

**If Lifelong Learning is the Solution, What is the Problem?:
A Perspective from South of the Border**

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I. Introduction.

Grant Gilmore famously concluded his historical study, *The Ages of American Law*, with the observation, “In Heaven there will be no law, and the lion will lie down with the lamb. . . . In Hell there will be nothing but law, and due process will be meticulously observed.”² In thinking about this conference, I was reminded of Gilmore’s *bon mot*, and wondered whether in Hell there will be nothing but lawyers, and the concept of professionalism will be scrupulously taught and observed. As an American academic, my perspective on this subject is inevitably colored by having lived through countless conferences, reports, and articles on the subject of lawyers’ professionalism in the United States.³ While a few doubters have surfaced from time to time,⁴ it

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² Grant Gilmore, *The Ages of American Law* (New Haven: Yale University Press 1977), p. 111.

³ A little time spent with Google reveals that professionalism initiatives have been undertaken, surveys conducted, reports prepared, and various recommendations implemented by state court-appointed commissions in Florida, Georgia, Illinois, Maryland, New York, North Carolina, South Carolina, and Texas. The Conference of [State] Chief Justices established a working group which prepared an Action Plan on Lawyer Conduct and Professionalism, published in 1999, which is available on-line at <http://ccj.ncsc.dni.us/natlplan/NatlActionPlan.html> [hereinafter “Chief Justices Report”]. The American Bar Association has commissioned two major studies on professionalism, culminating in the so-called Stanley Commission Report, formally entitled “... *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, is reprinted at 112 F.R.D. 243 (1987) [hereinafter “Stanley Commission Report”], and the report of the ABA Section on Legal Education and Admission to the Bar, entitled *Report of the Professionalism Committee: Teaching and Learning Professionalism* (1996) [hereinafter “ABA Professionalism Committee Report”]. Several U.S. law schools, including Fordham, Georgia State, Mercer, South Carolina, and Stanford, have centers whose mission is defined, at least in part, as fostering discussion, research, teaching, and continuing legal education on the subject of professionalism.

⁴ See, e.g., Rob Atkinson, “A Dissenter’s Commentary on the Professionalism Crusade,” 74 *Tex. L. Rev.*

(continued...)

would appear that most lawyers, judges, and legal scholars agree that there is a pressing problem with the state of lawyers' professionalism in this country.⁵

I might be inclined to agree that there is a problem, if it were possible to figure out what is meant by the term professionalism. In ordinary usage, the word can be understood as synonymous with (1) competent performance or perhaps aspirational standards of excellence that go beyond a minimum level of competency (“the painter did a really professional job on our bathroom”); (2) civility (“that lawyer’s tirade in the courtroom reveals an unprofessional attitude”); or (3) doing something for a living as opposed to as a hobby (“my colleague plays violin as well as many professionals”). The term gains additional senses in academic discourse, including most notably in the sociology of the professions, which seeks to understand how professions differ from other occupational groups.⁶ In this literature, professionalism is a site of

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259 (1995); Amy R. Mashburn, Professionalism as “Class Ideology: Civility Codes and Bar Hierarchy,” 28 *Val. L. Rev.* 657 (1994); Timothy P. Terrell and James H. Wildman, “Rethinking ‘Professionalism’”, 41 *Emory L.J.* 403 (1992).

⁵ Similar rhetoric informs the Canadian debate over lawyer professionalism. See the Chief Justice of Ontario’s Advisory Committee on Professionalism, Working Group on the Definition of Professionalism, “Elements of Professionalism,” available at <http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf> [hereinafter “*Elements of Professionalism*”] (“Recently, however, concerns have been expressed about a decline in professionalism, and there has been a renewed call for professionalism among lawyers.”).

⁶ See, e.g., Richard L. Abel, *English Lawyers Between Market and State: The Politics of Professionalism* (Oxford: Oxford University Press 2003); Elliott A. Krause, *Death of the Guilds: Professions, States, and the Advance of Capitalism, 1930 to the Present* (New Haven: Yale University Press 1996); Robert L. Nelson, et al., *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* (Ithaca: Cornell University Press 1992); Richard L. Abel, *American Lawyers* (New York: Oxford University Press 1989); Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (Chicago: University of Chicago Press 1988); Terence C. Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment* (Chicago: University of Chicago Press 1987); Eliot Friedson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (Chicago: University of Chicago Press 1986); Magali Safatti Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press 1977).

contesting claims to authority and conceptions of legitimacy, asserted by the state, occupational groups, and society as a whole. To say that lawyers are professionals in this sense is to say, for example, that they should be entitled to the privilege of self-regulation and independence from the state. Similarly, to dispute the claim of professionalism in the sociological sense may be to critique the monopoly rents enjoyed by lawyers and to argue for greater competition and more attention to the interests of clients.

The result of this multiplicity of meanings is that people who argue back and forth about professionalism are often failing to engage in a serious debate. This is unfortunate, because there are many potential problems with lawyers' practices, potentially going under the banner of "professionalism," which might need to be addressed by courts, educators, or professional associations of lawyers. In practical terms, these problems may be amenable to very different solutions, however, and the inability of lawyers, judges, and scholars to agree on the meaning of professionalism hampers any effective response. More theoretically, the lack of definitional clarity on the surface may obscure underlying political issues which are really driving the debate. For example, if one takes the position (associated with scholars like Larson and Abel) that the claim to being a profession is essential a way to exclude competition from other occupational groups, monopolize the production of some service, and thus realize substantial economic rents, then one will be skeptical of attempts to defend the independence of a profession against either market forces or state attempts to regulate in the service of protecting the interests of non-professionals. A case study of this kind of conflict is the debate in the United States over regulation of business lawyers by the Securities and Exchange Commission, pitting the organized

bar against regulators claiming to represent the interests of investors.⁷

Less obviously, this conflict plays out behind the scenes when the organized bar attempts to define norms of good practice (through civility codes, creeds of professionalism, and the like), which can be used by elite lawyers as a weapon against lawyers representing unpopular, less powerful, clients.⁸ On the other hand, one might believe that professionalism is a good thing, on the assumption that autonomy and self-regulation permits an occupational group to dedicate itself to the production of some social good, like health or justice.⁹ Professional expertise, the opacity of which makes it difficult to for non-professionals to evaluate and regulate professional activities, may be a necessary (or at least very effective) means for carrying out some valuable social goal. There is accordingly a social contract between professions and society, in which professions agree to exercise their valuable prerogatives in the spirit of public service.¹⁰ Anthony Kronman, for example, has urged lawyers to recommit to the ideal of a lawyer-statesman, characterized by his or her “superior ability to discern the public good.”¹¹ The problem with this exhortation, however, is apparent in a society in which the content of the public interest is

⁷ See Susan P. Koniak, “When the Hurlyburly’s Done: The Bar’s Struggle with the SEC,” 103 *Colum. L. Rev.* 1236 (2003).

⁸ See Alice Woolley, “Does Civility Matter?,” 46 *Osgoode Hall L.J.* 175 (2008).

⁹ This is the structural-functional claim, associated with the work of Talcott Parsons. See Robert W. Gordon and William H. Simon, “The Redemption of Professionalism?,” in Nelson, *supra*; Robert W. Gordon, “The Independence of Lawyers,” 68 *B.U. L. Rev.* 1 (1988).

¹⁰ The phrase, “in the spirit of public service” comes from Roscoe Pound’s definition of professionalism, which has been widely quoted. See, e.g., Stanley Commission Report, *supra*; *Elements of Professionalism, supra*, p. 8.

¹¹ Anthony T. Kronman, *The Lost Lawyer* (Cambridge, Mass.: Belknap Press 1993), p. 35.

contestable. One may worry that a lawyer's ability to discern the public interest may be subtly influenced by the interests of the lawyer's clients. Indeed, the elite lawyers who serve as models for Kronman's lawyer-statesman ideal tended to identify the public interest with the interests of their powerful corporate clients.¹²

Responding to this difficulty, I have argued at length that the distinctive role of lawyers is to serve as custodians of the law, and ensure that their clients comply with its substantive meaning, rather than regarding law as merely an inconvenient obstacle to be planned around.¹³ This passage, from Robert Gordon and William Simon, is a good statement of the position that I have defended as the core ethical obligation of lawyers:

[E]ven private lawyers committed to unswerving loyalty to client interests still must assume a quasi-public responsibility for honest observance of the basic rules and procedures of the framework, even in the face of the many opportunities they have to ignore the rules with impunity.¹⁴

Complying with this ethical obligation means not advising clients on the basis of strained readings of the applicable law, and not seeing one's task as a lawyer as figuring out ways to get

¹² See, e.g., Russell G. Pearce, "Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role," 8 *U. Chi. L. Sch. Roundtable* 381 (2001) (discussing

¹³ See W. Bradley Wendel, "Professionalism as Interpretation," 99 *Nw. U. L. Rev.* 1167 (2005). That article, and other work, can be seen as trying to provide a foundation in jurisprudence and political philosophy for the position defended by Bob Gordon as a matter of history and sociology. See Robert W. Gordon, "A New Role for Lawyers?: The Corporate Counselor After Enron," 35 *Conn. L. Rev.* 1185 (2003); Robert W. Gordon, "Why Lawyers Can't Just Be Hired Guns," in Deborah L. Rhode, ed., *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (New York: Oxford University Press 2000); Robert W. Gordon, "A Collective Failure of Nerve: The Bar's Response to Kaye Scholer," 23 *Law & Soc. Inquiry* 315 (1998); Robert W. Gordon, "Corporate Law Practice as a Public Calling," 49 *Md. L. Rev.* 255 (1990).

¹⁴ Gordon and Simon, *supra*, p. 235.

around legal prohibitions.¹⁵ In my view, there is an attitude we may call “professionalism” which is associated with this ethical ideal. Professionalism accordingly has two components. First, there is a skill or distinctive expertise associated with the craft of interpreting and applying the law to client problems. This distinctive skill is the exercise of reflective judgment, and it is perhaps the central distinguishing feature of what is often called “thinking like a lawyer.” Second, there is a motivation or disposition to comply with the ethical duty. Lawyers may know what a fair and reasonable interpretation of the applicable law is, but may nevertheless be susceptible to pressure from a powerful client to provide a legal opinion that reflects a distorted reading of the law. Professionalism education must address both of these components.

The principal claim of this paper is that education at both the law school and post-graduation stage can plausibly address the first component but not the second. Legal analysis is a craft, and lawyers can become better at it through training and experience. Lifelong learning programs may contribute to this ongoing process of skills development. On the other hand, dispositions and motivations are not only difficult to inculcate through education, but are susceptible to being influenced — decisively, in some cases — by situational factors beyond the reach of educators. Thus, a legal ethics scandal such as the participation of Bush administration lawyers in drafting the so-called torture memos may be deemed a failure of professionalism; the legal advice given by the lawyers was deficient in terms of commonly accepted standards of

¹⁵ For the purposes of this discussion, it is necessary to assume, without providing a fully worked-out argument, that there is a difference between a legitimate and an artificial or distorted interpretation of the applicable law. I should also note that the ethical problems I am concerned with here arise for lawyers acting in a counseling or advising capacity, not representing clients in litigated matters. Lawyers are permitted to take more creative or aggressive positions with respect to the law in litigation, and rely on opposing counsel and the presence of a neutral tribunal to ensure compliance with the law.

professional craft,¹⁶ but given the talent and sophistication of the lawyers in question, the explanation for this failure is likely some feature of the drafting process, such as the paranoia and secrecy in which national security policy was made in the years following the September 11th attacks. The subsidiary argument in this paper, which may actually be the more controversial point, is that the central aspect of professionalism, with which we as scholars and educators should be concerned, is a matter of the appropriate attitude or orientation lawyers should take toward the law. In order to establish this claim, it will first be necessary to consider some other conceptions of professionalism that have some currency in the American and Canadian literature. That is the task of the next section of this paper.

II. Professionalism: A Concept in Search of a Definition.

As noted in the introduction, discussions of professionalism in the United States are often framed around the idea that there is some sort of crisis at hand, which in turn implies that the legal profession is losing sight of some ideal to which it had previously subscribed. The important thing to focus on is not the decline-and-fall narrative, which seems to be a perennial feature of the discourse of professionalism,¹⁷ but the connection between the professional ideal and other social and political values. Professions are relatively insulated from both political pressure (through regulation by politically responsive branches) and market forces. In other

¹⁶ This was a theme of my 2008 Wickwire Lecture at Dalhousie Law School. See W. Bradley Wendel, "Executive Branch Lawyers in a Time of Terror," 31 *Dalhousie L.J.* ____ (2009) (forthcoming).

¹⁷ See Rayman L. Solomon, "Five Crises or One: The Concept of Legal Professionalism, 1925-1960," in Robert L. Nelson, et al., *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Ithaca: Cornell University Press 1992).

words, professions claim *legitimate* authority to regulate their members, exclude non-members from performing certain tasks, and to define what constitutes good practice. These prerogatives, which have usefully been labeled “guild power,”¹⁸ obviously require some sort of justification in terms of values that have some currency in the broader society in which the profession is embedded.

For example, the charge that lawyers have abandoned the sense of the practice of law as a public calling, and have become businesspeople interested only in making a profit, can be understood in terms of the underlying value of independence from the interests of wealthy, powerful clients. One aspect of the ideal of professionalism is autonomy, which is understood to mean independence both from the state (hence, the emphasis on self-regulation) and from clients.¹⁹ This professional independence allows lawyers to play a mediating role, seeking to harmonize the interests of society with those of individuals.²⁰ The concept of professionalism only has analytical heft if it can be connected in this way with underlying social and political ideals. In this way, it is possible to make an institutional normative argument, showing that the legal system as a whole has legitimacy in terms of these social values, that lawyer play an essential role within that system, and that certain features of the lawyer’s role are necessary in

¹⁸ Elliott A. Krause, *Death of the Guilds: Professions, States, and the Advance of Capitalism, 1930 to the Present* (New Haven: Yale University Press 1996), p. 20 and *passim*.

¹⁹ Robert W. Gordon, “The Independence of Lawyers,” 68 *B.U. L. Rev.* 1 (1988).

²⁰ See Robert L. Nelson & David M. Trubek, “Arenas of Professionalism: The Professional Ideologies of Lawyers in Context,” in Robert L. Nelson, et al., *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* (Ithaca: Cornell University Press 1992); William H. Simon, “Babbitt v. Brandeis: The Decline of the Professional Ideal,” 37 *Stan. L. Rev.* 565 (1985).

order that the system continue to serve its justified function.

Unfortunately, these arguments are often lacking in a substantial normative foundation, so that they take on an ad hoc, question-begging quality — for any observed problem with lawyers, the solution must be more “professionalism.”²¹ As a result, the concept of professionalism is so protean that it is difficult to make progress on understanding how it should be taught, inculcated, reinforced, or regulated. The first step in thinking about professionalism *education* must therefore be definitional clarification. This section considers two of the definitions that have frequently been used in the professionalism debate, and shows why they should not be the aim of continuing professionalism education.

A. *From a Calling to a Business.*

A perennial theme of the professionalism literature in the U.S. is that the legal profession was once a calling, but has degenerated into merely a profit-oriented business.²² The Stanley

²¹ Readers can insert their own cliché here. Two suggestions: “Every problem looks like a nail, if you happen to have a hammer.” Alternatively: A drunk was looking for his house keys under a street lamp. A police officer walked over and asked him what he was doing. “Looking for my keys,” he replied. “Do you think you lost them here?” asked the police officer. “No,” replied the drunk, “but the light is better here.”

²² See, e.g., Michael H. Trotter, *Profit and the Practice of Law: What Happened to the Legal Profession?* (Athens: University of Georgia Press 1997); Rudolph J. Gerber, *Lawyers, Courts, and Professionalism* (New York: Greenwood Press 1989), p. 23 (“Today we have lost the ability to distinguish between a calling and a station in life, to see differences between a profession and a trade. To the extent that law students and lawyers become absorbed in status and gain, law ceases to be a profession . . .”); Russell G. Pearce, “The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar,” 70 *N.Y.U. L. Rev.* 1229 (1996) (“in contrast to businesspersons, who maximize financial self-interest, lawyers altruistically place the good of their clients and the good of society above their own self-interest”); Arlin M. Adams, “The Legal Profession: A Critical Evaluation,” 93 *Dick. L. Rev.* 643, 652 (1989) (noting “the decline of professionalism and its replacement
(continued...)”).

Commission Report, issued in 1986 by the ABA’s Commission on Professionalism, began by asking whether the legal profession had “abandoned principle for profit, professionalism for commercialism.”²³ Not surprisingly given the way the question was posed, the commission concluded that many of the symptoms of declining professionalism “could begin to be addressed by subordinating a lawyer’s drive to make money as a primary goal of law practice.”²⁴ The same criticism appears to be a feature of the debate in Canada as well, with Allan Hutchinson observing that “many lawyers now see themselves as being just as concerned with the bottom line as with broader issues of social justice,”²⁵ and the Ontario Chief Justice’s Advisory Committee warning against “lawyers’ desire to maximize income and status with little or no attention to public service.”²⁶

This sort of criticism prompts a few quibbles and two substantive responses. The first quibble is that the criticism of the profit motive is unfair to people engaged in “mere” businesses — there is nothing wrong, from an ethical point of view, with spending one’s life working as a plumber or an airline pilot. Businesspeople can provide socially valuable services, and can hold

²²(...continued)
with commercialism”); Norman Bowie, “The Law: From a Profession to a Business,” 41 *Vand. L. Rev.* 741 (1988); Tom C. Clark, “Teaching Professional Ethics,” 12 *San Diego L. Rev.* 249, 251 (1975) (“the primacy of service over profit is the criterion which distinguishes a profession from a business”); Kronman, *supra*, p. 294 (“Lawyers working in large firms thirty years ago saw their jobs as a way of making a living just as those working in such firms do today. But they did not see their work in purely instrumental terms, as nothing but a means for making money.”).

²³ Stanley Commission Report, *supra*, p. 251.

²⁴ *Id.* at 300.

²⁵ Allan C. Hutchinson, *Legal Ethics and Professional Responsibility* (Toronto: Irwin Law 1999), p. 5.

²⁶ *Elements of Professionalism*, *supra*, p. 9.

themselves to high standards of competence and honesty. The desire to make money at one's trade does not automatically lead to the conclusion that one is behaving unethically, nor is it incompatible with admiration for having done a difficult job with great competence and due regard for the interests of others. (Presumably no one would begrudge Chesley Sullenberger, the captain of U.S. Airways flight 1549, a penny of his salary.) Moreover, as critics aligned with Richard Abel would point out, maximizing the income and status of their members is what professions *do*²⁷; ideally, however, there is a quid pro quo with the public, in which professions agree to enjoy their monopoly rents in exchange for contributing something valuable to society. Second, at least in the United States, lawyers have always been accused of either of themselves engaging in money-grubbing and inappropriately business-like behavior,²⁸ or of representing wealthy clients to the detriment of the interests of the public as a whole.²⁹ As Mark Galanter's engaging study of lawyer jokes shows, there has never been a time in which one of the primary focal points of public criticism of lawyers has not been the related themes of greed, overcharging clients, the association with fat-cat clients, and the indifference to the plight of the less well off.³⁰

²⁷ See, e.g., Richard L. Abel, *American Lawyers* (New York: Oxford University Press 1989), pp. 24-30; Richard L. Abel, "Why Does the ABA Promulgate Ethical Rules?", 59 *Tex. L. Rev.* 639 (1981).

²⁸ The influential Nineteenth Century legal ethics treatise written by George Sharswood laments the decline of the legal profession "from an honorable office to a money-making trade." George Sharswood, *Essay on Professional Ethics* (Philadelphia: T. & J.W. Johnson, 5th ed., 1884) (Gale, Cengage Learning Electronic Edition), p.142. Russ Pearce describes an "extraordinary outpouring of rhetoric" in the Nineteenth Century decrying the erosion of professional ideals — defined in part as indifference to financial self-interest — and their replacement by commercialism or profit-seeking by lawyers. Russell G. Pearce, "The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar," 70 *NYU L. Rev.* 1229, 1241 (1995).

²⁹ Lawrence M. Friedman, *A History of American Law* (New York: Touchstone, 2d ed., 1985), p. 639 ("Two charges have been leveled against the Wall Street firm: that it served its rich, evil clients rather than the public; and that it perverted the legal profession, turning free, independent craftsmen into workers in factories of law. Both charges were already heard in the late 19th century and have never completely subsided.").

³⁰ Mark Galanter, *Lowering the Bar: Lawyer Jokes and Legal Culture* (Madison: University of Wisconsin (continued...))

The first substantive response to the critique of the legal profession as a mere business is that “business” can be understood as the antonym of a monopoly, and that competitive markets are generally good for consumers. The legal profession in the United States has always devoted significant energy and resources to preventing non-lawyers from poaching on the turf of the bar.³¹ Even as recently as 1999, the Texas Unauthorized Practice of Law Committee attempted to enjoin the publication of Quicken Family Lawyer, a software package intended to assist families and small businesses with preparing simple legal documents such as wills and residential lease agreements.³² The organized bar has promoted anti-competitive measures such as restrictions on advertising and in-person solicitation, which it generally attempts to justify as necessary for the protection of the image of the (elite) profession. It is useful to remember that the idea that the legal profession is a calling, not a mere business, is rooted in the traditions of the English Bar, and that a career as a barrister was closed to anyone who was not independently wealthy, because of the long period of study and apprenticeship, without remuneration, that was required before being called to the bar.³³ Significantly, the recent encroachments on the Bar’s professional turf by the solicitor profession were prefigured by the increasing salience of free-market rhetoric in

³⁰(...continued)
Press 2005), p. 17 and *passim*.

³¹ Friedman, *supra*, pp. 634-35; Rayman L. Solomon, “Five Crises or One: The Concept of Legal Professionalism, 1925-1960,” in Robert L. Nelson, et al., *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* (Ithaca: Cornell University Press 1992).

³² *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*, 1999 WL 47235 (N.D. Texas, Jan. 22, 1999) (reprinted in Geoffrey C. Hazard, Jr., *The Law and Ethics of Lawyering* (New York: Foundation Press, 4th ed., 2005), p. 911).

³³ See Richard L. Abel, *English Lawyers Between Market and State: The Politics of Professionalism* (Oxford: Oxford University Press 2003), pp. 96-105.

the public debate over access to justice.³⁴

The second substantive response is that the rhetoric of business vs. calling is really just a makeweight, and the substantive force of this argument is that lawyers should comply with ethical standards even if it is not in their economic self-interest to do so. U.S. Supreme Court Justice O'Connor has written that the distinguishing feature of a profession is that "membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either through legal fiat or through the discipline of the market."³⁵ Much of what American lawyers call "legal ethics" is nothing more than the law governing lawyers, including state bar disciplinary rules as well as norms grounded in the generally applicable law of torts, agency, contracts, and criminal and constitutional law.³⁶ There is nothing wrong with promulgating, enforcing, and teaching about the positive law regulating

³⁴ See Richard L. Abel, "The Professional as Political: English Lawyers from the 1989 Green Papers Through the Access to Justice Act 1999," in William L.F. Felsteiner, ed., *Reorganization and Resistance: Legal Professions Confront a Changing World* (Oxford: Hart Publishing 2005), pp. 20-26.

³⁵ *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 488 (1988) (O'Connor, J., dissenting).

³⁶ In contrast to the situation in Canada, and despite occasional fulminations to the contrary by the organized bar, the American profession is not substantially self-regulating. Grievance and disciplinary procedures established by the states' highest courts do serve as one source of constraint on the activities of lawyers. In many practice settings, such as prosecutors' offices and large law firms, lawyers face an extremely low likelihood of professional discipline. In those and other contexts, the possibility of other legal sanctions, outside the scope of the state bar disciplinary process, is a much more salient concern. These legal constraints include malpractice or breach-of-fiduciary duty lawsuits by aggrieved clients, sanctions imposed by tribunals pursuant to their inherent power to regulate the practice of law by lawyers in their courts, and legislation and administrative agency regulations such as the Securities and Exchange Commission's regulations imposed under Section 307 of the Sarbanes-Oxley Act, and the Internal Revenue Service's Circular 230. At one time in the United States the so-called negative inherent powers doctrine prevented legislatures from poaching on the turf of the organized profession by enacting statutes to regulate the activities of lawyers, but that doctrine is now all but dead. See Charles W. Wolfram, *Modern Legal Ethics* (Minneapolis: West Publishing 1986), § 2.2.3, pp. 27-33. For a descriptively and theoretically satisfying account of the tension between the bar's normative vision and the competing visions of other institutional actors, see Susan P. Koniak, "The Law Between the Bar and the State," 70 *N.C. L. Rev.* 1389 (1992).

the activities of the legal profession. It is increasingly complex, contains numerous pitfalls for the unwary, and given the potential cost of adverse judgments or settlements, compliance with the law governing lawyers is a major preoccupation of managing partners and inside general counsel at large law firms.³⁷ Surely, however, this is not what anyone means by “professionalism,” and the quotation from Justice O’Connor shows that the rhetorical contrast with a business is meant to suggest that lawyers are differently motivated, as compared with businesspeople, when it comes to voluntarily complying with the demands of morality.

I will address this appeal to “ethics beyond the rules” in the final section of the paper. Briefly, if professionalism is a matter of a disposition or motivation to comply with ethical standards, or a faculty of judgment that cannot be reduced to the application of technical knowledge to a problem, then it would appear to be difficult to inculcate through any existing program of continuing professional education. At least in the U.S., continuing legal education seminars aim at conveying knowledge. To use a distinction from moral philosophy, we are all familiar with the process of educating people on the basis of theoretical reasoning, but it is a very different matter to educate people within the domain of practical reasoning.³⁸ Theoretical reasoning concerns what we have reasons to believe. A statement at a CLE program that, “advance waivers of conflicts of interest are enforceable if certain conditions are satisfied,” gives

³⁷ See Roger C. Cramton & Susan P. Koniak, “Rule, Story and Commitment in the Teaching of Legal Ethics,” 38 *Wm. & Mary L. Rev.* 145, 152-53 (1996) (“The restrictions on a lawyer engaging in a business transaction with a client, the rules on safekeeping client property, and the nuances of conflicts of interest are not matters that law students should be expected to intuit based on their otherwise fully developed moral character, however good that moral character might be.”).

³⁸ See, e.g., Christine M. Korsgaard, *The Sources of Normativity* (Cambridge: Cambridge University Press 1996), pp. 450-46; John Rawls, *Political Liberalism* (New York: Columbia University Press 1993), p. 93.

a lawyer a reason to believe that if she obtains an advance waiver under the specified conditions, it will be enforced by a court. On the other hand, practical reasoning concerns what we have reasons to do. In the standard account, there must be something present, over and above reasons for belief, to justify the conclusion of practical reasoning that one ought to do such-and-such.³⁹ The source of motivation may be self-interest, altruism, the “moral sentiments,” one’s desire to be (and be seen as) a person with a certain moral character, and so on. Whatever the motivation, however, it is independent of knowledge that X is the case. Proponents of professionalism education need to explain how that “something else” may be inculcated through their proposed program of instruction.

B. Adversarial Excess and Incivility.

If there is one issue that seems to dominate many discussions of professionalism in the U.S., it is civility.⁴⁰ The story of Joe Jamail’s cursing at a deposition in Delaware and then laughing at the sanctions imposed by the court (“Don’t Joe me, asshole,” “I’d rather have a nose on my ass than come back to Delaware for any reason,” etc.) has by now become a standard trope in the professionalism literature.⁴¹ However, I tend to agree with those who believe the emphasis on civility is at best a distraction, and at worst antithetical to some of the core values of

³⁹ See Stephen Darwall, Allan Gibbard & Peter Railton, “Toward Fin de Siècle Ethics: Some Trends,” 101 *Phil. Rev.* 115, 131-37 (1992).

⁴⁰ See Chief Justices’ Report, *supra* (surveying state-bar definitions of professionalism and concluding that “[b]y far the most common definition related to the courtesy and respect that lawyers should have for their clients, adverse parties, opposing counsel, the courts, court personnel, witnesses, jurors, and the public”).

⁴¹ *Paramount Communications v. QVC Network*, 637 A.2d 34 (Del. 1994).

lawyering.⁴² It is a distraction because incivility is generally a symptom of some underlying cause, which should be the focus of reform initiatives. For example, if lawyers are obnoxious to one another in depositions (“examinations for discovery” in Canada), the problem may be that the discovery process in a case has gotten out of control, or that party-controlled discovery is in general a natural arena for misconduct by lawyers.⁴³ The civility movement is actively harmful, however, if norms of civility are understood as precluding challenges to injustices within the legal system. One of my former colleagues, a committed advocate for capital defendants, observed that many civility codes would prohibit a defense lawyer from alleging in open court that a prosecution was racially biased, even if that claim were factually supported. This same colleague was fond of paraphrasing a maxim about journalists and applying it to lawyers: The job of the lawyer, in his view, is to “comfort the afflicted and afflict the comfortable.”⁴⁴ Afflicting the comfortable is not always pleasant, and may result in accusations of incivility by the comfortable. To turn the point around, effective, ethical lawyering may require nastiness, not civility.⁴⁵

The claim that the legal profession was once characterized by civility can easily slip into a lament for the loss of *gentility*. Genteel traditions are generally sustainable only within a fairly

⁴² See Woolley, *supra*.

⁴³ See, e.g., Austin Sarat, “Enactments of Professionalism: A Study of Judges’ and Lawyers’ Accounts of Ethics and Civility in Litigation,” 67 *Fordham L. Rev.* 809 (1998).

⁴⁴ The original quote is attributed to Finley Peter Dunne in Justin Kaplan, ed., *Bartlett’s Familiar Quotations* (16th ed., 1992), p. 602. Dunne wrote in the name of his character, the voluble Irish-American barkeeper Mr. Dooley, in Chicago newspapers, and made his name in a series of columns opposing the Spanish-American war.

⁴⁵ Terrell & Wildman, *supra*, p. 420.

small, homogenous community — a gentleman’s club, in other words. Some modern legal ethics scholars have recommended a return to the tradition of the lawyer as gentleman. Thomas Shaffer (writing with his daughter, Mary) has argued that “[t]he morals of the gentleman are an ethic for the professions.”⁴⁶ The Shaffers observe of the early 20th Century Philadelphia lawyer Henry Drinker: “He was a gentleman; he knew what made a person morally unfit to practice law.”⁴⁷ Even today, in a society that claims to have rejected the social role of gentleman, television portrayals of lawyers frequently show the resolution of moral dilemmas by an wise (generally white and male) elder statesman, whose experience, judgment, and craftsmanship mark him as a person of ethical probity who understands how a good person is supposed to act in practical situations.⁴⁸ Kronman’s lawyer-statesman ideal trades on the ethics of gentlemen, particularly in Kronman’s candid admission that practical wisdom is the province of an elite caste. Although any lawyer can aspire to it, and through experience gain a measure of practical wisdom, only the wisest, most virtuous lawyers deserve emulation.

The effect that the gentleman lawyer is supposed to have on law practice can be perceived from Steven Lubet’s story of the day Bert Jenner came to the ordinary peoples’ court.⁴⁹ As Lubet relates the story, he was a legal services lawyer with a specialization in landlord-tenant and consumer debtor cases, practicing in barely contained pandemonium on the eleventh floor of the

⁴⁶ Thomas L. Shaffer & Mary M. Shaffer, *American Lawyers and Their Communities: Ethics in the Legal Profession* (Notre Dame, Ind.: Univ. of Notre Dame Press 1991), p. 34.

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 31.

⁴⁹ Steven Lubet, “Professionalism Revisited,” 42 *Emory L. Rev.* 197 (1993).

municipal court building in Chicago. No one was courteous to one another, the judges and court personnel treated poor litigants with undisguised contempt, and the courthouse regulars were far more concerned with pleasing the repeat-player creditors and landlords than ensuring that the defendants had a fair hearing. All this changed one day when Albert Jenner, the former counsel to the Senate Watergate Committee and a name partner in Jenner & Block, with his “stern countenance, ramrod posture, piercing eyes, and signature bow tie” unexpectedly showed up to handle a case.

[T]he entire courtroom suddenly metamorphosed. The muttering plaintiffs’ bar fell silent. Clerks began answering inquiries from unrepresented defendants. The judge actually asked questions about the facts and the law. It was as though we were now in a real courtroom where justice, and people, mattered. Furthermore, this effect lasted for the entire day, long after Mr. Jenner left.

Significantly, Jenner was not just any person — he was a gentleman, and his reputation shamed the lawyers and judges around him into living up to their own ideals. The Jenner story seems like an apt illustration of the highest qualities of professionalism.

The problem with equating professionalism with civility and the ethics of gentlemen is that the word “gentleman” is often understood literally. That is not a good thing in light of the bar’s long and ugly history of seeking to exclude members of lower-status groups. The elite of the profession have often warned that letting in outsiders will corrupt the morals of the bar. As Lawrence Friedman observes:

Old-line lawyers were never too happy about the influx of “Celts,” Jews, and other undesirables. George T. Strong, writing in his diary in 1874, hailed the idea

of a test for admission at the Columbia Law School: “either a college diploma, or an *examination including Latin*. This will keep out the little scrubs (German Jew boys mostly) whom the School now promotes from the grocery-counters . . . to be ‘gentlemen of the Bar.’”⁵⁰

Women and African-Americans were even less likely to be accepted as members of the profession by elite lawyers.⁵¹ The point is not only that the legal profession has a bad track record in terms of inclusiveness. The more general problem is that norms like gentility and civility tend to flourish only in relatively small, tightly knit, homogeneous communities. Notice how Bert Jenner appears almost as a visitor from another planet in Lubet’s account. There were no gentlemen in Chicago municipal court until Jenner arrived as an emissary from the world of elite corporate practice, in which lawyers conducted themselves according to high standards of professionalism.

I do not deny that these communities exist. In my own practice experience in Seattle (with a relatively small population of lawyers, by U.S. standards), I remember envying the members of some smaller, specialized legal communities, such as the maritime and bankruptcy bars, whose members treated one another with courtesy and respect, refrained from playing games with discovery, routinely granted requests for continuances, stipulated to facts not

⁵⁰ Friedman, *supra*, p. 638. *See also id.*, pp. 650-51 (noting that at the time of their formation, the American Bar Association and city bar associations formed in Chicago, New York, and elsewhere wanted to improve the image of the bar, but were concerned to include only the “decent part” of the profession); Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (New York: Oxford University Press 1976); Marc Galanter, “Lawyers in the Mist: The Golden Age of Legal Nostalgia,” 100 *Dick. L. Rev.* 549 (1996).

⁵¹ Friedman, *supra*, p. 639.

reasonably in dispute, conducted themselves in a civil manner in depositions, and so on.⁵² This is consistent with empirical evidence on the benefits of cooperation in litigation.⁵³ The reason for this, in game-theoretic terms, is that lawyers in certain communities may be repeat players with respect to each other, and with respect to local judges. It is worth investing in a reputation for cooperativeness, because it serves as a “bond” or a guarantee of trustworthiness. Other parties can rely on a cooperative party not to defect, because doing so would lead to a loss of reputation. Many commercial relationships are stable and predictable because the parties are interested in protecting their reputation for honesty and reliability.⁵⁴ As Stuart Macaulay observed in a classic article, parties to transactions protect themselves by dealing with trustworthy counterparties —

⁵² These are the sorts of things that codes of professionalism generally seek to encourage. For example, the American Bar Association Section of Tort and Insurance Practice adopted a Creed of Professionalism in 1988, which provides, *inter alia*:

“In litigation proceedings I will agree to reasonable requests for extensions of time or for waiver of procedural formalities [e.g. service of process] when the legitimate interests of my client will not be adversely affected.” Standard B(3).

“In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness and disrespect.” Standard B(8).

“I will not serve motions and pleadings on the other party, or his counsel, at such a time or in such a manner as will unfairly limit the other party’s opportunity to respond.” Standard B(9).

“In civil matters, I will stipulate to facts as to which there is no genuine dispute.” Standard C(9).

Reprinted in *ABA Compendium of Professional Responsibility Rules and Standards* (2001), p. 366.

⁵³ See, e.g., Ronald J. Gilson & Robert H. Mnookin, “Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation,” 94 *Colum. L. Rev.* 509 (1994).

⁵⁴ See Lisa Bernstein, “Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry,” 21 *J. Leg. Stud.* 115 (1992); David Charny, “Nonlegal Sanctions in Commercial Relationships,” 104 *Harv. L. Rev.* 373 (1990).

“we can trust old Max,” they assume.⁵⁵ If a community is small enough that information about reputation can be ascertained at low cost, and if parties are repeat players with respect to one another, there may be sufficient incentives to behave in a trustworthy fashion. That is, the community may foster professionalism.

This does not do much for us as *educators*, however, since the conditions under which these communities can flourish either obtain or not. There is little anyone can do to make an occupational group small, close-knit, and relatively homogeneous. Many of these communities are small and isolated because of historical accidents. The diamond industry described by Lisa Bernstein has historically been dominated by Orthodox Jews located in cities like Antwerp and New York; as a result, it is difficult for outsiders to break into the business.⁵⁶ The maritime personal-injury bar in Seattle is close-knit because of the inherently local nature of the practice, its specialized nature (including the need for nautical experience, which creates a substantial barrier to entry for most lawyers), and the small number of lawyers needed to satisfy the demand for legal services on both the plaintiffs’ and defense sides. Gentility, in a non-pernicious sense, may characterize certain communities, but if professionalism education is aimed at replicating the norms of those communities, it is difficult to see how this can be accomplished using the tools at our disposal.

⁵⁵ Stuart Macaulay, “Non-Contractual Relations in Business: A Preliminary Study,” 28 *Am. Soc. Rev.* 55, 58-60 (1963).

⁵⁶ Bernstein, *supra*, pp. 140-41.

III. *A Substantial Ethical Conception of Professionalism.*

The basic theoretical problem when talking about the sociology of the professions is making good on their claim to exercise legitimate authority to regulate the provision of some service. One attempt to ground the legitimate authority of professions is associated with the Weberian tradition in sociology, and relies on a claim to rational, value-free, “scientific” competence over some domain of technical problems.⁵⁷ In this conception, the application of professional skill must be value-free, neutral, and objective. Claiming that professional knowledge is neutral and scientific connects the profession with highly culturally salient values of technical expertise and objectivity.⁵⁸ An aspect of the so-called standard conception of legal ethics is that the work of lawyers is highly complex, technical, and value-free, and that the moral issues raised by their work are simply someone else’s problem.⁵⁹ Although this is a claim put forward by lawyers, it may turn out that it misses the point entirely. The interesting ethical questions — including those which would be raised under the rubric of professionalism — may

⁵⁷ See, e.g., Robert Granfield, “Lawyers and Power: Reproduction and Resistance in the Legal Profession,” 30 *L. & Soc’y Rev.* 205, 207-08 (1996); Richard L. Abel & Philip S.C. Lewis, “Putting Law Back into the Sociology of Lawyers,” in 3 Richard L. Abel & Philip S.C. Lewis eds., *Lawyers in Society: Comparative Theories* (Berkeley: University of California Press 1989), pp. 502-04.

⁵⁸ Larson, *supra*, pp. 22, 40-42; Abbott, *supra*, pp. 53-54.

⁵⁹ See Gordon and Simon, *supra*, pp. 248-57; Richard Wasserstrom, “Lawyers as Professionals: Some Moral Issues,” 5 *Hum. Rts.* 1, 8 (1975) (describing but not endorsing the received view among lawyers that “[t]he job of the lawyer . . . is not to approve or disapprove of the character of his or her client, the cause for which the client seeks the lawyer’s assistance, or the avenues provided by the law to achieve that which the client wants to accomplish. The lawyer’s task is, instead, to provide that competence which the client lacks and the lawyer, as professional, possesses.”). For a strong statement of the view Wasserstrom describes, see Lee Modjeska, “On Teaching Morality to Law Students,” 41 *J. Leg. Educ.* 71 (1991) (disapproving, in hindsight, of his own moral advice to a client not to throw employees out of work on Christmas Eve, and stating that his own professional competence was questionable since he dared suggest that the client’s business plan might be morally problematic).

be those that are unrelated to the application of technical expertise to pre-defined problems.

The late philosopher of education Donald Schön begins his study of professional education with a nice metaphor of the topography of professional practice, in which the high ground overlooks a swamp.⁶⁰ The high ground consists of problems requiring the application of technical rationality — that is, figuring out which means to use to achieve an end that is already defined. These problems turn out to be relatively uninteresting, however, particularly in comparison with those in the swamp, in which figuring out how to frame the problem is a question that necessarily precedes the application of technical rationality, and this initial framing question requires the exercise of discretion and judgment. For example, a civil engineer asked to build a road will think in terms of the requirements of technical rationality, and consider factors like soil conditions, stability, and drainage. Deciding whether or where to build a road, however, implicates “a complex and ill-defined mélange of topographical, financial, economic, environmental, and political factors.”⁶¹ Similarly, lawyers who appeal only to their technical expertise as the ground for professional authority are missing the fact that the core ethical problems for lawyers are like the decision whether to build the road — polycentric, ill-defined, messy, and calling for the exercise of something other than technical rationality.

Trevor Farrow refers to an “overall calculus of what counts as the ‘right’ course of

⁶⁰ Donald A. Schön, *Educating the Reflective Practitioner* (San Francisco: Jossey-Bass 1987), pp. 1-4 [hereinafter, “Schön, *Educating*”].

⁶¹ *Id.*, p. 4.

conduct, both in a given retainer as well as, more generally, in a given career.”⁶² This makes Schön’s point exactly, that all of the interesting questions in professional ethics are to be found in the swampy lowlands in which problems do not lend themselves to the application of technical solutions. Looking at the problem in this way distinguishes a particular substantive conception of legal ethics and professionalism from the law governing lawyers. Ascertaining the content of the law on any given point is a matter for the high ground, the application of technical rationality. By contrast, “real ethics” or “ethics beyond the law” is thought to be a matter of judgment that cannot be reduced to an algorithmic decision procedure. Ethical competence (which is to say, practical reasoning) may be said to be a matter of tacit, intuitive knowledge that practitioners can recognize in action, but not necessarily be able to articulate prior to action.⁶³ One might also observe that the factors in the overall calculus of right conduct are incomparable in some way, resisting reduction to a common metric that would lend itself to technical rationality. Kronman, for example, argues that exercising good judgment with respect to decisions about ends (those in the swampy lowlands) is not a matter of calculating, but depends on the actor’s ethical character, specifically the qualities of imagination, sympathy, and detachment.⁶⁴

Depending on what one hopes to accomplish, continuing legal education (whether mandatory or optional), may be well or poorly suited to that end. As noted previously, there is nothing objectionable about continuing legal education aimed at informing lawyers about new

⁶² Trevor Farrow, “Sustainable Professionalism,” 46 *Osgoode Hall L.J.* 51, 55 (2008).

⁶³ Donald A. Schön, *The Reflective Practitioner* (New York: Basic Books 1983), pp. 49-69 [hereinafter “Schön, *Reflective Practitioner*”].

⁶⁴ Kronman, *supra*, pp. 59-73.

developments in the law. The law governing lawyers is a complex field, and lawyers may be unaware that there have been some important new cases decided on lawyer liability for aiding and abetting a client's breach of a fiduciary duty, or that the American Bar Association recently released an opinion on the propriety of combing through one's opposing party's documents for confidential electronic metadata.⁶⁵ Even CLE programs at their best, however, can accomplish only so much. Lectures and seminars are capable of conveying information, but that may be the extent of their usefulness. The exercise of judgment, or reflection-in-action (to use Donald Schön term), is a skill at which one can improve, but acquiring this skill requires specific opportunities that may be difficult to create using continuing legal education programming. In particular, one must experience professional practice in order to learn how to become better at doing it. Reflection-in-action is not fundamentally a skill that one can develop by reading about it or hearing lectures.

Consider two statements about the nature of reflection-in-action or professional judgment:

⁶⁵ Of course, anything that can be done well can also be done badly, as Deborah Rhode rather acidly observes concerning the American experience with CLE:

CLE requirements are minimal, and user-friendly approaches are endless. . . . Sports law can be absorbed at sporting events, along with complimentary hot dogs and peanuts. "Opportunities to exchange views on legal developments with Superior Court Judges can briefly interrupt snorkeling and windsurfing at luxury resorts. . . . Attorneys may certify that they have watched videos, listened to audiotapes, completed interactive computer programs, or written publishable articles. Nor is the problem solved by requiring physical attendance at courses, since no one checks to see if participants are sober, engaged, or even awake. According to one seasoned veteran, "Almost any lawyer will tell you that CLE credits are much easier to swallow when washed down with Bloody Marys."

Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (New York: Oxford University Press 2000), pp. 156-57.

[T]o deliberate well, one must do more than just survey the alternatives under consideration from an external point of view. One must also make an effort to enter, with appreciative feeling, into the different points of view they represent, while at the same time retaining an attitude of detached neutrality toward them.⁶⁶

When a practitioner reflects in and on his practice, the possible objects of his reflection are as varied as the kinds of phenomena before him and the systems of knowing-in-practice which he brings to them. He may reflect on the tacit norms and appreciations which underlie a judgment, or on the strategies and theories implicit in a pattern of behavior. He may reflect on the feeling for a situation which has led him to adopt a particular course of action, on the way in which he has framed the problem he is trying to solve, or on the role he has constructed for himself within a larger institutional context.⁶⁷

Both of these passages emphasize the experiential setting of decision-making. Professionals have to be *in* practice; there is a feeling of being in the situation; reflective judgment is not the same as deliberation from an external point of view. As Schön puts it, professional practice involves practitioners in “reflective conversations with their situations.”⁶⁸ There is also an affective dimension to judgment — it is about feel, attitude, appreciation, a gut-level reaction. The decisions made by practitioners are complex, polycentric, and make reference to multiple points of view. (Compare Kronman’s identification of the professional point of view with the simultaneous stance of sympathy for one’s client’s situation and detachment or independence from the client’s position.) There are “problematic instances” in which theoretical knowledge does not seem quite to match up with the facts on the ground, where some adjustment is required between theory and practice, and where the solution may be to re-frame the problem entirely, in

⁶⁶ Kronman, *supra*, p. 83.

⁶⁷ Schön, *Reflective Practitioner*, p. 62.

⁶⁸ *Id.*, p. 141.

terms of different ends.⁶⁹ These features characterize what I think critics are getting at when they talk about lawyer professionalism as “an attitude and approach to an occupation that is commonly characterized by intelligence, integrity, maturity, and thoughtfulness.”⁷⁰

Some legal ethics scholars have emphasized the experiential or affective dimension of the traditional, so-called “Socratic” method of legal education.⁷¹ Maybe this method of instruction does facilitate “the development of the moral imagination,”⁷² although the experience of most law students is likely to be that only the most gifted teachers can fulfill this promise. Nevertheless, an effectively conducted Socratic dialogue is a tremendously resource-intensive undertaking. Despite the prevalence of images from movies like *The Paper Chase*, with one magnetic (or terrifying) professor holding the attention of all of the students in a large amphitheater classroom, the experience of most law teachers in the United States is that the Socratic method does not work well in large classes. To be more precise, a kind of faux-Socratic dialogue can be conducted, with the professor asking scripted questions of a few select students, but this a long way from the transformative experience of being able to project students imaginatively into a situation in which they are called upon to view the client’s problem from the perspectives of sympathy and detachment. An organized curriculum of continuing professional education would likely resemble large first-year law classes, rather than something more personal

⁶⁹ Schön, *Educating*, p. 39.

⁷⁰ *Elements of Professionalism*, p. 1.

⁷¹ Kronman, *supra*, pp. 109-116; Cramton & Koniak, *supra*, pp. 178-79.

⁷² Kronman, *supra*, p. 113.

and experiential, at least if the costs of providing such continuing education are to be kept under control.

A further difficulty is the relationship between formal education and the tacit knowledge acquired in practice. Even on the assumption that Socratic teaching can be personally transformative,⁷³ one might wonder whether its effects are swamped by the professional socialization that occurs in law firms, prosecutors' offices, or other practice contexts. Kronman worries about this, but he is preoccupied with his own conception of practical wisdom, and therefore focused on the lack of opportunities for lawyers to exercise the virtues of sympathy and detachment.⁷⁴ A broader assessment of the ethical culture of contemporary law practice comes from Patrick Schiltz's strikingly pessimistic views on the effect of working in large law firms.⁷⁵ Schiltz's argument essentially trades on some familiar findings of social psychologists. Law firms have ethical cultures, which work by attaching normative significance to the day-to-day activities of lawyers. Certain acts are positively valenced, and others implicitly subject to critique. Attorneys at a firm tend to drift subtly into particular patterns of action, which they then understand in ethical terms, often without knowing that they are absorbing a system of ethical norms. Explicit knowledge is frequently much less important than these tacit understandings of

⁷³ *Id.*, p. 115 ("the process of legal education does more than impart knowledge . . . [i]n addition it works . . . upon the students' dispositions by strengthening their capacity for sympathetic understanding. This strengthening of this capacity often brings with it . . . changes of attitude that many experience as personally transforming.").

⁷⁴ *Id.*, p. 297.

⁷⁵ Patrick J. Schiltz, "On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession," 52 *Vand. L. Rev.* 871 (1999); Patrick J. Schiltz, "Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney," 82 *Minn. L. Rev.* 705 (1998).

what is expected from professional peers. The result is that lawyers become socialized into a particular conception of good lawyering, and this occurs without much conscious thought and certainly quite apart from the educational efforts of law schools and the organized bar.

IV. Conclusion.

There is an ironic relationship here between conceptions of professionalism and the ability of the organized profession to do anything about perceived problems with professionalism. It is possible to provide inexpensive Band-Aid solutions, such as continuing legal education seminars, but these are responsive only to the least interesting problems, such as unfamiliarity with new developments in the law. Real, substantive education in professionalism would have to be an effort to teach professional judgment, or to affect the attitudes and motivations of lawyers. Doing this, however, would require time-consuming, expensive programming, and still might be overwhelmed by structural forces such as the decentralization of professional communities. If the real reason behind the perceived decline in professionalism is cultural, as I think it is, then there would appear to be little that can be done about the problem by regulators, beyond stepping up enforcement of the existing law governing lawyers. To the extent one believes that professionalism is fundamentally about “ethics beyond the rules,” however, that response is inadequate. Unfortunately, returning lawyers generally to a lost spirit of professionalism may require reversing long-term social changes such as the increasing size and geographic scope of practice by professionals.

Rather than end on such a pessimistic note, I will suggest that some smaller-scale changes may be effective in bringing about improvements in professionalism in practice. For example, I alluded to the craft of legal analysis, and pressures within organizations that may create conditions in which good lawyering craft is unlikely to flourish. I have argued that the so-called torture memos, produced by elite lawyers in the Office of Legal Counsel, were substantively flawed because the drafting process was so badly structured.⁷⁶ Only proponents of broad executive power and unilateralism in foreign policy were involved in the discussions. Working groups on the treatment of detainees under international law were deliberately set up to exclude lawyers from the State Department, who might have been sympathetic with then Secretary of State Colin Powell's more multilateral, internationalist approach. Draft memorandums were not reviewed by the Justice Department's Criminal Division, or by career military lawyers with the Judge Advocate General Corps, who would have immediately recognized the erroneous analysis of the application of the Geneva Conventions. Finally, administration lawyers were under considerable pressure to think in a "forward-leaning" way, on the assumption that the September 11th attacks had created a kind of normative watershed. Not surprisingly, the drafting process was dysfunctional with respect to the end of encouraging lawyers to exercise good judgment. Organizations such as law firms and government agencies can attend to structural features such as reporting relationships and evaluation and compensation mechanisms. This is not as ambitious as affecting the professionalism of the bar as a whole, but it is a start. Thus, perhaps professionalism education should be focused less on inculcating individual dispositions like

⁷⁶ See the discussion in W. Bradley Wendel, "Legal Ethics and the Separation of Law and Morals," 91 *Cornell L. Rev.* 67 (2005).

sympathy and detachment, or creating conditions in which lawyers can practice using professional judgment, and should be more attentive to designing institutional mechanisms to ensure that lawyers have the opportunity to do the right thing, and are not pressured into abandoning their commitment to good lawyering craft.