The Supreme Court's decisions in *Yeshiva* and *Health Care*, which found professionals to be part of management and thus unprotected by the NLRA, hamper the ability of professionals to unionize and thus to enforce professional norms through collective bargaining.

The result can be bad for the interests of those whom professionals serve. For example, unions of professional workers in the health care industry often seek to establish staffing levels sufficient to ensure that each professional's workload is not so heavy as to prevent him or her from providing proper patient care.[110] Such staffing levels, however, may conflict with the cost-containment goals of management. Patient care may suffer absent a union to negotiate for and enforce such staffing levels.

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[108] 609 N.E.2d at 110.

[109] David Rabban, *Can American Labor Law Accommodate Collective Bargaining By Professional Employees?*, 99 YALE L. J. 689, 691 (1990).

[110] *See, e.g.*, Gornik, *supra* note 83, at 111, n.137 (explaining that nurse unions often bargain on staffing ratios); *see also* Crain, *supra* note 15, at 582-83 (noting that key bargaining goals of physician unions concern standards on amount of time spent with each patient).

Of course, professional norms can also be enforced in the workplace by individual professionals insisting on compliance with codes of professional conduct. This was the case in *Horn*, where the physician allegedly sought to protect patient confidentiality against prying by management.[111] Other examples include an accountant insisting on compliance with professional standards when reporting on her employer's financial situation,[112] or a journalist insisting that her employer's television program comply with standards of journalistic ethics.[113] In the absence of some legal protection for their doing so, however, individual professional workers will be far less likely to seek to enforce professional norms in the workplace in the face of countervailing management demands, and, moreover, management will feel freer to make such demands.[114] Decisions that deny a cause of action to professionals who are fired for seeking to enforce professional standards, therefore, have real negative consequences: they weaken, for example, protections on patient confidentiality, on accuracy in financial reporting, on journalistic integrity.

The Pennsylvania Supreme Court explained as early as 1938 that when a professional is "under the control of an employer" whose interests are economically driven, the professional "is apt to have less regard for professional ethics and to be less amendable to regulations for their enforcement."[115] Decisions that tend to deprive professional employees of labor law rights or job protection put them more firmly under the control of management, and thus reduces the likelihood that these employees will enforce professional norms that may be in tension with their employer's economic interests.

VII. CONCLUSION

In the first half of the twentieth century, courts fully embraced the ideology of professionalism. This judicial acceptance of professional ideology led to decisions that exempted professionals from antitrust scrutiny and that barred corporations from employing professionals to serve others. In recent decades, courts have gone to the other extreme, first embracing consumerism, then managerialism. Labor and employment law cases that embrace managerialism deny the actual or potential divergence between the interests of professionals and their employers. Such cases have held that professionals are part of management with no protected right to unionize and that professionals have no cause of action if discharged for insisting on compliance with professional codes of conduct. The practical consequences of these decisions is to make it far less likely that professional norms will be enforced in the workplace over countervailing management demands, to the potential detriment of the public or those whom the professionals serve.

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[111] *Horn,* 790 N.E.2d at 754.

[112] *See* Rocky Mountain Hosp. & Med. Serv. v. Mariani, 916 P.2d 519, 527-28 (Colo. 1996).

[113] *See* Bartel v. NBC Universal, Inc., 543 F.3d 901, 903 (7th Cir. 2008).

[114] For a discussion of the potential conflict between professional ethics and management demands, see Lawrence Blades, *Employment At Will vs. Individual Freedom: On Limiting The Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1404, 1408-09 (1967).

[115] Neill v. Gimble Brothers, Inc., 199 A. 178, 182 (Pa. 1938).