

1-1-1999

Professionalism

Anthony T. Kronman

Follow this and additional works at: <http://scholarlycommons.law.hofstra.edu/jisle>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Kronman, Anthony T. (1999) "Professionalism," *Journal of the Institute for the Study of Legal Ethics*: Vol. 2 , Article 9.
Available at: <http://scholarlycommons.law.hofstra.edu/jisle/vol2/iss1/9>

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Journal of the Institute for the Study of Legal Ethics by an authorized editor of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

PROFESSIONALISM*

*Anthony T. Kronman***

In his essay *The Eighteenth Brumaire of Louis Bonaparte*, Karl Marx commented that “The tradition of all the dead generations weighs like a nightmare on the brain of the living.” In this famous remark, as in so many other ways, Marx expressed with a unique stylistic genius the spirit of our age, which regards every impediment to its restless acceleration as a barrier to be overcome—as a dead weight that must be cast off if the two great reigning ideals of our time, the ideals of freedom and speed, are to be honored in the way they demand. To many today the past is a dead weight of this kind, a vast repository of error and prejudice, of silliness and superstition, a realm of moral and material backwardness whose only continuing utility for us is as a reminder of how brutal and stupid people can be. Those who see the past in this way, of course, are understandably eager to forget it, or to condemn it. They are anxious to move on to the future where life will be freer, and pleasures will come faster than ever before. But there is another and more positive way of conceiving the weight of the past. The past, it might be said, holds us in the human world in the same way that gravity holds us on the earth. Gravity is a burden. It makes life on earth heavy and hard. But without it we would all fly away into space. We would be separate spinning atoms, homeless in the void. In a similar way, the past grounds us in the human world of ideas and institutions, and it gives our lives a density and a depth that neither the present, which is transitory, nor the future, which is blank, can ever provide.

This is how I view the past of the legal profession. The profession’s past is complex and contested. There are different views of what it is and what it means. There is much in it that is petty and unflattering, and some things that are shameful, as we judge them now in the light of contemporary moral opinion. But it is from the deep well of the past that lawyers also draw their highest ideals, and from its accumulation of experience that their collective identity continues, however shakily, to be

* This paper is based on a talk I gave at a groundbreaking ceremony at Chapman University School of Law, and which was published at 1 *CHAPMAN LAW REV.* 1 (1998).

** Dean of the Yale Law School and Edward J. Phelps Professor of Law.

formed. Today the American legal profession is in turmoil. The organized bar has lost much of its authority. The country's leading firms have been transformed in basic ways. The aims of legal education are increasingly unclear to teachers and practitioners alike. And a new and aggressive culture of commercial values, which claims for itself a moral as well as a material superiority, is spreading through the profession as a whole. There are some who celebrate these changes and call them liberating. There are others who insist they are the product of large economic forces over which none of us, either individually or collectively, have any control. I feel no sympathy at all for the first group and only some for the second, whose fatalism concedes far too little to the power of ideas and to the possibilities and opportunities for resistance. But whatever side one takes in these debates, the *meaning* of the changes that have overtaken the American legal profession in the last quarter of the twentieth century can be understood only from the standpoint of its older values and its received traditions, which is to say, only from the standpoint of its past.

I want to begin by examining the idea implicit in my last remarks: that the practice of law *is* a profession. Every professional, the lawyer included, makes a living by doing what he does, but not every job is a profession, not every job is a way of life. The word "profession" suggests a certain stature and prestige. It implies that the activity to which it is attached possesses a special dignity that other jobs do not. For centuries the practice of law has been considered a profession both by lawyers and lay people, and legal education has always been thought of as a form of professional and not merely vocational training. What lies behind these ancient assumptions? What makes the law a profession? My answer to this question has four parts. The practice of law has four characteristic features that make it a profession and that entitle those engaged in it to the special respect this word implies.

The first is that the law is a public calling which entails a duty to serve the good of the community as a whole and not just one's own good or that of one's own clients. In the second chapter of *The Wealth of Nations*, Adam Smith makes the famous observation that "it is not from the benevolence of the butcher, the baker, or the brewer that we expect our dinner, but from their regard to their own interest," and he goes on to explain how each of these, pursuing his business with an eye solely to his own advantage, produces by means of an invisible hand an addition to the public good. With lawyers it is different. Like the butcher, the brewer, and the baker, the lawyer also expects an income from his work. Like them the lawyer is not motivated by benevolence to do what he

does. But in contrast to Smith's tradesmen, it *is* part of the lawyer's job to be directly concerned with the public good—with the integrity of the legal system, with the fairness of its rules and their administration, with the health and well-being of the community which the laws in part establish and in part aspire to create.

We say that every lawyer is an officer of the court. What we mean by this is that lawyers like judges are bound by their position to look after the soundness of the legal system and must take steps to insure its justice—conscious, direct, deliberate steps, not those indirect and unanticipated ones that lead the butcher and his friends from a preoccupation with their own advantage to the surprising and wholly unintended production of a public good. This is not to say that lawyers are exclusively concerned with the public good. Of course they are not. Lawyers represent clients and causes whose partisan interests often contribute nothing to the public good and sometimes conflict sharply with it. But a lawyer must always keep at least one eye on the public good and make sure it is well-protected against the assaults of private interest, including those of the lawyer's own clients. And a lawyer must do this not just occasionally, not just in the fraction of time that he or she devotes to *pro bono* activities, but constantly and consistently in every moment the lawyer is practicing law. A lawyer who is doing his job well dwells in the tension between private interest and public good and never for a moment overcomes it. He struggles constantly between the duty to serve his client and the equally powerful obligation to serve the good of the laws as a whole. Adam Smith's tradesmen do the latter automatically and unthinkingly by doing the former, and so they never experience a tension between the two. The lawyer does experience a tension because unlike the butcher, the brewer, and the baker, he is charged with a conscious trusteeship of the public good that cannot be discharged by any mechanism other than his own direct intervention. This is what is implied by the claim that every lawyer is an officer of the court and the law a public calling, the first of the four features that makes law practice a genuine profession.

The second is the non-specialized nature of law practice. The legal profession remains to a surprising degree a generalist's craft whose possessor can move with relative ease from one field to another, from criminal law to bankruptcy to civil rights and back again, with only modest readjustments. The law is not a form of technical expertise but a loose ensemble of methods and habits easily transported across doctrinal lines, and a lawyer is not a technician trained to do one thing well but a Jack or Jill of all trades. Here, again, the practice of law differs from the other

activities that Adam Smith takes as his paradigm of modern economic life — activities like pinmaking, which are characterized, Smith says, by the division of labor into ever finer parts, each the province of a specialist with a tremendously developed but excruciatingly narrow expertise. Lawyers by contrast perform a range of different tasks, counseling clients, drafting documents for them, negotiating and litigating on their behalf, touching in the process on a dozen different substantive areas of law, and they move about among these tasks with a flexibility unthinkable in Adam Smith's pinmaking factory.

The education that American lawyers receive even today, at the end of the twentieth century, reflects this. The purpose of a legal education is not to produce experts as many non-lawyers wrongly believe, and many beginning law students wrongly expect. It is to train law students, as the cliché has it, to think like lawyers, which means, broadly speaking, to be attentive to the facts and to know which ones in any given situation are important; to be able to tell a story with the facts, to master the power of narration; to recognize what others hope to achieve, even or especially when they have a hard time defining their own ambitions, and to appreciate empathically a range of human purposes and values and ideals wider than one's own. The man or woman who lacks these qualities will never think like a lawyer no matter how much doctrinal knowledge he or she possesses. By contrast, the person who possesses these qualities need have only the most elementary knowledge of legal rules and procedures to be well prepared for the practice of law, to have the kind of preparation that the very best law schools provide. From the standpoint of the pin factory and all the other modern forms of enterprise whose success depends upon the division of labor and the cultivation of a deep but narrow expertise, the fact that law remains a generalist's craft can only be interpreted as a sign of its dilettantism and amateurish backwardness. But viewed in another light, with pride and not embarrassment, the non-technical nature of the work that lawyers do constitutes a second enduring source of the lawyer's claim to be a professional with a range and freedom of activity that specialization destroys.

A third source of the lawyer's professionalism is related to the second one. A moment ago I said that the goal of legal education is not to impart a body of technical knowledge but to develop certain general aptitudes or abilities—the ability, for example, to see facts clearly and to grasp the appeal of points of view one doesn't embrace. To do this requires more than intellectual skill. It also requires the development of perceptual and emotional powers, and hence necessarily engages parts of one's personality other than the cognitive or thinking part. A good legal

education is a process of general maturation in which the seeing, thinking, and feeling parts of the soul are all reciprocally engaged. It is a bad mistake to think that legal education sharpens the mind only. The clever lawyer, who possesses a huge stockpile of technical information about the law and is adept at its manipulation but who lacks the ability to distinguish between what is important and what is not, and who cannot sympathetically imagine how things look and feel from his adversary's point of view, is not a good lawyer. He is in fact a rather poor lawyer who is more likely to do his clients harm than good. The good lawyer, the one who is really skilled at his job, is the lawyer who possesses the full complement of emotional and perceptual and intellectual powers that are needed for good judgment, the lawyer's most important and valuable trait.

The fourth and last of the characteristics that make the law, in my view, a genuine profession concern time and the location of law within it. Every activity has a past. Every activity therefore necessarily has a history which can be studied and written down in books. I am sure that even pinmaking has its history. But the law has a special relation to the past. The law's past is not only something that can be observed from the outside. It also possesses value and prestige within the law itself. In pinmaking the fact that pins were made a certain way before is no argument at all for continuing to make them the same way now. We may do so out of habit but prior practice has no normative force in pinmaking or computer chipmaking, or any other line of manufacture. Put differently, precedent is not a value in these activities—at most it is a fact. By contrast, precedent is a value in the law—not always the final or weightiest value, but a value that must always be taken into account and given its due. The fact that a law has been in existence for some time is always a reason for continuing to respect it now, and this reason must be considered and weighed even when we reject it. The law is internally connected to its past, connected by its own defining norms and values and not just externally connected, as every enterprise is, through the story an observer might tell from the outside about its development over time. To enter the legal profession is, therefore, to come into an activity with self-conscious historical depth, to feel that one is entering an activity that has long been underway and whose fulfillment requires a collaboration among the generations. It is to know that one belongs to a tradition. By contrast, in many lines of work, even those with a long history, all that matters is what is happening now and the temporal horizon of one's own engagement in the work shrinks down to the point of the present. I imagine the experience of those in the computer industry, which seems to

undergo a revolution every eighteen months, to be like this, though I should tell you I am only guessing. What I do know from my own experience and from the experience of my students, is that the work of lawyers joins them in a self-conscious collegueship with the dead and the unborn, and that this widening of temporal outlook is part of what lawyers mean when they describe their work as a profession.

I've now identified the four features of law practice which in my view make it a profession. The practice of law is a public calling and a generalist's craft that engages the whole personality of the practitioner and which links him to a tradition that joins the generations in a partnership of historical proportions. Together, these four features give the practice of law a dignity that is the source of the lawyer's professional pride, of his belief that what he does for a living constitutes a way of life with special worth. But these same four features also explain the special contribution that lawyers make to society as a whole, and the special regard in which the legal profession is held by those outside it. Now, at this point some of you may be thinking, "Surely, he's joking. *What regard?*" For everyone knows that lawyers are today considered by many people, thoughtful and otherwise, to be a bothersome necessity with about as great a claim to respect as a rattlesnake, and for comparable reasons. Today, indeed, the prestige of lawyers in America seems to be slipping badly, though whether it was ever higher in the past is hard to say. In a democratic country like ours, devoted to rule of law, there will always be a healthy suspicion of those who appear to possess the secret keys to the house of law and, with that, a disproportionate share of power. And of course there will always be more than enough bad lawyers to give the profession a black eye. But despite these perennial sources of suspicion and reproach, the American people have asked lawyers since the days of the Revolution to lead the way and to guide them in arranging their affairs, both public and private. Fearing lawyers and even occasionally loathing them, we Americans have also entrusted our lawyers with great powers and responsibilities and made them, to a remarkable degree, the stewards of our republic. Behind all the cynicism and fashionable disgust, behind all the complaints (many of them justified) about the excesses of the adversarial system and the partisan exploitation of loopholes and technicalities, lies this basic fact of trust, the huge trust we have placed in our lawyers.

We have trusted our lawyers to play a central role in the design and management of our society and that trust has been well placed because the four features of law practice that I have identified equip lawyers to play this role in an especially effective way. Let me explain. We live

today in a sprawling heterogeneous society, the most complex society the world has ever known. The great nineteenth century European social thinkers who observed the development and growth of this novel social order were struck by the power of the disintegrative forces within it and by the need to find a counterweight that would resist them. The forces of disintegration they identified were four. The first was privatization, the tendency in a large free enterprise economy like ours for individuals to concern themselves exclusively with their own private welfare and to neglect or forget entirely the claims of public life which the Greeks and Romans had pursued with such memorable passion. The second was specialization, whose inexorable tendency is to separate those in different lines of work and to reduce their fund of shared experience, the common world of shared endeavors. The third was alienation, the sense of detachment from one's work and secondarily from other human beings, the experience of being only partially engaged by, hence only partially revealed through, the activities that constitute one's living in a narrow but also in a broader sense. And the fourth disintegrative force that Tocqueville and Marx and Durkheim and Weber identified as a threat to the far flung interdependencies of modern social life was forgetfulness, the loss of a sense of historical depth, and the consequent disconnection of the present moment, characterized by the idiocy of material comfort, from both the pain of the past and the calling of the future. We are witnessing, these thinkers said, the evolution of a form of life more complex and interconnected than any ever seen, but in the heart of this new order lurk forces of disintegration powerful enough to nullify its achievements: the forces of privatization, specialization, alienation, and forgetfulness, the loss of one's sense of location in time.

You will now see where my argument is going. For the four features of law practice I have identified and that I have suggested make it a profession, may be paired with each of the four forces of disintegration I've mentioned, to each of which one or another aspect of legal professionalism may be thought of as an antidote or counterweight of sorts. Thus, to take the first, the lawyer's obligation to promote the public good is a counterweight against the strictly private concerns of his clients, who for the most part want only to succeed within the framework of the law but who take no interest in the well-being of the law itself. Lawyers serve the private interests of their clients but they also care about the integrity and justice of the legal system that defines the public order within which these interests are pursued. In this way they provide a link between the realms of public and of private life, helping to rejoin what the forces of privatization are constantly pulling apart.

To the disintegrative effects of specialization, the generalist nature of law practice offers valuable resistance. Because they represent clients of many different sorts in many different lines of work, lawyers are in a position to evaluate the social order from a broader point of view unrestricted by the narrowing assumptions and experience of any single expertise, and to provide a kind of connective tissue among different forms of enterprise which lawyers are often called upon to join through a sort of shuttle diplomacy and the transactional schemes they design. If the public-mindedness of lawyers prepares them to provide a horizontal linkage upwards from the realm of private concerns to that of public values, the fact that theirs is a generalist's craft equips them to provide vertical linkages across the increasingly specialized world of work.

So far as alienation is concerned, it would, of course, be preposterous to suggest that lawyers can combat its spread or soften its effects. We have all experienced, to one degree or another, the sense of separation from the world which the word "alienation" implies and have known the loneliness associated with it, and there is little that lawyers or anyone else can do to change this basic fact of modern life. But to the extent that the law remains a profession that engages the whole person, that calls upon all the powers of the soul—perceptual and emotional as well as intellectual—it offers those who enter it the hope of a completeness of engagement in their work, which is the antithesis of alienation, and it provides an image at least of what unalienated work can be.

And finally, the historical traditions of the law which give the lawyers who work in it a self-conscious sense of their location in a continuing adventure with a past and a future as well as a present, act as a counterweight against the forgetfulness, the obliviousness to time, which characterizes our life today with its rush of transient moments each disconnected from the rest in a contented but timeless present where the partnership among the generations, "the great primeval contract of eternal society" as Edmund Burke called it, is literally disintegrated and forgotten. Much of the shallowness of our life today, our fickle fascination with celebrities for example, and the brevity of their fame, is the result of this loss of a sense of location in time and all those forms of work for which a sense of historical depth continues to be needed should be valued for the resistance they offer to this temporal flattening of experience. Among these forms of work the practice of law is especially important.

The four features of law practice that make it a profession are significant, therefore, not only because they justify the status pride of lawyers, because they give lawyers good cause to walk around with puffed shirts and a feeling of stature, but because they each in a different way

help to ameliorate one of the four disintegrating forces which the very developments that have produced our wealthy and complex world have themselves unchained. The legal profession is an integrative force in a world of disintegrating powers, and this is why, despite the natural suspicion that lawyers arouse in any democratic culture and the bad behavior of some, they have been entrusted with such large responsibilities and viewed by the people at large with such high regard. Or so, at least, one looking backward at the past of the profession might conclude. But suppose for a moment we reverse the direction of our gaze and peer into the future instead. How do things stand there? Can we be confident that the sources of legal professionalism will remain strong and that lawyers will continue to play the integrative role they have played in the past? I am troubled by doubts. I fear that things are changing rapidly and for the worse. I am worried that the legal profession is today in danger—deep danger—and I want to end my talk by very briefly telling you why.

In the last quarter-century, the American legal profession has been transformed by a series of sweeping changes that have compromised each of the four features of law practice that justify its claim to be a profession. In the first place the commercialization of law practice, especially in its upper reaches at the country's largest and most prestigious firms, has introduced an element of competitiveness that has caused many lawyers in these firms to view their public responsibilities as a luxury they can no longer afford in the frantic scramble to attract business by appealing to the self-interest of clients, and this tendency has been exacerbated, I believe, by the official pronouncements on legal ethics made by the American Bar Association and other organized groups, which increasingly endorse the view that lawyers serve the public good by serving the private interests of their clients with maximum zeal, in effect treating lawyers like Adam Smith's tradesmen, who count on an invisible hand to transmute their pursuit of private advantage into a benefit for the community as a whole.

At the same time the pressure for increased specialization in law practice has been growing, and it is doubtful whether this pressure can be resisted much longer. In part the demand for specialization reflects a change in the relationship of lawyers to clients, who today increasingly expect their lawyers to supply highly specialized instructions for a narrowly defined range of problems and not the general, all-purpose advice that legal counselors in the past were often asked to provide. The sheer increase in the number and complexity of legal rules to which we are now subject has also increased the pressure for specialization. Vast quantities of new laws are enacted each year, and countless courts issue innu-

merable opinions construing them. In this expanding universe of law it seems increasingly unrealistic to expect any one lawyer to ever master more than a small portion of it, and so the demand for specialization grows and with it the demand for a more specialized law school curriculum.

Today a higher percentage of lawyers work in large institutions—in law firms of fifty or more and in government bureaus—more than ever before. This shift has inevitably meant an increase in bureaucracy and management, something every large organization requires. The result has been the development of a culture—again, most visible in the country's leading firms—marked by the managerial delimitation of assignments and responsibilities, the substitution of teams for individuals, and the emergence of relatively inflexible hierarchies of command in place of the older collegial arrangements that existed in the largest firms two decades ago. Is it any surprise that the lawyers in these firms—the young lawyers especially—report a growing sense of detachment from their firms and from the work they do within them? Is it any surprise they complain, as the workers in every bureaucracy will, about their diminished feeling of personal fulfillment and growing sense of alienation?

And finally, like everything else in our world, the practice of law is today in danger of losing its temporal range and shrinking down to a series of disconnected points. The growing volume of law and the multiplication of decisions interpreting it has weakened the precedential value of each single judgment, since one can now often find many conflicting answers to the very same question, and this weakening of precedent has cut the practice of law off from its normative base in the past. Technology has also, in a different way, foreshortened the temporal horizons of lawyers. The phone (now portable), the fax (now ubiquitous) and the computer (now able to generate documents and revisions in documents at the speed of light) have together had the effect of accelerating the practice of law to the point where many lawyers today complain that their clients expect an instantaneous reply to every question and give them no time to think. The result is a fragmentation of experience, and the narrowing of one's temporal frame of reference, an inward state of mind that is outwardly reflected in the growing tendency of lawyers to move from one firm to the next with dizzying speed.

In short, lawyers are today less public-spirited and connected to their past and more specialized and alienated from their work than they were a quarter-century ago. Each of the four pillars of legal professionalism is presently under assault. No one will deny that the legal profession has made dramatic gains during this same period, most notably by open-

ing its doors (part way at least) to groups that had been barred from the profession by a prejudice unworthy of lawyers. But the profession, to which these groups have with such justice been admitted, is now in danger of losing all of the characteristic features that make it a profession and not just a job. If this happens it will be a terrible irony for the profession's newest recruits and a blow to the status pride of all lawyers. But more importantly, it will be a blow to America, for the features of legal professionalism that are under such strain today have been a vital integrating force in the construction of our country and our way of life. If the pillars of legal professionalism crumble, we will all be hurt. The disintegrating tendencies of modern life will all meet with less resistance. The common ground on which we all depend will shrink and become less stable.

Today's lawyers are the heirs of a long tradition of professionalism. It is an inheritance that conveys responsibilities as well as honor. In the best of times, these responsibilities would be heavy, for the law is a living tradition that demands imagination and renewal to survive. But these are not the best of times for the legal profession. Today, the roots of legal professionalism are challenged as never before. Today, the survival of the profession demands the clearest possible reaffirmation of the four features that make it such, and a heroic commitment to their protection. Let us resolve to make this commitment. Let us resolve to be what our past, at its best, invites us to be. Let us honor the past we have inherited by making its ideals a force in the present. Let us free ourselves from the shallow and self-congratulatory praise of the law's increasingly commercial culture, and from the fatalism that insists it must be so. Let us resolve to have a future worthy of the spirit of professionalism that is the most valuable possession of every lawyer in this land. Let us remember our profession's future by once again imagining its past.

