The Problematics of Moral and Legal Theory

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Chapter 3

Professionalism

The Two Professionalisms

Part One was primarily, although not exclusively, critical rather than con­structive. I want now to be more constructive (though still highly criti­cal!). The keys to improving law, I shall argue, are professionalism and pragmatism in senses to be defined. I have traced elsewhere the decline of the law as a profession in the bad sense that relates “profession” to the medieval guild and the modern cartel.[[1]](#footnote-1) In another and virtually opposite sense, however, the law has become more professional by being swept up in a wave of genuine—of substantial rather than formal or atmospheric— professionalization that is one of the big underreported stories of our time. But this wave has not carried the law as far as one might have hoped.

In this chapter I try to untangle these distinct senses of professionalism and relate them to the criticisms of moral and legal theory presented in Part One. In the final chapter I argue for orienting the law in a more pragmatic direction and make proposals for institutional reform. Profes­sionalism and pragmatism are entwined; the “bad” professionalism stands as an obstacle to pragmatic legal reform, while the “good” professionalism is a precondition of that reform.

Professions and Professional Mystique

The terms “profession” and “professionalism” have a wide and vague range of meanings, to the despair of sociology, the discipline that has studied the

professions the most.At the simplest level, the terms denote a set of occupations conventionally called “professions.” They are law, medicine (and related fields such as dentistry, pharmacology, optometry, nursing, physical therapy, and psychology), military officership, engineering, the clergy of organized religions, teaching (plus PhD-level research whether or not conjoined with teaching), certain types of consulting, architecture, actuarial services, social work, and accounting. Occupations that usually are not classified as professions include business management and business generally, advertising and marketing, public relations, farming, politics, fiction writing and other artistic endeavors both creative and performing, investment advising, the civil service, soldiering below the commissioned- officer level, entertainment (including “professional” athletics), construc­tion (other than architecture and engineering), police and detective work, computer programming, clerical work, and most jobs in transportation, as well as blue-collar work. Journalists, clergy of unstructured religions, op­erators of day-care centers, photographers, and diplomats occupy the boundary area between professionals and nonprofessionals.

The hallmark of a profession is the belief that it is an occupation of considerable public importance the practice of which requires highly spe­cialized, even esoteric, knowledge that can be acquired only by specialized formal education or a carefully supervised apprenticeship. As a conse­quence of these features a profession is an occupation that cannot respon­sibly be entered at will but only in conformity with a prescribed and usually exacting protocol and upon proof of competence. Because of the importance of the occupation, and therefore the professional’s capacity to harm society, it is often believed that entry should be controlled by gov­ernment. Not only should the title of “physician,” “lawyer,” and so forth be reserved for people who satisfy the professions own criteria for entry into the profession; no one should be allowed to perform professional services without a license from the government. For the same reasons (the professions importance and its capacity to do harm), but also because the arcane skills of professionals make their performance difficult for outsiders to monitor and therefore facilitates exploitation of the client by the profes­sional, it is usually believed that the norms and working conditions of a profession should be such as to discourage the undiluted pursuit of pecuniary self-interest. There is a curious joinder here of “professional” and “amateur.” The professional is supposed to be a kind of amateur, a lover of his work and not of lucre—but “amateurish” is the very antithesis of “professional.”

This description of professionalism, culled from the sociological litera­ture and common observation, fits law and medicine—the most powerful and most studied of contemporary American professions—better than it does the other professions, many of which do not require a license; and some nonprofessional occupations are licensed. But all the professions fit some part or parts of my composite description better than the nonprofes­sional occupations do, though the line blurs when we consider psychol­ogy, social work, and forest management, as well as the borderline occupa­tions mentioned earlier. The rough edges don’t matter to my purposes here; it is enough that a family resemblance among the various professions can be discerned despite their heterogeneity.

The key to an occupation’s being classified as a profession, it must be emphasized, is not the actual possession of specialized, socially valuable knowledge; it is the belief that some group has such knowledge. For it is the belief that enables the group to claim professional status, with the opportunities for obtaining exclusive privileges and the resulting personal advantages that such status confers. The belief need not be true, need not even be positively correlated with the amount of specialized, socially valu­able knowledge that the group possesses. We may be more conscious today of the limitations of medical knowledge than people were in the later Middle Ages, even though physicians then had almost no therapeutic resources.3

When belief in a professions knowledge claims is not justified by the professions actual knowledge, we have a case of “professional mystique.”4 The more impressive and convincing that mystique, the more secure the profession’s claim to the privileges of professional status. A profession whose knowledge claims are inherently shaky has a particularly urgent interest in preserving its mystique. Let us consider the techniques by which it can do this.

One is to cultivate an obscurantist style of discourse in order to make the

professions processes of inquiry and inference impenetrable to outsiders. Another (which is really two others, and thus second and third on my list) is to fix demanding educational qualifications for entry into the profes­sion. By raising the educational level of its members, such qualifications make the professions claim to possess specialized knowledge more plausi­ble because education is a well-accepted route to knowledge and because it makes the professionals thought processes more opaque to outsiders.

One type of educational qualification is insistence on general education or educability, an insistence designed to limit entry into the profession to a stratum of highly intelligent persons. The other is the specialized profes­sional training itself. It is designed not merely to impart essential knowl­edge but also to establish the uniqueness of that knowledge in relation to the knowledge possessed by outsiders. The two types of qualification correspond to two distinct techniques for preserving professional mys­tique: screening prospective entrants for intellectuality, and maintaining the impermeability of professional knowledge, or in other words the profes­sions autonomy. Although these functions can be separated analytically, they interact. Screening for intelligence increases impermeability because highly intelligent people are comfortable with complexity and special vocabularies. People of average intelligence could not have created some­thing as intellectually complex and challenging as the Internal Revenue Code or the traditional doctrines of property law.

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

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

6. Sixth is lack of hierarchy. When a complex task is broken down into its components, each performed by a different class of worker, a need for supervision and coordination arises, engendering the hierarchical structure, with its tiers of management, that is characteristic of organizations. Traditionally, professionals were not organized hierarchically. Lawyers practiced by themselves or in partnership with other lawyers; likewise doctors. This was indicative of their lack of specialization.

7. Seventh, a profession is likely to employ altruistic pretense. It will try to conceal the extent to which its members are motivated by financial incen­tives in order to bolster the claim that they have been drawn to the profession by the opportunity to pursue a calling that yields rich intellec­tual rewards or gratifies a desire to serve. Altruistic pretense reinforces charismatic personality, which is undermined by the appearance of self- seeking.

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

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

That a profession cultivates professional mystique does not prove that it lacks real knowledge. Mystique enhances a profession’s status and so isvaluable even if the profession does possess a large body of genuinely useful, and unavoidably esoteric, knowledge. Still, the denser the web of mystique-enhancing techniques that the profession spins, the shakier the profession’s knowledge claims are likely to be, because the techniques are more valuable, and therefore more likely to be used heavily, the more there is to conceal. Conversely, the more defensible an occupations knowledge claims are, whether or not it is a profession (and it could be a profession not because of flim-flam but because its members really do possess highly specialized, socially valuable knowledge that cannot be accessed by the ordinary person or embodied in algorithms or rote knowledge), the less frequently these techniques will be encountered.

There are two other symptoms of the shakiness of a professions knowl­edge claims besides its resorting to some or all of the techniques of creat­ing mystique. The first is defeat when faced by a new challenge. This is conspicuous in the case of the profession of arms, which is uniquely exposed to challenge in an environment that it does not control. Sorcery and prophecy enjoy professional status in many primitive societies, but are overthrown when the practitioners face competition from groups that use rational methods. The status of the clergy has declined markedly with the growth of science.

The second symptom can be called nonrational employment prac­tices—the use of methods of selection into or promotion within the profession that (like selection in favor of charismatic personality) do not further the acquisition of knowledge. These methods include nepotism, credentialism, discrimination, lockstep compensation, and automatic pro­motion. Anyone familiar with legal education, especially before the 1960s, will recognize this symptom; and anyone familiar with the legal profession in general, especially before the 1960s, will recognize not only this symp­tom but also every one of the nine techniques by which a profession disguises its epistemological weakness.

The Growing Professionalism of Law . . .

Developments since the 1960s have seemed to make, and to an extent have made, the law more professional in the good sense, the sense in which a profession earns its status and attendant privileges by deploying a body of genuine, specialized, socially valuable, knowledge-based skills rather than by cultivating professional mystique. The process by which professional mystique is superseded by fully rational methods is an aspect of what Max Weber called “rationalization” (of which more later). It is visible in the legal profession today, though far from complete. The ob­scurantist style—legal jargon—is as bad as ever. And the insistence on a heavy dose of formal education, both undergraduate and professional, is unabated. But the professional education itself is more permeable to the claims of other disciplines than it once was. There is less confident asser­tion of the professions autonomy, especially in the academic branch of the profession, where new, outside perspectives on law have been most influential. Economists, political theorists, psychologists, and even literary critics are writing about law with sufficient authority to require academic lawyers to take notice and respond.

There is less cultivation of charismatic personality as an important constituent of professional success; a symptom is the much-lamented decline of the “lawyer statesman” model of professional practice. And specialization has grown. This is seen in the emergence of the paralegal as a distinct tier of legal-services provider and in the increasingly stan­dardized division of labor between judge and law clerk. It is seen in the growing division between academic law and practicing law and between academic law and judging; today, almost all worthwhile legal scholarship is the product of the academy, and judges and lawyers, and even the occasional professor, complain about the irrelevance to their concerns of most such scholarship. And it is seen in the increased specialization of legal practice—fewer lawyers hold themselves out as competent in more than one field. Increased specialization has contributed to the decline of the charismatic personality, as clients increasingly demand a specialist’s competence rather than a statesman’s wisdom. Further contributing to that decline has been the dismantling of many of the impediments to competition in the legal-services industry, a dismantling that has revealed that most lawyers are motivated by the same incentives as the members of nonprofessional occupations. The increase in competition has forced law­yers to serve their clients better and so to rely less on mystique and more on specialized knowledge that has genuine value to the client. Specialization has been accompanied by an increase in professional

hierarchies. Take judging. It used to be that judicial work was performed by—judges. In the federal judiciary, there were originally just two tiers of judicial officer: district judges and Supreme Court Justices. Now there are many: interns and externs, staff attorneys and law clerks, magistrate judges, district judges, circuit judges, and Supreme Court Justices. State judiciaries are becoming similarly tiered, and in addition there is a slowly growing number of specialized federal courts. Most large law firms today have paralegals, associates, income partners, equity partners, and manag­ing partners, rather than just partners (or partners plus clerks—that is, apprentices), as was originally the case, or, later, partners and associates. Some firms employ professors of literature to help the lawyers with their writing and are managed by MBA’s rather than lawyers.

The impetus to these developments in the legal profession, as it was to parallel developments that I shall discuss shortly in the military sphere, came in part from that tell-tale symptom of a profession’s dependence on mystique: defeat. Beginning in the 1960s, the legal profession in all its branches became associated with policies that in time came to be largely discredited. These policies included the judicial activism of the Supreme Court in the heyday of Earl Warrens chief justiceship; a related knee-jerk receptivity to every “liberal” proposal for enlarging legal rights—and inci­dentally lawyers’ incomes; the plain incapacity of legal reasoning, as dem­onstrated by modern economics, to make sense of the legal regulation of competition and monopoly; a relaxation of the barriers to litigation that contributed to an enormous, unsettling, and unforeseen increase in the amount of litigation; and a host of lawyer-fostered statutory “reforms” in fields ranging from bankruptcy and consumer protection to employment discrimination, safety regulation, and environmental protection that often had perverse, unintended consequences. The traumatic impact of these failures on the legal profession’s self-confidence has been much less than the traumatic impact that the Vietnam War had on the military profes­sion. But there has been some impact, which, along with other factors, has spurred the legal profession to become more professional in the good sense. The other factors are a trend toward deregulation that has included the elimination of a number of barriers to competition between lawyers; the destabilizing effect on the legal profession of the enormous growth in the demand for legal services and of the huge increase in the size of the profession in response to that growth; and the increased cost-consciousness of the legal professions business clients, which is due to the increased professionalism and competitiveness of business.

One by-product of increased legal professionalism has been a decline in nonrational employment practices. There is much less discrimination and nepotism in hiring and promotion than there used to be, though a partial offset has been the rise of affirmative action in forms that constitute reverse discrimination (mainly discrimination against white males) rather than mere correction of past discrimination. The decline of nonrational employment practices has particularly affected the gender composition of the legal profession, which until recently was in all its branches completely dominated by men. Harvard Law School did not admit women as stu­dents until the 1950s, and the first female U.S. Supreme Court Justice was not appointed until 1981. As a result of the paucity of women in influen­tial positions in the legal profession and the generally subordinate role of women in the society, the law failed to reflect womens perspectives on a wide range of issues, including procedures in trials for rape, the sale and display of pornography, sexual harassment in the workplace, gender dis­crimination in employment and education, rules governing divorce and child custody, legal restrictions on abortion, and workplace accommoda­tions to pregnancy. All this has now changed.

Automatic promotion has waned both in law firms and in the academy, where the imposition of stiff publication requirements for tenure has enabled the establishment of rational, if sometimes inflexible, criteria for promotion. In the 1960s, law teaching was one of the least professional (most amateurish, least rationalized) branches of the legal profession. The features that had long made university-level research and teaching, despite the absence of licensing, a highly professional occupation-including the requirement of writing a dissertation and of publishing articles in peer- reviewed journals—were largely absent from law. Although doctoral dis­sertations in law remain uncommon in the United States, law professors increasingly have a doctoral degree in a related discipline; there is a grow­ing number of peer-reviewed journals; heavy emphasis is now placed on publication in respected journals as a criterion of promotion to tenure; and fewer and fewer law professors have a substantial background in legal practice.

The last point—the diminishing number of law professors with sig­nificant experience in the practice of law—is particularly important. In the process of becoming more professional, academic law is becoming a separate profession (separate at least from the practice of law, though closer to other academic disciplines, such as economics and political the­ory). This is the fundamental cause of the growing estrangement between legal academics and other lawyers (including judges). A profession doesn’t want to be on the same wavelength as any other occupation. Academic law is not a separate profession if it is totally transparent to judges and practitioners. Against Judge Edwards and the other grumblers it is necessary to observe that a profession can be useful without being transparent to its clientele. The fact that patients don’t understand medical science does not disvalue medicine; the growing gap in understanding between the laity and medical professionals reflects nothing more than the growing scientific sophistication of the medical profession. Academic law­yers can be more helpful to the judiciary by developing and analyzing empirical data bearing on the law than by operating as a shadow judiciary of kibitzers and scolds.[[2]](#footnote-2) (Not that these are the only alternatives; doc­trinal analysis, especially when embodied in treatises, remains an im­mensely valuable, yet currently undervalued, form of academic legal schol­arship.) And in the process of making itself more opaque to the practical branches of the profession by embracing interdisciplinarity, the legal professoriat has made its scholarship more transparent to other disciplines, such as philosophy and political science, and this has made legal scholar­ship less provincial.

The changes that I have described in the legal profession are on the whole good, but the qualification (“on the whole”) should be kept steadily in view. There is such a thing as too much specialization; this and other drawbacks of even the good professionalism (as distinct from the guild or mystique form) are real dangers for law. But while it is a mistake to overlook these dangers, it is equally a mistake to oppose the increasing professionalization of legal services root and branch, and to pine for the days of the professional guild and professional mystique, as does Mary Arjn Glendon. A traditionalist and something of a nostalgist, she be­lieves that the profession has been going downhill for many years. Casting an admiring eye back over the Anglo-American legal tradition, she finds great value even in such faintly fogeyish figures as Lord Coke, who cele­brated the “artificial reason of the law,” and in Blackstone, and in the nineteenth-century formalists whom Holmes derided. The best strands in the tradition were, she argues, braided in the 1950s. By 1960—when Glendon herself was a law student—the practicing bar, the judiciary, and the legal professoriat were operating in fruitful harmony. In this, laws heyday, the law’s ideal was that of the patient craftsman. Judges, the best of them anyway, “approached the task of judging in fear and trembling” (p. 129).

Since 1960, Glendon argues, the braid has come undone and each of the strands has become frayed. The bar has become flashy, mercenary, and unscrupulous. The “raider” ethic of the litigator has come to dominate the “trader” ethic of the counselor. (Glendon borrows these terms from Jane Jacobs, but they echo distinctions that Nietzsche and Weber had drawn between aristocratic and bourgeois attitudes.) This has occurred because litigation is so much larger a proportion of law practice than it used to be, thanks to the “litigation explosion” that began around 1960. Glendon quotes a lawyers’ flyer: “We are pleased to announce that we obtained for our client the largest verdict ever for an arm amputation—$7.8 million” (p. 5). Fierce competition within the profession is not only both cause and consequence of hucksterism; it has made lawyers work harder yet with less job security than in the past.

The bench, too, has, according to Glendon, become an arena of im­modesty and self-aggrandizement. Justice Douglas was ahead of his time. His contempt for form was regarded as sloppiness; his visionary opinions were seen as evidence he was angling for the presidency; and his solicitude for those he considered underdogs was understood as favoritism. In the 1990s, he would surely have basked in the “Greenhouse Effect”—a term (named after the New York Timess Linda Greenhouse) for the warm reciprocity between activist journalists and judges who meet with their approval, (p. 1 Glendon quotes with well-deserved derision the pompous self-congratula­tory opinion in Planned Parenthood v. Casey (reaffirming the core of Roe v. Wade) in which three Justices of the Supreme Court declared that Ameri­cans’ “very belief in themselves” as “people who aspire to live according to the rule of law” is “not readily separable from their understanding of the [Supreme] Court”[[3]](#footnote-3)—this in defense of abortion rights, which, whatever their merit, can hardly be thought securely grounded in the Constitution. The Justices seem to be claiming to be possessed of constitutional ESR One of the authors of the opinion, Glendon reminds us, just happened to have a journalist in his office the day the opinion was issued, to whom the Justice compared himself to Caesar crossing the Rubicon. He may have forgotten that Caesar crossed the Rubicon to wage civil war and install himself as dictator. Judges have been accused of activism; perhaps a more apt word is Caesarism.

The legal academy, Glendon argues, has been atomized into contending schools of esoteric scholarship that have little to do with the practice of law. Legal treatises are derided by these scholars as “battleships”—useful in their time, but obsolete. Glendon quotes a crusty old Harvard professor as remarking that the Young Turks of legal academia would rather write about the sex life of caterpillars than write treatises that would shape the law (p. 205). As a result of these brats’ rejection of traditional norms of legal professionalism, todays law-school graduates are ill prepared to prac­tice law or to serve as judges.

That the legal profession in all its branches has changed greatly since the 1950s, and in approximately the ways described by Glendon, is true. That the changes have brought in their wake many absurdities; that the profession is becoming increasingly an offense to the fastidious; that tradi­tional legal scholarship is stupidly denigrated; that the direct and indirect expenses of law have become enormous, as though the legal system were trying to appropriate as large a share of the Gross National Product as the health-care system—these things are also true. But they do not have the significance that Glendon ascribes to them. The profession was not as wonderful in 1960 as Glendon makes out. Many of the changes since then either are improvements or are inseparable from improvements. And Glendon has no explanation of why or how the changes came about and no program for reversing them.

Competition in the Darwinian jungle is literally genocidal; in the economic marketplace it is merely painful and vulgar, and its antithesis is not peace, but cartelization. The bar in the 1950s was a regulated cartel. State law limited entry into the profession, forbade competition in the provi­sion of legal services by nonlawyers’(“unauthorized practice”), and limited competition among lawyers by forbidding advertising and solicitation, encouraging price fixing, forbidding investment by nonlawyers in law firms, and restricting interstate mobility. (Many of these restrictions re­main in force.) “Billing was a fine art,” Glendon quotes approvingly (p. 29)—yes, the fine art of price discrimination, whereby monopolists maximize their profits. As for the judiciary, state or federal, it would be extremely difficult to show—Glendon does not show—that it was of higher quality in the 1950s than today. State judges have somewhat more secure tenure today, and there is probably less corruption; aspirants for federal judgeships are screened more carefully; and most judges are harder working and more productive than their predecessors. Although the growth in the number of law clerks and other supporting personnel has its downside, the average judicial opinion is a more professional product than it was in the Golden Age that Glendon celebrates. (Just read and com­pare.) It is true that most judges today do not approach their task in “fear and trembling,” but neither did most judges yesterday. Judges no more quaver at rendering judgments than surgeons quaver at making incisions.

Judges are probably no more aggressive today on balance than they used to be, but I agree with Glendon that they are too aggressive and intrude too deeply into the activities of other branches of government, acting all too often as ignorant policy czars. But as I intimated in Chapter 2 in discussing constitutional criminal procedure, judges may have been too passive in enforcing rights before the Warren Court began its gallop. There was surprisingly little actual enforcement of constitutional rights in the 1950s. A large proportion of criminal defendants who could not afford a lawyer had to defend themselves; the appointment of lawyers to represent indigent criminal defendants was not routine. Many state prisons and state insane asylums were hellholes, and to their inmates’ complaints the courts turned a deaf ear. The right of free speech was narrowly interpreted, the better to crush the Communist Party U.S.A. and protect the reading public from Henry Miller. Police brutality was rampant, and the tort remedies against it ineffectual. Criminal sentencing verged on random­ness; in some parts of the country, capital punishment was imposed with an approach to casualness. In practice the Bill of Rights mostly protected only the respectable elements of society, who did not need its protection.

And it was not only the Constitution that looked better on paper than in practice. Many private rights were not effectively enforceable. Legal and medical malpractice suits were unwinnable, though we now know that both forms of malpractice were and are common. There were almost no effective legal protections of the environment. Every variety of invidious discrimination was common in employment, and there were virtually no legal remedies for it. Judges were ignorant of economics, and their inter­pretations of the antitrust laws frequently turned antitrust on its head, discouraging competition and promoting monopoly.

Public policy is a pendulum. If it swings too far in one direction, it will swing too far in the other before it comes to rest (and it may never come to rest, if it keeps getting pushed). If there was too little enforcement of legal rights in the 1950s—but maybe there was not too little; maybe, as I intimated in discussing constitutional criminal procedure, the rule of law should not extend all the way to the margins of society—there is probably too much today.14 The fallacy is to suppose that if there is now too much enforcement, or too many lawyers, there must have been about the right amount of these things at some time in the past. Glendon is correct that increased competition for legal services makes it less likely that a lawyer will subordinate his clients interests to the lawyer’s conception of “higher” social interests; but it also makes it less likely that the lawyer will subordi­nate his client’s interests to his own selfish interests. Women today may, as Glendon remarks, find marriage and children “almost impossible to com­bine with the fast track in law firms” (p. 88). In the Golden Age they could not get hired by major law firms. A partner at the Cravath firm told Glendon when she interviewed for a job with the firm in the early 1960s: “I couldn’t bring a girl in to meet Tom Watson [of IBM] any more than I could bring a Jew” (p. 28).

The law professors of the 1950s were for the most part happily oblivi­ous to the gap between aspiration and achievement in the law. The law’s “singing reason” (a phrase of Karl Llewellyn’s) was something encountered in the better judicial opinions and law-review articles rather than at the operating level of the legal system. Faith in reason (“reason called law” as Felix Frankfurter and Herbert Wechsler put it) was the complacent faith of academics and judges who either did not know how law was actually being implemented at the operating level or did not think it seemly to let on. They were intellectually provincial as well, in but not of the university, incurious about what other disciplines might be able to contribute to the understanding and improvement of the legal system. Many of the devel­opments that Glendon deplores, such as the greatly expanded use (and potential for abuse) of pretrial discovery, are the consequence of reforms devised by her academic heroes, who could not predict the impact of those reforms in the real world. She herself acknowledges disappointment that these giants, such as Archibald Cox and Louis Loss (the anticaterpillar man), as senior faculty of the Harvard Law School in the late 1960s and early 1970s, hired nihilistic practitioners of critical legal studies, plunged headlong into affirmative action, genuflected to the “paragons of political correctness” (p. 228), and in these and other ways undermined the edifice of law. She gestures at the possibility that her own paragons lacked the intellectual sophistication and moral courage necessary to take a stand against the antilaw people when she remarks that while “they [her heroes] could ‘do’ law very well . . . they were tongue-tied when it came to explaining and defending their ingrained habitual doings” (p. 231). Can one really “do” law well without being aware of what one is doing?

Many intellectuals, including legal intellectuals, including Glendon, have a pre-Darwinian outlook. They see the present as a degeneration from a golden past rather than as an evolution from a simpler past. They are thus prone to the fallacy of comparing the best of the old with the average of the new.So James Madison, Abraham Lincoln, Elihu Root, and the cousins Hand are taken to be your typical American lawyers before the Fall and are contrasted with the plaintiff’s lawyer in the ampu­tation case.

The clock cannot be turned back, especially to a time that exists only in the imagination. It would be refreshing if leading legal thinkers, rather than pining for a lost yesterday, would think about tomorrow. Glendon is fearful of the “swelling ranks of innovators, iconoclasts, and adversarial advocates” in the profession (p. 102). But it is innovators and iconoclasts, rather than nostalgists and stand-patters, who will adapt the law of today to the challenge of tomorrow. She juxtaposes approving references to Burke’s praise of incrementalism and to the American Founders; but the latter were revolutionaries. She quotes with approval Paul Freunds praise of law as the discipline that “teaches us to look through the great antino­mies,” such as liberty and authority, “in order to discover the precise issue in controversy, the precise consequences of one decision or another, and the possibility of an accommodation by deflating the isms and narrowing the schisms” (p. 103).16 This is law conceived pragmatically—and also, one might think, innovatively and even iconoclastically—rather than nos­talgically.

. . . And of Everything Else as Well

What has been happening to the legal profession since the 1960s is a bit like what has been happening to the American military profession since the 1970s. The Vietnam War revealed striking deficiencies in the civilian management of national security affairs. But it also revealed the consider­able amateurism of the military profession.17 The officer corps relied heav­ily on mystique in lieu of serious study of and planning for the exigencies of modern warfare. Nepotism was rife both in routine promotion and in appointments to important commands; charisma frequently substituted for competence; bluff, wishful thinking, and outright misrepresentation were used to conceal failures. A hypertrophy of mystique professionalism developed in the form of lethal interservice rivalries that could be con­trolled only by the equivalent of noncompete agreements; it was as un­thinkable to the navy that the army could direct naval aviation missions as it was unthinkable to lawyers that accountants could conduct tax litiga­tion. The armed services were united only in believing the military a world apart that could neither learn from the civilian sector, for example about the intelligent management of race relations and other personnel prob­lems, nor even communicate with it. A caricature of the warrior as Nean­derthal, Curtis LeMay, became emblematic of the U.S. military of the period.

A quarter of a century later, as shown by the performance of the American military in the Persian Gulf campaign, the military profession had been transformed.18 This was partly in reaction to the disastrous effects of the Vietnam War on the morale, effectiveness, and public esteem of the military, and partly because the end of the draft forced the military to design “professional” armed forces. By the end of the period of reform, the system of promotion had been revamped to place emphasis on suc­cessful performance in realistic, objectively evaluated military exercises; personnel policies in general had been professionalized. Feedback loops (“after action review”) had been created to foster learning from experience. Emphasis on continuing education, both military and civilian, had facili­tated the creation of a more intelligent officer corps and one able to make maximum use of modern analytical tools and modern technologies in the waging of war, and also to communicate effectively with civilians, as shown by the military’s media relations during the Gulf campaign. Proce­dures and institutions to assure at least a minimum of interservice coop­eration had been created. War remains emotional and unpredictable to a degree not matched by any other professional activity; but American military officership has become legitimately professional to a far greater degree than it once was.

Even more interesting than the increasing professionalization of the traditional professions is the increasing professionalization of all work. The essence of “good” professionalism is the application of a specialized body of knowledge to an activity of importance to society. As knowledge grows—and, as a concomitant of growth, becomes more specialized be­cause of the intellectual limitations of even the ablest human being—we can expect more and more occupations to become professionalized in the good sense. Yet they might never acquire the traditional accoutrements of professionalism, because they would not need to cultivate professional mystique.

The trend toward universal professionalization was first glimpsed by Weber, for whom the hallmark of modernization was the bringing of more and more activities under the governance of rationality. Early and some­what questionable illustrations were the “rationalization” (actually carteli­zation or monopolization) of industry through mergers and the control of production by means of time-and-motion studies (“Taylorism”). The growth of rational methods would, Weber rightly predicted, foster the disenchantment of the world, as activities became demystified and trans­parent.

In recent years the process that he foresaw has grown by leaps and bounds. Consider university administration. It was once a bastion of amateurism. The typical university president was a distinguished scholar who had stepped directly from a career of teaching and research into the presidency. He was assisted by a small administrative staff composed pri­marily of amateurs as well, either former teacher-scholars like him or, at some Ivy League schools, socially well-connected alumni. Today, with the leading universities multi-hundred-million dollar enterprises subject to complex laws and regulations, the typical university president is a profes­sional administrator. He has climbed the lower rungs of an administrative ladder that normally include service as a university provost and earlier as a dean. He is assisted by a large staff of specialists in administration, many of whom do not have substantial academic backgrounds but instead have backgrounds in legal practice, accounting, finance, and business adminis­tration. The university’s hospital complex will be managed by a profes­sional hospital administrator, hospital administration having become a specialized field in itself.

Business, too, has become rationalized, professionalized, to an extraor­dinary degree. Although there is still an important role for lone-wolf entrepreneurs in start-up firms and in takeover and turnaround situations, mature firms are increasingly the domain of executives who have a thor­ough grasp of rational and systematic methods of financial management, personnel (“human resources”) administration, inventory control, market­ing, production, procurement, government relations, law, and every other dimension of a complex enterprise. As the professions have become in­creasingly businesslike, business has become increasingly professional, not in the spurious sense in which some of the old-line professions cultivated a professional mystique but in the real sense of deploying specialized knowledge in rational and effective pursuit of clearly defined, socially valued goals.

Law’s traditional peer is the medical profession. Its astonishing transformation since the 1960s has been powered by an explosion of medical knowledge that has vastly increased the efficacy of medical treatment in prolonging life and alleviating suffering. As one would expect, this explo­sion has been accompanied by a rapid decline in the mystique elements formerly so conspicuous in this profession—discriminatory selection prac­tices, the concealment of carelessness and incompetence (the “conspiracy of silence” and the often literal “burying of mistakes”), the physician’s assumption of omniscience in dealing with patients and refusal to level with them about prognosis, hostility to forms of health maintenance that do not require esoteric medical skills (such as diet and exercise), inade­quate specialization that had physicians doing many tasks that nurses could perform as well and nurses doing many tasks that medical orderlies and technicians could perform as well, disdain for outsider methods or disciplines such as statistics and public health, and hostility toward inno­vations in the pricing and delivery of medical services. The advent of social insurance in the form of Medicare and Medicaid, and of advanced technology, sent the costs of medical services soaring, thus exposing the primitive management techniques of the medical sector. Faced with a defeat potentially of Vietnam proportions, the medical profession together with the other components of the vast medical-services sector discovered and are busy adopting rational methods of medical administration that are designed to prevent doctor and patient from contracting for wasteful treatments paid by hapless third parties—the biggest source of avoidable medical inflation.

Compared to the medical profession, the law’s professionalizing has not proceeded far at all. Part of the reason may be the law’s entwinement with politics, which, in a democracy anyway, resists professionalization, at least of the sort that might help the law to become more professional. The qualification is important. Politics, too, has become more professional, as a result of improvements in the techniques of public opinion polling, campaign fund-raising and advertising, and identifying, packaging, and promoting political candidates as media stars. But none of this has rubbed off on the law in any useful way. There is no evidence that the televising of trials, appeals, and judicial confirmation hearings enhances the quality of a legal system or that the use of public opinion polling techniques and the insights of social psychology to select and then influence jurors has in­creased the accuracy of jury trials. Because of the strategic character of litigation, technical improvements can increase the cost to both sides without a commensurate benefit in more accurate determinations; this is a frequent criticism of the heavy use of expert witnesses in many types of litigation. An exactly parallel argument could of course be made against the genuineness of the professionalizing of military officership when viewed in a global perspective (which, however, few Americans are in­clined to do). Some medical innovations, too, confer limited or even negative social benefits because of secondary effects—for example, an improvement that saves the patients life but causes a more expensive, and fatal, illness a short time later, or a treatment that by making a disease less lethal induces people to take less care to avoid it, as in the case of syphilis, and perhaps of AIDS. But the problem of running-in-place improvements seems particularly acute in the case of law (as also of sports, another adversary enterprise).

The laws resistance to genuine improvement is shown, paradoxically, by the rise of moral theory applied to law whether directly or through constitutional theory. The practical side of the profession, as we have seen, resists this type of theorizing, which strikes lawyers and judges as useless; they are content with an untheorized moral vocabulary heavy with un­defined terms such as “fairness” and “justice.” For the academic lawyer, however, moral theory is an escape from having to think of law as a form of social science or policy science. Law conceived in scientific terms might have an embarrassing transparency, for legal claims might then actually be falsifiable. Moral theory and constitutional theory, in contrast to scientific theory, are at once opaque and spongy. They provide vocabularies in which to make law conform to the theorists political preferences without seeming to do so. These theories are alternative mystifications to the traditional concept of law as an autonomous and hermetic discipline. A suggestion for using philosophy to guide military strategy, medical treat­ment, or university administration would be met with open-mouthed incredulity. No greater role for philosophy would be admitted in those fields than that of proposing ethical constraints. The suggestion that law should steer by the light of moral philosophy reflects a conception of law as a preprofessional, unsystematized activity.

In discussing Mary Ann Glendons jeremiad I mentioned that the Su­preme Courts opinions have become more professional over the last forty years. They are more thorough, more accurate, and more methodical. They reflect a greater depth of research, both legal and collateral. They are more carefully written in an effort to avoid misunderstandings and irre­sponsible dicta. They are more uniform, less idiosyncratic, in style—more “correct,” in a grammarian’s sense. They are more, one might say, the product of rational methods and rules, less of individual vision. This is not an accident. There have been significant changes in the staffing of the Court. Appointments are scrutinized more carefully, a process that tends to eliminate oddballs. Prior judicial experience has become a de facto qualification; all the Associate Justices have some. The number of Su­preme Court law clerks has doubled and the clerks are more carefully selected, with merit playing an even greater role than formerly. And every one of them has already spent a year as a law clerk to another judge, most often a federal appellate judge, whose docket is broadly similar to that of the Supreme Court. The management innovation known as the “cert, pool,” whereby one law clerk prepares a recommendation for all the Justices on whether to grant plenary review of a case, has enabled the law clerks to screen applications for review in less time than in the earlier period despite the fact that the number of applications has increased even faster than the number of clerks. Since as a result each law clerk has as much time to work on opinions as in the old days, and the ratio of law clerks to opinions has more than doubled (an additional factor being a decline in the number of cases that the Court accepts for argument), the Justices have much more, as well as more experienced, help in preparing their opinions.23 Word processing and computerized legal research have further increased the clerks’ productivity. All these developments have worked together to generate the improvements in the Supreme Court’s opinions of which I spoke.

But the improvements—what are they really worth? The opinions take longer to read, they are duller, and they are harder to use as predictors of the Court’s reaction to future cases because of their impersonal cast. Recall how heavily padded the majority opinion in the VMI case was. Much of what goes on in the Court’s opinions and accounts for their length and their dense texture—such as the ping-pong game between majority and dissenting Justices, the relentless dissection of precedents, and the elabo­rate statutory histories and exegeses—neither illuminates the Justices’ ac­tual thought processes nor instructs the lower-court judges or the practic­ing bar in analytical techniques that will resolve difficult legal issues. The Court’s caseload is dominated by difficult constitutional cases, and only the naive think that the results in such cases owe a lot to disinterested, nonpolitical, “observer-independent” methods of inquiry. No doubt each Justice thinks that his votes owe everything, or at least a great deal, to such methods, while being skeptical about the votes of the other Justices. That is the psychology of judging. It is easy (even for a judge) to be a cynical observer of judges, but it is difficult to be a cynical judge. The main result of the measures that have made the Supreme Court a more professional institution has been, at least as far as constitutional decisions are con­cerned, to thicken the window dressing.

The law is still in the process of building a body of knowledge of the kind that has enabled other professions to move decisively in the direction of genuine professionalism. The strategic and political dimensions of the law may make this project impossible, although I prefer to think that they make it merely difficult. The political dimension is largely responsible for the inroads that affirmative action and political correctness have made in legal education, with retrogressive results from the standpoint of profes­sionalization. Indeed, one prominent component of the political-correct- ness, affirmative-action beachhead in the law schools is a scholarly move­ment, critical race theory, that expressly rejects the tenets of rational analysis. Politics may also explain those dreary constitutional law opin­ions. Efficiency through specialization doesn’t mean much if a lack of agreed ends places an activity in the domain not of purposeful, goal- oriented, instrumental rationality but of politics or ideology; what could “specialist in ideology” mean, now that the Soviet Union is defunct? (“Moral specialist” would be an equivalent oxymoron.) But if I am right that a tide of genuine professionalism is sweeping the nation (maybe the world), how likely is it that the law, of all activities, will remain untouched by it?

The Path away from the Law

The hope for law to become a genuine profession, in the sense in which the developments in other occupations are teaching us to understand professionalism, lies in what I like to call, with deliberate provocation, “overcoming law” or, alternatively, the “supersession thesis.” The thesis is that what we understand as the law is merely a transitional phase in the evolution of social control. Holmes hinted at this in his essay “The Path of the Law.” He implied that law as he knew it, and as we largely know it still, is merely a stage in human history. It followed revenge historically and will someday be succeeded by forms of social control that perform the essential functions of law but are not law in a recognizable sense, although they are latent in law, just as law was latent in revenge.

Law in the recognizable sense, the sense that will eventually be super­seded, is assumed to be continuous with morality, and it is certainly saturated with moral terms. It is also traditional—today we would say “path dependent.” Judges have a duty to enforce political settlements made in the past. A related point is that law is logical, meaning that new doctrines can be created only by derivation, whether by deduction, anal­ogy, or interpretation, from existing doctrines.

This traditional conception of law, which is as orthodox today as it was a century ago, Holmes seems to have regarded as epiphenomenal, ob­scurantist, and transitory. “The Path of the Law” argues that people care about what their legal duties are because judges have been empowered to decree the use of overwhelming force to enforce those duties. A prudent person wants to know how to avoid getting in the way of that force (or, Holmes should have added, how to get it behind ones claims—for law enforces rights as well as duties). From this standpoint all that matters is being able to predict how judges will rule given a particular set of facts, and this is why people consult lawyers. Statutes and judicial opinions provide the materials for the prediction. Predictions of what the courts will do are really all there is to law. Morality is immaterial. A bad person cares as much about keeping out of the way of state force as a good person; and because law and morality are frequently discrepant, the law’s use of moral language is a source of confusion, so it would be good to banish all such language from the law. For example, while both law and morality use the word “duty” a lot, legal duty to keep a promise is merely a prediction that if you don’t keep it you’ll have to pay for any harm that breaking your promise imposes on the promisee. It doesn’t matter whether you broke it deliberately or, at the other extreme, for reasons completely beyond your control. As further evidence that the law doesn’t really care about intentions or other mental states, it enforces contracts if the parties signify assent, whether or not they really assent. In criminal law, words like “intent” or “negligence” denote degrees of danger­ousness, nothing more.

The moral and mental baggage of the law is connected with the fact that the basis of most legal principles is tradition, and the tradition, heavily Judeo-Christian, is saturated with moral concepts that emphasize state of mind. (In contrast, the pre-Socratic Greeks placed greater empha­sis on consequences.) The backward-looking, tradition- and precedent- ridden cast of legal thinking, which we glimpsed in Glendon’s pessimistic assessment of the contemporary legal profession, is to be regretted. The only worthwhile use of history in law is to debunk outmoded doctrines by showing them to be vestigial. Judges have got to understand that the only sound basis for a legal rule is its social advantage, which requires an economic judgment, balancing benefits against costs. If the law submitted to instruction by economics and the other social sciences we might find the tort system replaced by a system of social insurance and the system of criminal law, which is based on a belief in deterrence, replaced by a system in which the methods of scientific criminology are used to identify and isolate, or even kill, dangerous people. And if we were realistic we would realize that what judges do does not conform to the official picture of adjudication. It is sometimes mindless standpatism and sometimes voting their fears, but sometimes, and ideally, it is weighing costs and benefits, though with some concern (much emphasized in Holmes’s judicial opin­ions) for avoiding rapid changes of front that would make it difficult for lawyers to predict the outcomes of new cases. So precedent is important, but for thoroughly practical reasons having nothing to do with any “duty” to the past.

Was Holmes right that “the law” is just a mask or skin that may confuse the wearer but that has no social function in modernity and ought to be stripped away to reveal a policymaking apparatus that could be improved if only it were recognized for what it is? He was half right. There is indeed a lot of needlessly solemn and obfuscatory moralistic and traditionary blather in judicial decision making and legal thought generally. It is im­mensely useful in dealing with legal issues always to try to strip away the conventional verbiage in which the issues come wrapped and look at the actual interests at stake, the purposes of the participants, the policies behind the precedents, and the consequences of alternative decisions, as Paul Freund suggested in the passage quoted by Glendon. Law can use a big dose of the disenchantment that accompanies real professionalization under the conditions of modernity.

But Holmes overlooked a number of points. One is the tension be­tween a “realistic” conception of judges as policymakers and the idea that the way to predict what the judges will do in the next case is to extrapolate from previous decisions, which implies that the official picture of adjudi­cation, in which judges “reason” from the precedents, is accurate after all. A related point is that the social interest in certainty of legal obligation requires the judge to stick pretty close to statutory text and judicial prece­dent in most cases and thus to behave, much of the time anyway, as a formalist. Furthermore, the more that law conforms to prevailing moral opinions, including the moral opinions of relevant subcultures such as the commercial community, the easier it is for lay people to understand and comply with law. They can avoid coming into conflict with it just by being well-socialized members of their community.

Another point, one that Holmes could not have understood because it is a lesson of totalitarianism, which did not yet exist in 1897, is that the maintenance of a moral veneer in the law’s dealing with the people subject to it, especially the antisocial people subject to it, offers a first line of defense against excesses of official violence. It is not healthy to treat even disgusting criminals as animals, yet Holmes toyed with the idea of doing that when he said, “If the typical criminal is a degenerate, bound to swindle or to murder by as deep seated an organic necessity as that which makes the rattlesnake bite, it is idle to talk of deterring him by the classical method of imprisonment. He must be got rid of.”27 Excluding a class of human beings from the human community can become a habit and spread from criminals to ne’er-do-wells to the sick and the aged and the mentally disturbed or dejfcient (“Three generations of imbeciles are enough”) and finally to nonconformists and to members of unpopular minorities. Do I have to explain, perhaps by reference to moral philoso­phy, why these would be bad results in the conditions of our society? I don’t think so!

Holmes also failed to consider that if through the application of rational methods the practice of law is made as routinized, as cut and dried, as the work now done by paralegals, bookkeepers, inventory clerks, ticket agents, and medical technicians, the legal profession may cease to attract the ablest people and the quality of law may suffer. Of course, a century after Holmes wrote, we are still far from such a pass, yet we shall note in the next chapter the growth of dissatisfaction by American lawyers with their highly remunerated but increasingly corseted professional lives. What Glendon sees as inexplicable moral deterioration may be a symptom of an underlying transformation in the material conditions of practice. Those dull Supreme Court opinions may be another symptom.

The last of Holmes’s oversights in “The Path of the Law,” and perhaps the most important, is his failure to appreciate the risk of premature enthusiasm for scientific solutions to human problems. There is irony in this oversight, since Holmes was a skeptic, and among the things he was skeptical of were schemes of social betterment based on the latest ideas in economics and other social sciences. Despite his skepticism he could not wholly escape the gravitational pull of the latest and best thinking in his intellectual milieu; hence his enthusiasm for eugenics and his receptivity both to a “therapeutic” model of criminal justice and to replacing the tort system with a scheme of social insurance—another questionable idea, as we have learned from experience with no-fault automobile accident com­pensation schemes.

The scientific mistakes of the past, so emphasized by the Supreme Court in the VMI case, should make us wary about jettisoning the tradi­tional conception of law, barnacled though it is with fusty moralisms, in favor of a wholly scientific conception of law. But the equal and opposite error is to suppose that the present and the future will be just like the past. To suppose that is to deny, in the face of much contrary evidence, that there has been progress in the understanding of human behavior and social institutions. Economics, psychology both cognitive and abnormal, evolutionary biology, statistics, and historiography have all advanced since Holmes wrote. New methods of apprehending social behavior, such as game theory, have emerged. We know more about the social world than Holmes could have known. We should be able to avoid his mistakes. No doubt we shall make our own. Prudence as well as realism suggests that the entanglement of law with morality, politics, tradition, and rhetoric may well be permanent and the path to complete professionalization therefore permanently blocked. But we should be able to go a long way down that path before reaching the obstruction. We should try, at any rate, which will require more emphasis in the legal academy than at present on economics, statistics, game theory, cognitive psychology, political science, sociology, decision theory, and related disciplines. In trying we shall be joining a great and, on the whole, a beneficent na­tional movement toward the professionalization of all forms of productive work.

The Sociology of Law

Some readers may suspect that when I say “economics . . . and related disciplines” I mean “economics.” I do not. I assign large roles, in a mature legal professionalism having a social science orientation, to other disci­plines, including sociology—a traditional rival of economics. Sociology plays a large role in this book. Sociologists’ skepticism about the knowl­edge claims of professions and intellectual disciplines, the penetrating analyses of professional behavior that this skepticism has encouraged, and Weber’s association of modernization with rationalization and disenchant­ment have guided my exploration of the relation between theory and practice in moral and legal decision making. Yet sociology of law is not at the moment a major “player” in interdisci­plinary legal studies. The reasons are various[[4]](#footnote-4) and include an association with discredited ideas, for example in criminology. Criminologists of tra­ditional, which is to say of sociological, bent located the causes of crime in social factors, such as poverty and discrimination, that no longer seem adequately explanatory. Crime rates soared in the United States during the 1960s even though poverty and discrimination were declining. These opposing trends and the correlative changes in public opinion toward crime left criminologists beached. They had long derided deterrence as an objective of criminal law, believing that the threat of punishment does not deter. Instead, they had advocated rehabilitation as the proper objective of punishment. It is now pretty clear that punishment does deter (a fact that criminologists missed not only because of their preconceptions, but also because their empirical methods were primitive) and that rehabilita­tion is not a feasible objective of a criminal justice system. The emphasis that traditional criminology placed on social factors in crime, its dispar­agement of deterrence, and its promotion of rehabilitation were related. Rehabilitation tries to change the criminal’s social environment; deter­rence ignores that environment, viewing the main purpose of criminal punishment as being that of fixing a “price” for crime. Crime rates are now falling, but the fall appears to be due to harsh punishment and aggressive policing rather than to anything that criminologists, with the important exception of James Q. Wilson, have been advocating. It is one of many instances in which sociology has lost a round to economics, economists having emphasized the importance of punishment to the con­trol of crime. Yet the most recent wave of economic writing on crime is paying a lot of attention to social factors, one of several signs of the possible convergence of the two disciplines.

The debacle of criminology has contributed to the impression that sociology is a beleaguered discipline. In the United States at least, the eclipse of sociology is undeniable. Student enrollments have fallen; depart­ments have been closed; the field is even said to be “decomposing.” But the academic sickness of sociology may be as misleading as the (compara­tive) academic health of moral philosophy. It would be a big mistake to write off sociology of law on the basis of the failures of criminology, for sociologists of law have made incontestably valuable and important con­tributions in other areas. One is the study of the legal profession itself. Although the work here is primarily classificatory and descriptive, with emphasis on ethnic and class differences between elite and marginal prac­titioners, it contains a critical dimension, as in the work of Richard Abel, and important studies of the compensation structure of the modern law firm and of changes in the economic organization of the legal services industry.

Another area in which sociologists of law have made important contri­butions is the litigation process, with particular emphasis on trial courts, the role of the jury, litigiousness, the role of lawyers in the process (and here the two areas of study that I have mentioned merge), and the alleged “litigation explosion.” Regarding the last, sociologists have played their traditional debunking role by pointing out that litigation rates were actually higher in eighteenth-century America than they are today and that the sharp growth in federal-court filings in recent decades has prob­ably not been matched by the experience in the state courts, even though about 90 percent of all litigation in this country takes place in state rather than federal courts.

Marc Galanter has pointed to the asymmetry in many areas of law (for example, accident cases against railroads) between plaintiffs and defen­dants. The former are “one-shot” litigants with no interest in the develop­ment of doctrine or the overall success of plaintiffs. The latter are “repeat players” who have a higher stake in winning because they anticipate future such cases if they lose this one. Their higher stake causes them to invest more in winning, and this skews case outcomes in their favor. Sociolo­gists have also conducted a number of useful studies of the settlement process and of alternatives to law for resolving disputes, and a few studies of citation patterns in appellate opinions. The sociologists inter­est in the legal profession and in the litigation process join in studies of how the outlook and self-interest of the profession influence that process and in studies of the costs of litigation.

Valuable work has been done in other areas of sociology of law as well—including a famous article on the law in action, which finds that businesspeople place relatively little reliance on legal remedies for obtain­ing compliance with contracts; a study of the settlement practices of liability insurance companies; and a study of the common law of privacy and of other common law doctrines relating to the control of informa­tion. What is particularly noteworthy about the sociology of law taken as a whole is its empirical cast and its refusal to take for granted that legal doctrines track legal practices. These are perspectives sorely lack­ing both in conventional legal analysis and in highfalutin constitutional and jurisprudential theorizing. Sociology of law is refreshingly down to earth.

There is more that sociologists can do to ¡Iluminad the legal system. They are experts on social class; and it is doubtful that the savagery with which the United States is attempting to extirpate a seemingly arbitrary subset of mind-altering drugs (cocaine and LSD, but not Prozac; heroin, but not Valium; marijuana, but not cigarettes or alcohol; benzedrine, but not caffeine) can be explained without reference to social class. As I noted in Chapter 2, it is mainly the mind-altering drugs favored by blacks and by members of the “counterculture” that have been criminalized.

Differences in social class—between offender and victim, plaintiff and defendant, judge and litigants, and judge and jurors—may also explain some of the divergences between the ideals of formal justice and the actual behavior of the American legal system. Blacks who kill whites are more likely to be sentenced to death than blacks who kill blacks or whites who kill blacks; and in general murderers whose victims are above them in the social hierarchy are likely to be punished more severely than murderers whose victims are below them in that hierarchy. The explanation for the pattern may ultimately be economic: wealthier people can hire better lawyers (including lawyers retained by the families of victims to assure a vigorous prosecution of the offender), and juries even in criminal cases may value the lives of victims in part at least by reference to their eco­nomic value. The propensity of the drug enforcement authorities to prosecute blacks disproportionately may likewise have an economic expla­nation. Blacks tend to be concentrated in the street-sale end of the busi­ness, and street sellers are easier to catch, so the authorities can maximize their output of convictions by concentrating on them.

These examples bring out the important point that economic theory, and the empirical methods that economists have honed to a high degree of precision, should be regarded as tools available for the use of sociologists of law, just as economists, and economically minded lawyers, are now borrowing topics, concepts, perspectives, insights, data, and even empiri­cal methods (mainly the large-scale survey) from sociologists. This bor­rowing has produced an important hybrid scholarship illustrated by Robert Ellickson’s field study of the difference between legal norms and the norms that actually guide behavior. I shall end this chapter with anexample of how economic and sociological insights can be combined to improve our understanding of legal phenomena.

But I wish first to counter the cynical reaction that a suggestion to place greater emphasis on empirical work is bound to engender in some quarters of the legal profession. I have heard it said of empirical research on the legal system that there are just two types of empirical questions about law: questions not worth asking and questions impossible to answer. People who say this are probably thinking of the failed manifestos of the legal realists and of the fact that empirical researchers in law occupy a lower rank in the academic pecking order than theorists and even doctrinalists. These cynics are ignorant of the amount of good empirical research being done nowadays, scattered though it is over the vastness that is the modern American legal system, and of the increased pace at which it is being done, in part because of the greater availability and retrievability of data (the Internet is a factor here) and the falling cost of computerized data storage and analysis. I could not, without greatly increasing the length of this book, describe and evaluate the many empirical studies that now exist of major facets of the legal system. But I can describe one of my own studies to give the reader a flavor of the current work.

It is commonly supposed that the United States is an ijpi usually litigious society, especially in comparison to England, even though the legal sys­tems of the two countries are similar in the areas such as tort, contract, and criminal law that generate the most cases. And indeed the per capita number of tort suits filed in the United States is almost three times the number in England. Within the United States, the variance is even greater, ranging from 97.2 suits per 100,000 population in North Dakota to 1,070.5 in Massachusetts, with England coming in at 133.5. These differences are much greater than any differences in accident rates or costs of suit, so it is tempting to ascribe them to cultural factors. If those are the decisive factors, there is probably very little that can be done to reduce the amount of litigation and we might as well stop wringing our hands over our litigiousness. But maybe the conclusion is premature. Maybe, despite appearances, litigation—even tort litigation, an emotional class of cases because most of them arise out of personal injuries—is driven more by incentives than by emotion or character. If so, it may be possible to use quantitative variables to explain the variance in the rate of tort litigation across states and even nations. That is what I shall try to do here: explain variance in tort litigation on the basis of quantifiable variables, both economic and sociological—thus illustrating the complementarity of the economic and sociological approaches and the power of social science to illuminate baffling issues about the legal system.

1. Richard A. Posner, Overcoming Law, ch. 1 (1995). See also Jonathan Rose, “The Legal Profession in Medieval England: A History of Regulation,” 48 Syracuse Law Review 1, 72-73, 79-80, 89-90, 108-109 (1998). [↑](#footnote-ref-1)
2. For properly tart observations on law professors who identify with judges, see Pierre Schlag, Laying Down the Law: Mysticism, Fetishism, and the American Legal Mind, ch. 8 (1996). [↑](#footnote-ref-2)
3. [↑](#footnote-ref-3)
4. See Richard A. Posner, “The Sociology of the Sociology of Law: A View from Economics,” 2 European Journal of Law and Economics 265 (1995). [↑](#footnote-ref-4)