

J. Byron McCormick Lecture

“PRACTICE” IN LAW AND OTHER PROFESSIONS

Geoffrey C. Hazard, Jr.*

INTRODUCTION AND SUMMARY

For the last decade or so lawyers and legal academics, and critics from outside, have been giving intensive consideration to the failings of the legal profession.¹ The simplest solution of course is that proposed by Shakespeare, that we simply kill all the lawyers. Those of us who are lawyers, at least, think that there must be a better way, although we have not found what that way might be. I share many of these concerns, notwithstanding that I do not share widely held views about the appropriate diagnosis, let alone the appropriate cures. I agree that better training in law school, greater emphasis on legal ethics, and closer adherence to the canon of “civility” may be helpful. However, I do not think these remedies get to the bottom of the matter. It seems unlikely, indeed, that we can reach the bottom of the matter and, if we did, that we could agree on solutions. But that is not a reason for refusing to try to understand our situation. It is such an understanding that I will pursue on this occasion.

In the present endeavor I will address the crisis in the legal profession in a larger context, specifically by observing that similar crises are being experienced in most of the other “traditional” professions. These crises in the various professions appear to have common manifestations, some common causes, and a similar sense of helplessness that the affected professions feel in trying to deal with their difficulties.

* Trustee Professor of Law, University of Pennsylvania Law School; Director, American Law Institute.

1. See, e.g., DEBORAH AARON, *RUNNING FROM THE LAW: WHY GOOD LAWYERS ARE GETTING OUT OF THE LEGAL PROFESSION* (1991); MARY GLENDON, *A NATION UNDER LAWYERS* (1994); ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1995); SOL LINOWITZ, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994); JOHNATHAN & ANDREW ROTH, *DEVIL’S ADVOCATES: THE UNNATURAL HISTORY OF LAWYERS* (1989); SAM STEIGER, *KILL THE LAWYERS* (1990). See also AMERICAN BAR ASS’N, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE PROFESSIONALISM COMMITTEE, *TEACHING AND LEARNING PROFESSIONALISM* (1996) [hereinafter *TEACHING AND LEARNING PROFESSIONALISM*].

My principal points are these:

First, all professions, including the legal profession, are having to respond to an environment of more specialized knowledge and correspondingly specialized professional technique. The result is balkanization within the professions along lines of specialization, a deterioration of the sense of common identity among professionals, and a growing dependence on information and ideas from sources outside the traditional domains of the various professions.

Second, there is a correlative change in the relationship between the professions and the professional schools. Whereas the professional schools had been the vehicle for carrying on the tradition of received learning and art in the professions, they have become vehicles for specialized research and experimentation that intensifies the centrifugal intellectual forces being felt in practice. As a result, at the same time that practitioners of the profession face increasing difficulty in talking with each other, they find it even more difficult to talk with anyone in the academy except the dean and other fund-raisers.

Third, the importance of "practice" as the defining characteristic of a profession has, paradoxically, increased at the very time that practice in a profession has, for the reasons given above, become more heterogeneous. Whatever a profession's specialty in the modern setting, the distinguishing characteristic of a professional is the endeavor as a practitioner, rather than as a scholar or researcher or, on the other hand, as a technician. The essence of practice is the *use* of specialized knowledge to deal with real-world problems that have a significant measure of uncertainty. The fact that practitioners act in the real world distinguishes them from scholars and researchers; the fact that they deal with a significant measure of uncertainty distinguishes them from technicians.

Finally, if this analysis is correct, it follows that concern for the well-being of the professions should focus on the special intellectual, political, emotional and moral aspects of being an actor who uses specialized knowledge to deal with uncertainties in the real world.

If this approach is suggestive, then we should have a deeper understanding of the crisis in the legal profession and at the same time may be disposed to give less attention and have less confidence in remedies that are specific to our profession. Indeed, we should be able to relate our difficulties to still larger forces operating in society as a whole, not only in this country but throughout the world. The ensuing realizations, if they are correct, may give us little comfort, although even professional misery, like all misery, loves company. However, the implications may allow those of us who have some control over our professional lives to recognize that our efforts at improvement need to be better calibrated to the scale of the problems in which we are enmeshed.

A. Situational Crises in the Contemporary Professions

The crises identified in the legal profession appear to correspond to similar

difficulties in other contemporary professions.

These similarities were brought home to me last year when I sat on a university committee at the University of Pennsylvania charged with nominating a new dean for the Graduate School of Fine Arts. The departments in that School include architecture, landscape architecture, urban planning and fine arts. All of these disciplines, and certainly architecture, can be described as professions. Faculty in these disciplines are at the same time members of these professions and also members of the academic community. The selection committee included not only members of the allied professions situated in the School but also the Dean of the Wharton School (a school of professional business management) and myself (law, of course). To carry out the Selection Committee's responsibilities required listening and reading about the crisis in architecture and these allied professions. That undertaking in turn led me to reflect on discussions I have had about similar troubles in yet other professions, particularly business management and medicine. The range of reflection was thereafter extended from architecture, business management, law, and medicine to include accounting, engineering, the ministry, public administration, the professoriate in higher education, and teaching at the primary and secondary levels.

There are, to be sure, important differences in the condition and environment of these professional callings. Primary and secondary education, for example, have suffered from chronic underfunding; the medical profession is undergoing a revolution resulting from change in its economic basis from fee-for-service to insurance of one kind or another; the traditional ministry is adversely affected by the decline of the established churches and the rise of the new evangelicals. Nevertheless, there seem to be important commonalities in what might be called, to borrow a phrase from the late Dean Pound, the causes of dissatisfaction.²

I will describe these common causes of distress in what I hope is a functional sequence, that is, from cause to effect. However, like all causation in human endeavor, the forces involved interact such that they are all mediate consequences as well as initial causes. The forces I have in mind are:

- specialization
- more intense economic competition
- balkanization within the professional community
- dispersion of the larger community in which practice is pursued
- increased personal anxiety of the professionals themselves
- finally, but not least, intellectual and ethical demoralization.

The first causal force, and also a mediate consequence of the other causes, is specialization. The story here is familiar and quickly told: All traditional

2. I refer of course to Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AMER. L. REV. 729 (1906).

professional callings have divided into subspecialties. In law, for example, we have long since subdivided beyond the traditional bifurcation between courtroom lawyer and office lawyer (i.e., between barrister and solicitor). Among the courtroom people there are now divisions between civil versus criminal litigation, personal injury versus commercial, administrative versus judicial proceedings, securities versus environmental, *ad infinitum*. In office practice the old subdivision between mortgage lawyers and will draftsmen has proliferated into real estate versus Article 9 practice, estate planning versus pension practice, continuing counselling of business management versus merger and acquisition specialists, etc.

The same picture emerges in medicine, where my nephew, for example, is not simply an orthopedic surgeon but a specialist in shoulders and knees; in accounting, where some problems of cost accounting that are bread and butter for one accountant are virtually unintelligible to a fellow practitioner down the hall; in architecture, where the firm that has employed another of my close relatives has come to specialize in jails and prisons; in teaching, where even at the elementary level there is differentiation not only by grade level but between math and language, which in the old days were both within the province of a single classroom teacher. And so on in the other professions.

Perhaps the clearest signal of this development is the recurring call in all the professions for "generalists." If we had not ceased to be generalists by becoming the specialists that we are, there would be no such calls. Here, as in other domains of life, there is truth in paradox.

An antecedent cause of specialization is the exponential growth of information and change in technique in the professions. This phenomenon is familiar in medicine and engineering, where evolving science continually inflicts obsolescence on established knowledge and technique. But the same phenomenon attends other professions as well, including law. For example, the term "Shepardise" refers to a technique of legal research that is now obsolete. The computer has also revolutionized the practice of legal documentation. In all professional fields research and practical experimentation yield new knowledge and new methodologies by the minute. There are corresponding proliferations of communication about the "new," in the form of the specialized journals, symposia, meetings, and now Internet pages. There are limits to the depth of knowledge and skill that can be achieved by anyone, except an occasional Renaissance Man, so that we all must specialize to stay abreast.

The second causal force is intensified economic competition. According to Adam Smith's classic economic theory, which I take to be axiomatic, specialization increases efficiency and, hence, improves the competitive position of an operative who has become specialized. Correlatively, the increased pressure from a specialized competitor is a powerful incentive for others to acquire the similar specialized knowledge and adopt similar or better specialized techniques. Hence, all vocations and businesses in the modern world, not merely the professions, find themselves in an economic "rat race." It is important that we professionals not suppose we are alone in being subjected to these forces. Ask the people at Ford Motor Company or IBM.

A consequence of intensive specialization is the political balkanization of the professions. Every skilled artisan is to some extent lonely and wants company, for such purposes as sharing emergent knowledge and technique, comparing fragments of information about the market, exchanging professional gossip, complaining about the competition, and denouncing the supposedly small number of "bad apples" in the subspecialty. Birds of a feather flock together, as well as competing among themselves for nesting places. Adam Smith also observed that competitors try to fence out more remote competition through legal and professional regulation. All these were the grist of guild proceedings and now are the same in professional associations.

The distinctive feature today is the increasing proliferation of subassociations corresponding to the increasing fields of specialization. For example, in the American Bar Association the center of activity has gradually shifted from the Association as a whole to the Sections, which are subassociations based on specialization: business law, criminal law, tax law, etc. The same phenomenon is evident in the state bars and even in the Association of American Law Schools (AALS), the organization of law teachers, which now also has sections, specialized topical presentations, and specialized organizational politics. The same thing goes on in the other professions.

Balkanization, indeed, reaches down into specific workplaces, such as law firms in our profession, clinics and hospitals in health care, accounting firms, engineering departments, etc. Thus, every law firm of middling size or larger has "departments" with their own structure, technique and local lore. A doctor who recently helped me observed, with some sadness, that the last common intellectual experience among members of his profession was their second year in medical school.

The resultant of these forces is progressively to weaken the sense of common identity among the members of the professions. Of course, nominally the traditional professions remain intact and integrated. I am a "lawyer" and have certificates of admission to practice to prove it. But what does that mean to me or to another practitioner in the jurisdictions in which I am admitted? This distancing is manifested, among other ways, by the efforts that must be made to establish common ground with lawyers with whom we have not previously dealt—small talk of where we went to law school and such.

Dispersion of the relevant community is occurring not only within the professions but within the larger social communities in which modern professionals function. Society itself has changed its face, as anyone knows who drives a freeway between a downtown office and place of residence, or takes less time in an airplane to travel to a distant place than it used to take to get to the next county. People in today's society, both professionals themselves and the clients they serve, no longer live and work in a town or city as traditionally defined. Rather, people live and work at more or less remote locations in archipelagos or networks formed by transportation routes, telephone connections, Fed Ex drops and social networks. The term "alienation" is often used to describe this situation—the detachment of people from their home place and its circle of face-to-face acquaintances. However, that term seems inapposite. It seems to me that people have always been connected with those with whom they

immediately work and play but disconnected from everyone else. The difference in our modern era is in the basis of connection. Whereas the basis of connection between people used to be primarily geography—the village community is the classic model—now the bases of connection are specialized vocations and specialized vacations.

However, attitudes toward life are still shaped by the old model of the village community.³ There is, as a result, a severe discrepancy between our actual experience in life and work and our model of the ideal life and work. A resultant of this discrepancy, and an additional cause of our present condition, is disorientation in the sense of individual identity, in the concept of community and one's relationship to it, including the concept of professional community. The further resultant is a corresponding increase in personal anxiety. The term "alienation" can appropriately be used to describe this aspect of modern life, although that term may mask the causes and character of this phenomenon.

At any rate, all professions have Jeremiads explaining that things are no longer as they used to be, but have gone to hell. These lamentations are of course correct in observing the change of condition. Whether they are correct that things are worse than they used to be is more debatable. Certainly there is discontent among many successful white, male professionals, who imagine that they would have achieved professional success just as well in the good old days. However, there is also discontent among women, members of ethnic minorities, and white males who were born without silver spoons. The discontent of these folks is of a different kind, but nevertheless real. Perhaps for them it is that, having arrived at a station in professional life, the newcomers discover that there is "no there there." Or at least that the "there" which they anticipated turns out to be no rose garden.

At all events, the dimension of the social forces I have described is that of oceanic tidal waves. I see no means of controlling these forces and few means of moderating their effects. Nevertheless, the debates within the profession as well as in society at large over how to deal with the situation consist of arguments over how the Old Jerusalem is to be rebuilt, not whether that is impossible and hence whether we should consider some other model. As indicated below, I think there are ameliorations that are worth pursuing. However, those prescriptions are based on the premise that we have little more control over our long run future as a society than we have over the population of China. In my view, a degree of modesty of aspiration seems fitting.

B. The Intellectual Crisis in the Professions

A related and more complex crisis of the professions concerns their intellectual foundations. Again, these problems of intellectual foundation are being experienced in all the professions. They are manifested by uncertainty and disputation about professional school curricula; in battles over the composition of the professional school faculties; over what constitutes "research" in a profession's subject matter; and over what professional students are supposed to

3. Compare HILLARY CLINTON, *IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US* (1995).

take with them upon graduation. Cross-cutting these issues, and compounding the confusion, are issues concerning ethnic and gender diversity. The arguments can become very bitter. The old guard, among whom I count at least in terms of seniority, sometimes conceals its own confusion by reaffirming Old Time Religion. I would not be wholly surprised, for example, to hear a call for return to a law school curriculum based on common law pleading and the Rule Against Perpetuities. At the same time, the newcomers consider that they have something unique to offer, uncontaminated by the confusion among the proprietors of the status quo—such as gender-sensitive interpretations of the Securities and Exchange Acts.

At all events, the intellectual response to the larger forces affecting our society has been what might be called a migration upward in the subject matter of professional academic discourse. In all the professional schools, serious scholarly discourse increasingly is conducted in terms of more abstract and more or less scientific academic disciplines. In the legal profession, for example, the movement to these disciplines is manifested in the "law and..." phenomenon: law and economics, law and political theory, feminist theory in law, law and probability, law and history, racism in law, the science or technique of deconstruction (whatever that is), and so on. Indeed, in a provocative article, Judge Richard Posner has gone so far as to say that "law" as such has no independent content, and hence that it can be intelligently discussed only in terms of other disciplines such as economics, history, linguistics, etc.⁴

I have some things to say about the "law and" phenomenon in a moment. However, a sense of proportion should be maintained by noting that essentially similar phenomena are manifested in other professional academies. Academic medicine, for example, has long since ascended into biology and organic chemistry. The intellectual foundation of contemporary business school education is a mix of microeconomics and social psychology. The intellectual foundation of architecture appears to be a mix of visual design theory and urban sociology. The divinity schools are institutes weirdly combining social work and comparative theology. All of the professional schools are scenes of intense philosophical debates, some of them properly informed.

Much of what passes for research in the more amorphous disciplines such as law is undisciplined ragpicking of bright snippets from the higher disciplines. However, the better modern academic work, in professional disciplines including but not limited to law, is very illuminating and exciting. In law, it is familiar that economic analysis and game theory have helped us understand certain phenomena that have long been puzzling. A notable example in my own field is the mystery of why and how cases settle. It had long been recognized that a high percentage of cases settle. It was accordingly thought that, if the cases which would eventually settle could be identified somewhere earlier in the process, then a great deal of time and bother could be saved. Accordingly, an earlier generation of proceduralists thought the key problem was to identify the cases that were "settlement prone" and get them out of the system early.⁵

4. See Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761 (1987).

5. See MAURICE ROSENBERG, *THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE*

More recent study, informed by economics and game theory, suggests, however, that this is a futile quest. Rather, the key is the process itself, which consists of a complex set of interactions among the court, the parties and the lawyers. On the premise that the key is the process, there is no predetermination of cases that will settle—no cases that can be headed off by some means other than going through the process itself. It follows that the key to more efficient administration is a focus, not on the cases as such, but on how the rules and practices of the court system shape the process that winnows the cases.⁶

There are many other examples. In my personal observation, for example, portfolio theory has resulted in revamping trust law.⁷ Game theory, although not labeled as such, has helped reshape the law of suretyship and guaranty and corporate governance.⁸ Statistical analysis can help us understand deep seated social and legal problems, even if that kind of analysis may be insufficient to enable legal authority to do much about these problems.⁹

Similar transformations are occurring in the academic centers in other professional fields. Medicine is, of course, a familiar and conspicuous example. But we should be mindful that the same transformations are occurring in accounting, business management, engineering, and so on.

One unhappy result of these developments, however, is a change in the intellectual distance between the practitioners of the professions in the contemporary world and their academic counterparts. It is frequently remarked that the practitioners of today do not understand what the academicians are talking about, let alone understand what they are doing.¹⁰ Yet I think these complaints both sometimes oversimplify the situation and sometimes obscure an important element in it.

It is true that most practitioners do not understand what many academicians are talking about. But I submit that it is also true that most practitioners do not understand what other practitioners are talking about, and also that most academicians do not understand what other academicians are doing. I submit that it is also true that practitioners in various specialty fields and the academic counterparts in those same fields understand quite well what is being done and

(1964).

6. See, e.g., James Hughes & Edward Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225 (1995), and sources cited therein.

7. See RESTATEMENT (THIRD) OF THE LAW OF THE PRUDENT INVESTOR RULE 60–82 (1992).

8. See RESTATEMENT (THIRD) OF THE LAW OF SURETYSHIP AND GUARANTY (1996); AMERICAN LAW INSTITUTE: PRINCIPLES OF CORPORATE GOVERNANCE (1994).

9. A stark illustration is revealed in *Freeman v. Pitts*, 503 U.S. 467, 496 (1992) (whites consider “integration” to be 80/20%, whereas blacks consider it to be 50/50%).

10. The strongest statement to this effect is Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

said in *that subspecialty field*. Thus, the tax specialists and the tax academicians talk to each other without much difficulty, the securities specialists talk to each other, the pension specialists, etc. Moreover, these subspecialists within our profession can talk intelligently to members of other professions with whom they interface in dealing with the specialized subject matter. Thus, the tax law specialists can discuss tax with tax accountants, securities specialists can talk securities with financial analysts, and lawyers dealing with medical malpractice can talk with doctors, sometimes as friends and sometimes not.

In our multispecialty world, indeed it can be said that the only people who must try to make sense of all these conversations are high level policy-makers in various political arenas. In law, this includes the judges, the members of the management committees in large law firms, and the deans of the professional schools. My experience in the search for a dean of the School of Fine Arts at the University of Pennsylvania suggests that the same is true in the other professional disciplines.

Essentially what is happening is that the intellectual axis of the professions has been deflected. "Law" was previously defined in terms of certain traditional legal concepts and procedures, and the techniques used by office practitioners to avoid entanglement in legal procedures. "Law" is now defined in terms of fields of specific social controversy—securities law, employment discrimination, environmental law, etc. Again, there is a parallel development in the other professions. Doctors are no longer "doctors" but orthopedists, cardiac specialists, gerontologists, etc. Accountancy no longer focuses on the general journal but addresses such subjects as production analysis, capital cost projection, financial audit, etc.

It is not that the law has ceased to be concerned with common law pleading, or its modern equivalent in the subject of civil procedure, and ways of avoiding litigation such as contract drafting. Rather, it is that these basic skills no longer sufficiently define the profession of law. Recall the doctor who remarked that the only thing he had in common with his colleagues in the hospital was their second year in medical school. The same is true of law. That may well be why the defining bond among lawyers remains the first year in law school. That year was the same, or we imagine it to have been the same, for all of us. After that, our career paths have moved in centrifugal directions, intellectually and existentially.

I do not interpret our present situation as a New Ice Age. On the contrary, the new intellectual depth in legal study and practice is arresting and exciting even if very difficult for us generalists to contend with. We must acknowledge that many of the rules of law as we inherited them one or two generations ago were supported by no stronger foundation than that, in the ironic words of Oliver Wendell Holmes, they "had been so laid down in the time of Henry IV."¹¹ The new intellectual dimensions with which law practice must conjure are simply an irreversible phenomenon of social processes that also provide us with

11. OLIVER WENDELL HOLMES, *THE COMMON LAW* 35–36 (1881).

automobiles, washing machines, television and word processors. It seems to me fatuous and counterproductive to try to fight that revolution in our environment, for example, by restoring the law school curriculum of 1930.

C. Understanding and Responding to the Revolution

Perhaps the chief victims of the confusion are the current students in the professional schools. The professional school students are here because they want to get somewhere, but they have no idea what that somewhere might be like. A concomitant is uncertainty on their part as to whom to believe: The academics who purport to shed permanent light on narrow crevices of human experience, such as portfolio theory? Or the practitioners who complain that the teachers don't know what is going on? For reasons I have suggested, in my observation most practitioners, when speaking of matters outside their own fields of specialty, have a weak grasp of what they are talking about. Of more immediate interest, many practitioners complain that the graduates of professional schools don't know how to do professional work. This in turn leads the students to be afraid—thousands of dollars in tuition later—that the practitioners might be right. Thus, as a result of the current intellectual crisis as to what the professions are about, there is a crisis of confidence as to what the professions will be in the future.

In addressing this situation I would like to make certain observations.

First, the specialization revolution has arrived and will remain permanent. Specialization of knowledge and technique has so many benefits for society as a whole that it is an irreversible process, at least short of an atomic or astrophysical catastrophe that returns us all to being cavepeople.

Second, and correlatively, the specialization revolution implies ever narrowing intellectual specialization, both within and as between fields of endeavor. Tax lawyers, for example, will have continuing difficulty in communicating with lawyers in other fields, but will also continue to experience familiarity in communicating with tax specialists who are not lawyers. So also in all the other specialized fields of law, and so also in other professions.

Third, and for this reason, there will be a continuation of the "upward migration" of the professions' intellectual bases, from traditional lore taught in traditional class formats in the direction of analytic technique such as mathematical analysis and empirical research informed by such "higher" disciplines as politics, economics, and psychology and, in other professional fields, biochemistry and physics. Every component of professional lore and every method of professional technique is susceptible of analysis in terms of these "higher" disciplines. This is the explanation of why it is in a sense true that law has no inherent special content, as Judge Posner has suggested. But that proposition holds for all other professional disciplines as well, as we would discover in talking with the people in the medical schools, the business schools, and the engineering schools.

Fourth, although the special identity of a member of a profession will continue to

be established in a professional school—law school, medical school, business school, or whatever—that special identity will even more rapidly become evanescent, as the graduates move out into the world of specialized practice.

So how can the professions and the professional schools intelligently respond to this world? Not a new world, but one already here.

As intimated in the title of this presentation, I believe a key to comprehending the future of the professions is the idea of "practice." Practice is the common denominator of the old professions and the new specialized subprofessions, even those professionals whose fields intersect and overlap each other. It is worthwhile taking a closer look at the idea of "practice."

Practice consists above all of personal action in the face of real world dilemmas and uncertainties. Practice entails levels of specialized knowledge and skill that distinguish the professional from the general population. It entails personal responsibility when addressing situations and working out some way of dealing with them that distinguish the professional from the technician or the bureaucrat. It will not do for a professional to say merely that he adhered to recognized techniques if the circumstances give warning that recognized technique was inapposite. It also will not do for a professional to say that a problem committed to his professional attention is not in "his department." If the professional cannot work out a satisfactory resolution of a problem, he has responsibility for making a referral—that is, finding someone in a better position to deal with the problem.

Above all, practice is bound by real time and by real circumstance. In real time the clock is not suspended in order to permit further research. In the real world the resources are constrained and cannot be augmented. Real choices are involved, not merely hypothetical possibilities. Real consequences will ensue and not merely imaginary ones. A parable told in medical school is of the student who gives a long-winded answer to a question of diagnosis, whereupon the teacher remarks that the patient died thirty seconds ago. Law students and young lawyers have to be trained out of the technique learned from some law teachers, of offering full analysis of a problem but no suggestions of how to deal with it. A practicing engineer is concerned not with measuring the precise point at which a metal structure will disintegrate, but in deciding how much strength is required so that a structure will not disintegrate. Taking specific action to prevent the disintegration of structures is an undertaking common to all the professions.

In these respects, practice transcends all of the "higher disciplines," and for the foregoing intractable reasons. We academics in our scholarly disciplines are engaged primarily in the creation and dissemination of new knowledge that may have application in myriad but unforeseeable contexts. In contrast, practitioners of the professions are engaged primarily in the application of presently available knowledge to deal with problems that are immediately at hand. The problems that are immediately at hand for the professional are of course actual or potential subjects of study in the higher disciplines. The difference between the academic disciplinarian and the professional is not the problems being addressed. The

difference is in the responsibility being undertaken and the techniques to be employed.

From this perspective we can see that every profession engages in undertakings that can be described as "law and...", "medicine and...", "business and...", etc. Moreover, there are few limits to the findings derived in the higher disciplines that can be incorporated one way or another into lore and practice of the various professions. The question for any particular interdisciplinary endeavor between the practitioners and the academics is not whether they have anything to say to each other, but of selecting an agenda.

Judge Posner, who has done so well in exciting serious attention to this and other fundamental legal problems, describes what I have called "practice" in the following rather unattractive way: "[A] heterogeneous medley of rhetorical thrusts and parries, of advice and mediation by wise elders, of policy analyses and investigations, of miscellaneous clerical and bureaucratic tasks."¹²

I have two disagreements, perhaps only one, with his description. The first is Judge Posner's suggestion that law practice has recently descended to this low work-a-day plane. The historical record of law practice indicates that it has always been chiefly of this character. Of course, the law practice of many practitioners is punctuated occasionally by need to think deeply rather than to act decisively. Less often law practice may encounter, in Holmes' words, a "princess mightier than she who once wrought at Bayeux."¹³ But mostly, in yesteryear as today, law practice has consisted of a heterogeneous medley of mundane tasks. Perhaps there is no difference in viewpoint here, however, because Judge Posner is referring to a change, not in the practice of law as such but, in his words, "the reigning conception of law."¹⁴ Thus, he may simply be recording the fact that lawyers and legal academics are now more inclined than in the past to look at practice without the aid of rose-colored glasses.

My second disagreement runs deeper. The significant aspect of practice, in my view, is not simply that most practice is mundane. Rather, it is the fact that practice involves immediate personal engagement with the real world of limited time and resources and of risk as well as opportunity. Indeed, these characteristics are literally what makes law practice "mundane"—that is, a thing of this world rather than above or beyond it. The same is true of the practice of medicine, architecture and the other classical and newly emergent professions.

CONCLUSION

Thus, we should address the subjects of professional activity in terms of the common features of practice. I have already briefly indicated what those common features are: Activity, not simply contemplation or analysis; use of best available

12. Richard Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 2 (1993).

13. Oliver Wendell Holmes, *The Law*, in COLLECTED LEGAL PAPERS 27 (1920).

14. Posner, *supra* note 12, at 2.

knowledge and technique, under constraints against acquiring more knowledge or improving technique; confrontation of uncertainty; real world consequences; and personal responsibility.

The integral implementation of these components requires what is usefully called "professional judgment."¹⁵ As generally employed, however, the term "professional judgment" often brings discussion and analysis to a halt. It is taken to refer to a mysterious amalgam that can be acquired unconsciously in the course of practice but which cannot be explicated. The young must learn it only by experience. There is something to this, as Aristotle suggested long ago in differentiating theoretical and practical knowledge. Surely, however, it is time to see whether we can do better in the analysis and explication of "practice."

High on the agenda should be more systematic and sympathetic academic inquiry into the processes of practice.¹⁶ If practice requires a synthesis of the best insights from the academic disciplines, then professional school students should have background in those disciplines. Familiarity with those disciplines—economics, politics, psychology, etc.—therefore should be further nurtured in professional education. If practice requires decision and action, then professional school students should have wider opportunities for clinical and apprenticeship experience. Those opportunities, including law school clinics and summer apprenticeships, have been much enlarged in recent decades, but need further development. If practice requires self-consciousness and a sense of responsibility in a field of action, then professional school should treat that problem with the seriousness it deserves.¹⁷ If self-consciousness and a sense of responsibility are important, then these phenomena need continuing attention at the philosophical level as well as in the application.¹⁸ A subcategory of serious engagement in the problems of decision and action is of course serious engagement with problems of professional ethics.¹⁹

Finally, the members of the practicing profession in law at least must themselves treat these issues with corresponding seriousness. That will require a higher degree of openness, humility and courage, instead of bewailing the decline of our profession in public esteem.

15. See Michael Boudin, *Common Sense in Law Practice*, HARV. L. SCH. BULL., Spring 1983, at 22. For a remarkably similar but more general analysis of "judgment," see Sir Isaiah Bertin, *On Political Judgment*, N.Y. REV. BOOKS, Oct. 3, 1996, at 26.

16. For a call for this kind of analysis, see AMERICAN BAR ASS'N TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992). This report is usually referred to as the MacCrate Report after Robert MacCrate, Chair of the Task Force. See also TEACHING AND LEARNING PROFESSIONALISM, *supra* note 1.

17. For a thoughtful exposition of the types of education and training this can involve, see Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527 (1994).

18. As exemplified in WILLIAM JAMES, *PRINCIPLES OF PSYCHOLOGY* (1890) (a major work of philosophy); see also, e.g., STUART HAMPSHIRE, *THOUGHT AND ACTION* (1959).

19. See Susan Koniak & Geoffrey Hazard Jr., *Paying Attention to the Signs*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 117.

