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TOWARD A THEORY OF LAW AND ENTREPRENEURSHIP

STEVEN H. HOBBS*

"We are living in a strenuous, active age, when men see, not through the spectacles of sympathy, but demand that each and every one measures up in proportion to the world's demand for service."¹

INTRODUCTION

The irresistible urge to strike out on one's own and start an exciting business is part of our American landscape. The idea of entrepreneurship is touted in the popular media, and the popular press publishes plenty of books on the subject.² As a discipline, entrepreneurship has flourished in America's schools of business.³ The possibilities are endless in a world of constantly emerging technologies and shifts from a manufacturing-base economy to a service/information-base economy.⁴ While many large corporations are adapting entrepreneurial theories to become more competitive in a global market,⁵ the heart of entrepreneurship lies in the creation of small ventures by one person or a small group of individuals.⁶

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¹ MARCUS GARVEY, *PHILOSOPHY AND OPINIONS OF MARCUS GARVEY ON AFRICA FOR THE AFRICAN*, (compiled by Amy Jacques Garvey), 11 (Frank Cass ed., 2d ed. 1967).

² See, e.g., HARRELL WILSON, *FOR ENTREPRENEURS ONLY: SUCCESS STRATEGIES FOR ANYONE STARTING OR GROWING A BUSINESS* (1994); PAUL HAWKIN, *GROWING A BUSINESS* (1987) (representing the companion volume to 17-part PBS series.); BLACK ENTERPRISE; INC.; *SUCCESS*. I have used many traditional and non-traditional sources throughout this article. This is in keeping with an entrepreneurial mindset which calls for one to seek out ideas and information in some of the least likely places.

³ For an overview of entrepreneurial programs in business schools, see Katherine Callan & Michael Warshaw, *The 25 Best Business Schools for Entrepreneurs*, *SUCCESS*, Sept. 1995, at 37.

⁴ See *The Era of Possibilities*, *FORTUNE*, Jan. 15, 1990, at 42-78.

⁵ See GIFFORD PINCHOT III, *INTRAPRENEURING: WHY YOU DON'T HAVE TO LEAVE THE CORPORATION TO BECOME AN ENTREPRENEUR* (1985). The phenomenon has been

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For those of us who choose to be legal professionals, entrepreneurship is a subject worthy of intellectual inquiry and mastery.⁷ The boundaries of the subject stretch as far as our imaginations.⁸ Certainly entrepreneurship

described as follows: "These corporate risk takers are very much like entrepreneurs. They take personal risks to make new ideas happen. The difference is that they work within large organization instead of outside them. I call them 'intrapreneurs'—my shorthand for intracorporate entrepreneurs." *Id.* at xii.

⁶ Data collected for the 1995 White House Conference on Small Business yielded the following conclusions:

While large firms capture most of the media attention, small businesses, defined as companies with fewer than 500 workers, have been the engine of U.S. economic growth in recent years. These firms have generated nearly all the new jobs, a role our experts expect they will continue to play well into the next century. Current data shows that small companies account for:

- * 52 percent of the dollar volume of private sector sales;
- * 50 percent of private sector output;
- * 54 percent of private sector employment;
- * 99.7 percent of all private sector employers;
- * 41 percent of private sector business total assets;
- * 41 percent of private sector business total debt;
- * 42 percent of private sector business net worth;
- * 36 percent of all private sector innovations.

Dr. David J. Brophy, *Prospects for Small Business in the 21st Century*, in *THE THIRD MILLENIUM: SMALL BUSINESS AND ENTREPRENEURSHIP IN THE 21ST CENTURY* (A Special Publication Prepared for Delegates to the 1995 White House Conference on Small Business) 21-22 (1995).

⁷ The University of Oregon created a Law and Entrepreneurship Center in 1994 and has as its mission:

To prepare students to represent entrepreneurs and to be entrepreneurs.
 To direct faculty research toward legal and economic problems that confront entrepreneurs.
 To make a lasting contribution to the economic development of Oregon by providing a forum for interaction, exchange, and education for students and professionals in the Northwest business and legal communities.

UNIVERSITY OF OREGON LAW AND ENTREPRENEURSHIP CENTER, 1994-95 ANNUAL REPORT 1.

⁸ The interdisciplinary nature of the study of entrepreneurship is studied below. From a legal perspective, a practice focusing on small business crosses many legal subject areas. See John M. Cunningham, *Helping Business Get Started: In Praise of an Unsung Legal Specialty*, *BUS. L. TODAY*, Nov.-Dec. 1995 at 5, 9. Cunningham points out at least

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entails business arrangements large and small, privately- or publicly-held, and domestic or international. However, the focus in this article is the study of law as it affects the entrepreneurial activities of small businesses.

Schollhammer and Kuriloff noted that "[t]he natural habitat of entrepreneurs is small business."⁹ They define "a small business to be one in which the proprietor can walk through the establishment and know each company member by name."¹⁰ The Small Business Administration has a process by which a small business is determined by its size—focusing on, among other factors, its affiliation with other businesses, annual receipts, and number of employees.¹¹

The number of small businesses in the United States has increased 49 percent since 1982. As of 1994, there were approximately 21.5 million non-farm businesses, of which 99 percent are small by size standards set by the U.S. Small Business Administration Almost two-thirds of the 21.5 million businesses operate full-time, the rest part-time.¹²

Many of our clients will start small businesses as they pursue their version of the American Dream of self-determination and success.¹³ Fantastic stories are reported on individuals who started tinkering with a product idea in their basement and ended up running a multi-million dollar company.¹⁴ There are certainly also social, political and economic

seven areas of note: securities law; employment laws; real estate and environment law; intellectual property law; contract and commercial law; estate planning; and laws specific to particular lines of business. *Id.* at 10-11.

⁹ HANS SCHÖLLHAMMER & ARTHUR H. KURILOFF, *ENTREPRENEURSHIP AND SMALL BUSINESS MANAGEMENT* 7 (1979).

¹⁰ *Id.* at 4. The authors go on to suggest just how small such a business establishment would be: "Practical experience suggests that the small company fitting this definition would usually have not more than 150 people and that a starting venture would be limited to a small handful at most." *Id.*

¹¹ 15 U.S.C. § 632 (1994).

¹² *Foundations for a New Century: A Report to the President and Congress*, The White House Conference on Small Business, at 47, Sept. 1995 [hereinafter *Foundations for a New Century*].

¹³ For a discussion of the spirit of entrepreneurship, see Duncan Maxwell Anderson & Richard Poe, *A Culture of Achievement: Creating the Entrepreneurial Society*, *SUCCESS*, June 1992, at 31.

¹⁴ The most popular contemporary story is the founding of the Apple Computer Company by John Sculley and Steven Jobs. For a discussion of the Apple Computer Company, see JOHN SCULLEY, *ODESSY* (1987). In the significant book, *THINK AND GROW RICH: A BLACK CHOICE*, the authors chronicle the achievements of many black entrepreneurs. See DENNIS KIMBRO & NAPOLEON HILL, *THINK AND GROW RICH: A BLACK CHOICE* (1991). For example, Madame C. J. Walker developed a unique hair care system

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implications. As American corporations continue to downsize, many of the individuals will seek to start their own businesses.¹⁵ Also, as our society lurches from welfare to workfare, new job opportunities must be created to enhance employment opportunity for those with limited labor experience.¹⁶ Further, with the waning of affirmative action as a remedy for past racial and ethnic discrimination,¹⁷ the development of

for black Americans that made it possible to straighten and soften naturally kinky hair. Her door-to-door sales technique became the blueprint for such modern cosmetic giants as Avon and Mary Kay. See COOKIE LOMMEL, MADAM C.J. WALKER 84 (1993). She became America's first black female millionaire. See *id.* at 46-47.

¹⁵ In preparation for the 1995 White House Conference on Small Business, the SBA's Office of Advocacy conducted focus groups across the country which recognized the impact of downsizing:

There was unanimity of opinion among the focus group panels that corporate downsizing during the first half of the 1990s had a major impact on American society and the environment for small business and entrepreneurship, and that corporate downsizing would continue over the decade from 1995 to 2005, albeit at a slower pace. It was also the opinion of the focus groups that the downsizing phenomenon would spread to other large organizations in society, specifically government and education. The downsizing of larger corporations and the outsourcing of many of the functions previously performed internally offer new opportunities for small businesses.

BROPHY, *supra* note 7, at 5. For a recent, in-depth study of the corporate downsizing phenomenon, see Rick Bragg, et. al., *The Downsizing of America*, N.Y. TIMES, Mar. 3-Mar. 9, 1996, at A1.

¹⁶ This is a significant national debate which has cross-currents throughout our national economic policy. For a thoughtful reflection of this subject, see WARREN R. COPELAND, *ECONOMIC JUSTICE: THE SOCIAL ETHICS OF U.S. ECONOMIC POLICY* (1988).

¹⁷ The debate on public welfare and private responsibility for economic opportunity and self-determination is aptly articulated by Robert Woodson:

The black community must disentangle itself from the welfare professionals whose objective is to maintain clients. With the ultimate goals of economic independence and self-sufficiency, a better strategy should concentrate on the three E's: Empowerment, economic development or entrepreneurship, and education. The role of redefined and more responsive public policies that encourage maximum private initiative and creativity will be an integral component of a workable solution.

Robert L. Woodson, *Race and Economic Opportunity*, 42 VAND. L. REV. 1017, 1030 (1989); see also Steven H. Hobbs, *Personal Reflections on Adarand Construction Co. v. Pena*, 2 RACE AND ETHNIC ANCESTRY LAW DIG. 18 (1996).

entrepreneurship and small business ownership is a critical part of the pursuit of social and economic justice.¹⁸

This article presents the case for pursuing the idea of entrepreneurship as an academic discipline in the law school setting.¹⁹ The basic premise is that lawyers need special knowledge, skills and tools to effectively service clients who own small businesses and pursue entrepreneurial opportunity.²⁰ Furthermore, combining a study of law and entrepreneurship will provide a fruitful field for scholars interested in the economic and social well-being of our nation.²¹

This article first describes a seminar on small businesses that I have developed and taught over the past twelve years.²² The section also

¹⁸ Out of the ashes of the Los Angeles Riots, a group of high school students grew a vegetable garden and developed and marketed their own brand of salad dressing. See Larry Armstrong, *From Riot and Ruin, A Surprising Harvest*, BUS. WK., May 9, 1994, at 38; see also Phillippe Bourgois, *What Opportunities for the Young*, AM. ENT., May-June 1991, at 31.

¹⁹ Turnaround should be fair play. My colleague, Richard Shell, teaches a course entitled, "Legal Aspects of Entrepreneurship" at The Wharton School of the University of Pennsylvania, which helps business and entrepreneurship students understand the law.

²⁰ The American Bar Association Section of Business Law recognized the significance of the legal needs of small businesses and dedicated an issue of the section magazine. See generally 5 BUS. L. TODAY (1995). In setting out the theme for the issue, Michale E. Flowers, issue editor, made the following observations:

Therefore, it is not surprising that in the most recent survey of the members of the Section of Business Law, one in every three of the respondents indicated that they spent some time on small business issues. Because of the significance of small businesses to our economy and to the members of our profession who advise small business owners, we have devoted this issue of our magazine to an exploration of some of the important legal issues now confronting the small business community.

Id. at 1.

²¹ See Steven H. Hobbs, *From the Shoulders of Houston: A Vision for Social and Economic Justice*, 32 HOW. L.J. 505 (1990).

²² Washington and Lee University course catalogue description:

This seminar analyzes advanced legal issues in small business associations. Examines theories on the national economic significance of small business development and the vital role of lawyers in advising small business. Considers government policy for encouraging small business growth and development including financing and management assistance programs administered by the Small Business Administration and other government agencies, special tax structure aspects and reduction of regulatory burdens on small business. Emphasis will also be placed on solving realistic and practical problems of

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considers the business and legal planning tools that lawyers must use when advising entrepreneurial clients. A few other law schools have developed courses or clinics on small businesses, entrepreneurship or economic development that suggest the emerging importance of the discipline.²³ While the more traditional business planning courses (featuring advance tax, securities, and corporations) are similar in nature, the entrepreneurial courses transcend the boundaries of the law, considering a variety of parallel disciplines.²⁴

The next section takes up the multi-disciplinary nature of the study of law and entrepreneurship. It presents a review of the theoretical literature on entrepreneurship and focuses on developing an understanding of the entrepreneur as a special client. The section is divided into four parts that consider general theories of entrepreneurship and review different models and perspectives on defining entrepreneurship.

The final section presents a teleological explanation for studying law and entrepreneurship. The marriage of law and entrepreneurship into an interdisciplinary study is exciting because of the important functions both play in our ever-changing society. The primary focus is on the intersection of entrepreneurship, economic theory and public law and a description of why and how the entrepreneur is an agent of change in our society.

planning and advising small business associations including organizational and operational problems, the sale and purchase of businesses, financing alternatives, compliance with state regulations, franchising and leasing. The format involves lectures, problems, and individual student presentations on a topic germane to the general seminar theme. A written paper is also submitted, the subject of which may relate to any aspect of the planning and advising of a small business. Prerequisite: Close Business Arrangements or permission of the instructor. Two hours.

Washington and Lee University course catalogue (1996).

²³ A recent survey by The Harrison Institute for Public Law at the Georgetown University Law Center inventoried law school housing and community development clinical programs; community and economic development programs; and small business development programs. (Survey results were released on February 27, 1996 under cover letter by Bennett L. Hecht, Associate Director, The Harrison Institute for Public Law.) The survey found law school small business development programs at Washington and Lee University, Santa Clara University, Marquette University, George Washington University, University of Pittsburgh, Yale, Georgetown University, and City University of New York.

The George Washington University National Law Center, with funding in part by the U.S. Small Business Administration, was the first school to establish a small business clinic in 1977.

²⁴ For example, law and entrepreneurship material can be found in literature, sociology, psychology, history and economics as will be seen in this article.

I. A SEMINAR ON SMALL BUSINESS THEORY

A. *A Course of Study on Entrepreneurship and the Law*

This seminar is primarily for law students who may practice in small to medium size law firms which generally service small businesses.²⁵ The central premise of the seminar is that lawyers must not only master the legal analysis and methodology necessary for competent counseling of small business, but they also must understand entrepreneurship and the personal characteristics of the entrepreneur.²⁶ Therefore, the seminar endeavors to instruct law students that, in rendering competent legal advice, lawyers must understand the content and contour of strategic management and planning concepts necessary for the successful start-up and early growth stages of an entrepreneurial firm.²⁷ Among many other tasks, the principle issues can be summarized as follows:

Successful management of enterprise rests on three basic factors: 1) identification of opportunities, 2) analysis of the risk attached to grasping opportunities, and 3) sound management practice in converting opportunities into reality and in running the business. The first depends upon awareness—continuous search for newer and better things to do and newer and better ways of doing things.

²⁵ At Washington and Lee, 67 percent of our 1995 graduates entered private practice. Washington and Lee Placement Office Statistics (on file with author). Of that group, 62.7 percent started for law firms with fewer than fifty members. *Id.*

²⁶ One author noted how the business acumen of a lawyer is particularly needed for the client who is buying or selling a small business:

The entrepreneur's lawyer has a multifaceted role. While the lawyer and accountant are usually the entrepreneur's primary outside consultants, a 1989 Arthur Andersen Northeastern Ohio poll revealed that small business owners relied on their lawyers as their primary business adviser nearly twice as often as their accountant.

The lawyer's multiple roles involve challenging, comforting and advising the entrepreneur through an event that is probably the entrepreneur's most traumatic business experience. A lawyer's skills as a business analyst, devil's advocate and amateur psychiatrist are as important as the lawyer's legal and drafting skills.

Charles R. Schaefer, *You and Your Eager Entrepreneur*, 5 BUS. L. TODAY 43, Nov.-Dec. 1995, at 44.

²⁷ See Cunningham, *supra* note 9, at 9; see also CLIFFORD R. ENNICO, BUSINESS LAWYER'S HANDBOOK (1991).

The second and third come with personal growth through self-education in the principles and practice of management.²⁸

As will be discussed below, the lawyer for the entrepreneur must have a sense of the business management issues confronting a small business owner.²⁹

The seminar trains students to "re-see" the legal issues from the vantage point of the entrepreneur's hopes and aspirations. One authority refers to this as a "client-centered approach."³⁰ Through reading materials, class discussions, counseling simulations, research and actual interaction with entrepreneurs, law students begin to comprehend the special needs of entrepreneurs.³¹ They also develop a better understanding of the social, political and economic significance of small businesses to the vitality of local communities and to the general welfare of America.³²

The seminar strives to achieve four major educational objectives. First, the seminar examines the concept of entrepreneurship. This entails

²⁸ SCHÖLLHAMMER & KURILOFF, *supra* note 9, at 27.

²⁹ See *infra* notes 36-40 and accompanying text.

³⁰ DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH*, 17 (1991).

³¹ One of the earlier articles used in the seminar is Charles B. Blackmar, *Partnership Precedents in a Corporate Setting—Exit From the Close Corporation*, 7 J. CORP. L. 237 (1982). While the piece is now dated, it does provide a format for considering how individuals function in a closely-held business when the legal lines of formal corporate law are blurred with assumptions about partnerships creating counseling and legal problems for the lawyer. Blackmar considers a hypothetical business situation with three "partners" who must deal with partner inaction, expulsion, inter-vivos transfer, succession and withdrawal:

Combination contains the seeds of discord. People usually start out in business together with the assumption that the business will be profitable and that they can agree on fundamentals. They are often disappointed in both expectations. Sometimes one of the proprietors of a tolerably successful business may conclude that he could do better on his own. When there is no agreement on the terms for disassociation, business proprietors, just as parties to domestic disputes, often find themselves in court.

Id. at 237. Awareness of these problems at an enterprise's beginning arms the lawyer with knowledge to plan for these contingencies.

³² See JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS* (1984) (discussing the significance of regional economic development based on the interrelationship between cities and their surrounding rural and suburban areas).

a review of literature describing entrepreneurial theory from an historical and contemporary perspective.³³ Included in this study are materials by entrepreneurial-economists,³⁴ as well as the traits and characteristics of individual entrepreneurs and entrepreneurial enterprises.³⁵

Second, the seminar considers how entrepreneurship as a discipline enhances the study and practice of law.³⁶ Entrepreneurship contemplates new ventures exploding across the land creating new jobs and inventing new technologies. For example, recent changes in tax laws provide incentives for individual tax payers to invest in small business and support entrepreneurship.³⁷ Now, under certain restrictions, capital gains taxes can be reduced for investing in small business stock.³⁸ Further, the individual

³³ See *infra* notes 119-33 and accompanying text.

³⁴ See ROBERT DAHL, A PREFACE TO ECONOMIC DEMOCRACY (1985); BURTON KLEIN, DYNAMIC ECONOMICS (1997); and E.F. SCHUMACHER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED (1973).

³⁵ See THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE (1982).

³⁶ One author notes the need for more literature on small business law as a distinct specialty:

But, as a few minutes' reflection will make clear, in order to handle business start-ups competently, business lawyers must master a clearly defined and extensive body of law and a wide range of skills. They must also master a wide array of specialized practice tools. Achieving this mastery requires years of focused training and experience.

Accordingly, business start-up practice is as much a legal specialization as tax, securities or environmental practice. It should be understood, studied, conducted, and indeed (to the extent local rules permit) advertised to clients as such.

Cunningham, *supra* note 8, at 9.

³⁷ See Marc D. Teitelbaum, *The New Tax Benefit Entities: Qualified Small Business Corporations and Specialized Small Business Investment Companies*, 21 J. CORP. TAX'N 220 (1994).

³⁸ See *id.* at 223. Teitelbaum noted:

The Revenue Reconciliation Act of 1933 (RRA '93) provided substantial incentives for investment and earning capital appreciation by providing under new Section 1202 that, subject to certain limitations, 50% of the "eligible gain" from the sale of "qualified small business corporation stock" that has been held by a taxpayer for five years is excluded from his gross income.

Id.

taxpayer who participates in a small business investment company receives special tax incentives.³⁹ Legal practitioners and scholars can be a part of this process by utilizing traditional legal concepts in innovative ways and creating new methodologies that enhance entrepreneurial possibilities.⁴⁰

Third, the seminar analyzes the public policy implications of small business development.⁴¹ Small business enterprises form the cornerstone of our local and national economies.⁴² Small businesses have been heralded as the creators of jobs and economic growth.⁴³ Therefore, the seminar examines federal, state and local governmental initiatives designed to assist and encourage small business development.⁴⁴ Of particular attention are governmental programs which encourage the development of minority and women-owned businesses.⁴⁵ Students also explore ways in which lawyers can contribute to the small business, public

³⁹ This program provides "substantial incentives for investment in businesses controlled by persons from socially or economically disadvantaged groups . . ." *Id.* at 224. Investments in such specialized small business investment companies get 100 percent of the gain excluded from taxable income. *Id.*

⁴⁰ The movement toward limited liability companies is a major part of this trend, as more flexible business structures are sought. For just a sample of the scholarship on new business entity laws, see Symposium, *LLCs, LLPs and the Evolving Corporate Form*, 66 U. COLO. L. REV. 855-1103 (1995); Larry E. Ribsein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1 (1995); Allan W. Vestal, *A Comprehensive Uniform Limited Partnership Act? The Time Has Come*, 28 U.C. DAVIS L. REV. 1195 (1995); Allan W. Vestal, *Should the Revised Uniform Partnership Act of 1994 really be Retroactive?*, 50 BUS. LAW. 267 (1994).

⁴¹ See generally PUBLIC-PRIVATE PARTNERSHIP: NEW OPPORTUNITIES FOR MEETING SOCIAL NEEDS (Harvey Brooks et al. eds., 1984); PETER F. DRUCKER, THE NEW REALITIES: IN GOVERNMENT AND POLITICS / IN ECONOMICS AND BUSINESS / IN SOCIETY AND WORLD VIEW (1989).

⁴² See Robert Howard, *Can Small Business Help Countries Compete?*, HARV. BUS. REV., Nov.-Dec. 1990, at 88.

⁴³ See BROPHY, *supra* note 6, at 21-22.

⁴⁴ State and local governments give significant assistance to attract and retain businesses.

⁴⁵ A student in the seminar completed a research paper on an entrepreneurship training program run by Total Action Against Poverty, a Roanoke, Virginia social services agency for low income individuals. For a different perspective on the issue, see Parren Mitchell, *Federal Affirmative Action for MBE's: An Historical Analysis*, 1 NAT'L BAR ASS'N MAG. 46 (1983); Stephen Plass, *Judicial Versus Legislative Charting of National Economic Policy: Plotting a Democratic Course for Minority Entrepreneurs*, 24 LOY. L.A. L. REV. 655 (1991).

policy making process either as policy makers or advisors to policy makers.⁴⁶

Finally, the seminar has a public practicum component. To the extent practicable, the seminar affords students the opportunity to work with small business persons.⁴⁷ Law students may give business and legal advice to entrepreneurs in a supervised setting.⁴⁸ Students may choose to conduct individual research for a small business person or to work collectively on a seminar project designed to evaluate public policy on small businesses, making recommendations for changes and improvements in that policy to the appropriate government official.⁴⁹ The seminar provides a vehicle for community service through hosting workshops for local small businesses.⁵⁰ These workshops provide valuable educational information to small businesses at a nominal cost; they have the added benefit of encouraging mutually beneficial contact between law students, small business owners and entrepreneurial experts.

⁴⁶ Students in my seminar have studied the economic development commissions in their hometowns with a view towards networking with small business developers.

⁴⁷ Local businesses have been very cooperative in allowing students to study local businesses. The students have provided research on some of the legal and business issues confronting these businesses. For example, one student studied the insurance issues of a horse farm which provided equestrian lessons to the public.

⁴⁸ Students at Washington and Lee University have worked with a group of senior citizens to form a non-profit organization for the purpose of establishing a community center. The Small Business Clinic at George Washington University National Law Center does significant work with non-profits.

⁴⁹ In 1985, the Virginia Legislature created the Virginia Horse Center to be constructed in Lexington, Virginia. The Enabling Legislation had the following findings:

The General Assembly finds and declares that the horse industry and horse-related activities are integral to Virginia's economy and heritage. The establishment of a statewide center devoted to the staging of equine events and activities will significantly enhance this important segment of Virginia's state character by providing a showplace for state, national and international horse competitions as well a marketplace for horse promotion and sales. Because development of these activities will benefit the economy and tourism, it is in the public interest to establish such a facility.

VA. CODE ANN. § 3.1-22.30 (Michie 1994). The seminar has used this facility as a case study in economic and small business development.

⁵⁰ The seminar has hosted a workshop on organizing a small business and on financing a small business.

The seminar has provided a means for students to do research and analysis of their families' businesses.⁵¹ Some students have started or refined their own businesses while others have used many of the small business tools in providing advice to legal clients.⁵² One year the class worked with a group of senior citizens forming a not-for-profit organization to save an historic school building and convert it into a community center. The class drafted the organization's by-laws and completed the application for non-profit tax status.

*B. Legal Planning Tools of the Entrepreneurial Lawyer*⁵³

One of the basic premises for studying entrepreneurship in law schools is that the majority of law students will work in small to medium size firms located in small to medium size cities.⁵⁴ Many of their clients will be small business persons for whom the challenge of competing in tight markets is constant.⁵⁵ Such clients do not always come with an expert board of directors which helps steer the business through the shoals of business challenges.⁵⁶ These clients will seek advice from their

⁵¹ This past year a student studied how the elimination of farm subsidies and the difficulty of financing new farm technologies will impact the future viability of her family's farm.

⁵² One student was able to more formally organize his magician business. Another student reported to me that he encouraged three clients to write business plans as an aid to obtaining financing.

⁵³ Throughout this section many rhetorical questions are posed, especially in the discussion on choice of form or entity. These are just some of the issues a lawyer would explore in counseling the small business client.

⁵⁴ It is apparent that our educational process has bias towards big corporations and big law firm practice.

⁵⁵ Certainly this also is a factor for large corporations, but the impact of a loss of business for a small company may mean the catastrophic loss of a family's livelihood and principle assets including the family home.

⁵⁶ This is particularly true for the lawyer assisting the entrepreneur in transactional activity:

However, all business ventures entail risk, and businesswomen and men are by nature risk-takers. Some risks are financial: a transaction may not produce expected financial benefits. Other risks are legal: a non-competition clause in an employment contract may not be enforceable. Client-centeredness suggests that whether or not either type of risk is worth taking is ultimately for a client to decide. Helping clients evaluate and avoid risks is part of your professional role.

attorneys, bankers and accountants with the hope that these professionals will give them the edge needed to stay in business.⁵⁷

Lawyers and law students must learn to provide service in the context of the special needs and requirements of a small business.⁵⁸ The business and legal principles which drive large, publicly-held enterprises do not attain in the same manner for small, closely-held businesses.⁵⁹ Primarily, this is because the operating assumption in big corporations is that generally, the owners of the corporation (stockholders) are not usually the managers and officers of the corporation.⁶⁰ Further, the employees are non-owners who work for the company, with the exception of employee stock ownership plans and businesses which offer as a benefit the opportunity to purchase stock.⁶¹ The employees are, in most cases, conceived as units of human capital, counted as part of the expense or

⁵⁷ See *id.* at 201-03.

⁵⁸ See generally HARRY J. HAYNSWORTH, *THE PROFESSIONAL SKILLS OF THE SMALL BUSINESS LAWYER* (1984); HARRY J. HAYNSWORTH, *SELECTING THE FORM OF A SMALL BUSINESS ENTITY* (1985); HARRY J. HAYNSWORTH, *ORGANIZING A SMALL BUSINESS ENTITY* (1986); Harry J. Haynsworth IV, *Preventive Law for Small Business: All Relevant Factors Should Tell Proper Form for a Small Business*, 7 *PREVENTIVE L. REP.* 15 (1988).

⁵⁹ See WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES*, 104-09 (6th Ed. 1996).

⁶⁰ See *id.* at 105. Klein and Coffee indicate:

The principle distinguishing feature of the closely held corporation is a small number of shareholders, though in all likelihood the firm will also be one of relatively modest economic scope (whether measured by revenues, by assets, or on any other scale), and generally (though by no means always) the people owning a substantial portion of the total shares will occupy the top managerial positions or will be involved in a meaningful way in the selection and monitoring of the people who do occupy those positions as well as in the formulation of corporate strategies and policies.

Id.

⁶¹ Employee stock ownership plans (ESOP's) are another method to structure a business. See Paul Caver, *Employee-Owned Airlines: The Cure For an Ailing Airlines*, 61 *J. AIR L. & COM.* 639, 655 (1996) (presenting historical data on ESOP's, including the Weirton Steel Corporation, in Weirton, West Virginia).

costs of doing business.⁶² The number of workers can be increased or decreased as business needs demand.⁶³

In small businesses, the functions of owners, managers and employees are merged into the entrepreneur who founded the company.⁶⁴ As the business expands, the entrepreneur will hire more workers or take on partners. This has an impact on how key legal decisions are made because the personal interests and the business interests of the entrepreneur are inter-woven with the interests of the workers.⁶⁵ Beyond personal and legal relationship issues, the broader context of the entrepreneurial endeavor is integral to the decisions about choice of form and structure.⁶⁶

First, the initial legal matter is choosing the form of the business enterprise.⁶⁷ Foremost in the client's mind are risk and personal liability.⁶⁸

⁶² But see Lewis D. Solomon, *On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations: A Critical Assessment*, 50 WASH. & LEE L. REV. 1625 (1993).

⁶³ This is what is driving the current trend of reducing or downsizing in large corporations. See John A. Byrne, *The Pain of Downsizing*, BUS. WK., May 9, 1994, at 60-69.

⁶⁴ SCHÖLLHAMMER & KURILOFF, *supra* note 9, at 179-81.

⁶⁵ An employee might start out just receiving a salary, but may become an integral part of the enterprise and critical to its success. Klein and Coffee point out that: An ideal-type employee has a fixed claim, to a salary, and is obligated to follow the directions . . . of the owner. But part or all of the employee's compensation may be a bonus based on profits, which is a residual-type claim that moves the employee along the spectrum in the direction of ownership. An employee with this kind of residual claim may bargain for the right to hire and fire all subordinate employees, thereby gaining a degree of control that moves her or him even closer to the status of an owner. KLEIN & COFFEE, *supra* note 59, at 2.

⁶⁶ See SCHÖLLHAMMER & KURILOFF, *supra* note 9, at 92-119.

⁶⁷ See Michael E. Flowers, *Choosing the Right Business Entity*, 40 PRAC. LAW. 21 (1994); see also HAYNSWORTH, *SELECTING THE FORM OF A SMALL BUSINESS ENTITY*, *supra* note 58; Lipton, *infra* note 73.

⁶⁸ For an excellent discussion of risk and liability, see generally KLEIN & COFFEE, *supra* note 59 (exploring the topic as an integral part of business planning). The authors state:

In business relationships, the fundamental bargain elements, which people in business may refer to as the basic "deal points," can be described by four general concepts or terms: (a) risk of loss, (b) return, (c) control, and (d) duration. These elements are interrelated, so the person with the greatest risk of loss generally will have control, the importance of control increases as duration increases, etc. . . .

(continued)

Can he or she be sued if torts are committed or contracts broken or fraud perpetrated on unsuspecting customers by unscrupulous partners or employees?⁶⁹ Would a businessperson wish to proceed as a sole proprietor or to incorporate the business? If there are several entrepreneurs, should they join together as a partnership or as a closely-held corporation with a Chapter S tax status? If the enterprise is to be part of a larger venture jointly pursued with other companies, how should the legal structure and relationships be defined?⁷⁰ Is the business such that its success can be duplicated in a franchise system?⁷¹

Evaluating a choice of form decision requires the consideration of several standard factors, most of which students in the seminar have covered in their introductory business associations course work. For example:

Apart from tax considerations, six factors commonly are used in comparing the various business forms:

- *Limited Liability;
- *Perpetual existence;
- *Transferability of interests;
- *Centralized management;
- *Ease of financing; and
- *The ability to sue or be sued as a separate entity.

“An additional factor is the cost and complexity of formation and operation. Complexity of documentation is another important component. Other factors, such as usury statutes and securities laws, must also be taken into consideration.”⁷²

Risk of loss refers to the allocation among the participants of losses from the investment in or operation of the business. If the business fails, who pays, or bears the burden of, debts, who is entitled to what portion of any remaining assets, etc.?

Id. at 2 (emphasis in original).

⁶⁹ Many of these issues are derived from principles of agency law. For a general discussion of these issues, see *id.* at 25-31.

⁷⁰ See Kevin D. Thompson, *Forging a Perfect Partnership: From Joint Ventures to Strategic Alliances, Small Businesses Find that There is Strength in Numbers*, BLACK ENT., Sept. 1993, at 66.

⁷¹ For a discussion of the advantages of structuring a business by franchising, see Robert T. Justis, et al., *Using Marketing Research to Enhance Franchisee/Franchisor Relationships*, 31 J. SMALL BUS. MGMT. 121 (1993).

⁷² Haynsworth, *Preventive Law for Small Business*, *supra* note 58, at 15.

Second, tax consequences may be important in choosing a business entity.⁷³ Are taxes to be the responsibility of the business entity or of the individual entrepreneur? Will a corporate Chapter S tax election successfully allow the entrepreneur to pass through tax losses useful on his or her personal tax return? How can one avoid the double taxation problem when profits are exacted via dividends? And will the IRS strictly scrutinize the tax return searching for distributions masquerading as excess salary or employment benefits?

Third, the business entity must be financed and the financial needs vary over the life of the business.⁷⁴ Will the enterprise grow and need to seek additional financing through an initial public offering? Will new partners with needed business or technical expertise join the venture necessitating a flexible approach to the issue of ownership? What level of participation in the venture will a capital contributor seek? Would there be a need for limited liability by the financier? Will the financier need to exercise decisional control over the direction of the enterprise or over the choice of managers and officers?

Fourth, some business forms are easier to establish than others.⁷⁵ For purposes of the entrepreneur, is the simple form of a sole proprietorship adequate? Will the client have the resources, as well as the need, to comply with corporate registration requirements? Will financing alternatives raise issues about state and federal securities laws?⁷⁶ Will the business be conducted in an international setting? Will there be a need to register the corporation in foreign jurisdictions?

Fifth, the client will need to make a decision about continuity and transferability.⁷⁷ How long will the business be in operation—short term for the completion of one venture or designed to exist in perpetuity (or as long as the market holds up)? If there is a need to sell the business, which form most likely enhances that possibility and the sale price? If there are

⁷³ For a discussion on the tax issues to be considered when choosing a business entity, see Richard M. Lipton, *Choice of Entity: How to Choose, How to Change*, 72 TAXES—THE TAX MAG. 309. (1994); William P. Streng, 700 T. M., *Choice of Entity* (Tax Management 1993).

⁷⁴ See generally KLEIN & COFFEE, *supra* note 59.

⁷⁵ See generally Haynsworth, *Preventive Law for Small Business*, *supra* note 58 (discussing factors that are commonly used in comparing various business forms).

⁷⁶ HAYNSWORTH, ORGANIZING A SMALL BUSINESS ENTITY, *supra* note 58, at 19. ("The formation of every business enterprise has securities law implications that are often overlooked. A lawyer representing a small business must have a working knowledge of federal and state securities laws. An understanding of the various statutory and administrative exemptions from registration is essential.")

⁷⁷ See KLEIN & COFFEE, *supra* note 59, at 93, 98, 117-39.

multiple entrepreneurs, how likely will there be a need for one to sell his or her interest to another? Should we build in a mechanism which would allow the enterprise to "cash-out" one of the partners? How should one account for the need to sell or transfer an ownership interest when the entrepreneur dies or becomes incapacitated?

Finally, the enterprise may have to comply with myriad operating regulations.⁷⁸ Will the government require a certain capital structure? Will banks and lending institutions require personal guarantees for loans? Are there any special zoning regulations which impact a home based business?⁷⁹ Does a government entity require a business license? What are the state and local tax requirements?

Within each form of business, the lawyer must help the client create a working structure that accommodates the participants' interests and abilities.⁸⁰ The working structure must also enhance the chance of successfully pursuing the endeavor by reflecting the business planning efforts of the entrepreneur.⁸¹ It will establish who has what authority to legally bind the enterprise and lay out how business decision making will be accomplished.⁸² The structure should further define the financial relationships of the participants and how to parcel out the fruits of the endeavor.⁸³ The structure will provide the means for accepting new

⁷⁸ See ENNICO, *supra* note 27, at 7-1-7-17.

⁷⁹ See, e.g., Amey Stone, *A Zoning Nightmare On Elm Street: Home Business? The Neighbors May Raise Hell*, BUS. WK., Mar. 18, 1996.

⁸⁰ For a discussion of the "intangible 'client relations' skills needed to help the client work through these issues, see ENNICO, *supra* note 27, at 2-1-2-9.

⁸¹ See HAYNSWORTH, THE PROFESSIONAL SKILLS OF THE SMALL BUSINESS LAWYER, *supra* note 58, at 7. Haynsworth indicates:

The outer limit of the lawyer's role in counseling small businesses is not well-defined. Because the success of a small business depends in part on the ability of the investors to work together in a reasonably harmonious manner, knowledge of the backgrounds, the personalities, and the personal needs and objectives of the participants is relevant. Recommendations that do not take into account the psychological and emotional, as well as other, background factors involved can lead to disastrous results.

Id.

⁸² See KLEIN & COFFEE, *supra* note 59.

⁸³ See *id.*; see also WARREN FREEDMAN, THE EMPLOYMENT CONTRACT: RIGHTS AND DUTIES OF EMPLOYERS AND EMPLOYEES (1989).

participants and allowing an exit mechanism for those who wish to leave.⁸⁴

If there is just one entrepreneur as the client, there may be other family members about whose interests the client is concerned.⁸⁵ Will a spouse or children work in the business?⁸⁶ Might a spouse be a required signatory on financial documents, especially if family assets are to be encumbered? How will the ownership and management of the family business pass to the next generation?⁸⁷ If there are multiple entrepreneurs, these family issues also may be of concern.⁸⁸ Moreover, the lawyer must understand how the entrepreneurs are related to each other, business-wise and personally.⁸⁹

C. The Business Plan as Resource for Entrepreneur and Lawyer

The business plan is one of the more useful tools to a lawyer in assisting an entrepreneur developing a business. The entrepreneurial process is in part reflected in the entrepreneurial thought pattern as suggested by Stevenson and Gumpert.⁹⁰ They suggest that the entrepreneurial mind ask these questions:

Where is the opportunity?
How do I capitalize on it?
What resources do I need?
How do I gain control over them?

⁸⁴ See KLEIN & COFFEE, *supra* note 59, at 203-05.

⁸⁵ See MICHAEL FRIEDMAN & SCOTT FRIEDMAN, *HOW TO RUN A FAMILY BUSINESS*, (1994); Glenn R. Ayres, *Rough Family Justice: Equity in Family Business Succession Planning*, 3 FAM. BUS. REV. 3 (1990).

⁸⁶ For a study of how family dynamics can impact a business, see SUSAN E. TIFFT & ALEX S. JONES, *THE PATRIARCH: THE RISE AND FALL OF THE BINGHAM DYNASTY* (1991).

⁸⁷ See John L. Ward, *Perpetuating the Family Business*, in 3 *THE FUTURE OF PRIVATE ENTERPRISE: IDEAS FOR A CHANGING WORLD* 175, (Craig E. Aronoff et al. eds., 1986); Paul Farhi, *Stepping Into the Family Business*, WASH. POST, July 9, 1990, at Bus. Sec. 1.

⁸⁸ For insight on some of the issues family matters raise, see HAYNSWORTH, *ORGANIZING A SMALL BUSINESS ENTITY*, *supra* note 59, at 170-71, 218-23.

⁸⁹ See Robert A. Mamis, *Sparring Partners: Partnerships Seem to Breaking Up Faster Than Marriages These Days. And It's Not Always Happening Behind Closed Doors*, INC. Mar. 1984, at 43.

⁹⁰ Howard H. Stevenson & David E. Gumpert, *The Heart of Entrepreneurship*, HARV. BUS. REV., Mar.-Apr. 1985, at 85.

What structure is best?⁹¹

To answer these questions, a successful entrepreneur must engage in a thoughtful strategic planning process and outline the business strategy in a business plan.⁹²

In brief, a formal business plan has "carefully worked out statements of purpose, specific steps to be taken, and corresponding budgets."⁹³ A plan helps the entrepreneur stay focused on the business objectives and outlines the steps necessary to bring the product or service to market successfully.⁹⁴ The plan identifies fiscal needs and predicts cash flow requirements.⁹⁵ Obtaining venture capital will also be advanced by a plan

⁹¹ *Id.* at 87.

⁹² See KARL H. VESPER, *NEW VENTURE STRATEGIES* (1980).

⁹³ Philip H. Thurston, *Should Smaller Companies Make Formal Plans?*, HARV. BUS. REV., Sept.-Oct. 1983, at 162.

⁹⁴ See Amar Bhide, *How Entrepreneurs Craft Strategies That Work*, HARV. BUS. REV., Mar.-Apr. 1994, at 150. Bhide suggests that since some entrepreneurs lack the time to do extensive and often expensive planning, there are quick, down and dirty methods of planning:

Yet all ventures merit some analysis and planning. Appearances to the contrary, successful entrepreneurs don't risk blindly. Rather, they use a quick cheap approach that represents a middle ground between planning paralysis and no planning. They don't expect perfection—even the most astute entrepreneurs have their share of false starts

What are the critical elements of winning entrepreneurial approaches? Our evidence suggests three general guidelines for aspiring founders:

1. Screen opportunities quickly to weed out unpromising ventures.
2. Analyze ideas parsimoniously. Focus on a few important issues.
3. Integrate action and analysis. Don't wait for all the answers, and be ready to change course.

Id. at 150.

⁹⁵ Zenas Block & Ian C. MacMillan, *Milestones for Successful Venture Planning*, HARV. BUS. REV., Sept.-Oct. 1985, at 184, 185. The authors recognize that as each business develops it reaches certain, identifiable milestones, such as prototype development, market testing and production start-up. These milestones represent critical decision making opportunities which may determine the success of the enterprise. Planning recognizes the following dynamics:

Starting a new business is essentially an experiment. Implicit in the experiment are a number of hypotheses (commonly called assumptions) that can be tested only by experience. The entrepreneur launches the enterprise and works to establish it while simultaneously validating or invalidating the assumptions. Because some will be dead wrong and

(continued)

that demonstrates a carefully conceived business enterprise. "An effective business plan will convince the investor that you have identified a high-growth opportunity, that you have the entrepreneurial and management talent to effectively exploit that opportunity, and that you have a rational, coherent, and believable program for doing so."⁹⁶ For the lawyer working with a businessperson, a business plan helps the lawyer get on the same wavelength as the businessperson.⁹⁷ A well-crafted business plan forms the basis of giving legal advice on choice of form, ownership issues and financing instruments.⁹⁸ The plan permits an articulation of the business objectives of the firm given an analysis of the market situation.⁹⁹ It can

others partially wrong, an important goal of the business plan must be to continually produce and build on new knowledge. Managers must justify moving to each stage or milestone in the plan on the basis of information learned in the previous stage.

....

Milestone planning is hardly new. Traditionally, though, such forethought relies on predetermined dates set for reviews or project completions. The problem with date milestones is that they are totally unreliable for new ventures. Therefore, we suggest that managers make financing decisions instead as events are completed, using what they have just learned to make go, no-go, or redirection decisions.

Id. at 184.

⁹⁶ Jeffery A. Timmons, *A Business Plan Is More Than a Financing Device*, 14 HARV. BUS. REV. Mar.-Apr. 1980, at 14.

⁹⁷ One author described the business plan as a roadmap which can aid the entrepreneur in explaining his or her business objectives to others as follows:

Many times you will want to inform other people regarding your business and its progress toward its goals, or about its objectives and how you intend on reaching them. For example, you may wish to brief new employees you have hired for your firm. This doesn't mean that you have to lay out the entire business plan with all its financial data. However, showing them the objectives that you have set for yourself, how and when you plan on reaching them, and where they fit into this big picture will not only motivate them but it will also help them to do a better job.

WILLIAM A. COHEN, *THE ENTREPRENEUR & SMALL BUSINESS PROBLEM SOLVER: AN ENCYCLOPEDIA REFERENCE AND GUIDE* 91 (1983).

⁹⁸ *Id.* at 93.

⁹⁹ *Id.* Cohen indicates that: "The situation analysis has several subsections which are important and should be included and discussed. These are: demand for your product or service, your target market, competition, unique advantages, legal restrictions, if any, and any other situational variables that you feel are important to your business." *Id.*

also help identify other legal issues that must be attended to in a timely manner, such as proper taxpayer status and identification numbers, business licenses, intellectual property protection, environmental regulations and employee benefit concerns.¹⁰⁰

D. Summary

Entrepreneurs recognize the need for effective legal advice¹⁰¹ but are often leery of lawyers whom they view as deal killers.¹⁰² In working with a business client, the attorney must consider the legal advice and the business strategy or design articulated by the client.¹⁰³ All of this is possible by the creative use of the fundamental tools of business organization. A succinct statement of this observation provides:

To tailor a corporation to the individual needs of a particular business and its participants, a lawyer must be able to plan and draft preincorporation agreements, special charter and bylaw provisions, stock transfer restrictions, buy-and-sell arrangements, stockholders' pooling agreements, long-term employment contracts, and various other instruments. These instruments should accurately reflect, and operate to conform the business to, the participants' expectations. A lawyer—whether in a large or small firm—does not adequately serve his

¹⁰⁰ See generally HAYNSWORTH, ORGANIZING A SMALL BUSINESS ENTITY, *supra* note 58.

¹⁰¹ A popular magazine on home computing reviewed new software designed to assist small businesses with legal issues. The editor's review is as follows: "Kiplinger's Small Business Attorney Multimedia trim your legal expenses by preparing your own documents to bring to a lawyer for review. Just follow the prompts—which offer explanations in English, not legalese—to fill in the blanks in any of more than 80 common documents." HOME PC, June 1996, at 80.

¹⁰² KLEIN & COFFEE, *supra* note 59, at 64. The authors note:

One of the interesting and significant aspects of the process of drafting partnership agreements (and other business agreements as well) has to do with the concern often expressed by experienced lawyers that their efforts might "queer the deal." One of the most important functions of the lawyer is to look beyond the days of heady optimism and mutual good will that may characterize the initiation of a business venture.

Id.

¹⁰³ *Id.* at 64-66.

business clients unless he considers the use of instruments of this kind.¹⁰⁴

Similar documents are available for partnerships, limited liability companies and joint ventures.

The key to thinking through these choice-of-form factors and the design of the business structure is to place the decision in the context of the specific business situation.¹⁰⁵ Certainly, one would not merely use a form book or blindly borrow from the last corporation documents prepared for a previous client.¹⁰⁶ A lawyer must know and understand the persons seeking to pursue a specific business opportunity.

The lawyer retained for the business situation, must inform and counsel his or her clients on how their individual interests may be divergent.¹⁰⁷ With the input of the client(s), the attorney must make an assessment of the specific legal challenges presented by the business and the enterprise participants.¹⁰⁸ These challenges may have more than a legal context to them and involve a consideration of their personal relationships. For instance, how do a husband and wife or siblings entering business together construct a viable working relationship that maintains a healthy accommodation of their personal relationship?¹⁰⁹

This necessarily enlarges the role of the attorney.¹¹⁰ He or she is no longer a mere scrivener who drafts and files required business

¹⁰⁴ F. Hodge O'Neal, *Preventive Law: Tailoring the Corporate Form of Business To Ensure Fair Treatment of All*, CORP. PRACT. COMMENTATOR 161, 162.

¹⁰⁵ *Id.* at 162. O'Neal states: The planning and drafting of instruments for a close corporation require the lawyer to analyze difficult factual problems and to use effectively a great variety of materials, legal and nonlegal, tax and nontax, common and statutory. Almost any legitimate desire of a client can be achieved if the lawyer is sufficiently resourceful. *Id.*

¹⁰⁶ *See id.* at 161.

¹⁰⁷ For a discussion of multiple clients and conflicts of interest, see HAYNSWORTH, PROFESSIONAL SKILLS, *supra* note 58, at 16-30.

¹⁰⁸ *See* Lizabeth Ann Moody, *Statutory Solutions to Conflicts of Interest in Close Corporations*, 35 CLEV. ST. L. REV. 95 (1987).

¹⁰⁹ *See* Arthur M. Sherwood, *Family Businesses Breed Conflict: The Ability of the Family and the Business To Separate From Each Other Can be the Key to the Ongoing Success of Each*, TRS. & EST., Feb. 1989, at 30.

¹¹⁰ One author identifies at least some aspects of the role a small business lawyer must play as follows: The business lawyer in the United States serves three basic functions for his clients: monitoring the client's legal and business environment; counseling the client on legal problems raised by the client's present and proposed business activities; and managing the client's business transactions with others. ENNICO, *supra* note 27, at 1-17.

documents.¹¹¹ The attorney becomes an entrepreneurial counselor who assists the client(s) in pursuit of dreams.¹¹² The attorney helps make it legally possible to take advantage of an entrepreneurial opportunity and yet protects and promotes clients' personal interests and legal obligations.¹¹³

This necessarily calls for increased attention to the manner in which we educate and train lawyers who choose to establish an entrepreneurial client practice.¹¹⁴ As suggested by the seminar on small business theory, we envision training lawyers to be vital assets to entrepreneurs.¹¹⁵ Indeed, law students may get the "entrepreneurship bug" and design legal careers that specifically specialize in small business practice.¹¹⁶ These lawyers will possess the skills needed to develop small business enterprises that contribute to the economic prosperity of our nation. Moreover, these

¹¹¹ See BINDER ET AL., *supra* note 30, at 201.

¹¹² Focus groups consisting of small business owners met in conjunction with the 1995 White House Conference on Small Business and drafted numerous insights on the state of small business and the needs of small business which policy makers should heed. *Foundations for a New Century*, *supra* note 12, at 41-44. The following is one insight which highlights the significance of small businesses to our national consciousness: INSIGHT 19: Small Business and Entrepreneurship Will Increasingly Serve as the Embodiment of Individual values and the American Dream. After experiencing downsizing by larger enterprises and feeling a consequent loss of certainty and security, employees, new labor-market entrants, and society as a whole are reexamining the options available to them. Many individuals are looking to gain control of their lives, careers and economic destiny. For many, this makes small business and entrepreneurship a much more attractive options. Being one's own boss increasingly offers protection against being fired. *Id.* at 44.

¹¹³ *Id.* at 20-21. The Conference indicated:

The client-centered approach emphasizes the value and importance of clients' taking the role of primary decision maker. It adopts this emphasis for two reasons. First, decisions having significant impact on a client are best based on an evaluation of which potential solution is most likely to satisfy the client. Second, because each client generally has unique values and goals, a client is typically in a better position than you to choose which potential solution is best.

Id.

¹¹⁴ See *supra* note 36.

¹¹⁵ Katherine Callan & Michael Warshaw, *American Revolutionaries: On the Streets: University Outreach Programs are Creating the New Entrepreneurial Society*, SUCCESS, Sept. 1994, at 48-49.

¹¹⁶ See Joe M. Goodman, *Marketing Estate Planning Services to the Small Business Client*, 42 PRAC. LAW. 21 (1996).

lawyers will be important community resources for those determined to foster community economic development in an era of global economic change.¹¹⁷

II. DEVELOPING THEORETICAL FOUNDATIONS FOR LAW AND ENTREPRENEURSHIP

In teaching the small business theory seminar, I always have used a number of terms interchangeably: entrepreneurship, small business, family-owned business and economic development.¹¹⁸ They are not the same, although they are interconnected. Entrepreneurial activity can take place in large or small businesses. A small business may be family-owned or it can offer shares to a variety of interested persons seeking to invest venture capital. Economic development could include the promotion of small business or focus on entrepreneurial activity of larger corporations. In reviewing the literature on entrepreneurship, one finds a variety of approaches, from simple statements to complex models. This section will present theoretical explorations of entrepreneurship concepts with an eye toward seeing the interconnectedness of the concepts.

¹¹⁷ Leslie Newman, *Law Schools: Building a Corps of Lawyers Skilled in CED*, 1 NAT'L ECON. DEV. AND L. CENTER MONOGRAPH (1993). Newman states:

By exposing today's students to problems in low-income communities and the role of nonprofit organizations, local enterprise, and policy makers in alleviating poverty, and by training students in important non-litigation skill, clinical law programs and courses focusing on CED are playing a vital role in promoting community economic development, and they can be an important local resource for legal services programs trying to tackle persistent poverty.

Id.

¹¹⁸ In using the term economic development, one could focus on governmental agencies or regional commissions which promote business within a given state, region or local. For an example of the types of assistance and programs available, see *Virginia Capital Resources Directory* (Dec. 1994), produced by the Virginia Department of Economic Development. One can also speak of economic development as a means of eliminating poverty utilizing principles of self-determination:

Community economic development is a resident-driven strategy that uses advocacy and development to produce tangible results such as affordable housing, credit unions, loan funds, employment and business opportunities, revitalized commercial districts, quality child care and other human services in neighborhoods.

Newman, *supra* 117. The American Bar Association sponsors a forum on affordable housing and community development law.

A. *Entrepreneurship—A Hunt For the Heffalump*

At the outset one attempts to answer what is entrepreneurship and who is an entrepreneur. The definition of entrepreneurship is like the concept itself—there are many possibilities. Peter Kilby likens the search and study of entrepreneurial activity to a hunt for the Heffalump, a mythical character in Milne's Winnie-The-Pooh stories.¹¹⁹ The following short-handled definitions give a sense of the breadth of the search: "Entrepreneurship is the process of creating value by pulling together a unique package of resources to exploit an opportunity."¹²⁰

"Most would agree that entrepreneurs tend to be independent operators, though they sometimes work in teams and that they take initiative to profit on business opportunities."¹²¹ "One consistent theme appears in the literature on the wealth of nations, however; it points to a special class of individuals who have been the initiators of economic growth. These persons are known as *entrepreneurs*."¹²² "Entrepreneurship fundamentally involves combining factors of production to achieve a specific consequence. . . . Economic entrepreneurship involves the combination of *economic* factors of

¹¹⁹ Peter Kilby, *Hunting the Heffalump*, ENTREPRENEURSHIP AND ECON. DEV. 1 (Peter Kilby ed. 1971). The search for the source of dynamic entrepreneurial performance has much in common with hunting the Heffalump. The Heffalump is a rather large and very important animal. He has been hunted by many individuals using various ingenious trapping devices, but no one so far has succeeded in capturing him. All who claim to have caught sight of him report that he is enormous, but they disagree on his particularities. Not having explored his current habitat with sufficient care, some hunters have used as bait their own favorite dishes and have then tried to persuade people that what they caught was a Heffalump. However, very few are convinced, and the search goes on. *Id.* (citing A. A. Milne, WINNIE-THE -POOH Ch. 5 (1926); THE HOUSE AT POOH CORNER Ch. 3 (1928)).

¹²⁰ HOWARD H. STEVENSON ET. AL., NEW BUSINESS VENTURES AND THE ENTREPRENEUR 16 (2d ed. 1985). This definition is based on the assumption that the entrepreneur must gather the necessary resources. This is difficult as the authors note: "Because the entrepreneur never controls all of the necessary resources, pursuing the opportunity requires 'bridging the resource gap.' Such a process requires a series of choices which must be made in a manner which is both internally consistent and externally appropriate to the market." *Id.*

¹²¹ VESPER, *supra* note 92, at 3. Vesper's approach is directed towards individuals who are interested in going into business for themselves. He focuses on the different types of entrepreneurs and their characteristics. *Id.* at 3-6.

¹²² SCHÖLLHAMMER & KURILOFF, *supra* note 9, at 7.

production—land, labor, capital, and technology—and economic consequences, usually the production of goods and services.”¹²³

The predominant concept of entrepreneurship generally refers to “economic activities [involving] the *distribution* of goods and services, e.g., wholesaling and retailing.”¹²⁴ Other economic theorists base their work on the concept of technological innovation as pioneered by Joseph Schumpeter.¹²⁵ However, one author further argues that the concept can be used in other fields:

By defining it generally in these terms, one allows for the possibility of delineating types of entrepreneurship other than economic entrepreneurship. These other types, such as political entrepreneurship, will be distinguished from economic entrepreneurship both by the factors that are combined and the consequences that are achieved. Political entrepreneurship will involve the combination of *political* factors, whatever they may be, and the achievement of political consequences.¹²⁶

The *Encyclopedia of Entrepreneurship* collects in one volume the work of many contemporary scholars who have not only studied the field

¹²³ PAUL H. WILKEN, *ENTREPRENEURSHIP: A COMPARATIVE AND HISTORICAL STUDY* 59 (1979) (emphasis in original).

¹²⁴ *Id.* at 59 n.1.

¹²⁵ There is an International Schumpeter Society which meets to share work in economic and entrepreneurial theory:

What brings most members . . . together however, is interest in what might be broadly characterized as the Schumpeterian tradition of economic analysis. This tradition embodies several themes. For one, Schumpeter emphasized the crucial role that technological innovation and technological change play in generating economic growth. Second, for Schumpeter, entrepreneurship was a fundamental driving force in the achievement of technological innovation. . . . Finally, many scholars are fascinated with what Schumpeter called “the process of creative destruction”—that is, a process through which innovation constantly reshapes the very market structures out of which it arises in an evolutionary way.

FREDERIC M. SCHERER & MARK PERLMAN, *ENTREPRENEURSHIP, TECHNOLOGICAL INNOVATION, AND ECONOMIC GROWTH: STUDIES IN THE SCHUMPETERIAN TRADITION* 1 (Frederic Scherer & Mark Perlman eds. 1992).

¹²⁶ *Id.* (emphasis in original).

but have also put forward their own thinking on the subject.¹²⁷ The collection notes different ways of looking at the subject.¹²⁸ In broad terms, scholars have studied the entrepreneurial individual for behavioral characteristics that indicate a proclivity towards entrepreneurial activity.¹²⁹ Some scholars have looked at the process of entrepreneurship—or *the how* of the entrepreneurial activity.¹³⁰ Another major area of research focuses on environmental factor, which precipitate entrepreneurial activities.¹³¹ Here economic forces of the marketplace, changes in technology and fundamental changes in our society and in the way we live are fruitful areas of study.¹³² Additionally, some scholars will examine venture

¹²⁷ ENCYCLOPEDIA OF ENTREPRENEURSHIP xxvii (Calvin A. Kent et al. eds., 1982).

¹²⁸ In Chapter Two of the ENCYCLOPEDIA OF ENTREPRENEURSHIP, John A. Hornaday presents an article entitled *Research About Living Entrepreneurs*. *Id.* at 20-34. He notes that the chapter headings of the encyclopedia correspond to the way many scholars would organize the various branches of the field of entrepreneurship. *Id.* at 23-24. Using Hornaday's table, here are the organizing categories: "Entrepreneurship History, Psychology of the Entrepreneur, Sociology of the Entrepreneur, Entrepreneurship in Economic Development, Education for Entrepreneurship, Mechanics and Strategy of Venture Initiation, Venture Finance, Entrepreneurship-Small Business Interface, Internal Corporate Entrepreneurship, Innovation from Entrepreneurship, The Environment for Entrepreneurship, and Nonacademic Literature." *Id.* at 24.

¹²⁹ In his study of types or traits found by researchers in the field, Hornaday notes that some studies have identified over forty-two characteristics found in entrepreneurs, even though some of them overlap. *Id.* at 25-28. *But cf.* Yvon Gasse, *Elaborations on the Psychology of the Entrepreneur*, in ENCYCLOPEDIA OF ENTREPRENEURSHIP 57, 58 (questioning the validity of trait lines, since highly motivated individuals with some of these traits enter either fields of work such as "the arts, politics, religion, or education").

¹³⁰ There is huge market for "how-to" books. For some recent examples, see WILSON HARRELL, *FOR ENTREPRENEURS ONLY: SUCCESS STRATEGIES FOR ANYONE STARTING OR GROWING A BUSINESS* (1994); PAUL HAWKEN, *GROWING A BUSINESS* (1987); KIMBRO & HILL, *supra* note 14; HARVEY MACKAY, *SWIM WITH THE SHARKS WITHOUT BEING EATEN ALIVE* (1988); HARVEY MACKAY, *BEWARE THE NAKED MAN WHO OFFERS YOU HIS SHIRT* (1990).

¹³¹ See Larry R. Smeltzer et al., *Environmental Scanning Practices in Small Business*, 26 J. SMALL BUS. MGMT. 55 (1988). "As an integral component of planning, environmental scanning is defined as gathering and interpreting pertinent information and introducing the results into the organizational decision process. An owner/manager scans the environment to detect external changes or events which may affect the firm." *Id.* at 56.

¹³² In the report to the President and the Congress, the policy and social implications were highlighted:

The United States has gone through waves of change and will face even more challenging change in the decades ahead. It is important that society in general is aware of the importance of change and innovation

(continued)

creation, capital formation and management techniques.¹³³ The following sections present a brief survey of different approaches to the field of entrepreneurship. The material is presented in a manner so that law students obtain a flavor of some of the motivating factors inspiring an entrepreneurial client.

B. *Entrepreneurship as Biography*

One approach suggested by Ronstadt is to collect "normative folk wisdom."¹³⁴ Here one could study entrepreneurship by studying the success stories of entrepreneurial heroes. Many hold up such business luminaries as Ray Kroc of McDonald's (hamburgers and fries)¹³⁵ or Tom Watson, Sr. of IBM¹³⁶ or Henry Ford.¹³⁷ Popular print media feature stories on the "Entrepreneur of the Year"¹³⁸ or highlight the successes of entrepreneurs who transformed small businesses into multi-million dollar firms.¹³⁹ Books are published with ostentatious titles such as, *Think and*

in our society and economy and their effects upon all aspects of life, both intended and unintended.

Government should maintain positive programs that encourage small business and entrepreneurship, and it should take aggressive steps to build and maintain appropriate information systems for monitoring small-business firms and analyzing laws, regulations and programs that may affect them.

Foundations for a New Century, *supra* note 12, at 45.

¹³³ See LINDA A. HILL, *BECOMING A MANAGER: MASTERY OF A NEW IDENTITY* (1992); SCHÖLLHAMMER & KURILOFF, *supra* note 9; STEVENSON ET. AL., *supra* note 120; VESPER, *supra* note 92.

¹³⁴ ROBERT RONSTADT, *ENTREPRENEURSHIP: TEXT, CASES AND NOTES* xvii (1984).

¹³⁵ See GERALD GUNDERSON, *THE WEALTH CREATORS: AN ENTREPRENEURIAL HISTORY OF THE UNITED STATES, 172-73* (1989). McDonald's is noted for its development of the franchise system. *Id.*

¹³⁶ *Id.* at 249-50.

¹³⁷ *Id.* at 189-90. Gunderson notes:

Henry Ford was the central entrepreneur during the early years of the auto industry. But more than that he is probably the best known of all entrepreneurs in American history—for good reason. The product that he created is one of the most valuable, with a corresponding impact on the economy.

Id.

¹³⁸ See *The Hottest Entrepreneurs in America*, INC., Dec. 1995.

¹³⁹ See Tom Stein, *The World's Greatest Entrepreneurs: Their Powerful Strategies for Creating Success*, SUCCESS (June 1996), at 34.

Grow Rich: A Black Choice,¹⁴⁰ or "*Why Should White Guys Have All The Fun?: How Reginald Lewis Created a Billion-Dollar Business Enterprise*." Such a study of normative stories could be classified as the entrepreneur as a captain of industry.¹⁴¹

A more useful method of finding entrepreneurial meaning in normative folk wisdom is through the biographic medium of storytelling by more ordinary people. In her book, *I've Known Rivers: Lives of Loss and Liberation*, Sara Lawrence-Lightfoot tells the stories of six, middle-class, mid-life, African-Americans.¹⁴² Her task is broad, yet subtle:

The African-American legacy of storytelling infuses these narratives and serves as a source of deep resonance between us. Our cultural and historical roots have been given expression and meaning through stories. The slave narratives, for example, were elaborate tales of survival and cunning, but they can also be read as vehicles for individual empowerment, community building, and cultural transmission. In telling the story, the narrator defined his/her full humanity.¹⁴³

In the telling of the stories we learn, if only by glimpses of intended expression and meaning, what it takes to "make it" in America and in life. The stories tell us of possibilities, or as Lawrence-Lightfoot explains: "In the six lives portrayed here, I search for an authentic and subtle rendering of African-Americans of privilege. This is a book that acknowledges loss and ambivalence, celebrates accomplishment, and examines the power of storytelling in shaping and interpreting the journey."¹⁴⁴

This is exactly how a reflective entrepreneur might talk about his or her life. It is how we can learn, by their example and inspiration, to recognize and pursue opportunities using the highest professional skills, personal experiences, and introspective vision. Moreover, when read from a legal counselor's point of view, the stories offer insight into the human condition.

Without doing justice to the fullness of their stories, one can provide a sense of their entrepreneurial passion. Not all of the six storytellers are entrepreneurs in the sense of running businesses. However, they are

¹⁴⁰ See KIMBRO & HILL, *supra* note 14.

¹⁴¹ See GUNDERSON, *supra* note 135.

¹⁴² See SARA LAWRENCE-LIGHTFOOT, *I'VE KNOWN RIVERS: LIVES OF LOSS AND LIBERATION* (1994).

¹⁴³ *Id.* at 606.

¹⁴⁴ *Id.* at 9.

entrepreneurial in the best sense of the concept and their stories provide unique normative folk wisdom.¹⁴⁵

For Katie Cannon, a professor of philosophy and theology, the entrepreneurial task is to use her personal and intellectual experience to write a book, through which "[s]he will strive to weave together the themes of her own brand of womanist theology—a *black* womanist theology, a *southern* black womanist theology, a southern, "*working poor*," black womanist theology."¹⁴⁶ For Toni Schiesler, her story tells of a journey as a nun teaching chemistry in a Catholic school to pursuing the priesthood in the Episcopal Church. There she will develop a creative ministry dedicated to the needs of women.¹⁴⁷

By focusing on the special spiritual and counseling needs of women, Cannon and Schiesler are establishing niches for their life's work. They are carving out an area, or a market which has either been ignored or underdeveloped by others. This is how creative entrepreneurs set themselves apart from others and establish successful market positions.

For Charles Ogletree, a Harvard Law School professor, he is entrepreneurial in developing innovative methods of teaching trial advocacy from a defense perspective.¹⁴⁸ For Tony Earls, a professor and

¹⁴⁵ As demonstrated by the individuals in Lawrence-Lightfoot's book, one can be entrepreneurial in one's career or life:

Being an entrepreneur is more than a job or a career: it is a life-style, and certain principles may influence your career strategy for being an entrepreneur. You must be flexible and imaginative, be able to plan, take risks, make decisions and implement action to achieve your goals. You should be realistic as well as future-oriented. You should be willing to work under conditions of conflict, change and ambiguity. This will require that you analyse (sic) yourself in relation to the environment in which you will have to work.

GEOFFREY G. MEREDITH ET AL., *THE PRACTICE OF ENTREPRENEURSHIP* 7 (1982).

¹⁴⁶ LAWRENCE-LIGHTFOOT, *supra* note 145, at 95.

¹⁴⁷ *Id.* at 282.

¹⁴⁸ His course is described as follows:

He is eager to show me how he helps students bridge theory and practice, how he urges the convergence of analysis and action. In his work with law students, he wants to "teach them how to think *and* what to think" in an effort to "balance the other message out there that claim that the law is value free." He hopes that his teaching will allow students to see the law as "an instrument for social and political change A tool to empower the dispossessed and disenfranchised . . . and a means to make the privileged more respectful of differences."

researcher at the Harvard School of Public Health, his entrepreneurial challenge is to reshape his professional agenda, "from being a psychiatrist primarily interested in the emotional development of children . . . toward using the tools of epidemiology to study the environments that shape human growth and experience."¹⁴⁹

Ogletree and Earls witness serious social and political problems in their communities. They are creating innovative approaches to tackle these problems. The innovation is in developing new tools to solve these problems—Ogletree, by educating lawyers trained to creatively make a difference in the legal arena; and Earls, by bringing new scholarship and research methodologies to the field of public health. The entrepreneur's hallmark is using innovation to produce added value to a given process, skill or service such as law or public health.

For Orlando Bagwell, his entrepreneurial spirit is expressed in creative filmmaking, which at once preserves historical legacy and transforms the viewer.¹⁵⁰ His skill is to examine the past extensively and to sort through images that reveal our present condition and see beyond the horizon to a world that does not yet exist.¹⁵¹ In describing Bagwell, who produced the documentary *Eyes on the Prize*, Lawrence-Lightfoot makes this observation about the power of such entrepreneurial work:

For Orlando Bagwell, in particular, storytelling is his life's work; it merges art and history, celebration and critique. Not only do his documentary films offer a complex reinterpretation of history, they are also works of art. His blend of imagery and commentary creates a powerful vehicle for social transformation.¹⁵²

Bagwell offers an entrepreneurial lesson in vision, or more to the point, creative imagination. Through the medium of film, transformation occurs when the viewer's mind's eye comprehends a past heretofore not completely understood and glimpses that tomorrow not yet seen. The visionary entrepreneur thus inspires others to action.

For Cheryle Wills, her story details how she helped manage a large, family-owned funeral home and then entered the communication field through owning radio stations.¹⁵³ The story of Cheryle Wills is perhaps

Id. at 131 (emphasis in original).

¹⁴⁹ *Id.* at 382.

¹⁵⁰ *See id.* at 607.

¹⁵¹ At the time of the interview for Lawrence-Lightfoot's book, Bagwell was working on a film about Malcolm X. *See id.* at 511.

¹⁵² *Id.* at 607.

¹⁵³ *See id.* at 492.

most illuminating in capturing the benefits of entrepreneurial folk wisdom. Within her reflections are many lessons learned from other successful entrepreneurs.¹⁵⁴ In working in the funeral business, she learned that the social and cultural significance of funerals required attention to details and meeting the many needs of the family.¹⁵⁵ She states a high standard for doing business:

When we as blacks are in business, we must give *superior*, not inferior quality. It is very important that you get the best in death, even if you never had it in life Here everyone gets the same service regardless of what they pay People must be treated well, welcomed fully, and made to feel they are really somebody.¹⁵⁶

Moreover, she realizes that entrepreneurship has the power to transform a community, especially a minority community.¹⁵⁷ Lawrence-Lightfoot conveys this entrepreneurial lesson as follows:

Making money is critical for "building our community," and Cheryle believes that black people must be more sophisticated and ambitious in what goals we set for ourselves. "It is *not* about jobs. It is about owning and distributing resources. We must declare, '*It's our cake and we'll eat it.*'" But this requires strategy, initiative, and responsibility.¹⁵⁸

Such entrepreneurial philosophy can inspire and direct one who wishes to make a difference in his or her life and in the lives of others.

¹⁵⁴ See *id.* at 462-63.

¹⁵⁵ See *id.* In recounting one lesson she learned from her mentor, J. W. Wills, the founder of the House of Wills, Cheryle discusses the significance of funerals for black people:

He knew why funerals had to be elaborate events designed to fulfill ancient and unrealized expectations. "Folks would say, 'Put all of Mama's rings on, dress her up fancy, press her hair right, make her beautiful,'" Cheryle smiles. "These were *very* important things. . . . Finally Mama was getting what she deserved. . . ."

Id. at 454 (emphasis in original).

¹⁵⁶ *Id.* at 457 (emphasis in original).

¹⁵⁷ See *id.* at 451-61.

¹⁵⁸ *Id.* at 493 (emphasis in original).

C. *Entrepreneurship as Self-Definition*

If one were to ask a group of entrepreneurs to define themselves, they might answer with the Entrepreneur's Credo:

I do not choose to be a common man. It is my right to be uncommon—if I can. I seek opportunity—not security. I do not wish to be a kept citizen, humbled and dulled by having the state look after me.

I want to take the calculated risk, to dream and to build, to fail and to succeed.

I refuse to barter incentive for a dole: I prefer the challenges of life to the guaranteed existence; the thrill of fulfillment to the stale calm of Utopia.

I will not trade my freedom for beneficence nor my dignity for a handout. I will never cower before any master nor bend to any treat.

It is my heritage to stand erect, proud, and unafraid; to think and act for myself, to enjoy the benefit of my creations and to face the world boldly and say:

This, with God's help, I have done. All this is what it means to be an Entrepreneur.¹⁵⁹

This credo offers insight into the personality and characteristics of entrepreneurs—a prevalent methodology for defining the subject matter. Hornaday found that one scholar's study, "posits 11 entrepreneurial 'types' but points out that each of those could be further subdivided. His divisions include: solo self-employed individuals, team builders, independent pattern multipliers, economy-of-scale exploiters, capital

¹⁵⁹

OFFICIAL CREDO OF AMERICAN ENTREPRENEUR ASSOCIATION (1984), *reprinted in* ENTREPRENEUR, Dec. 1984, at 5.

aggregators, acquirers, buy-sell artists, conglomerators, speculators, and apparent value manipulators."¹⁶⁰

They are fiercely independent, abhor welfare and handouts and possess a value system grounded in the work ethic.¹⁶¹ They are self-confident and may even be egocentric.¹⁶² They are dreamers who pursue innovation.

Entrepreneurs innovate. Innovation is the specific instrument of entrepreneurship. It is the act that endows resources with a new capacity to create wealth. Innovation, indeed, creates a resource. There is no such thing as a "resource" until man finds a use for something in nature and thus endows it with economic value. Until then, every plant is a weed and every mineral just another rock.¹⁶³

New possibilities and opportunities exist in the mundane, the tragic and the ordinary.¹⁶⁴ Entrepreneurs take the initiative and are achievement oriented.¹⁶⁵ They are doers who choose not to sit on the sideline but

¹⁶⁰ Hornaday, *supra* note 128, at 26.

¹⁶¹ See GEORGE GILDER, *RECAPTURING THE SPIRIT OF ENTERPRISE* (1992).

¹⁶² In understanding the entrepreneurial client one has to keep in mind what motivates him or her, especially if the motivator is ego:

There's nothing as invigorating as the ego boost that comes from having others—some of them virtual strangers—sign on when your company is just a dream. What they are saying when they agree to serve as customers, suppliers, employees, or distributors is that they believe in you. They may never express that as unambiguously again.

Joshua Hyatt, *Mapping the Entrepreneurial Mind*, INC., Aug. 1991, at 26, 28-29.

¹⁶³ PETER F. DRUCKER, *INNOVATION AND ENTREPRENEURSHIP: PRACTICE AND PRINCIPLES* 30 (1985).

¹⁶⁴ See *id.* at 30-35.

¹⁶⁵ Robert H. Brockhaus, Sr., writing on *The Psychology of the Entrepreneur*, in *ENCYCLOPEDIA OF ENTREPRENEURSHIP*, focuses on the work of DAVID C. McCLELLAND, *THE ACHIEVING SOCIETY* (1961) and other scholarly work. See ROBERT H. BROCKHAUS, SR., *The Psychology of the Entrepreneur*, in *ENCYCLOPEDIA OF ENTREPRENEURSHIP*, *supra* note 127, at 41. Brockhaus synthesizes the McClelland concept of a need for achievement, or "n Ach" in shorthand, as follows:

[I]ndividuals with high n Ach as those preferring to be personally responsible for solving problems, for setting goals, and for reaching these goals by their own efforts. Such persons also have a strong desire to know how well they are accomplishing their tasks. On the basis of

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firmly believe that they have the power to control their own destiny.¹⁶⁶ In so doing, they accept the risk of failure and loss.¹⁶⁷ There is a great tolerance for ambiguity¹⁶⁸ and a willingness to proceed to an end that is visible only in the mind's eye.¹⁶⁹

Some scholars have suggested that there are major personality characteristics that entrepreneurs possess.¹⁷⁰ There are psychological traits that make a person driven to succeed and to advance an enterprise in the face of seemingly overwhelming odds and obstacles. These individuals can be said to have an entrepreneurial mindset capable of innovation and a "sixth" sense of what the market needs will be in the future.¹⁷¹ Some of these traits have been measured systematically with

these demonstrated characteristics, McClelland suggested that entrepreneurs should have high n Ach.

Id.

¹⁶⁶ Brockhaus reviews the literature on "locus-of-control" theory which considers whether an individual perceives the outcome of an event as being either within or beyond his personal control and understanding." *Id.* at 43.

¹⁶⁷ *Id.* at 45-49.

¹⁶⁸ See RONSTADT, *supra* note 134, at 103-04.

¹⁶⁹ See TOM J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES (1982). In this book, Peters and Waterman explore evolving management techniques of excellently run companies. They find that excellent companies understand that the world of business is full of ambiguity and paradox. See *id.* at 89-91. Instead of letting number-crunching managers determine the fate of the organization, an excellent company is driven by a "bias for action," *id.* at 119-55, and a willingness to pursue innovation even if some of the results do not pan out. See *id.* at 114. They find:

The organization acts, and then learns from what it has done. It experiments, it makes mistakes, it finds unanticipated success—and new strategic direction inexorably emerges. We strongly believe that the major reasons big companies stop innovating is their dependence on big factories, smooth production flow, integrated operations, big-bet technology planning, and rigid strategic direction setting. They forgot how to learn and they quit tolerating mistakes. The company forgets what made it successful in the first place, which was usually a culture that encouraged action, experiments, repeated tries.

Id.

¹⁷⁰ For an extensive discussion of personality theory in the entrepreneur context, see ELIZABETH CHELL ET AL., THE ENTREPRENEURIAL PERSONALITY: CONCEPTS, CASES AND CATEGORIES (1991).

¹⁷¹ See DRUCKER, *supra* note 163, at 135. Drucker indicates:

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sophisticated scholarly research. Other evidence of these traits are recanted in popular books and magazines.¹⁷²

Such individuals, while presenting exciting legal opportunities for lawyers, can also be a challenge to counsel. The very independence that propels them to entrepreneurial activity,¹⁷³ can also cause them to reject the wisdom of legal and financial advisors. As the business grows and its legal and managerial structures change, will they be able to run a maturing growth company, delegate authority and share profits with outside investors? It is therefore useful for the attorney to understand his or her client and to know what motivates him or her.

D. Entrepreneurship as Analytical Process

A more complex methodology for studying entrepreneurship is to consider it as an evolving process of innovation.¹⁷⁴ The process is based on the ability to creatively package and market a business concept using strategic planning, market research and innovative design of a product or

Innovation is both conceptual and perceptual. The second imperative of innovation is therefore to go out to look, to ask, to listen. This cannot be stressed too often. Successful innovators use both the right side and the left side of their brains. They look at figures, and they look at people. They work out analytically what the innovation has to be to satisfy an opportunity. And then they go out and look at the customers, the users, to see what their expectations, their values, their needs are.

Id.

¹⁷² There is a wealth of printed material on entrepreneurship including government printings, specialized periodicals, popular books, and specially directed newsletters. See, e.g., John A Hornaday, *Research About Living Entrepreneurs*, in *ENCYCLOPEDIA OF ENTREPRENEURSHIP*, *supra* note 128, at 20-22.

¹⁷³ See Manfred F.R. Kets de Vries, *The Dark Side of Entrepreneurship*, *HARV. BUS. REV.* Nov.-Dec. 1985, at 160. Kets de Vries examines how the need for control, a sense of distrust of other, and a constant desire for applause can lead to behavior that is destructive to the enterprise. He observes:

Along with their mystique, however, entrepreneurs can have personality quirks that make them hard people to work with. For example, their bias toward action, which makes them act rather thoughtlessly, sometimes can have dire consequences for the organization. Moreover, some entrepreneurs I have known have had great difficulty taking direction.

Id. at 161.

¹⁷⁴ See DRUCKER, *supra* note 163; see also SCHERER & PERLMAN, *supra* note 125.

service.¹⁷⁵ The success of an enterprise is dependent on developing or enhancing the value of a product or service needed by consumers in the marketplace.¹⁷⁶ The service or product may be so new as to create a need that heretofore did not exist.¹⁷⁷

What office can exist and survive without emerging computer technology to access the information highway?¹⁷⁸ So now we find that fax machines, pagers, cellular phones, notebook computers, internet addresses, and ever-expanding software libraries are indispensable parts of a contemporary business operation. All of these recent inventions create more opportunities for creative entrepreneurs and their attorneys.¹⁷⁹

The process of pursuing opportunities requires developing an analytical perspective focusing on the entrepreneur.¹⁸⁰ This perspective considers the characteristics of the entrepreneur, the manner in which entrepreneurial opportunity is pursued, and the environment that fosters entrepreneurship and small business development.¹⁸¹ The analytical approach focuses on the unique ways managerial functions and

¹⁷⁵ One study suggests that an understanding of the entrepreneurship process may give a small business a competitive advantage. See Marjorie A. Lyles et al., *Formalized Planning in Small Business: Increasing Strategic Choices*, 31 J. SMALL BUS. MGMT. 38 (1993). Their study found the following benefits of analytical, formal planning process: Although environmental scanning may be done adequately without reliance on a formal planning process, the elements of goal formulation, developing distinctive competencies, determining authority relationships, deploying resources, and monitoring implementation receive more effective attention when small businesses engage in formal planning. In addition, the small business owner develops a more complete knowledge of the strategic management issues facing the firm.
Id. at 48.

¹⁷⁶ See DRUCKER, *supra* note 174.

¹⁷⁷ See THOMAS J. PETERS & ROBERT H. WATERMAN, JR., *IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES* (1982). Peters and Waterman highlight many new innovations which were first created and then researchers found uses for the product. Along with several other innovative companies, Peters and Waterman hold up the Minnesota Mining and Manufacturing Company (3M) as an innovative leader in developing such products as scotch tape and post-its. See *id.* at 224-34.

¹⁷⁸ For a discussion of how the information age is transforming the workplace, see *The New Workplace*, BUS. WK. Apr. 29, 1996, at 107; Merlisa Lawrence Corbett, *Telecommuting: The New Workplace Trend*, BLACK ENT., June 1996, at 256.

¹⁷⁹ See Gretchen Cook, *Entering the World of Multi-Media Technology*, BLACK ENT., June 1996, at 262.

¹⁸⁰ See SCHÖLLHAMMER & KURILOFF, *supra* note 9, at 181.

¹⁸¹ See MEREDITH ET AL., *supra* note 145.

operational activities are carried out by the entrepreneur in a small firm.¹⁸² The perspective is a qualitative examination of what motivates the individual entrepreneur and how he or she manages his or her business. Further, the approach considers how the humanness or the personal qualities of the entrepreneur impact the environment within the company and determines how successful it operates.¹⁸³ The focus is on "the actual interpersonal relationships and interactions among a group of people pursuing common objectives."¹⁸⁴ The entrepreneurial owner is thus the catalyst for the dynamic process of small business activity.¹⁸⁵

Ronstadt, in his textbook on entrepreneurship, wrestles with the analytical perspective as reflected in the historical work of economists and other academics.¹⁸⁶ He draws on the insights of other theorists to capture

¹⁸² SCHÖLLHAMMER & KURILOFF, *supra* note 9, at 181. The authors state:

Although the scope and complexity of management problems and decision making may be different, the basic managerial functions and the operational activities are essentially the same in both small and large companies. In order to be effective and to accomplish the organizational objectives, small and large firms require planning, close attention to organizational considerations, systematic control, and technical competence in their business. However, in the small firm with its limited resources and financial constraints, these functions must be carried out differently than in a large firm.

Id.

¹⁸³ *See id.* at 212.

¹⁸⁴ *Id.* at 211.

¹⁸⁵ *Id.* at 181. ("This person's managerial skill, drive, ingenuity, resourcefulness, and dogged determination are a small firm's major source of strength. The entrepreneur plans, organizes, directs subordinates, controls their performance, and is not afraid to pitch in personally whenever an operational task requires added effort.")

¹⁸⁶ RONSTADT, *supra* note 134, at 5. Ronstadt recognizes that the subject of entrepreneurship is complex:

The reason it is complex is that we are dealing with imperfect knowledge and the knowledge we possess about entrepreneurial pursuits is based on a variety of different interpretations of the concept. Several critical distinctions have been made over the last two hundred years and people are still finding new ways to interpret and define entrepreneurship, as well as who is an entrepreneur. I should emphasize that understanding these different definitions is not simply a semantic or academic exercise. From a practical standpoint, one should know at least what others mean when discussing the concept, given the variety of possible meanings and their potential impact on your own entrepreneurial pursuits.

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a broader view of entrepreneurship. The model he develops is based on economic assumptions about wealth creation. It is further designed to promote a mindset or entrepreneurial perspective founded on multiple factors, some measurable and some intuitive.

Again, the analytical perspective focuses on the process of entrepreneurship. He summarizes that there are three broad approaches presented in the historical literature and presents a model that further develops the concept:

Over the last two centuries, serious inquiries into the nature of entrepreneurship have focused on either [1] the functions of the entrepreneur, [2] the traits or behavioral characteristics that differentiated entrepreneurs from the rest of mankind, or [3] the environmental conditions that caused entrepreneurs to flower or wither on the vine. Only recently have investigations started to examine the *process of entrepreneurship as a way to distinguish between entrepreneurs*.¹⁸⁷

To explore the idea of entrepreneurial process, Ronstadt builds on these three approaches of studying the subject.

One, functions of the entrepreneur can be identified by the types of ventures entrepreneurs form and how those ventures are useful in achieving the business endeavor or are unsuccessful in the endeavor.¹⁸⁸ Two, the traits or characteristics of an entrepreneur provide an approach to the subject based on who the individual entrepreneur is, not only today, but also the personality characteristics that individual has established over time constructed from a variety of life experiences.¹⁸⁹ Accumulated self-knowledge and experience can identify known talents and personality

Id.

¹⁸⁷ *Id.* at 6 (emphasis in original).

¹⁸⁸ Ronstadt suggests that by studying ventures we can see how an entrepreneur starts up a business and how that business looks if it fails. *See id.* at 39-40. Further learning can be acquired by studying the entrepreneur's efforts over a long period of time:

"This orientation reflects partly what an entrepreneurial perspective is all about: selecting the right kind of venture opportunities, at the right time and place, to build the kind of career as an entrepreneur that is right for you . . . Knowledge about initiating, maintaining, and discontinuing a venture is valuable indeed . . ."

Id. at 40.

¹⁸⁹ *See id.* at 40-41.

traits and suggests new ones that can be acquired or developed.¹⁹⁰ The third approach comes from an assessment of the economic, political and social environment within which an entrepreneur seeks to pursue a business venture. The focus of this approach is whether the present time or place is the opportune time or place for a particular entrepreneur.¹⁹¹ The entrepreneurship process can therefore best be studied by "weav[ing] together or integrat[ing] human and venture factors with environmental conditions."¹⁹² It is in the combining of these methodologies that we can obtain a more comprehensive understanding of the entrepreneurial Heffalump.

Ronstadt's study of entrepreneurship process is further grounded on three core assumptions which inform his model. First, Ronstadt's definition of entrepreneurship is based on the classical economic belief in the economic creation of wealth.¹⁹³ He states:

Entrepreneurship is the dynamic process of creating incremental wealth. This wealth is created by individuals who assume the major risks in terms of equity, time, and/or career commitment of providing value for some product or service. The product or service itself may or may not be new or unique but value must somehow be infused by the entrepreneur by securing and allocating the necessary skills and resources.¹⁹⁴

This definition, centered on wealth creation, is reflective of those discussed earlier.¹⁹⁵

¹⁹⁰ Ronstadt suggests that personality studies of entrepreneurs provide only a snapshot of that individual taken at the time of the study. *See id.* He proposes that the better method would be to look at the individual over a longer period of time and at different stages of life and to ask the following questions:

What traits, characteristics, and values can I influence over time? Which do I wish to influence? How much time and effort will it take to produce a desired change? And for what purpose? In other words, now or at any moment in time, do my traits, characteristics, and values relate well to a particular venture, in a particular environment?

Id.

¹⁹¹ *Id.* at 41.

¹⁹² *Id.*

¹⁹³ *Id.* at 27-28.

¹⁹⁴ *Id.* at 28.

¹⁹⁵ *See* discussion *supra* accompanying notes 127.

The second core assumption is reflected in the definition's focus on entrepreneurship as a dynamic process:

It is a view that sees entrepreneurship occurring often over substantial periods of time, a process that involves thought as well as action, a process that is influenced most often by a complex web of events rather than a single lucky event, a process that involves more than the start-up phase of a venture, a process that involves very possibly more than one venture, a process that may involve more than one entrepreneur, and a process in which the role of the entrepreneur is constantly changing.¹⁹⁶

By describing entrepreneurship as dynamic, one comes to examine the subject from a multi-dimensional perspective. The process is viewed over time and impacted by a wide range of factors.¹⁹⁷

The third assumption recognizes that the individual comes to the decision to enter entrepreneurial activity as a career decision.¹⁹⁸ This individual agrees with the sentiments of the Entrepreneurs Credo discussed earlier.¹⁹⁹ The entrepreneur seeks to control his or her destiny, to the extent possible, and to pursue the dreams and values that are important in his or her life.²⁰⁰

¹⁹⁶ *Id.* at 38.

¹⁹⁷ For example, with more women in the workplace, the traditional housewife who prepared the family meal everyday is now a rarity with an increase in female-headed households and dual career couples. To feed families on the run, we now see an explosion of fast food restaurants serving an important need.

¹⁹⁸ Ronstadt recognizes that various scholars have studied the notion of entrepreneurship as a career, roughly organized under the same three methodological perspectives described earlier—human, venture and environment. *Id.* at 47-61. The literature in the field leads to the following observation:

Certainly one does not usually think of entrepreneurship as a career. Yet if one envisions a career as a series of related positions, projects, or functions, then entrepreneurship is a career comprised of one or a series of ventures, in one or a series of environments, involving one or more entrepreneurs. How to evaluate the many combinations is part of the art of entrepreneuring.

Id. at 62.

¹⁹⁹ See discussion *supra* accompanying notes 159-60.

²⁰⁰ For an excellent discussion on how some in the African-American community are promoting self-determination by the economic empowerment of entrepreneurship, see

(continued)

E. Summary

My favorite definition of entrepreneurship is this: "Entrepreneurship is the process of creating value by pulling together a unique package of resources to exploit an opportunity."²⁰¹

This statement considers process, creating value, and recognizing opportunity. The entrepreneur sees the world from a unique prospective and visualizes the possible when no one else can; the essence of an entrepreneurial perspective.

The methodology proposed by Ronstadt is one by which we can obtain an entrepreneurial perspective based on a dynamic analysis of multi-modal, interwoven factors. The entrepreneurial process is illuminated by an active assessment of the wealth creating opportunity in terms of the particular venture, the individual entrepreneur and the environment in which the endeavor is presented. The assessment is furthered by a qualitative, quantitative, strategic, and ethical evaluation of information and circumstances observed by the entrepreneur and his or her advisors.

The lawyer in this context takes up the challenge made by Ronald Gilson in his seminal work on value creation by business lawyers.²⁰² Gilson presents an analysis of the impact lawyers have on business transactions and posits: "If what a business lawyer does has value, a transaction must be worth more, net of legal fees, as a result of the lawyer's participation."²⁰³

From this he constructs an economic model which calls for attorneys to be "transaction cost engineers."²⁰⁴ They add value to the client's

generally GEORGE FRASER, *SUCCESS RUNS IN OUR RACE: THE COMPLETE GUIDE TO EFFECTIVE NETWORKING IN THE AFRICAN-AMERICAN COMMUNITY* (1994).

²⁰¹ STEVENSON ET. AL., *supra* note 120, at 16.

²⁰² Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239 (1984).

²⁰³ *Id.* at 243 (emphasis in original).

²⁰⁴ Gilson constructs a model which takes the legal skills of the lawyer and the goal to increase the value of the transaction and places them in the context of economic world where perfect knowledge about pricing and assumptions do not always intend:

My hypothesis about what business lawyers *really* do—their potential to create value—is simply this: Lawyers function as *transaction cost* engineers, devising efficient mechanisms which bridge the gap between capital asset pricing theory's hypothetical world of perfect markets and less-than-perfect reality of effecting transactions in this world. Value is created when the transactional structure designed by the business lawyer allows the parties to act, *for that transaction*, as if the

(continued)

transaction by reducing the cost of market uncertainties by explicating and making useful the information supporting the transaction, for instance, drafting a legal opinion on the transaction.²⁰⁵

If the lawyer for the entrepreneur understands that his or her client's main objective is to create value, then the lawyer must be aware of the entrepreneurial process and the entrepreneurial personality of the client.²⁰⁶ It is then that the two can creatively work together to maximize the opportunity and minimize the risk of the venture.²⁰⁷

Consequently, it should be clear that the marriage of law and entrepreneurship has great significance for legal education. As Gilson suggests, business law education should go beyond theory and practice to focus on "helping people arrange their relationships in the absence of

assumptions on which capital asset pricing theory is based were accurate.

Id. at 255 (emphasis added).

²⁰⁵

Id. at 293-94.

²⁰⁶

This is the task taken up by Lisa Bernstein in her interdisciplinary account of the many roles lawyers have in representing clients in the Silicon Valley of California. Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Cost Engineer?*, 74 OR. L. REV. 239 (1995). She states her research agenda as follows:

In order to understand how Silicon Valley lawyers might create value, it is useful to explore how, in the many legal and nonlegal roles they play, lawyers' activities might bring the real-world of a given transaction closer to the hypothetical-world of the capital asset pricing model. It is also interesting to take a step back and consider whether some of the less transaction specific roles played by lawyers might be understood as "private innovations that improve market performance."

Id. at 245.

²⁰⁷

Knowledge of entrepreneurship principles helps the lawyer be a key advisor on the entrepreneur's team of advisors, as one source suggests:

There are specific recommendations that from time to time you should seek assistance and advice from external professionals. These professionals may belong to professional bodies, such as accountants, lawyers, consultants, systems analysts and bankers; or the term "professionals" may be taken in a broader context and include fellow entrepreneurs, industry leaders, government officials; in fact, any individual or group capable of contributing to your business growth and development.

government intervention; facilitating *private ordering*.²⁰⁸ Necessarily a broader role for the entrepreneurial lawyer is recognized.²⁰⁹

Further, to fully understand this approach, legal scholars can find opportunities to further the work of theoreticians like Gilson.²¹⁰ More models are needed to study how lawyers add value to the entrepreneurial process.²¹¹

III. SMALL BUSINESS IS LARGE—ENTREPRENEUR AS TELEOLOGIC AGENT

A. *Entrepreneurship and the Law as Twin Agents of Change*

The dominant theme in the pursuit of a theory of law and entrepreneurship is that entrepreneurship is important to our changing society, and law (and lawyers) can be facilitative in promoting entrepreneurship. It is axiomatic that we are a nation of laws living under the rule of law. Law is the bulwark of our commercial and personal relationships. Correspondingly, we are also an ever-evolving nation within which entrepreneurs play an important function in our economy. One source noted this as follows:

Entrepreneurship is critical. Change must be seen as desirable if we are to respond to the new economic and technological environment. Organizing to pursue opportunity is the theme of the decade for the individual

²⁰⁸ *Id.* at 303 (emphasis in original).

²⁰⁹ One possible role is suggested by a Karl S. Okamoto work describing how the business transaction lawyer is a reputational intermediary. See Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15 (1995). He builds on Gilson's value creation work, see Gilson, *supra* note 202, to examine how lawyers add value and to explain why society pays lawyers for this service:

These reputational intermediaries will lease their reputation to the client by offering various forms of third-party verification to the other party to the transaction. By joining in the client's assurances, these intermediaries stake their reputation on behalf of the client. The client in turn pays for this service in the form of premium billing rates or commissions charged by the higher reputation firms.

Id. at 23.

²¹⁰ See Symposium: *Business Lawyering and Value Creation For Clients*, 74 OR. L. REV. 1 (1995).

²¹¹ See Richard W. Painter, *Afterward: Contractarian and Cultural Perspectives on Value Creation By Business Lawyers*, 74 OR. L. REV. 327, 335-36 (1995).

and for our best organizations. Entrepreneurship is more than a word, it is a *mission*.²¹²

If change is inevitable in any social or economic system, then the entrepreneur is the principle agent of change.²¹³ This section considers the question of how entrepreneurs and entrepreneurial processes can be teleologic agents; or more concrete, vitally contribute to and facilitate the normal functioning of the economic and social systems of our nation. For the purposes of this discussion, I am using the concept of teleology as follows:

Teleological explanations attempt to account for things and features by appeal to their contributions to optimal states, or the normal functioning, or the attainment of goals, of wholes or systems they belong to.

....

Teleological explanations which do not presuppose that what is to be explained is the work of an intelligent agent are to be found in biology, economics and elsewhere. Their justification typically involves two components: an analysis of the function of the item to be explained and an aetiological account.

²¹² Howard H. Stevenson & William A. Sahlman, *Importance of Entrepreneurship in Economic Development*, in *ENTREPRENEURSHIP, INTRAPRENEURSHIP, AND VENTURE CAPITAL: THE FOUNDATION OF ECONOMIC RENAISSANCE*, 3, 25 (Robert D. Hisrich ed. 1986) (emphasis added).

²¹³ In developing a theory about entrepreneurs as agents of change in the public sector, one set of authors make the following general statement:

Political and economic systems are continually changing. Most social science theories view change as occurring in incremental or evolutionary fashion, and these theories usually model adaptations as responses to environmental forces But of even greater interest to us is a basic fact evident to many complex social systems: radical change is often produced by actors within these systems and strong forces for change are released as these actors perceive opportunities and create the incentives and forces to challenge existing political, social, and economic conditions.

Functional analysis seeks to determine what contribution the item to be explained makes to some main activity, to the proper functioning, or to the well-being or preservation, of the organism, object, or system it belongs to.

....

Functional analysis cannot explain a feature's presence without an aetiological account that explains how the feature came to be where we find it.²¹⁴

A functional analysis of entrepreneurship is largely grounded in economic analyses focusing on change in the system. From an economic perspective one considers what precipitates entrepreneurial activity and what motivates the entrepreneur. To further understand the entrepreneur as agent of change, one can explain how the entrepreneur comes to be found in small business concerns. This aetiological account can be presented by recognizing that "[t]he individual entrepreneur is a person who perceives opportunity, finds the pursuit of opportunity desirable in the context of his or her life situation, and believes that success is possible."²¹⁵ Further, the entrepreneur comes to be located in the small business enterprise because our system of law (primarily the law of business arrangements and contracts) provides the appropriate medium or modus for exercising the change function.

The next section will describe the entrepreneur using economic theory which addresses the question of who is an entrepreneur and what motivates the entrepreneur to function as an agent of change. Following that discussion we will place the entrepreneur in the context of public policy and how the law works to encourage entrepreneurial activity.

B. Economic Modeling of Entrepreneurial Activity

The primary literature seeking to define entrepreneurship is heavily grounded in economic theory.²¹⁶ Scholars have historically sought to explain entrepreneurial activity by constructing economic models which

²¹⁴ THE OXFORD COMPANION TO PHILOSOPHY 868 (Ted Honderich ed. 1995).

²¹⁵ Stevenson & Sahlman, *supra* note 212, at 24.

²¹⁶ For an extensive treatment of the history of economic theory on entrepreneurship, see ROBERT F. HERBERT & ALBERT N. LINK, *THE ENTREPRENEUR: MAINSTREAM VIEWS AND RADICAL CRITIQUES* (1982).

explain the genesis of such activity and the importance of such pursuits.²¹⁷ As Kilby suggests, no one theorist has captured the elusive prey called entrepreneur in concrete terms.²¹⁸ We have, however, attained a more comprehensive understanding of what entrepreneurial activity consists, and how such activity contributes to the functioning of society.

The work of Carl Kaiser builds an econometric model grounded on the historical work of other economists. He measures the economic and non-economic factors which determine entry into entrepreneurial activity. In his work, Kaiser identifies three different strands of thought drawn from entrepreneur scholarship: 1) entrepreneurship as a function of risk taking in a market economy; 2) entrepreneurship as a function of innovative change in the production of goods and services; and 3) entrepreneurship as a response to market changes or disequilibria.²¹⁹

Kaiser's work on entrepreneurship further conceptualizes entrepreneurial theory in terms of the personal, psychic and non-pecuniary rewards motivating the entrepreneur.²²⁰ He considers the individual's personal need for achievement, desire to take control of their own destiny, and ability to bear and manage risk.²²¹ Kaiser posits that an entrepreneur possesses human and financial capital resources that he or she is willing to expend on entrepreneurial activity even at the *risk* of losing those resources, if there is a perceived, sufficient rate of return on the chosen activity.²²²

²¹⁷ For a good discussion of this literature, see *ENCYCLOPEDIA OF ENTREPRENEURSHIP*, *supra* note 127, at 231-76.

²¹⁸ *See supra* note 119.

²¹⁹ Carl P. Kaiser, *Entrepreneurship and Resource Allocation*, *E. ECON. J.*, Volume XVI, No. 1, Jan.-Mar. 1990, at 9.

²²⁰ *See id.*

²²¹ *See id.* at 11.

²²² Kaiser further finds:

Rather than avoid it, when faced with moderate levels of risk, entrepreneurs will seek to increase their understanding of the environment to minimize and manage risk. Typical entrepreneurs tend to have much confidence in their ability to gather and assimilate relevant information, identify new opportunities, assess and manage risk, and indeed, to have strong impacts on the outcomes of the ventures they undertake. Thus, to date, research on the psychological and behavioral characteristics of successful entrepreneurs suggests that they have great confidence in their ability to determine their own fate, and they are willing to accept risk in their urgent quest for novelty and independence.

(continued)

Using these economic and non-economic factors, Kaiser constructs a useful economic model to measure when an individual will allocate financial and personal resources to an economic or business activity:

It assumes that prospective entrepreneurs will differ with respect to how much risk they are willing to bear, and with respect to how much utility they receive from undertaking "their own" projects. Accordingly, the rate or return required by an individual to undertake a given venture is determined by the individual's opportunity rate of return, the degree to which the individual prefers risk, and the degree to which the individual receives utility from the act of creating a new enterprise and exercising complete and absolute control over the venture. The analysis implies a supply of entrepreneurial expenditures function that when coupled with a concept of society's demand for entrepreneurial expenditures—as perceived by prospective entrepreneurs—yields a market model of the entrepreneurial process.²²³

Simply, an individual will supply entrepreneurial expenditures (time, energy and money) in response to a demand (opportunity) in the market, based on the capacity to handle risk of loss for the chance of gain, both financial and personal.

For lawyers, this is a useful tool for helping a client assess a business opportunity. In the counseling process we can ask questions about market potential, or as Stevenson and Gumpert would put it, find out where the opportunities are located.²²⁴ We can assess the client's ability to undertake the endeavor and successfully manage the risks involved.²²⁵ Our legal expertise can help identify legal risk, which might shape how the enterprise is structured.²²⁶ By understanding the client's preference for risk, we can see what resources he is willing to allocate to the endeavor and what resources must be obtained from other sources. Identifying

Id.

²²³ *Id.* at 10.

²²⁴ See *supra* note 91. One of my students did an analysis of NAFTA to see how that treaty may have created new opportunities for prepared small businesses.

²²⁵ See MEREDITH ET AL., *supra* note 145, at 25-36.

²²⁶ One student paper considered the legal and practical difficulties of importing brass from the region of India. Aggarwal.

outside resources or investors or co-venturers will provide needed insight on the appropriate capital structure.²²⁷

The challenge for our society is to ensure the growth and development of small businesses. This was, in part, the reason for holding a White House Conference on Small Businesses. As one expert notes:

The United States has gone through waves of change and will face even more challenging change in the decades ahead. It is important that society in general be aware of the importance of change and innovation and their effects upon all aspects of life, both intended and unintended.

The important public policy issues center on the extent to which we as a nation will take steps to ensure that small businesses not only survive, but flourish. We should try to help small businesses of all types be more entrepreneurial and realize their potential to the greatest degree possible.²²⁸

The next section turns to this vital discussion.

C. *Law and Public Policy as Facilitators of Entrepreneurship*

The political realities of our nation necessitated a legislative decision to support small business as a vital segment of a productive society and economy.²²⁹ This suggests an approach to describing small business and

²²⁷ As suggested earlier, franchising may be a method of entering business and controlling risk by working with other entrepreneurs. One trend is in franchises which offer business services to small businesses:

Just as important is the growing desire of many Americans to become entrepreneurs. Business service franchises often offer the chance to do that without much money. For example, it costs \$17,500 to purchase a franchise from Mailboxes Etc. USA, originally established to rent mailboxes to small businesses. The firm, which began franchising in 1980, now has 470 franchises and offers secretarial services as well as telephone answering, copying, printing, post office boxes and business supplies.

Bob Gatty, *Franchising: Business Services*, NATION'S BUS., Mar. 1987, at 38.

²²⁸ BROPHY, *supra* note 6, at 27-28.

²²⁹ Part of the political and economic reality in our nation's history was the fear of monopoly and anti-competitive business practices, as suggested in a history on small business legislation written by Parren Mitchell:

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its important function in our society from a policy perspective.²³⁰ As noted earlier, the Small Business Administration (SBA) has a process by which a small business is determined by its size—focusing on, among other factors, its affiliation with other businesses, annual receipts, and number of employees.²³¹ The process was created as a way to determine who is eligible for governmental small business programs.

That Congress is aware of the importance of small business is reflected in the creation of the SBA by the Small Business Act of 1953.²³² Moreover, the declared policy of the Congress recognizes the vital role small business plays in our national economy:

The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed.²³³

The policy perspective is based on the notion that the government enacts programs and benefits that promote small businesses. To efficiently administer such programs and benefits, a bright line definition

The early 1940's were wrought with complaints and allegations flooding into Washington that small business was being subjected to discrimination, that defense contracts were being given almost exclusively to the larger corporations, and that certain sections of the country were receiving a disproportionate share of defense work while other sections were neglected. Members of Congress feared that, unless steps were taken to include the small businessman in the defense production program, the United States might be weakened on the home front in numerous ways. Not only was it thought that vast aggregate productive power of small units might be lost, but also that if the country failed to keep many thousands of small businessmen functioning, the economy of the Nation would be harmed.

Parren J. Mitchell, *Federal Affirmative Action for MBE's: An Historical Analysis*, 1 NAT'L BAR ASS'N MAG., Summer 1983, at 46.

²³⁰ See *supra* note 6.

²³¹ See 15 U.S.C.A. § 632 (West 1997).

²³² 15 U.S.C. §§ 631. Small Business Act of 1953, Pub. L. No. 83-163, Title II, 67 Stat. 232 (current version codified at 15 U.S.C. §§ 631 to 647 (1994)).

²³³ 15 U.S.C.A. § 631(a).

of small business is imperative.²³⁴ A quantitative measure of small business is therefore appropriate. The quantitative approach is theoretically based on a descriptive analysis of business sizes. Congress has decreed that "a small-business concern . . . shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation"²³⁵ It is the responsibility of the SBA Administrator to "specify detailed definitions or standards (by number of employees or dollar volume of business) by which a business concern is to be recognized as a small business concern"²³⁶ These definitional standards vary from industry to industry²³⁷ and are published in the Federal Register.²³⁸

The SBA is given broad discretion to determine what constitutes a small business concern.²³⁹ The SBA utilizes the Standard Industrial

²³⁴ To implement statutory policy, Congress established the Small Business Administration (SBA) in 1953 and gave it the responsibility to administer a range of programs designed to achieve specified economic goals. Generally, eligibility for assistance under SBA programs requires a firm be *small*. See 13 C.F.R. § 121.201. In addition, other Federal agencies may implement programs for which a *small* size is an eligibility criterion. See 13 C.F.R. § 121.902(b). Both the actual setting of size standards (i.e., the size specification of *small*) and the determination of which concerns fall within these standards and accordingly qualify as *small* are powers authorized to the Administrator of the SBA. See, e.g., 13 C.F.R. § 121.201 (setting forth size standards for industries under the Standard Industrial Classification system).

²³⁵ 15 U.S.C.A. § 632(a)(1).

²³⁶ 15 U.S.C.A. § 632(a)(2)(A).

²³⁷ 15 U.S.C.A. § 632(a)(3).

²³⁸ See Pub.L. No. 102-366 § 222(b), 106 Stat. 999 (1992); see also 13 C.F.R. § 121.101.

²³⁹ 15 U.S.C.A. § 634(b)(6). The SBA has broad discretion in managing the various programs committed to its authority. For example, in *SGA Financial Corporation v. United States Small Business Administration*, a case where the District Court considered whether to review the reasonableness of fees the SBA charged in a loan program, the court noted:

Thus, the legislative scheme clearly contemplates a broad exercise of discretionary power by SBA. The granting of broad discretionary power to an administrative agency is not a *per se* commitment of the area to agency discretion so as to preclude judicial review. Such a result would render the traditional standard of review, abuse of discretion, a nullity. The existence of such a scheme, however, often suggests that the challenged decision is the product of political, military, economic or managerial choices that are not really susceptible to judicial review.

(continued)

Classification Manual as prepared by the Office of Management and Budget to establish size criterion.²⁴⁰

For example, to be considered a small business concern in the area of agriculture, a producer of eggs may not have more than nine million dollars in annual receipts.²⁴¹ A beef cattle feedlot may not have more than one million dollars in annual receipts.²⁴² In the area of construction, a general contractor who builds single-family homes may have a maximum of seventeen million dollars in annual receipts,²⁴³ while most special trade contractors, such as plumbers, painters and electricians, may have a maximum of seven million dollars in annual receipts.²⁴⁴ Manufacturing concerns are measured for smallness by the number of employees. Makers of cereal breakfast foods can have a maximum of 1000 employees, while chewing gum manufacturers, dog and cat food producers, and bread bakers are limited to 500 employees.²⁴⁵

A procedure is available for a small business to self-certify its smallness if appropriate size standards are not available for that type of business.²⁴⁶ In that case, the Government Contracting Area Director or designee makes a formal size determination.²⁴⁷ If the SBA determines that a concern is other than small for a particular size standard, the concern is "ineligible for any procurement or assistance authorized by the Small Business Act of 1958, requiring the same or lower size standard, unless re-certified as small."²⁴⁸

The statutory definition focuses on ownership, control and dominance in the field.²⁴⁹ Ownership is determined by examining the applicant

SGA Fin. Corp. v. United States Small Bus. Admin., 509 F. Supp. 392, 397 (D.N.J. 1981) (quoting Local 2855, AFGE v. United States, 602 F.2d 574, 579 (3d Cir. 1979) (additional citations & quotation marks omitted).

²⁴⁰

See 13 C.F.R. § 121.101.

²⁴¹ *See* 13 C.F.R. 121.201 (setting forth a table listing size standards by SIC industry).

²⁴²

See id.

²⁴³

See id.

²⁴⁴

See id.

²⁴⁵

See id.

²⁴⁶

See 13 C.F.R. § 121.405.

²⁴⁷

See C.F.R. § 121.1002.

²⁴⁸

13 C.F.R. § 121.1009(g). A concern may receive re-certification upon applying with the Government Contracting Area Office. *See* 13 C.F.R. § 121.1010(a). However, "[t]here is no right of appeal of a size determination" apart from discretionary review of formal size determinations by the SBA Office of Hearings and Appeals in certain circumstances. *See* C.F.R. § 1011.

²⁴⁹

See 15 U.S.C.A. § 632(a)(1).

concern and any persons or business concerns affiliated with that applicant concern.²⁵⁰ The process determines who has an interest or stake in the business, and thus is more reflective of the concern's true size. Such an ownership interest, whether by an individual person or another business entity, is deemed to be an affiliate of a particular concern. Affiliates are defined as follows:

- (1) Concerns are affiliates of each other when either one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both.
- (2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, or contractual relationships in determining whether affiliation exists.
- (3) Individuals or firms that have identical or substantially identical business or economic interests, such as family members, persons with common investments, or firms that are economically dependent through contractual or other relationships may be treated as one party with such interests aggregated.
- (4) SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size.²⁵¹

Affiliation can arise through stock ownership,²⁵² under stock options, convertible debentures, and agreements to merger;²⁵³ through common management;²⁵⁴ under joint venture arrangements;²⁵⁵ and under franchise and license agreements.²⁵⁶

²⁵⁰ See generally 13 C.F.R. § 121.103 (setting forth a framework for assessing affiliation, ownership, and control).

²⁵¹ 13 C.F.R. § 121.103(a).

²⁵² 13 C.F.R. 121.103(c).

²⁵³ 13 C.F.R. 121.103(d).

²⁵⁴ 13 C.F.R. 121.103(e).

²⁵⁵ 13 C.F.R. § 121.103(f).

²⁵⁶ 13 C.F.R. § 121.103(g); see also *Dani Enter. v. United States Small Bus. Admin.*, 757 F. Supp. 99 (D.D.C. 1991).

Size is further determined by amount of annual receipts a concern and its affiliates receive during a given year²⁵⁷ and the number of employees it has.²⁵⁸ And finally, a determination of size is made by considering whether or not a concern is dominant in its field of operation.²⁵⁹

It should be noted that the statutory provisions of the Small Business Act are not the only place where one will find legislative provisions for small businesses. The U.S. Tax Code has specific provisions for small businesses.²⁶⁰ Security regulations promulgated by the Securities Exchange Commission exempt certain small businesses from securities registration requirements and create special exchange markets for small business public offerings.²⁶¹ Pension plan regulations also make special

²⁵⁷ See 13 C.F.R. §§ 121.104, 201; see also *Texas-Capital Contractors, Inc. v. Abdnor*, 933 F.2d 261 (5th Cir. 1990).

²⁵⁸ 13 C.F.R. § 121.201. For a discussion of the SBA's calculation of the number of employees, see 13 C.F.R. § 121.106.

²⁵⁹ See 48 C.F.R. § 19.001 (1996), stating:

A concern is *not dominant in its field of operation* when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining whether dominance exists, consideration shall be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity.

Id. (emphasis in original).

²⁶⁰ Corporations whose yearly taxable income exceeds \$50,000 but does not exceed \$10,000,000 receive a lower aggregate tax rate. I.R.C. § 11(b)(1)(A)-(C) (1997). Small business corporations can treat losses on "section 1244 stock" (which would but for this section be treated as a loss from the sale or exchange of a capital asset) as an ordinary loss for small businesses. I.R.C. § 1244(a). A corporation qualifies as a "small business corporation" if the aggregate amount of money and other property it receives for stock does not exceed one million dollars. See I.R.C. § 1244(c)(3)(A).

²⁶¹ An offeree not exceeding \$5,000,000 in net worth is exempted from section 5 of the Securities Act of 1933 which requires that all securities before being offered for sale must be registered with SEC by filing and having approved a registration statement. See 15 U.S.C.A. § 77d(2) (West 1997) (exempting public offerings). Section 4(6) of the Securities Act of 1933 provides yet another exemption for the small business owner to incorporate his business by keeping the business a closed corporation. Section 4(6) exempts, from the provisions of section 5, transactions . . . solely to one or more accredited investors, if the offering price of the issue . . . does not exceed the amount allowed under section 77c(b) [\$5,000,000]. See 15 U.S.C.S. § 77d(6).

provisions for small business.²⁶² All of these regulatory schemes define "small business" in different manners. A fuller discussion is beyond the scope of this article.

The primary function of the SBA is to promote the general interests of the small business community.²⁶³ The SBA should also encourage the development of small businesses located in areas of low income or high unemployment,²⁶⁴ as well as small businesses owned and operated by groups or individuals who have been socially discriminated against or economically disadvantaged.²⁶⁵

Therefore, an effort is made by our federal government "to insure that a fair proportion of the total purchases and contracts or subcontracts for

²⁶² Employers maintaining a SEP (simplified employee pension) who have twenty-five or fewer employees can utilize a special cash or deferred arrangement available to SEPs. See I.R.C. § 408(k)(6) (1995). Employers with 100 or more participants in their qualified retirement plans can use Form 5500, which is the combined IRS, Department of Labor and PBGC annual report. See MICHAEL J. CANAN, *QUALIFIED RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS* (1994).

²⁶³ The policies of Congress are further expressed in the Small Business Economic Policy Act of 1980:

For the purpose of preserving and promoting a competitive free enterprise economic system, Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practical means and to take such actions as are necessary, consistent with its needs and obligations and other essential considerations of national policy, to implement and coordinate all federal department, agency, and instrumentality policies, programs, and activities in order to: foster the economic interests of small businesses; insure a competitive climate conducive to the development, growth and expansion of small businesses; establish incentives to assure that adequate capital and other resources at competitive prices are available to small businesses; reduce the concentration of economic resources and expand competition; and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small businesses.

Small Business Economic Policy Act of 1980, Pub. L. No. 96-302, § 302(a), 94 Stat. 833, 848.

²⁶⁴ See 15 U.S.C.A. § 631(d)(1).

²⁶⁵ See 15 U.S.C.A. § 631(f) & (h). Several of the SBA programs are directed towards socially disadvantaged groups such as "black Americans, Hispanic Americans, Native Americans, Indian Tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities." 15 U.S.C.A. § 631(f)(i)(C). These programs also assist women entrepreneurs who, "as a group, are subjected to discrimination in entrepreneurial endeavors due to their gender." 15 U.S.C.A. § 631(h)(1)(C).

property and services for the Government . . . be placed with small business enterprises. . . .²⁶⁶ Also the government should help small business compete in international markets,²⁶⁷ assist small business concerns which participate in agriculture,²⁶⁸ and help those small businesses which are "victims of floods and other catastrophes and small-business concerns which are displaced as a result of federally aided construction programs."²⁶⁹

The pay-off for our nation is that these small businesses will create jobs and significantly contribute to our national economy. The study of small business job creation began in the late 1970's with the work of David L. Birch. Birch then a researcher at MIT, decided to study job creation by analyzing Dun & Bradstreet Corporation's data files on individual firms that applied for credit. At the time, it was a radical departure from conventional economic research, which relied on aggregate government data that did not allow for historical analysis of individual firms.²⁷⁰ Birch reported in 1979 that eight out of ten jobs added to the American economy were created by firms with fewer than 100 employees.²⁷¹ Birch incorporated this report into his book, which also showed that more than eighty percent of the jobs in the United States are created by enterprises with fewer than five hundred employees.²⁷²

In his more recent work, Birch asserts that it is "dysfunctional" to debate small versus large.²⁷³ In fact, the small firm share of job creation varies depending on what years are measured. During robust times, large firms account for a larger share of new jobs. In times of economic downturn, big businesses lay off workers, so their share of job creation shrinks. As a group, Birch notes that large businesses are more sensitive to economic ups and downs than smaller businesses.

Birch in recent years has defined small businesses as heterogeneous. He sketches out an economy with three breeds of companies, "elephants", which are big, publicly owned corporations; "mice", the firms that start

²⁶⁶ 15 U.S.C.A. § 631(a).

²⁶⁷ See 15 U.S.C.A. § 631(b)(1).

²⁶⁸ See 15 U.S.C.A. § 631(c).

²⁶⁹ See 15 U.S.C.A. § 631(e).

²⁷⁰ Maria Shao, *A Question of Size Economists Poke Holes in Notion that Little Companies are Big Engines of Job Growth*. BOSTON GLOBE June 25, 1995, at 55.

²⁷¹ DAVID L. BIRCH, *THE JOB GENERATION PROCESS: MIT PROGRAM ON NEIGHBORHOOD AND REGIONAL CHANGE* 29-30 (1979).

²⁷² DAVID L. BIRCH, *JOB CREATION IN AMERICA* 1987.

²⁷³ See *id.*

and stay puny; and "gazelles", firms that start small but grow quickly, often through innovations in marketing, products, or technology. It is the "gazelles" that Birch attributes the most job creations to. Between 1990 to 1994 "gazelles" accounted for all of the nation's net new jobs. According to Birch, they represented just three percent of all firms, but added five million jobs to an economy that added only 4.2 million net jobs.²⁷⁴

No one disputes that small companies play an important role in the economy, however critics do contend that small business' job creating prowess has been over-hyped. Most economists who have studied the numbers agree that small businesses create more jobs than their share of the market.

The Small Business Administration says that, from 1976 to 1990, firms with fewer than 500 workers created 65 percent of net new jobs, more than its 53 percent share of total employment. Meanwhile, Fortune 500 companies eliminated 3,000,000 jobs between 1980 and 1994.²⁷⁵

Some advocates of small businesses look at regional differences for job creation. In Austin Texas, according to the Austin Chamber of Commerce, small businesses employ about 55 percent of the local work force and create six out of every ten new jobs in the town.²⁷⁶ In another report, 44,000 new jobs were created in the seven Rocky Mountain states during a 24 month period from 1988 to 1990, according to a study by the center for the New West.²⁷⁷ The report concluded that entrepreneurship was a vital force for job creation and new wealth nationally, especially in the west.

In any event, the key to bear in mind is that entrepreneurial small businesses are critical to our economy. Our laws are structured to foster the growth and development of the small business community. Any lawyer representing small businesses should be aware of government programs and policies designed to assist such clients.

D. Summary

As suggested throughout this article, entrepreneurship flourishes in many arenas, but is especially vibrant within the world of small business. Small businesses innovate, creatively seek niches, and provide quality service often unmatched by larger companies. Our entrepreneurial clients,

²⁷⁴ See *id.*

²⁷⁵ See *id.* at 170.

²⁷⁶ Michele Kay, *Study Contradicts Belief of Small Firms Making Jobs*, AUSTIN AMERICAN-STATESMEN, July 17, 1989, at 1.

²⁷⁷ Phillip Burgess, *Small Businesses Responsible for Job Growth in Region*, PHOENIX GAZETTE, February 28, 1991, at C3.

calculating their tolerance for risk, respond to opportunities in the market and seek their piece of the American Dream. They consequently change our world, providing new services and products, employing other individuals, and making fundamentally important contributions to our national economy.

Lawyers should themselves be entrepreneurial in promoting the study of law and entrepreneurship. Lawyers are well-positioned to be in the vanguard of the changes moving throughout our society. Our entrepreneurial clients should be recognized as the teleologic agents that they are, as suggested by work of other scholars:

[E]ntrepreneurs must be recognized as crucial figures in the process of change in public and private markets and within formal hierarchical organizations. Entrepreneurs see opportunities that others do not and they seek personal gain by taking action to seize the opportunities created in an uncertain environment. In the process of taking such risks, entrepreneurs help radically transform economic and political systems.²⁷⁸

IV. CONCLUSION

Law and entrepreneurship combines two disciplines that are at the center of current public discourse. All have an interest in the process and content of our legal system. All have a stake in the robust growth of our economy. Lawyers and scholars of the law play a key role in the promotion and development of both.

In my course on Small Business Theory, I encourage my students to be shapers of the public discourse in the communities where they will practice. Gaining a fuller understanding of entrepreneurship and the client who is an entrepreneur will allow practioners to better serve this special agent of change in a society undergoing tremendous social and economic change. Moreover, there are enormous professional and personal rewards in helping an entrepreneurial client fulfill his or her dream. In his book on leadership, John Heider perhaps best described the role and function of the entrepreneur's lawyer when he uses the metaphor of midwife in describing leadership:

Remember that you are facilitating another person's process. It is not your process. Do not intrude. Do not control. Do not force your own needs and insights into the foreground.

²⁷⁸

Schneider, et al. *supra* note 213, at 6.

If you do not trust a person's process, that person will not trust you.

Imagine that you are a midwife; you are assisting at someone else's birth. Do good without show or fuss. Facilitate what is happening rather than what you think ought to be happening. If you must take the lead, lead so that the mother is helped, yet still free and in charge.

When the baby is born, the mother will rightly say: "We did it ourselves!"²⁷⁹

²⁷⁹

JOHN HEIDER, THE TAO OF LEADERSHIP: LAO TZU'S *TAO TE CHING* ADAPTED FOR A NEW AGE 33 (1985).

