

J. Byron McCormick Lecture

PROFESSIONALISMS

Richard A. Posner*

Some years ago, in a lecture at another law school, I traced the decline of the law as a profession, in a rather special sense of “profession” that I associated with the medieval guild.¹ In another sense, however, the law has become more professional in the very same period on which the earlier lecture focused. But in another and more profound sense the law is lagging alarmingly behind a wave of genuine professionalism that is one of the big underreported stories of our time. My effort in this lecture will be to untangle these distinct senses of “professionalism” and consider the implications for the future of American law.

I. PROFESSIONS AND PROFESSIONAL MYSTIQUE

The terms “profession” and “professionalism” have an incredibly large and vaguely bounded range of meanings, the despair of sociology, the discipline that has done most to study the professions.² I shall begin by using the terms in reference to the set of occupations that are most commonly referred to as professions. They are law, medicine (and related fields such as dentistry, pharmacology, optometry, nursing, physical therapy, and psychology), military

* Chief Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. This is the lightly revised text of the J. Byron McCormick Lecture delivered at the University of Arizona College of Law on November 13, 1997. I thank Héctor Acevedo-Polanco and Sorin Feiner for helpful research assistance, and the faculty and students at the Arizona College of Law for helpful comments on the oral version.

1. Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1 (1993), reprinted with considerable revision as Chapter 1 of my book *Overcoming Law* (1995).

2. See, e.g., ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988); ELIOT FREIDSON, *PROFESSIONALISM REBORN: THEORY, PROPHECY, AND POLICY* (1994).

officership, engineering, the clergy, teaching, architecture, actuarial services, librarianship, social work, journalism, and accounting. Occupations that are not commonly referred to as professions include business management and business generally, advertising, public relations, farming, politics, fiction writing, investment advice, the civil service, soldiering below the commissioned-officer level, entertainment, construction (other than architecture and engineering), police and detective work, computer programming, and most jobs in transportation.

The hallmark of a profession is the belief that it is an occupation of considerable public importance, the practice of which requires highly specialized, even esoteric, knowledge that can be acquired only by specialized formal education or a carefully supervised apprenticeship, hence an occupation that cannot responsibly be entered at will but only in compliance with a specified, and usually, exacting protocol and upon proof of competence. Because of the importance of the occupation, and therefore the professional's capacity to harm society, it is often believed that entry into it should be controlled by government: that not only should the title of "physician," "lawyer," etcetera be reserved for people who satisfy the profession's own criteria for entry to the profession, but no one should be allowed to perform the services performed by the members of the profession without a license from the government. For the same reasons (i.e., the profession's importance and its capacity to do harm), but also because the arcane skills of the professional make his performance difficult for outsiders to monitor and therefore facilitate exploitation, it is usually believed that the norms and working conditions of a profession should be such as to discourage the undiluted pursuit of pecuniary self-interest.

This description, culled from the sociological literature and common observation, fits law and medicine—the most powerful and most studied of contemporary American professions—more closely than it does the other professions. But they all fit some part, or parts, of it better than the nonprofessions do, though the line blurs when we consider such occupations as psychology, social work, and forest management. The rough edges don't matter to my purposes here; it is enough that a family resemblance among the various professions can be discerned despite their heterogeneity.

The key to classifying an occupation as a profession, it must be emphasized, is not the actual possession of specialized, socially valuable knowledge; it is the *belief* that some group has such knowledge, for it is the belief that enables the group to claim professional status, with the opportunities for exclusion and other privileges, and the resulting personal advancement, that such status confers. The belief need not be true, need not even be positively correlated with the amount of specialized, socially valuable knowledge that the group actually possesses. We are probably more conscious today of the limitations of medical knowledge than people were in the Middle Ages in Italy, where medicine was a highly prestigious profession even though physicians had almost no therapeutic resources.

I shall call the case in which belief in a profession's knowledge claims is not justified by the profession's actual knowledge the case of "professional mystique." The greater that mystique, the more secure the profession's claim is to the privileges of professional status. A profession whose knowledge claims are inherently shaky has a particularly urgent interest in preserving its mystique, and let us consider the techniques by which it can do this:

One is to cultivate an *obscurantist style* of discourse, in order to make the profession's processes of inquiry and inference impenetrable to outsiders.

Another technique, but, as we are about to see, really two techniques, is to fix demanding educational qualifications for entry into the profession. By raising the educational level of the profession, such qualifications make the profession's claim to possess specialized knowledge more plausible because education is a well-accepted route to knowledge. It also makes the professional's thought processes more opaque to outsiders.

Two types of educational qualification should be distinguished. The first is insistence on general education or educability, an insistence designed to limit professional entry to a stratum of highly intelligent persons. The second is the specialized professional training itself, which is designed not merely to impart essential knowledge but also to establish the uniqueness of that knowledge in relation to the knowledge possessed by outsiders. This distinction shows that the fixing of educational qualifications has two distinct functions in preserving professional mystique: to screen for *intellectuality*, and to preserve the *impermeability* of professional knowledge, or in other words, the profession's autonomy. Although these functions can be held separate analytically, they interact. Screening for intelligence is bound to increase impermeability because highly intelligent people are comfortable with complexity and special vocabularies. People of average intelligence could not create anything as intellectually complex and challenging as the Internal Revenue Code or the doctrines of property law.

A fourth technique of professional mystification is the cultivation of *charismatic personality*—the selection for membership in the profession of people whose appearance, personality, or personal background creates an impression of deep, perhaps inarticulate, insight and of masterful, unique competence.

Fifth, the profession bent on maximizing its mystique will resist subspecialization—the breaking up of its constituent tasks into subtasks—because that would tend to demystify the profession's methods, to make them transparent. The professional's mysterious mastery might be seen to consist in an assemblage of routine procedures requiring no specialized education to perform adequately, in just the same way that the intricate craft of carriage making devolved into the assembly-line production of a far more complex vehicle, the automobile, by less-skilled workers. A profession concerned with maintaining its mystique will therefore display *underspecialization*.

Sixth is *lack of hierarchy*. When a complex task is broken down into its components, each performed by a different class of worker, a need for supervision

and coordination arises, producing the hierarchical structure, with its tiers of management, that is characteristic of organizations. Traditionally, professionals were not organized hierarchically. Lawyers practiced by themselves or in partnership with other lawyers; likewise doctors.

Seventh, a profession is likely to employ *altruistic pretense*; that is, it will try to conceal the extent to which its members are motivated by financial incentives, in order to make more plausible the implication that they have been drawn to the profession by the opportunity to pursue a calling that yields rich intellectual rewards. Altruistic pretense reinforces charismatic personality, which is undermined by the appearance of self-seeking.

Eighth, the profession will be *anticompetitive*. It will seek both to repel competition from outside the profession and to limit competition within the profession. It will do these things to protect the pecuniary self-interest of its members directly, but also to bolster professional mystique. Thus it will try particularly hard to outlaw competing services whose success might undermine its knowledge claims. If accountants were seen to give just as good tax advice as tax lawyers, the claim of tax lawyers to possess a valuable body of skills that no other group possesses would lose credibility; likewise if pharmacists were permitted to prescribe drugs and not merely dispense them. And competition, especially within the profession, requires hustling and self-promotion that undermine the professional's effort to present himself as a charismatic master, as someone in control, since in a competitive market it is the customer rather than the supplier who is in control. Altruistic pretense plays a supporting role here by concealing the self-interested character of efforts to limit competition for one's services.

Ninth, the profession will resist the systematization of professional knowledge; it will be *anti-algorithmic*. As long as "the means of production of a profession's knowledge-based service is contained in their heads," the profession's monopoly is secure.³ Once the knowledge that is the professional's capital is organized in a form in which people can employ it without having to undergo the rigors of professional training, the professional becomes dispensable. Thus one can imagine computerized diagnostic techniques and artificial intelligence eventually eroding the positions of the physician and of the lawyer, respectively.

The fact that a profession cultivates professional mystique does not prove that it lacks real knowledge; modern medicine is a case in point. The addition of mystique to knowledge enhances the profession's awards and so is valuable even if the profession does possess genuine, and genuinely esoteric, useful knowledge. Still, the denser the web of mystique-enhancing techniques that the profession spins, the shakier the profession's knowledge claims are likely to be, because the techniques are more valuable, and therefore more likely to be used heavily, the more there is to conceal. Conversely, they are less likely to be employed the more defensible an occupation's knowledge claims are. This is true whether or not it is a

3. KEITH M. McDONALD, *THE SOCIOLOGY OF THE PROFESSIONS* 185 (1995).

profession in the usual sense. The occupation could have achieved professional status not because of flim-flam but because it really *does* possess highly specialized, socially valuable knowledge that cannot be accessed by the ordinary person or embodied in algorithms or rote knowledge.

There are other symptoms of the shakiness of a profession's knowledge claims besides its employment of some or all of the techniques of mystification. One is simply *defeat* when faced by a new challenge, and is conspicuous in the case of the military profession, which is uniquely exposed to challenge in an environment that it does not control. Sorcery and prophecy enjoy professional status in many primitive societies, and are overthrown when the practitioners face competition from groups that use rational methods.

Another symptom that a profession's knowledge claims are weak is that it employs methods of selection into or promotion within the profession that (like selection in favor of charismatic personality) do not further the acquisition of knowledge—methods such as nepotism, credentialism, discrimination, and automatic promotion. Anyone familiar with legal education, especially before the 1960s, will recognize this symptom, which I'll call *nonrational employment practices*. Anyone familiar with the legal profession in general, especially before the 1960s, will recognize not only this symptom but also every one of the nine techniques that I described by which a profession disguises its epistemological weakness.

II. THE GROWING PROFESSIONALISM OF LAW...

I want to assume rather than belabor these points, and move on now to developments during and since the 1960s that have seemed to make, and to an extent *have* made, the law more professional in the good sense, the sense in which a profession earns its status and attendant privileges by deploying a body of genuine, specialized, socially valuable knowledge-based skills rather than by cultivating a professional mystique.

The obscurantist style—legal jargon—is as bad as ever in law, and the insistence on a very heavy dose of formal education, both undergraduate and professional, is unabated. But the professional education itself is far more permeable to the claims of other disciplines, especially but not only economics, than it once was. There is much less confident assertion of the profession's autonomy, especially in the academic branch of the profession, where the new, outside perspectives on law have been most influential. Interdisciplinarity makes a field more accessible to the practitioners of other disciplines; so today we see economists, political theorists, psychologists, and even literary critics writing about law with sufficient authority to require the academic lawyers to take notice and respond.

There is also, I sense without being able to prove, less cultivation of charismatic personality as an important constituent of professional success. The

"lawyer statesman" model of professional practice is in much-lamented decline,⁴ in part because of the decline of supporting structures such as underspecialization and altruistic pretense and monopoly and in part, as we shall see later, because of the growing professionalism of competing occupations.

Specialization in the provision of legal services has grown. We can see this in the emergence of the paralegal as a distinct tier of professional provider, in the increasingly standardized division of labor between judge and law clerk, in the growing division between academic law and practicing law and between academic law and judging (so that today almost all legal scholarship is the product of the academy, and judges and lawyers complain about the "irrelevance" to their concerns of most such scholarship⁵), and above all in the increased specialization of legal practice, with fewer lawyers holding themselves out as competent in more than one field. Increased specialization in the legal profession has contributed to the decline of the charismatic legal-professional personality; increasingly, clients demand a narrow specialist's competence rather than the wisdom of the statesman-generalist. Further contributing to that decline has been the dismantling of many of the impediments to competition in the legal-services industry, a dismantling that has revealed that most lawyers are motivated by the same incentives as the members of nonprofessional occupations. The increase in competition has forced lawyers to serve their clients better and so to rely more on specialized knowledge that has genuine value to the client and less on mystique.

Specialization has been accompanied by a growth in professional hierarchies. Take judging. It used to be that judicial work was performed by judges. In the federal judiciary, there were originally just two tiers of judges—district judges and Supreme Court Justices.⁶ Today, judicial work in the federal courts is divided among tiers. The lowest comprises interns and externs; then come staff attorneys and law clerks; above them magistrate judges; then district judges; then circuit judges; and finally Supreme Court Justices. Similar tiering is increasingly found in state courts as well. And in most large law firms there are now paralegals, associates, income partners, and equity partners, rather than just partners as originally or, later, just partners and associates.

4. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993). For criticism, see RICHARD A. POSNER, *OVERCOMING LAW* 93-94 (1995); Richard A. Posner, *Barflies*, *NEW REPUBLIC*, Oct. 31, 1994, at 40. For a different take on this lamentational literature, see Kenneth Anderson, *A New Class of Lawyers: The Therapeutic as Rights Talk*, 96 *COLUM. L. REV.* 1062 (1996).

5. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *MICH. L. REV.* 34 (1992).

6. Technically three, because there are actually two tiers of Supreme Court Justices: the Chief Justice of the United States and the Associate Justices of the Supreme Court.

The impetus to the developments in the legal profession that I have been describing, as to parallel developments that I shall discuss shortly in the military sphere, came in part from that tell-tale symptom of a profession's dependence on mystique—defeat. Beginning in the 1960s, the legal profession in all its branches became associated with policies that in time came to be to a considerable extent discredited. These policies included the judicial activism of the Supreme Court in the heyday of Earl Warren's chief justiceship: a related knee-jerk receptivity to every "liberal" proposal for enlarging legal rights (and incidentally lawyers' incomes); the plain incapacity of legal reasoning, as demonstrated by modern economics, to make sense of the legal regulation of competition and monopoly; a relaxation of the barriers to litigation that has contributed to an enormous, unsettling, and unforeseen increase in the amount of litigation; and a host of lawyer-fostered statutory "reforms," in fields ranging from bankruptcy and consumer protection to employment discrimination, safety regulation, and environmental protection, that have often had perverse, unintended consequences. The traumatic impact of these failures on the legal profession's self-confidence has not been nearly so great as the traumatic impact of the Vietnam War on the American military profession. But it has had some impact, which, along with an economy-wide trend toward deregulation and the destabilizing effect of enormous growth in the demand for legal services and the resulting rapid expansion in the profession, has spurred the profession to become more professional in the good sense.

One byproduct of increased legal professionalism has been the decline in what I earlier termed nonrational employment practices. There is much less discrimination and nepotism in hiring and promotion, not only in law firms but also in the federal judiciary and—though to a lesser extent because of the virus of reverse discrimination, which rages more strongly in the legal academy than in the other branches of the profession—in the law schools. Automatic promotion has waned both in law firms and in the academy, and the imposition of publication requirements has enabled the academy to establish rational, if sometimes inflexible, criteria for promotion.

III. ...AND OF EVERYTHING ELSE AS WELL

The law's increased professionalism is not an isolated phenomenon; indeed, it is not limited to the professions. Within the professions, there is an interesting parallel to law in the evolution of the American military profession since the early 1970s. The Vietnam War revealed striking deficiencies in the civilian management of national security affairs. But it also revealed the considerable amateurism of the military profession.⁷ The officer corps relied heavily on mystique in lieu of serious study of and planning for the exigencies of

7. See, for an excellent popular account, JAMES KITFIELD, *PRODIGAL SOLDIERS: HOW THE GENERATION OF OFFICERS BORN OF VIETNAM REVOLUTIONIZED THE AMERICAN STYLE OF WAR* (1995).

modern warfare. Nepotism was rife both in routine promotions and in appointments to important commands; charisma frequently substituted for competence; bluff, wishful thinking, and outright misrepresentation were used to conceal failures. A hypertrophy of mystique professionalism developed in the form of lethal interservice rivalries that could be controlled only by the equivalent of noncompete agreements; it was as unthinkable to the navy that the army could direct naval aviation missions as it was unthinkable to lawyers that accountants could conduct tax litigation. The armed services were united only in believing the military a world apart that could neither learn from the civilian sector, for example about the intelligent management of race relations and other personnel problems, nor even communicate articulately with it. A caricature of the warrior as Neanderthal, Curtis LeMay, became emblematic of the U.S. military of the period.

Thirty years later, as shown by the performance of the American military in the Persian Gulf Campaign, the military profession had been transformed, partly in reaction to the disastrous effects of the Vietnam War on the morale, effectiveness, and public esteem of the military, and partly because the end of the draft forced the military to design "professional" armed forces. By the end of the period of reform, the system of promotion had been revamped to place emphasis on successful performance in realistic, objectively evaluated military exercises; personnel policies in general had been professionalized. Feedback loops ("after action review") had been created to foster learning from experience. Emphasis on continuing education, both military and civilian, had facilitated the creation of a more intelligent officer corps and one able to make maximum use of modern analytical tools and modern technologies in the waging of war, and also to communicate effectively with civilians, as shown by the military's media relations during the Gulf Campaign. Procedures and institutions to assure at least a minimum of interservice cooperation had been created. War remains emotional and unpredictable to a degree not matched by any other professional activity; but American military officership has become legitimately professional to a far greater degree than it once was, and perhaps to a greater degree than law is.

What is more interesting even than the increasing professionalization of the professions is the increasing professionalization of all work. If "good professionalism"—the kind that contributes to human welfare and not just to the self-interest of the members of the profession—is the application of a specialized body of knowledge to an activity of importance to the society, then as knowledge grows and necessarily becomes more specialized, we can, because of the limited intellectual scope of even the ablest human being, expect more and more occupations to become professionalized. Yet an occupation might never acquire the traditional accouterments of professionalism—maybe because it would not *need* to cultivate a professional mystique.

If the sociological study of the professions owes most to Durkheim, the study of what might be called universal professionalization must acknowledge a major debt to Weber. The hallmark of modernization, for Weber, was the bringing of more and more activities under the governance of rationality; early and somewhat questionable illustrations were the "rationalization" of industry through

mergers and the control of production by means of time-and-motion studies ("Taylorism"). The growth of rational methods would, Weber rightly predicted, foster the disenchantment of the world, as activities became demystified and transparent.⁸

In the last few years, the process foreseen by Weber has taken giant strides forward.⁹ Consider, for example, university administration. It was, once, a bastion of amateurism. The typical university president was a distinguished scholar who had stepped directly from his career of teaching and research into the presidency. He was assisted by a small administrative staff composed primarily of amateurs as well, either former teacher-scholars like the president or, at some Ivy League schools, socially well-connected alumni as well. Today, with universities often multihundred-million dollar enterprises subject to complex laws and regulations, the typical university president is a professional administrator, having climbed lower rungs that normally include service as a university provost and earlier as a dean. He is assisted by a large staff of specialists in administration, many of whom do not have substantial academic backgrounds but instead have backgrounds in law practice, accounting, finance, and business administration; and the university's hospital complex will be managed by a professional hospital administrator—hospital administration having become a specialized field in itself.

It is business above all that has become rationalized, professionalized, to a degree that Weber might have had difficulty imagining. Although there is still an important role for lone-wolf entrepreneurs in start-up firms and in takeover and turnaround situations, mature business firms are increasingly the domain of thoroughly rational and systematic methods in financial management, personnel ("human resources" administration), inventory control, marketing, production, procurement, government relations, law, and every other dimension of administering a complex enterprise. As the professions have become increasingly businesslike, business has become increasingly professional, not in the spurious sense in which some of the old-line professions cultivated a professional mystique, but in the real sense of deploying specialized knowledge in rational and effective pursuit of clearly defined, socially important goals.

8. See, e.g., MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 180–83 (Talcott Parsons trans., 1958); ANTHONY T. KRONMAN, *MAX WEBER* ch. 8 (1983).

9. Cf. STEVEN BRINT, *IN AN AGE OF EXPERTS: THE CHANGING ROLE OF PROFESSIONALS IN POLITICS AND PUBLIC LIFE* 205–07 (1994). The process is deplored by Brint, *id.* ch. 10, and by another left-wing sociologist, Elliott A. Krause, in his book *Death of the Guilds: Professions, States, and the Advance of Capitalism, 1930 to the Present* ch. 8 (1996). Brint and Krause regard the rationalization of the professions as a deplorable success of capitalism, bringing all economic activities under the rule of the market. For criticism of Brint, see Anderson, *supra* note 4, at 1072–81. The denigration of professionalism is a sign that the left is increasingly reactionary—it is increasingly nostalgic for premodern methods of production.

IV. LAW'S GROWING PROFESSIONALISM RECONSIDERED

The tide of professionalism that is sweeping the country, and indeed the world, brings into sharp focus the question how much real progress the law has made in moving from the era of professional mystique to the era of substantive rationality. It has made some progress, but less than the other activities I have mentioned and, above all, less than its traditional peer, the medical profession. The transformation of the medical profession since the 1960s has been astonishing. The centerpiece of that transformation has been the explosion of medical knowledge, which has vastly increased the efficacy of medical treatment in prolonging life and alleviating suffering. As one would expect, this explosion has been accompanied by a rapid decline in the mystique elements formerly so conspicuous in this profession—highly discriminatory selection practices, the concealment of carelessness and incompetence (the “conspiracy of silence” and the often literal “burying of mistakes”), the physician’s assumption of omniscience in dealing with patients and refusal to level with patients with regard to prognoses, hostility to forms of health maintenance that do not require esoteric medical skills (such as diet and exercise), inadequate specialization that had physicians doing many tasks that nurses could perform as well or better and that had nurses doing many tasks that medical orderlies and technicians could perform as well or better, disdain for outsider methods or disciplines such as statistics and public health, and hostility toward innovations in the pricing and delivery of medical services. The advent of social insurance in the form of Medicare and Medicaid, and of advanced technology, sent the costs of medical services soaring, thus exposing the primitive management techniques of the medical sector. Faced with a defeat potentially of Vietnam proportions, the medical profession together with the other components of the vast medical-services sector discovered, and are busy adopting, rational methods of medical administration that are designed to prevent doctor and patient from contracting for wasteful treatments paid by hapless third parties—the biggest source of avoidable medical inflation.

By comparison with the military profession, business and university administration, and the medical profession, the law’s professionalizing has not proceeded very far at all. Part of the reason may be the law’s deep entwinement with politics, which, in a democracy anyway, resists professionalization, at least of the sort that might help the law to become more professional. The qualification is important. Politics, too, has become more professional in recent decades as a result of improvements in the techniques of public opinion polling, campaign advertising, and the identification, packaging, and promotion of political candidates as media stars. But none of this has “rubbed off” on the law in any useful way; there is no evidence that the televising of trials, appeals, and judicial confirmation hearings contributes to the quality of a legal system, or that the use of public opinion polling techniques and the insights of social psychology to select, and then influence, jurors has had a positive effect. Because of the strategic character of litigation, technical improvements can increase the cost to both sides without a commensurate benefit in more accurate determinations; this is a frequent criticism of the heavy use of expert witnesses in many types of litigation. An

exactly parallel argument could, of course, be made against the genuineness of the professionalizing of military officership if a global perspective were employed, which, however, few Americans would be inclined to do; and certain medical improvements, too, have limited or even negative benefits because of secondary effects—for example, an improvement that saves the patient's life only for him to succumb to a more expensive illness a short time later, or that by making a disease less lethal induces people to take less care to avoid it (the case of syphilis, and perhaps of AIDS). But the problem of running-in-place improvements seems particularly acute in the case of law, as also of sports.

Let me give an example of the sort of change in law that at first glance seems to be an increase in professionalism, yet on more careful scrutiny is seen to be an example of running in place or even falling back. If you compare judicial opinions of the Supreme Court today with its opinions of thirty or forty years ago, you will notice signs of increased professionalism. The opinions are more thorough, more accurate, and more methodical; they reflect a greater depth of research both legal and collateral; they appear to be more carefully written in an effort to avoid misunderstandings and irresponsible or otherwise troublesome dicta; they are more uniform, less idiosyncratic, in style—more “correct,” in a grammarian's sense. They are more, one might say, the product of rational methods and rules, less of individual vision. This is not an accident. There have been significant changes in the staffing of the Court. Appointments to the Court itself are scrutinized more carefully, a process that tends to eliminate oddballs and other highly individual candidates. Prior judicial experience has become a *de facto* qualification; all of the Associate Justices have some. The number of Supreme Court law clerks has more than doubled. The clerks are more carefully selected, moreover, with merit playing an even more predominant role than in the earlier period of which I've spoken, and almost every clerk who is hired has already spent a year as a law clerk to another judge, most often a federal appellate judge, whose docket will be similar to that of the Supreme Court. The management innovation known as the “cert. pool” has enabled the law clerks to screen applications for review in less time than in the earlier period despite the fact that the number of applications has increased even faster than the number of clerks. As a result, the law clerks have more time to work on opinions, so that the effective and not merely nominal ratio of law clerks' to Justices' opinions has increased substantially. This, together with the more careful selection of the clerks and the requirement that they have prior clerkship experience, has enabled the improvements in the Supreme Court's opinions of which I have spoken.

But the improvements—what are they really worth? The opinions take longer to read, they are duller, and they are harder to use as predictors of the Court's reaction to future cases because of their impersonal cast. Much of what goes on in them and accounts for their length and their dense texture, such as the ping-pong game between majority and dissenting Justices, the relentless dissection of precedents, and the elaborate statutory histories and exegeses, neither illuminates the Justices' actual thought processes nor instructs the lower-court judges or the practicing bar in analytical techniques that will resolve difficult legal

issues. The Court's caseload is dominated by constitutional cases, and, at the risk of seeming cynical, I cannot believe that the results in many of these cases owe much to a genuinely disinterested, a technical or professional, application of rigorous, "observer independent" methods of inquiry.¹⁰ To exaggerate, but not I think crucially, what has happened as the result of the measures I have described that have made the Supreme Court a more professional institution has been to thicken the window dressing.¹¹

The root of the problem is that law is still striving to build a body of real knowledge of the kind that has enabled the other professions that I have discussed to move decisively in the direction of genuine professionalism. Perhaps the strategic or political dimensions of the law make the quest for a solid grounding in theory illusory. The political dimension is largely responsible for the inroads that affirmative action and political correctness generally have made in legal education, with retrogressive results from the standpoint of professionalization—indeed, one prominent component of the political-correctness beachhead in the law schools is a scholarly movement, critical race theory, that expressly rejects the basic tenets of rational analysis.¹²

V. THE SUPERSESSION THESIS

If there is hope for the law to become a genuine profession in the sense in which the developments in other occupations are teaching us to understand professionalism, it lies in what I like to call, with deliberate provocation, "overcoming law" or, alternatively and more neutrally, the "supersession thesis." It envisages what we understand the law to be today as a transitional phase. The best articulation of this thesis is found in Holmes' most famous article, *The Path of the Law*,¹³ and in discussing it here I shall be borrowing from a short piece I wrote recently in commemoration of the centenary of that article.¹⁴ I am sure that many of you are familiar with Holmes' article or at least with some of its famous aphorisms, such as, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"; "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry VI"; "For the rational study of the law the black-letter man may be the man of the

10. No doubt each Justice *thinks* that his or her votes owe everything to such methods of inquiry, while being skeptical about the votes of the other Justices, just as I think that my votes as a judge owe everything, or at least a great deal, to those methods. That is the psychology of judging. It is easy (even for a judge) to be a cynical observer of judges, but it is difficult to *be* a cynical judge.

11. Cf. Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995).

12. See DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

13. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

14. Richard A. Posner, *The Path away from the Law*, 110 HARV. L. REV. 1039 (1997).

present, but the man of the future is the man of statistics and the master of economics." But my interest is not in these. I want to argue that from the perspective shaped by the developments I have been discussing, Holmes' article can be seen to have mounted an even more radical challenge to accepted thinking about law than he, or at least his audience, could have realized.¹⁵ For the article implies that law as Holmes knew it, and as we largely know it still, is merely a stage in human history. It followed revenge historically, and it will be succeeded at some time in the future by forms of social control that perform the essential functions of law but are not law in a recognizable sense, although they are latent in law, just as law was latent in revenge.

Law in the recognizable sense, the sense that will eventually be superseded, is assumed to be continuous with morality, enforcing a subset of moral duties that is determined by considerations of feasibility and by the cost and efficacy of alternative methods for securing compliance with those duties. (So it enforces some but not all promises, and punishes deliberate and careless injuries but not, for example, failures to be a good Samaritan and rescue people in danger.) Law also enforces a number of morally indifferent, and no doubt some immoral, duties as well. Still, law is saturated with moral terms. And the morality from which those terms is drawn is Judeo-Christian and so gives primacy to intentions and other mental states bearing on culpability, rather than focusing, as the ancient Greeks did, primarily on results. Law is also traditional—today we would say "path dependent." The judges have a duty to enforce the political settlements made in the past. A related point is that law is "logical," meaning that new doctrines can be created only by derivation, whether by deduction, analogy, or interpretation, from existing doctrines.

15. One mustn't be fooled by Holmes' old-fashioned appearance and "Boston Brahmin" heritage. He was a futurist, an evolutionist, an iconoclast, and an optimist. I think it not improbable that man, like the grub that prepares a chamber for the winged thing it never has seen but is to be—that man may have cosmic destinies that he does not understand.

...I was walking homeward on Pennsylvania Avenue near the Treasury, and as I looked beyond Sherman's Statue to the west the sky was aflame with scarlet and crimson from the setting sun. But, like the note of downfall in Wagner's opera, below the sky line there came from little globes the pallid discord of the electric lights. And I thought to myself the *Götterdämmerung* will end, and from those globes clustered like evil eggs will come the new masters of the sky. It is like the time in which we live. But then I remembered the faith that I partly have expressed, faith in a universe not measured by our fears, a universe that has thought and more than thought inside of it, and as I gazed, after the sunset and above the electric lights there shone the stars.

OLIVER WENDELL HOLMES, JR., *Law and the Court*, in *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 145, 148 (Richard A. Posner ed., 1992).

This conventional, "official" conception of law, which is as orthodox today as it was a century ago, Holmes seems to have regarded as epiphenomenal, dispensable, obscurantist, and transitory. This is the argument of *The Path of the Law* as I see it: People care about what the law is because judges have been empowered to decree the use of overwhelming force, and a prudent person wants to know how to avoid getting in the way of that force. From this standpoint all that matters is being able to predict how the judges will rule given a particular set of facts, and this is why people consult lawyers. Statutes and judicial opinions provide the materials for the prediction. The predictions of what the courts will do is really all there is to law. Morality is neither here nor there. A bad man cares as much about keeping out of the way of state force as a good man; and because law and morality are frequently discrepant, the law's use of moral language is a source merely of confusion and it would be good to banish all such language from the law. For example, while both law and morals use the word "duty" a lot, the legal duty to keep a promise is merely a prediction that if you don't keep it you'll have to pay any damages that your promise-breaking imposes on the promisee. The law doesn't *really* care about intentions or other mental states, for it enforces contracts if the parties signify assent, whether or not they do assent. And words like "intent" or "negligence" as used in the criminal law denote degrees of dangerousness, nothing more. The moral and mentalistic baggage of the law is connected with the fact that the basis of most legal principles is tradition. This is to be regretted. The only worthwhile use of history in law is to debunk outmoded doctrines by showing them to be literally vestigial. Judges should understand that the only sound basis for a legal rule is its social advantage, which requires an economic judgment balancing benefits against costs. If the law submitted to instruction by economics and the other social sciences, we might find the tort system replaced by a system of social insurance, and the system of criminal law, which is based on a belief in deterrence, replaced by a system in which the methods of scientific criminology are used to identify and isolate, or even kill, dangerous people.

In Holmes' view, as articulated or implied in *The Path of the Law*, what judges do is not law in any sense that the contemporary legal professional will recognize. It is sometimes mindless "standpatism" and sometimes voting their fears, but sometimes, and ideally, it is weighing costs and benefits, though doubtless with some regard (much emphasized in Holmes' judicial opinions) for the desirability of avoiding rapid changes of front that would make it difficult for lawyers to predict the outcomes of new cases.

Was Holmes correct that "the law" is just a mask or skin that may confuse the wearer but that has no social function in modernity and that ought to be stripped away, revealing a policy-making apparatus that could be improved if only it were recognized for what it was? He was at least half right. There is indeed a lot of needlessly solemn and obfuscatory moralistic and traditionary blather in judicial decision making and legal thought generally, and it is immensely useful in dealing with legal issues always to try to strip away the conventional verbiage in which the issues come wrapped and look concretely at the interests at stake, the purposes of the participants, the policies behind the precedents, and the

consequences of alternative decisions. In other words, the law could use a dose of the disenchantment that accompanies real professionalization under the conditions of modernity.

But Holmes overlooked two points. The first is that the more law conforms to prevailing moral opinions, including the moral opinions of relevant subcultures such as the commercial community, the easier it is for lay people to understand and comply with law. The people subject to the law can avoid coming into conflict with it just by acting the part of well-socialized members of their community. The second point, which Holmes could not have understood because it is a lesson of totalitarianism, which did not yet exist in 1897, is that the maintenance of a moral veneer in the law's dealing with the people subject to it, especially the antisocial people subject to it, offers a first line of defense against excesses of official violence. It is not healthy to treat even disgusting criminals as animals, an idea Holmes toyed with in the *The Path of the Law* when he said, "If the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic necessity as that which makes the rattlesnake bite, it is idle to talk of deterring him by the classical method of imprisonment. He must be got rid of."¹⁶ Excluding a class of human beings from the human community can become a habit and spread from criminals to ne'er-do-wells to the sick and the aged and the mentally disturbed or deficient ("Three generations of imbeciles are enough"¹⁷). By this route, civilization can unravel.

If this is right, the entanglement of law with ethics, and politics, and rhetoric may indeed be permanent, and the path to complete professionalization therefore permanently obstructed. But I think, with Holmes, that we can go a long way down that path before reaching the obstruction. It would be presumptuous of me to try to trace that path within the compass of this lecture. Suffice it to say that progress along it will require bringing the social sciences into a closer alignment with law, welcoming the contribution that artificial intelligence has to make to law, dispelling the "math block" that continues to inflict so many law students, lawyers, and judges, and, in all likelihood, moving toward a specialized judiciary, as well as dismantling the remaining regulatory obstacles to a fully rationalized, fully competitive legal system. If we move along this path, even if we cannot and should not attempt to reach its final end, which would be the transformation of law into a goal-oriented policy science consecrated to the perfection of instrumental reasoning, we shall be joining a great and, on the whole, a beneficent national movement toward the professionalization of the professions—and of almost everything else.

16. Holmes, *supra* note 13, at 470.

17. Buck v. Bell, 274 U.S. 200, 207 (1927) (Holmes, J.).

