Chapman Law Review

Volume 1 Spring 1998 Number 1

© *1998 by Chapman Law Review*

Chapman University School of Law Groundbreaking Ceremony Friday, November 21, 1997

*Anthony T. Kronman**

We are here today as witnesses, to observe and celebrate an inaugural act. In material terms, the act itself is trivial. It consists of the movement of a spadeful of earth. But the meaning of the act transcends its physical effects. One might even say that the triviality of the act, in one realm, is deliberately designed to display its immensity in another, in the unseen realm of traditions and commitments. The legal profession is an ancient calling, rich in memory and achievements. This morning, we break ground for a new law library, the heart of a new law school, and by this single simple act link this new school backwards in time to the traditions of the profession whose long history it now joins. The act of groundbreaking gives the Chapman University School of Law a past by making it heir to the traditions of the legal profession. But it also gives the school a future by declaring its commitment to sustain these traditions, whose survival is now as much in Chapman's hands as every other law school's in the country. With a single spadeful of earth, the Chapman University School of Law declares itself the inheritor of the past and the trustee of the future, and enters the realm of traditions and commitments that forms the stream of human time. That is what we are here today to solemnize as witnesses.

The Romans understood with special clarity the meaning of moments such as this. "In no other realm," Cicero observed, "does

* Dean & Edward J. Phelps Professor of Law, Yale Law School; B.A., 1968, Williams College; Ph.D., 1972; J.D., 1975, Yale.

HeinOnline -- 1 Chap. L. Rev. 1 1998

human excellence approach so closely the paths of the gods as it does in the founding of new and in the preservation of already founded communities." Whenever and wherever they built, it was a practice among the Romans to dedicate the site, and to solemnize the occasion, just as we are doing here today. Those who officiated at such dedications were known as augurers, and they formed one of the four great colleges of priests. It was the job of the augurers, on these occasions, to consecrate the place of building, and to interpret the omens that foretold the future of the enterprise there begun. The Latin verb for this forward-looking act of interpretation is *inaugurare*, from which our English word "inaugurate"—a word that has with time acquired an entirely positive meaning, very much like the work "bless"—derives. But the forward-looking act of inauguration also had a backward-looking meaning for the Romans, as their language reveals. For the verb *inaugurare*—to forecast and consecrate the future—can be traced back to an older verbal root, *augere*, which means simply to increase or add to something already present. Our own word "augment" comes from this older root (as does, less obviously but more interestingly, our word "authority"). In the Roman mind, every new beginning, every inauguration, was thus always an augmentation of what had gone before, a rededication to something already underway, the reassumption of earlier ambitions. Every new beginning entailed for the Romans a reunion with the past, and how well and faithfully this reunion was accomplished determined the future prospects of the enterprise, its future being in this regard intimately joined to its past, and its authority dependent upon the preservation of the link between the two. The history and morality and religion of the Roman republic were all shaped by these ideas.

The buildings the Romans constructed have vanished, except for a few fragments here and there. But the ideas with which they built endure, and shape what we do here this morning, thousands of years later on a continent of whose existence the Romans had no knowledge. This morning, we connect the Chapman University School of Law to its past, to the past of the legal profession which this new school augments and extends, and we inaugurate its future, whose prospects depend upon how well this school preserves the link between the past and future of the profession: an endless task, both difficult and inspiring, and the true source of every law school's authority.

The past that Chapman inherits is long and complex and contested. There are different views of what it is and what it means. But at the core of our tradition of legal education there is one idea that no one will dispute. This is the idea that the practice of law is a profession. Every profession is a job. Every professional makes

HeinOnline -- 1 Chap. L. Rev. 2 1998

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 laypeople, 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 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 brewer, or the baker, 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 or 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* a 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 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 ensure its justice—conscious, direct, and 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 product 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 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 his own clients. And a lawyer must do this not just occasionally, not just in the fraction of time he devotes to *pro bono* activities, but constantly and consistently, in every moment he is

HeinOnline -- 1 Chap. L. Rev. 3 1998

practicing law. A lawyer who is doing his job well dwells in the tension between private interest and public good, and never 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 never experience a tension between the two. The lawyer does 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 of law practice that explains its standing as a profession.

The second is the nonspecialized nature of the practice of law. The legal profession remains, to a surprising degree, a generalist's craft, whose possessor can move from one field to another—from criminal law to bankruptcy to civil rights—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 things 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 pin-making, which are characterized, Smith says, by the division of tasks 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 areas of law—and move about among these tasks with a flexibility unthinkable in Adam Smith's pin-making factory.

The education that lawyers receive reflects this. The purpose of a legal education is not to produce experts, as many nonlawyers wrongly believe. It is to train law students, as the saying goes, to think like lawyers, which means: 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, empathetically, a range of 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 now much doctrinal knowledge he or she possesses. By contrast, the man or woman who possesses these qualities need have only the most elementary knowledge of legal rules and procedures to be well-prepared for

HeinOnline -- 1 Chap. L. Rev. 4 1998

the practice of law, to have the kind of preparation that the 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 the 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 nontechnical nature of his work constitutes a second enduring source of the lawyer's claim to be a professional with a freedom and range of activity that specialization destroys.

A third source of the lawyer's professionalism is related to this 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 reciprocally engaged. It is a big mistake to think that legal training sharpens the mind alone. 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, a lawyer's most important and valuable trait. The process of training to become a lawyer, and the subsequent experience of being one, gather the soul's powers in a way that confirms one's sense of wholeness as a person and sense of being wholly engaged by one's work in contrast to all activities that can be mastered by the mind alone, which often produce, among the technicians who perform them, a sense of partial engagement only. The good lawyer knows that he needs all his human powers to do his job well, and the knowledge that he does gives his work a dignity no expertise, however demanding intellectually, can ever possess. This is the third feature of law practice that entitles us to call it a profession.

The fourth, and last, concerns time, and the location of law within it. Every activity has a past. Every activity therefore has a history, which can be studied and written down in books. I am

HeinOnline -- 1 Chap. L. Rev. 5 1998

sure that even pin-making has been studied by historians. 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 pin-making, the fact that pins were made a certain way before is no argument at all for continuing to make them this way now. We may do so, out of habit, but prior practice has no normative force in pin-making, or computer chip-making, 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. The fact that a law has been in existence for some time is always a reason for continuing to respect it, 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 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 many 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 two years, to be like this, though 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 colleagueship 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 have now identified the four features of law practice that 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.

At this point, you may think that I am joking. "What regard?" you will ask. Everyone knows that lawyers are considered, by

HeinOnline -- 1 Chap. L. Rev. 6 1998

most people, to be a bothersome necessity with as great a claim to respect as a rattlesnake, and for similar reasons. Today, indeed, the prestige of lawyers in America seems to be slipping, though whether it was ever higher in the past is hard to say. In a democratic country like ours, devoted to the 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 sociologists 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 similar 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—and hence only partially revealed through—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

HeinOnline -- 1 Chap. L. Rev. 7 1998

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 all that went before or is to follow, from 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, and 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 that make it a profession may be paired with these four forces of disintegration, to each of which one aspect of legal professionalism provides a remedy of sorts.

Thus, the lawyer's obligation to promote the public good—the public nature of his calling—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 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 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 sorts, in many different lines of work, lawyers are in a position to evaluate the social order from broader points 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 publicmindedness 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 foolish 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 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

HeinOnline -- 1 Chap. L. Rev. 8 1998

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, are a counterweight against the forgetfulness, the obliviousness to time, which characterize 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 Burke called it—is literally disintegrated, and forgotten. Much of the shallowness of our life—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 the 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, but also because each in a different way helps to ameliorate one of the four disintegrating forces which the very developments that have produced our wealth 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, someone looking backward, at the past of the profession, might conclude. But suppose 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 this morning by briefly telling you why. I want to do this not because I am a gloomy man who enjoys spoiling a party. I want to do it because I believe that only an honest assessment of the danger the legal profession is now in can prepare the Chapman University School of Law for the challenges it faces in the years ahead, as a trustee of the profession's values and traditions, bound by a duty to preserve them.

HeinOnline -- 1 Chap. L. Rev. 9 1998

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. This tendency has been exacerbated, I am bound to say, 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 best by serving the private interest 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 of 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 a generation ago 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 of specialization. Vast quantifies of new laws are enacted each year, and countless courts issue innumerable opinions construing them. In the expanding world 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—law firms of fifty or more—than ever before. This shift has meant, inevitably, 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 even in the largest firms two decades ago. Is it a surprise that the lawyers in these firms—the young lawyers especially—report a growing sense of detachment from their firms, and from the work

HeinOnline -- 1 Chap. L. Rev. 10 1998

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 horizon of lawyers. The phone (now portable), the fax (now ubiquitous) and the computer (now able to generate documents and changes 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 (a pattern that suggests the weakening of interest in, and attachment to, any institution that outlasts oneself).

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 on opening 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 we celebrate the establishment of a new school of law. In doing so we celebrate the tradition to which it is heir. But we also recognize the responsibilities this inheritance conveys. In the best of times, these responsibilities would be heavy, for the law is

HeinOnline -- 1 Chap. L. Rev. 11 1998

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. This is a great struggle, in which every law school in the country is now engaged. It is a struggle for the soul of the profession. I welcome Chapman to the battle. I know that under Parham Williams' leadership you will bring fresh forces to the fight. And I congratulate you on having the courage to enter the fray when the odds are longest and the need for reinforcements great. You will prosper—I am sure of that—and in prospering you will bring honor to yourself and to the profession whose grand past and uncertain future you acquire this morning with a spadeful of earth.

—Anthony T. Kronman

HeinOnline -- 1 Chap. L. Rev. 12 1998