

The Material Basis of Jurisprudence[†]

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This paper juxtaposes, I hope in a mutually illuminating rather than merely paradoxical manner, two bodies of theory not often discussed in the same breath: cartel theory, and jurisprudence. My aim is, with the aid of economics, to cast new light on fundamental issues concerning the legal profession and professional ideology.

I. THE ARGUMENT IN BRIEF

Human beings are bright but selfish animals. Selfishness is as characteristic of lawyers as it is of other people, although lawyers are brighter on average than the population as a whole. So we should not be surprised that the history of the legal profession is to a great extent, and despite noisy and incessant protestation and apologetics, the history of efforts by all branches of the legal profession, including the professoriate and the judiciary, to secure a lustrous place in the financial and social status sun. And until sometime in the 1960's, the legal profession in the United States, as in most other wealthy countries, was succeeding triumphantly in this endeavor. The profession was an intricately and ingeniously reticulated, though imperfect, cartel. Governmental regulations designed to secure the cartel against competition and new entry from without, and centrifugal, disintegrative competitive pressures from within, held the cartel together against the dangers that beset and ordinarily would destroy a cartel of many members. The organization of the profession as a cartel produced, as a by-product, a certain view of "law"—the view of law as an objective, existent, enigmatic, but ultimately knowable entity constraining the behavior of lawyers and judges and thereby justifying the autonomy of the profession from political or market controls.

The cartel has weakened since the 1960's. There is a fruitful analogy to the decline of medieval craft production—also organized in cartels—and the rise of modern mass production industry. The effects of the weakening of the legal profession's cartel have been manifold. They include changes in the size and organization of law firms, changes in the relative compensation of junior and senior lawyers, an increase in the hours of work of lawyers, and a diminution in the satisfactions that practitioners, judges, and law professors derive from their jobs. And because mainstream legal thought is to a significant degree a

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by-product of cartelization, the weakening of the cartel has altered that thought—has altered it in the direction of disintegration and of a search, so far unavailing, for methods of reintegration. This body of thought is the particular concern and preserve of academic law, so it should also come as no surprise that the decline of the legal profession's cartel has thrown academic law into a tailspin. Should the cartel collapse entirely and law become largely an unregulated service like business management or retail selling, we can expect a profound change in the reigning conception of law: a change from the idea of law as an autonomous realm of thought to the idea of law as a heterogeneous medley of rhetorical thrusts and parries, of advice and mediation by wise elders, of policy analyses and investigations, of miscellaneous clerical and bureaucratic tasks.

Economists consider cartels in general a bad thing, because they restrict output below efficient levels and cause other distortions. But cartels can have good effects as well, and the legal cartel has some good effects. I suspect though cannot prove that the net effect is bad, and that such good effects as there are could be secured with regulations less restrictive than those that continue in force even in the cartel's present weakened form. Of one thing, however, I am confident: that among the good effects of eliminating the legal cartel would be to demolish "jurisprudence" in the special sense of the legal profession's flattering self-conception of what it means to do, to be, to live in, "the law."

Thirty years ago jurisprudence was "realistic" (in the scientific, not the "legal realist" sense). The legal profession was thought to possess and deploy cogent tools of inquiry—primarily deduction, analogy, precedent, interpretation, rule application, the identification and balancing of competing social policies, the formulation and application of neutral principles, and judicial restraint—constituting a methodology that could generate right answers to even the most difficult legal questions. Law was believed to be objective, impersonal, autonomous, constraining rather than manipulable, logical rather than rhetorical, and—ideally, but it was thought an attainable ideal—nonpolitical. The Supreme Court was said by the highest of academic authorities to be "predestined . . . to be a voice of reason," for "reason is the life of the law."¹ Today, in contrast, it is fast becoming a commonplace, though one stubbornly resisted in some quarters, that the idea of the law's "objectivity" and all that the term connotes have been exploded, that "we are all pragmatists now."² Is this because what I am calling a realistic (not to be confused

1. Henry M. Hart, Jr., *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99, 125 (1959). Holmes, of course, had thought the "life of the law" was "experience." OLIVER W. HOLMES, JR., *THE COMMON LAW* 1 (1881). The shift in terms is portentous, as we shall see.

2. This is the theme, not the words, of Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811 (1990). He argues that Ronald Dworkin, Roberto Unger, and myself, though occupying very different points on the jurisprudential compass, are all pragmatists—though it is a label that Dworkin resists fiercely. See RONALD DWORKIN, *LAW'S EMPIRE* 161 (1986). The symposium in which Rorty's piece appeared contains a number of other papers on the pragmatic tendency in contemporary jurisprudence. *Symposium on the Renaissance of Pragmatism in*

with legal realist) jurisprudence is false? Or, as I shall argue, because, true or false (and it is sometimes one and sometimes the other), it is inappropriate to the emerging structure of the legal profession, being the ideology of a cartelized, not of a competitive, industry?

I argue that a professional ideology is the result not of a scientific-like search for truth but of the way in which the members of the profession work, the form and content of their careers, the activities that constitute their daily rounds, in short the economic and social structure of the profession. The argument draws on an interesting, though fragmentary and inconclusive, literature on the effect of work on consciousness³ and on the history of the medieval craft guilds, a history rich in illuminating parallels to that of the American legal profession.

Do not, merely because Marxism is a discredited political philosophy, dismiss out of hand the suggestion that a profession's characteristic modes of thought might have economic causes. Medicine is rich with examples.⁴ Why has preventive medicine always been such an orphan of the medical profession? Because some of the most effective methods of preventive medicine, such as simple hygiene and water purification, do not require or depend on medical training and their benefits to health are not easily appropriated in the form of fees. Why did medieval physicians place such emphasis on prognosis? Because, given the lack of much real knowledge of disease, the essential skill from the standpoint of professional success was the ability to determine whether a prospective patient was likely to recover; if not, the case would be declined to protect the profession's reputation. And why did those same physicians consider surgery not to be the practice of medicine and leave it to barbers? Because the surgical skills of the time were almost entirely mechanical, having no tincture of abstract knowledge and hence inconsistent with the medical profession's self-presentation as a learned profession. Should we be surprised to find that self-interest has played as big a role in legal thought as in medical thought?

II. REALISM AND MATERIALISM

Even the most committed scientific realist would admit that the rate and direction of scientific research are influenced by factors of a political, ideological, or self-interested character extraneous to the truth of scientific ideas.⁵ But almost everyone, including the committed pragmatist, would also

American Legal Thought, 63 S. CAL. L. REV. 1569 (1990).

3. A literature well illustrated by JOSEPH BENSMAN & ROBERT LILIENTHAL, *CRAFT AND CONSCIOUSNESS: OCCUPATIONAL TECHNIQUE AND THE DEVELOPMENT OF WORLD IMAGES* (1973). See also Arthur L. Stinchcombe, *Reason and Rationality*, in *THE LIMITS OF RATIONALITY* 285 (Karen S. Cook & Margaret Levi eds., 1990), and Andrew Abbott's comment thereon, in *id.* at 317; ROBERT BLAUNER, *ALIENATION AND FREEDOM* (1964).

4. The following examples are drawn from ERWIN H. ACKERKNECHT, *A SHORT HISTORY OF MEDICINE* 54, 82, 195 (1955).

5. This point is emphasized in recent sociological studies of scientific knowledge. For a review of those studies, see H.M. Collins, *The Sociology of Scientific Knowledge: Studies of Contemporary*

grant that the experimental, statistical, predictive, and observational procedures of modern science, together with the technical capability of embodying and thereby testing scientific theories in technology (such as atomic theory, embodied in nuclear weapons and reactors), enable many scientific ideas to be reasonably held with a degree of confidence (never one hundred percent of course) that enables them to be called "true" without a sense of strain, rather than merely convenient to believe. Scientific *activity* is a cultural, therefore a local, activity. But the truths of science are not local; and the language of science, mathematics, is a universal language.

It is otherwise in law, though this is not because of every respect in which law and science differ. The problem is not, for example, that the law is different in different places. A proposition about the law of X might be as demonstrable in Y as in X, even though the law of Y on the point was different. Nor is the problem that lawyers and judges make little use of scientific methods. Many propositions that we hold as unshakably as we hold core scientific propositions are not scientific—for example, that it is wrong (in our culture, at this time) to torture children. That is as true a statement about contemporary American morality as the statement—itself merely an approximation, and impossible to verify by means comprehensible to the ordinary person—that the earth revolves around the sun is a true proposition of contemporary astronomy. And it is a statement that the inhabitants of a culture that had no concept of child abuse could be brought to agree with, for it is merely a descriptive statement about contemporary American morality, and not a normative statement. The problem with law (and for that matter with ethics as well) is that it lacks cogent techniques for resolving disagreement. If everyone just happens to agree that laws which forbid abortion infringe constitutional liberty, this becomes for all intents and purposes a true proposition of contemporary American law. But if rational persons disagree (and disagreement with this proposition cannot itself be deemed a sign of irrationality, as might disagreement with the proposition that it is considered wrong in our society to torture children, or that the earth revolves around the sun), there is no method of resolving their disagreement other than by force or some equivalently nonanalytic method of dispute resolution, such as voting. There are no tests, procedures, protocols, or algorithms for determining which side in the dispute is right. This is even truer of propositions of jurisprudence (rather than of law in the concrete), such as that the only real law is positive law, or natural law, or that law should be utilitarian or economic in character or should seek to promote equality above all, or that law is objective and impersonal, or alternatively that it is subjective and political. Not that one cannot make rational arguments pro and con the various position; but the arguments convince only people who are predisposed because of temperament or experiences to accept them. Especially with regard to the propositions of jurisprudence, then, we should expect political, self-interested, traditional,

habitual, or other truth-independent considerations to play a far more important role in explaining the content, character, and acceptance of ideas than in the case of science. With deliberate provocation, I call factors in the shaping of ideas that cannot be referred to a research program guided by the search for truth "material" and locate the material basis of jurisprudence in the rise and decline of cartelization in the legal profession.

I am not arguing that law is always and everywhere more political and subjective than science—and that a realistic (again, in the scientific, not the legal realist, sense) jurisprudence is therefore never an attainable goal. Law today in England, where the profession remains cohesive and most political questions have been removed from judicial consideration, is a more objective discipline than chemistry was in the Middle Ages. In fact, law was more objective thirty years ago in this country than it is today, which is why a realistic jurisprudence was orthodox then and is becoming heterodox now. Law is not all will and politics; it has tools of genuine intellectual inquiry and analysis. But how well they work depends in major part on who is wielding them and in what specific tasks.

III. PROFESSIONALISM

Since I place such emphasis on the structure of the legal profession as a causal factor behind the ideas of jurisprudence, I dare not take for granted what a "profession" is. It is an occupation in which competent performance requires or is thought to require not merely know-how, experience, and general "smarts," but also mastery of a body of specialized but relatively (sometimes highly) abstract knowledge, such as some branch of science, or some other body of thought believed to have structure and system, such as theology, or "the law," or "military science," which is the study of the general laws (in the scientific sense of the word) of tactics and strategy. With the growth of universities—institutions that specialize in imparting as well as enlarging abstract knowledge—the training for the professions has increasingly assumed (especially in the United States) the form of postgraduate study, though the older system of professional training—apprenticeship—remains influential in such professions as journalism and the military, and for that matter in medicine. So economics is a profession but business is not, because you can be a successful businessman without having mastered a body of formal knowledge, but you cannot be a successful economist on that basis. Carpentry is not a profession either, because although it involves more specialized training than business does, it does not require a high degree of intellectual training or competence.⁶

6. The vast literature, mainly sociological, on the professions is well represented by ANDREW ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988), and by ELIOT FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* (1986).

I am interested in *restricted* professions, of which law and medicine are the best known and most important. Economics is not restricted. Anyone can be a self-described economist, can be hired as an economist, can (if able) do the work of an economist. But one cannot practice law or medicine, or call oneself a physician or a lawyer, or for that matter teach in a public school, without a license. Many occupations that are not professions are also restricted, such as barbering or driving a taxi. But precisely because they are not professions, that is, they are not understood to require the mastery of a body of formal knowledge, the restrictions take a different form. The most characteristic though not only professional restriction today is a requirement of protracted formal education including some, and sometimes a lot of, specialized university-type education, plus proof of intellectual competence demonstrated by passing a demanding written examination. It was not always thus. Until this century, the formal educational prerequisites for lawyers in this country and England were modest, and often nil. But law was always understood to be a "learned" activity in both senses of the word and hence a profession, and entry into it was almost always restricted in one way or another.

Professional restrictions can be public (that is, governmental) or private, but the latter will rarely be effective for long unless they have some backing from government. Accreditation, for example, may be private, but unless the licensing authorities, which are public, refuse to license the graduates of unaccredited schools, accreditation may not do much to limit entry into the profession. California, interestingly, is one of a tiny handful of states that still allows persons who have not graduated from an accredited law school to be admitted to the bar of the state if they pass the state bar exam; one consequence is that unaccredited law schools have a significant foothold in California. On the other hand, the California bar exam is uncommonly difficult, so the superior training available at the accredited schools is of real value to the student and enables such schools to charge higher tuition than unaccredited schools do (and few try to pass the bar exam without having attended any law school). Still, in California, the brunt of limiting entry is shifted from the accrediting authorities and the law schools to the bar examiners.

A. The Medieval Cartel as a Model of the Modern Legal Profession

The legal profession in its traditional form is a cartel of providers of services related to society's laws.⁷ The theory of cartels explores the circumstances under which firms are, and are not, able to increase their prices

7. The cartel explanation for professional restrictions is of course not new. See ABBOTT, *supra* note 6, at 63-64; MILTON FRIEDMAN, CAPITALISM AND FREEDOM, ch. 9 (1962); D.S. LEES, ECONOMIC CONSEQUENCES OF THE PROFESSIONS (1966); REGULATING THE PROFESSIONS: A PUBLIC-POLICY SYMPOSIUM (Roger D. Blair & Stephen Rubin eds., 1980) [hereinafter REGULATING THE PROFESSIONS]; S. DAVID YOUNG, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA (1987).

above competitive levels and make the higher prices stick, at least for a time.⁸ Cartels come in a great variety of forms, today ranging from furtive short-lived bid-rigging conspiracies in the highway construction industry to the OPEC oil cartel, and including regulatory cartels such as that of the dairy or the tobacco farmers. Few of these cartels, however, have a mystique or an ideology, as restricted professions in general and the legal profession in particular have; for that we must go to the medieval craft guilds, early cartels that in periods both of prosperity and of decline resemble the corresponding phases of the legal profession. As my interest in the medieval guild is limited to the light it sheds on one of its remote descendants, it will be convenient to bring out the salient features of the guild system through a composite portrait of a fictitious guild.⁹

The linen weavers' guild of the Duchy of Guermantes in twelfth-century France operates under a charter from the Duke of Guermantes. The charter not only authorizes the guild to manufacture and sell linen fabrics, but, as important, it forbids the manufacture or importation into the duchy of linen fabrics other than those made by guild members and imprinted with the guild's exclusive mark. The prohibition of competitive entry is necessary (unless the members of the guild have such low costs that the price set by the guild, while in excess of those costs, is below the costs of new entrants) because a market price that exceeds the costs of production and sale is a magnet to firms in other markets and to people wanting to start their own firms in this one.

The Guermantes weavers' guild obtained its monopoly charter by agreeing to give the duke an annual present of its best fabrics. In exchange the guild is able, by virtue of the prohibition that the duke imposed against competitive entry, to fix prices that assure a handsome remuneration to the members of the guild for their work even after the cost of their gift to the duke is subtracted. But guild and duke alike are reluctant to justify the monopoly charter in the stark terms of mutual economic self-interest. Even in a nondemocratic polity, public opinion counts for something, and usually a lot. Privilege is resented, and may also have ominous political implications. In a later period, we find that the monopolist in the famous *Case of Monopolies*¹⁰—in which the English judges sided with Parliament in its opposition

8. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 283, 285-94 (4th ed. 1992) (summarizing the theory); see also Jonathan B. Baker, *Identifying Cartel Policing Under Uncertainty: The U.S. Steel Industry, 1933-1939*, 32 J.L. & ECON. S47 (1989) (a recent case study).

9. For sources of this composite portrait, see ANTONY BLACK, *GUILDS AND CIVIL SOCIETY IN EUROPEAN POLITICAL THOUGHT FROM THE TWELFTH CENTURY TO THE PRESENT* (1984); LUJO BRENTANO, *ON THE HISTORY AND DEVELOPMENT OF GILDS, AND THE ORIGIN OF TRADE-UNIONS* (1870); STEVEN A. EPSTEIN, *WAGE LABOR AND GUILDS IN MEDIEVAL EUROPE* (1991); TOULMIN SMITH, *ENGLISH GILDS: THE ORIGINAL ORDINANCES OF MORE THAN ONE HUNDRED EARLY ENGLISH GILDS* (1870); EDGUMBE STALEY, *THE GILDS OF FLORENCE* (1906); SYLVIA L. THRUPP, *The Guilds*, in 3 *CAMBRIDGE ECONOMIC HISTORY OF EUROPE* 230 (M.M. Postan et al. eds., 1965). For a particularly good discussion, see HENRI PIRENNE, *ECONOMIC AND SOCIAL HISTORY OF MEDIEVAL EUROPE* 178-91 (1937). The literature is summarized and criticized in Charles R. Hickson & Earl A. Thompson, *A New Theory of Guilds and European Economic Development*, 28 *EXPLORATIONS ECON. HIST.* 127 (1991).

10. *Darcy v. Allein*, 77 Eng. Rep. 1260 (K.B. 1602).

to the Crown's practice of raising revenue without parliamentary consent by selling monopolies—defended his monopoly of playing cards by arguing that monopoly kept the quality up and also that permitting cheap foreign imports would take jobs away from Englishmen.

We are therefore not surprised that the charter of the weavers' guild recites that monopoly is necessary to protect the public from deceptively cheap—because shoddy, but difficult to recognize as such—merchandise sold by foreigners and other undependable people. A precocious guild theoretician has pointed out that if consumers lack good information about the quality of a product they will perforce assume that every brand of the product, regardless of its price, is of average quality. They will therefore buy the cheapest brand—which, being of lowest quality, will probably cost the least to make. Producers of the higher-quality, costlier brands, unable to recoup their additional costs by charging a higher price, will be driven from the market unless they reduce the quality and hence the cost of their brand. With unrestricted competition, therefore, quality will spiral downward, and consumers will end up receiving a lower quality of product than they want and would be willing to pay for.¹¹

The quality-protection rationale (or rationalization) for prohibiting entry has a further utility to the guild. Although prohibiting entry is necessary if the guild is to have supracompetitive profits, it is not sufficient. If the members of a guild are numerous (and perhaps even if they are few), each will have an incentive to expand his output until the cost of the last unit that he produces is equal to the market price; because until that point is reached a greater output will increase his profits. The eventual result of all the additional output of these profit-maximizing guild members will be, however, to drive the market price down to the competitive level. One might suppose that this unhappy result could easily be averted by the guild's fixing a minimum price for its members' output at the level that maximizes their profits as a whole, and by punishing cheaters, that is, price cutters. The weavers' guild has done this. But even though outright cheating by members—the slight shading of the fixed minimum price to enable the member to sell a much larger output at a profit per unit only slightly lower than he would obtain at the fixed price—has been prevented, the temptation to engross a larger share of the guild's profits led some members of the guild in its early days to work longer hours, or hire more workers, in order to sell more at the fixed price. And it led others to

11. Hayne E. Leland, *Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards*, 87 J. POL. ECON. 1328 (1979). For criticism, see Keith B. Leffler, *Commentary*, in OCCUPATIONAL LICENSURE AND REGULATION 287 (Simon Rottenberg ed., 1980). In the case of a producer of personal services, such as a lawyer, this can mean that the client gets a less skilled practitioner than he wants and would be willing to pay for. See Carl Shapiro, *Investment, Moral Hazard, and Occupational Licensing*, 53 REV. ECON. STUD. 843 (1986). The economic case for regarding guilds as a response to a problem of consumer uncertainty about quality is argued in Bo Gustafsson, *The Rise and Economic Behavior of Medieval Craft Guilds: An Economic-Theoretical Interpretation*, 35 SCANDINAVIAN ECON. HIST. REV. 1, 22 (1987). I make no attempt to evaluate the overall economic efficiency or social value of the guild system or of the counterpart restrictions in the legal profession.

increase the quality of their output in order to wrest business from their competitors by offering the consumer more for the same (guild-fixed) price.

The guild has acted more vigorously against the first practice (increasing quantity) than against the second (increasing quality). This is partly for reasons of practicality and partly for reasons of public relations, or mystique. It is relatively easy for a guild to fix and even to enforce limits on hours of work and on number of workers. The weavers' guild has therefore forbidden its members to work at night or on holidays, or to hire workers beyond the minimum number of apprentices necessary to assure the continuation of the guild after its present members die or retire. Although the guild's profits have, nevertheless, eroded some, because its members persist in competing in quality, this is not entirely a bad thing from the guild's standpoint. Quality competition has reinforced the quality-protection argument that is the cornerstone of the guild's claim of legitimacy. The guild really *is* producing a superior product. In fact, it is a better product than consumers want, in the sense that they would prefer a product of slightly lower quality at a lower price. But they do not know the optimal price-quality combination because they are offered no alternative. What they do know and what the guild does not let them forget is that they are getting a satisfyingly high-quality product along such dimensions as tightness of weave, strength, softness, appearance, and durability.

The restrictions on employment, although primarily intended to limit the quantity produced by the weavers' guild, also reinforce the quality argument for the guild's monopoly. Because a member of the guild cannot hire a flock of workers—cannot operate on the factory system—he is, perforce, a craftsman, a handicrafter. The weavers' guild has therefore vigorously propagated a norm of craftsmanship, of hand-made-ness, as an index of quality. It is a plausible norm in an era before department stores and enforceable warranties. Each swatch of linen fabric produced by the guild bears the mark not only of the guild but also of the member who produced it. The consumer knows infallibly who the producer is. There is no divided responsibility, no possibility of mutual finger-pointing, when any of the guild's output proves defective.

The real danger to the guild is not that the members will compete away all available profits by increasing the quality of their product, although they are competing away some of the profits in this way. The danger is that the members will try to increase their profits by reducing that quality and, with it, their costs. Such competition would destroy the quality rationale for the guild's monopoly, engender consumer dissatisfaction in the long run (in the short run, consumers may not notice the deterioration in quality), and threaten the survival of the guild and therefore of its higher-cost members by creating irresistible pressure to abandon the minimum price fixed by the guild. The weavers' guild of Guermantes has responded by fixing minimum standards of quality of workmanship and materials. Members are required to adhere to these standards under threat of expulsion from the guild if they do not. The guild has gone so far as to specify the tools that the weavers must use. These

standards, these requirements, have provided, in turn, additional support for the quality rationale for guild restrictions—the guild is policing the quality of its members' work directly rather than merely excluding putatively lower-quality competitors.

The guild cannot expect the threat of sanctions to prevent all violations of guild restrictions. It has sought therefore to encourage social cohesiveness among its members in order to bring altruism and informal sanctions to bear in support of compliance with the guild's restrictions. The guild has excluded from membership Jews and other aliens believed not to share a common core of basic tastes and values with the existing members of the guild. And it has become a social as well as a business alliance, with frequent intermarriage among the families of members and with generational competition muted by drawing apprentices exclusively from the ranks of the sons and nephews of the guild's present members. The guild does all it can to emphasize the importance of pride in one's calling, of leading a blameless life, of loyalty to the guild, and of equality among guild members—does all it can in short to imbue its members with the moral precepts and values, communal rather than individualistic, that reduce the likelihood that members will cheat on the price and other restrictions that the guild imposes on them. Tradition not innovation, uniformity not variety, emphasis on input rather than emphasis on output, hence emphasis on quality rather than on quantity, and on doing one's own work rather than contracting it out or delegating it to employees—in short on making, on crafting, rather than on supervising the work of others—all are attitudes and values that the guild has been sedulous to cultivate.

We must take a closer look at apprenticeship. Its significance lies not only in its training function,¹² but also in the fact that a guild must make provisions for its continuation into the indefinite future. Even if the guild's members have no concern about its flourishing after they are dead, the guild cannot hope to retain its privileged status under the laws of the Duchy of Guermantes if it does not hold out reasonable assurances of being able to supply the duchy's linen needs for the indefinite future. It must therefore assure that there will be a next generation of guild members. How can it do this without sharing its monopoly rents with a class of new entrants? Apprenticeship is the answer. Entry into the potentially lucrative occupation of being a member of the weavers' guild is rationed to persons willing to put in long years of work at low wages. In effect, they buy a share of the master's share of the guild's profits, much as the modern purchaser of stock in a corporation that has a patent or other monopoly buys a right to receive a proportionate share of the firm's expected monopoly profits, but the right yields him only a competitive expected return on his investment, not a monopoly return, because the expected monopoly profits have been discounted in the purchase price of the stock.

12. See Bernard Elbaum, *Why Apprenticeship Persisted in Britain But Not in the United States*, 49 J. ECON. HIST. 337 (1989).

The length of the apprenticeship limits the rate at which the guild expands. Varying that length, therefore, enables the supply of labor to be adjusted continually to meet changes in the demand for the guild's output and hence in its derived demand for labor and other inputs, while the meager level of the wages paid apprentices prevents the dissipation of guild rents to newcomers.

As with other guild restrictions, the length of the apprenticeship serves the additional purpose of reinforcing the quality argument, which is the cornerstone of the guild's public relations. With apprenticeship conceived of as a period of training (as in part, of course, it is), the longer the period of apprenticeship the more plausibly can the guild represent to the public that making a high-quality product is a task requiring unusual skill that can be acquired only by lengthy training. Finally, apprenticeship serves the important function of screening and indoctrination of new members. Uniformity of outlook, and with it a greater likelihood of conforming to the established norms of pricing, workmanship, and the like, are fostered by a system in which new producers have spent many years as students, wards, and understudies of the old. When members died or demand grew beyond the capacity of the existing membership to supply it, the weavers' guild could auction off new memberships, as was later to be done with seats on stock exchanges, another cartel institution. But that would bring into the guild producers unlikely to internalize the guild's values—values designed to limit competition among the members. The apprenticeship system minimizes this risk.

I have resorted to a description of a fictional medieval craft guild in order to bring out the moral and ideological characteristics of guilds. Even if, as I believe, the best explanation for the guilds is that they were devices for maximizing the net earnings of their members, the efforts that the guilds bent to this end fostered both a particular personal morality and a particular institutional mystique. The personal morality emphasized such values as loyalty, equality, conformity, personal responsibility, and patient craftsmanship, implying scrupulous attention to detail and to quality. The institutional mystique involved celebration of the production of exquisitely high-quality goods or services as unique handicrafts by highly trained specialists, and the abhorrence of cheapness and shoddiness. I shall call this mutually reinforcing combination of morality and mystique the *ideology* of guild production. I have argued that the foundation of this ideology is the self-interest of producers in the cartelization of production; but it would be a mistake to *equate* guilds and cartels. The former are a subset of the latter. The possession of an ideology distinguishes medieval craft guilds from conventional modern cartels—and in a way that, as we shall see, is relevant to the understanding of jurisprudence.

B. From Guild to Factory

Weavers' guilds are no more. An "industry ideology," which is the distinguishing feature of the guild, does not survive the transition to mass production. The conditions of such production may, as Marx argued, foster the

creation of a workers' ideology; and over and against this we observe a diffuse business ideology shared by many business executives. But there is no ideology of the producing unit; as we are about to see, there *is* no single producing unit any more. A guild of weavers has an ideology; a cartel, and especially a competitive market, of textile manufacturers does not.

Mass production involves a change in the process of production from the handcrafting of small quantities of individualized, high-quality goods by highly trained specialists to the machine production of large quantities of goods of average quality, often by unskilled workers performing simple, repetitive operations under the direction of supervisors and ultimately by executives.¹³ The division of labor within the producing unit, by breaking up into its constituent operations the process of manufacture that was the guild's craft, enables a greater output to be produced by a work force that may lack anyone with the range of skills and the depth of training of a master craftsman in a guild system.¹⁴ The result is a heterogenous work force, no member of which much resembles the traditional craftsman. The importance of instilling traditional craft values in the work force therefore diminishes; so too the value of protracted training as under a system of apprenticeship. The workers are more like the different parts of a machine, or the different cells of an organism, than they are like handicraftsmen, for they do not individually produce an entire product. The values required of supervisors and executives are especially remote from those of the guild—they are leadership values and related "people skills," specific talents for maneuvering in large organizations, and financial and marketing acumen. Those talents are not much used by a person who works slowly, painstakingly, alone, or with at most the aid of one or two apprentices.

The diversity of tasks performed by the persons who constitute the productive enterprise in a modern industry thus dooms the moral uniformity secured by the guild system. And with quality deemphasized and handcrafting a thing of the past, the quality-centered mystique of the guild disappears as well. Not only the work force, but the management force, is mobile, possessed of general-purpose production and managerial skills rather than anchored to a particular industry by a patient accretion of unique handicraft skills. Once, a weaver might have been thought a kind of artist; no one would describe the modern textile manufacturing firm as an *atelier*.

There is danger of overstatement here. There is craft, and not just craftiness, in the organizational skills of the modern business executive and in the practical technical skills of the modern factory worker, who with the growth

13. An intermediate stage is the "craft" union, in which guild-like organization of the "skilled" work force is combined with modern methods of organizing production. The apprenticeship rules and exclusionary practices of the craft unions are redolent of guild practices. An analogy is to the "in house" lawyer who, as a corporate employee, is simultaneously a subordinate figure in an industrial workforce and an independent professional.

14. HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL* 79-80 (1974). It would be a mistake, however, to suppose that modern methods of production imply wholesale "deskilling" of the labor force. Paul Attewell, *The Deskilling Controversy*, 14 *WORK & OCCUPATIONS* 323 (1987).

of the "total quality management" concept and Japanese-style team production is less and less likely to be a Charlie Chaplinesque assembly-line automaton. I need a better word than "craft" to distinguish the work of medieval guild craftsmen from that of modern manufacturing personnel. That word is "artisanality."¹⁵ It is at once broader and narrower than craft. Broader because not limited to a member of a medieval (or any) guild; narrower because the terms craft, craftsman, and craftsmanship can be applied to nonartisanal activities, persons, and skills. The guild craftsman, however, was an artisan.

The industrial counterpart of the painter or sculptor, the artisan makes things with his hands, perhaps with some, but at most with only limited, aid from machinery. The artisan has the satisfaction of observing a direct, immediate, palpable, and intimate connection between his input and his output—the satisfaction of having something tangible to show for his efforts. The spirit of artisanality is captured in the "arts and crafts" movement that began in the nineteenth century. "It emphasized the human touch—the care, craftsmanship and attention to detail that go into a piece of furniture or a decorative object that is crafted by hand. The art of creating something, it was thought, should be a joyful, exhilarating experience, not just a way of earning money."¹⁶ In addition, the artisanal mode of production promotes a stable cartel organization of industry by limiting output.

IV. THE RISE OF THE LEGAL PROFESSION; THE PROFESSION CARTELIZED

Something like the evolution of the textile industry from guild production to mass production, and the concomitant decline of artisanality, is occurring today in the market for legal services. I have first to describe this evolution and then (and last) to consider its specific consequences for jurisprudence in the special sense in which I am using this word as denoting the ideology of the legal profession in its guild phase.

The roots of the American legal profession are English, and by the time of our Revolution the English legal profession had assumed something remarkably like its present form.¹⁷ The profession was rigidly divided between courtroom lawyers (the barristers) and office lawyers (the solicitors). To become a barrister, an aspirant had to be "called to the bar" after a period of residing and studying in an inn of court. Because such residence was costly, and because a barrister could not work for another barrister but instead had

15. See, e.g., PAUL S. SEAVER, *WALLINGTON'S WORLD: A PURITAN ARTISAN IN SEVENTEENTH-CENTURY LONDON*, 112-42 (1985).

16. Beth Sherman, *A Celebration of Beauty*, *NEWSDAY*, Mar. 31, 1988, at 3.

17. The historical sketch that follows is based on RICHARD L. ABEL, *AMERICAN LAWYERS* (1989); GERALD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840* (1979); *LAWYERS IN EARLY MODERN EUROPE AND AMERICA* (Wilfrid Prest ed., 1981); and ROBERT B. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983).

to depend on cases referred to him by solicitors, who were naturally reluctant to refer cases to a beginner, the career of a barrister was largely although not entirely limited to persons of independent means. As a result, the supply of barristers was restricted, and many barristers had very high incomes, though some—those who lost out in the barrister lottery by failing to obtain cases from solicitors—eked out a meager living, often supplemented by moonlighting, for example as a journalist. The large dispersion of lawyers' income remains a characteristic of both the English and the American legal profession to this day.

The successful barristers and the royal judges—virtually all of whom were former barristers—formed a small, cozy, homogeneous community. The common law is the expression of the values of this community.¹⁸ The lack of a felt need to systematize the common law by reducing it to a code is a reflection of the community's homogeneity. They had no more need for a code than the native speakers in a language community need a grammar book to know how to speak.

To become a solicitor in eighteenth-century England, one had to serve a period of years as an articled clerk, that is, as a solicitor's apprentice. So entry into the solicitors' branch of the profession was controlled too. Solicitors were allowed only one articled clerk at a time, which limited the growth of the profession.

The situation in the colonies, and in the new nation, was more fluid. Although lawyers had played a prominent role in the founding, and constituted in Tocqueville's view the nearest thing that the United States had to an aristocracy, the public was hostile to guild-like restrictions and privileges. The division between barristers and solicitors never took hold. Many judges were elected rather than appointed; they mostly did not wear the robe—the symbol of the judge's, as of the clergyman's, specialness—and their powers over juries were severely limited. In short, the idea of a legal caste was resisted. Before the Civil War, two states abolished all restrictions on entry into the legal profession other than that the entrant be an adult of good moral character.¹⁹ Other states were more restrictive, generally requiring an apprenticeship. But I conjecture that the real limitation on the size of the profession was the generally low standard of education in nineteenth-century America. Law was then, as it is today, an intellectually demanding profession (whether it has to be is a separate question). While a brilliant person like Abraham Lincoln could become a successful lawyer with little formal education, the pool of persons from which such lawyers could emerge must have been small, just like the pool of persons from which opera singers and professional athletes emerge—two unregulated occupations famous for high

18. A.W.B. Simpson, *The Common Law and Legal Theory*, in *LEGAL THEORY AND COMMON LAW* 8 (William Twining ed., 1986), reprinted in A.W.B. SIMPSON, *LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW* 359 (1987).

19. STEVENS, *supra* note 17, at 7.

salaries, though also, as one would expect—the high salaries acting as a magnet—a high variance in salaries.

Educational standards rose, and for that or other reasons the latter part of the century witnessed a movement, rich in parallels to developments occurring at the same time in the medical profession, toward making the American legal profession a restricted occupation. We may date the beginning of this movement to 1870, when Christopher Columbus Langdell became dean of the Harvard Law School. His program of educational reform²⁰ was explicitly based on the premise that law was a science. That premise made it natural to suppose that lawyers should undergo a lengthy period of preparation at a university—where else would one develop scientists? From there it is but a step, though a big step (and one not taken by real sciences), to *making* them undergo that preparation as a condition of being permitted to engage in professional activity. The step was not complete until apprenticeship (clerking in a lawyer's office, the equivalent of the English articulated clerkship) as an alternative route to qualifying to take the bar exam was abolished and until bar cram schools were discredited, although they survive to this day as the bar-review courses that newly graduated law students take for the few weeks between graduating from law school and taking the bar exam. As late as 1951, twenty percent of American lawyers had not graduated from law school, and fifty percent had not graduated from college.²¹ But by 1960, four years of college (more precisely, a college degree, which rarely is earned in fewer years), plus three years at an accredited law school, plus receipt of a passing grade on the bar exam administered by the state in which the candidate wanted to practice, plus satisfying a character committee of the bar that he was of sound moral character, formed a series of hoops through which almost everyone who wanted to become a licensed practitioner of law in this country had to jump.

The barrier to new entry created by these hoops was reinforced by other state imposed restrictions. The most important was the prohibition—without which the educational requirements would have had little restrictive effect—against the unauthorized practice of law. Not only were persons who had not been admitted to the bar of a state forbidden to call themselves lawyers; they could not perform the services that the state defined as the practice of law—mainly the representation of litigants before courts and most administrative agencies, and the sale of legal advice. Nonlawyers were kept from circumventing this prohibition by being forbidden to enter into partnership with lawyers or otherwise to obtain an ownership interest in enterprises providing legal services.

Besides limiting entry into the profession and preventing competition by outsiders with the profession's members, the law limited competition within

20. See Anthony Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979). Harvard President Charles W. Eliot actually played a "more significant role" than Langdell in the development of these reforms. *Id.* at 332.

21. DIETRICH RUESCHEMEYER, *LAWYERS AND THEIR SOCIETY: A COMPARATIVE STUDY OF THE LEGAL PROFESSION IN GERMANY AND IN THE UNITED STATES* 105 (1973).

the profession by forbidding most forms of soliciting business (including "ambulance chasing" and advertising), by encouraging lawyers to price their services according to fees set by the state bar association, and by limiting interstate mobility of lawyers. A lawyer was permitted to practice only in the courts of a state of which he was both a resident and, by virtue of having passed the state's bar exam and satisfying the state's other requirements for licensing, a member of the state's bar. However, some states permitted admission on motion, that is, without having to take another bar exam, if the applicant had practiced law in a state that provided reciprocal privileges. Even then he would have to become a resident of the state whose bar he was seeking to join. The prohibitions that I have mentioned against "lay intermediaries" (the employment of a lawyer by a nonlawyer, for example by a corporation seeking to market legal services to clients), and against unauthorized practice, limited competition within as well as with the legal profession by making it more difficult for law firms to expand.

What I have described as restrictions on competition within the profession are also restrictions on new entry into specific markets within the profession. Advertising, and access to efficient capital markets, are more important for new entrants than for existing firms, because the latter have already established their reputations and accumulated their capital. Even if an enterprising lawyer, perceiving unusual profit opportunities in a state in which the supply of legal services was especially restricted, went to the bother of obtaining a license in that state—and the bother might be considerable, might be the reason the supply of lawyers in the state was so restricted—he would not be able to use the common methods by which a new firm in a market seeks to wrest customers from the existing firms.

Yet in a market of thousands of sellers—for no state has fewer than a thousand lawyers and many have many times that number, with the national total approaching 800,000 at this writing—concern over the limitations on entry into the profession's markets might seem academic. Would there not be enough licensed sellers of legal services in every significant locality to guarantee vigorous competition—and thus thwart any efforts at cartelization—even if new entry were blocked completely? But we should distinguish between a cartel of producers of goods and a cartel of providers of personal services. While the latter is likely to have a larger membership, which will increase the costs of coordination and of preventing cheating, it is much more difficult for an individual to increase his output of a personal service than it is for a firm to increase its output of a product. The individual who belongs to a cartel may have more incentive to cheat than a corporate member would have but a good deal less capability of doing so. A firm can hire additional workers, build a larger factory, buy more machinery and supplies, and add more executives. Only gradually will it encounter diseconomies of scale that limit its growth. Personal services are different—although, as we shall see, less so than the providers of them believe. There are only so many hours in the year, and therefore only so many operations a highly skilled surgeon can perform, only so many trials that even the best trial lawyer can conduct, only

so many clients that the best legal counselor can advise. Even the world's best and cheapest lawyer, assisted by the most skilled and serviceable assistants, can supply only a tiny fraction of the market's demand for trial counsel. Rubens expanded his output by hiring assistants to paint the lesser figures in his massive paintings; but, even so, the amount of his personal attention that was required was too great to permit him to engage in mass production.

This point shows that even if it is totally infeasible to fix the price of legal services—a further difficulty being the heterogeneous character of those services—or to limit the output of individual lawyers or law firms, so long as the *number* of lawyers is limited some lawyers, at least, will enjoy monopoly returns.²² So limiting entry becomes the focus of the professional cartel. This in turn makes government assistance more important to professional cartels than to ordinary producer cartels. The latter can, by fixing prices or limiting output, make monopoly profits for a time, although new entry will eliminate those profits eventually. But control of entry is essential to a professional cartel, because the large number of its members is bound to make the coordination of prices and of output and the detection of cheaters very difficult to effectuate. And without government assistance it is virtually impossible to keep out new entrants. Despite a vast theoretical literature on the use of predatory tactics to discourage entry, instances of successful use of such tactics are rare and almost all involve single firm monopolies rather than cartels, since the coordinated employment of predatory tactics is particularly difficult to pull off. Government on the other hand, through a requirement that providers of a specified service have a license, can limit entry rather easily. So we should expect to find that durable, effective professional cartels are government supported.

Another difference between professional and producer cartels is that products generally are easier to define or distinguish among than professional services. Steel, aluminum, automobiles, oil, plumbing fixtures, and coffee are both visible and visibly distinct from one another in a way in which many legal services and medical services are not. If a lawyer hires a professional actor to read the script, written by the lawyer, of the lawyer's closing argument to the jury, is the actor practicing law? (An interpreter would not be; nor the lawyer's tailor—yet clothes are a form of statement.) Is drafting a will the practice of law? Creating a trust? Giving legal advice? Doing legal research for a lawyer? Indexing the record in a trial? Ghostwriting a judge's opinions? Teaching law to law students? How about to business students? Proofreading a bond indenture? Representing litigants in a tax court or before

22. Even with no restrictions, some lawyers would earn economic rents (returns greater than they could earn in any other activity), just as some opera singers, who compete in an unregulated industry, earn economic rents. But a rent to a factor of production that is in irremediably short supply relative to demand must be distinguished from a rent to a factor of production the supply of which is limited by agreement or regulation—only the rent resulting from a contrived, an artificial, an imposed scarcity is a true monopoly return. We shall see that in a completely competitive, totally unregulated market for legal services, some lawyers would have higher economic rents than in a regulated market for such services even though no lawyers would have monopoly returns.

a social security or veterans' disability tribunal? Bringing business into a law firm? Collecting overdue bills? Insuring real estate titles? Conveying real estate? Conveying an automobile? Interviewing potential witnesses? Serving as a commercial arbitrator? As a mediator? Is public sanitation the practice of medicine? Is setting simple fractures? Performing first trimester abortions? Treating neuroses? Administering enemas? Giving flu injections? Faith healing? Prescribing exercises for a sore back? Correcting vision? Pulling teeth? Prescribing a diet for losing weight? It should be apparent from these examples that to limit entry into a profession effectively it is not enough to place obstacles in the path of those who want to call themselves lawyers or doctors or whatever. It is also necessary to define the profession in a way that prevents competing sellers of personal services from taking away much of the profession's business, in the way that psychologists for example have taken away much of the medical and religious professions' business of ministering to people's mental health, and that banks and trust companies have taken away much of the legal profession's probate and conveyancing business.

I have called the demarcation of professional services entry limiting, but it could equally well be called demand increasing. The demand for a profession's services will be greater the greater the scope of those services. Defining an increase in demand as economists do, as the willingness of consumers to buy more of a product at any-given price for it, we can see that an increase in the demand for a cartel's product or service could increase the cartel's output without causing the price to fall, so that the cartel's profits would increase. Another way in which a cartel can increase demand is by inducing the government to subsidize that demand, for example by paying for a poor person's lawyer. But demand-increasing measures are double-edged swords from a cartel's standpoint, a fact that helps explain the long opposition of the medical and legal professions to government subsidization of their services. When demand is rising, a cartel has more difficulty detecting the cheaters in its ranks because the "honest" members may not lose sales but may merely grow more slowly than the cheaters—and may not even know that they are growing more slowly. If, moreover, a professional cartel, in the interest of preserving its cohesiveness, does not expand output in response to growing demand, public and competitive pressure to allow new entry may become overpowering as prices soar to ration the existing and now insufficient supply to the newly expanded demand. Because it is so difficult for an individual to expand his output of personal services, the only way to expand the supply of professional services to meet an increased demand may be to admit new members. Increasing the size of the cartel can, however, magnify the disintegrative pressures that afflict all cartels. It can do this both directly and indirectly by forcing the profession to admit new members who do not share the values of the old, perhaps because they are drawn from ethnic groups formerly barred from the profession.

My description of the guild system emphasized the intimate relation between cartelization and quality. Here I add with specific reference to professional cartels that cartelization can improve a profession's average

quality even if the selection or credentialing mechanism operates randomly with respect to quality (it could be a lottery system, for example). All that is necessary is that it limit the number of persons in the profession. For then their average income will be higher, which will raise the average quality of candidates for the profession unless the existing members of the profession are able to impose an apprenticeship system that will prevent newcomers from sharing in the monopoly rents that cartelization generates.

Another source of upward pressure on quality, not in all professions but in the legal and military professions, is that these are *adversarial* professions in a way that medicine for example is not. Bacteria do not become smarter when doctors become smarter. (Well, that is not quite true; bacteria may evolve resistant strains in response to an effective new drug.) But the better the lawyer on one side of a case is, the greater will be the value to the opposing party of having a good lawyer on his side. Better quality of lawyers may conduce to better quality of decisions, however, so the quality competition of lawyers is not the zero-sum game that the quality competition of the armed forces of potential enemies is. Although I am not attempting to compare the social benefits and costs of a cartelized versus a competitive legal profession, I do want to emphasize that there are benefits as well as costs. If cartelization results in higher quality lawyers who produce higher quality briefs, judges' decisions will tend to be of higher quality and this will confer benefits on the community as a whole.

While it is easy to see how many, probably most, lawyers benefit from cartelization of the profession, a complete analysis of the economics of professionalization would require explaining how a group composed of hundreds of thousands of individuals can overcome free rider obstacles to collective action to the extent of being able to obtain governmental support for a cartel. (But we know they can: think of farmers.) I can merely venture upon a possible answer here. Because the profession is so large, because a perceptible if small fraction of its members have a palpable self-interest in maintaining the professional cartel, and because the social costs of such a cartel are both highly diffuse and only dimly perceived, the free rider problem need not be insoluble. Provided that existing practitioners are grandfathered whenever some new entry barrier is created (such as graduation from an accredited law school), the entire cost of the barrier will fall on prospective entrants to the profession—many of whom have not begun to think about entering the profession and some of whom have not even been born—and on consumers of legal services.

Some states have an "integrated" bar, meaning that to practice law a lawyer must belong to the state bar association. In effect he is taxed to support the cartel enhancing activities of the association, and so the free rider problem is overcome. Of course we should ask how a state comes to have an integrated bar. Whose self-interest was served by taking a leading role in plumping for such an institution? A possible answer is that a part-time investment in bar association activities pays dividends in legal fees by making a lawyer better

known to his fellow lawyers, thereby increasing the likelihood that they will refer cases to him that they lack the time to handle themselves.

And universities, especially after Langdell's system of case law instruction, which is feasible (some think optimal) with a very low ratio of faculty to students, and hence is cheap, had and have an interest in promoting a requirement that lawyers graduate from a three-year law school.²³ Existing universities also have a pecuniary interest in accreditation standards that will limit competition from new schools, such as the dreaded "proprietary" (profit-making) professional schools. Law professors have an interest in raising the quality of the legal profession too, because better students are more rewarding to teach, and in preserving the system of regulation that requires people who want to practice law to attend law schools for a lengthy fixed period.²⁴ One rarely finds law professors, whether they are radicals or libertarians, inveighing against the cartel restrictions of the profession.

V. GUILD AND PROFESSION COMPARED

We can begin to sense ideological parallels, and to understand their common material basis, between the medieval craft guild, and the modern legal profession as it stood on the eve of the transformation of the market for legal services that began (at first very gradually) around 1960. In both forms of market organization, the guild and the profession, an aid to, and perhaps even a condition of, successful cartelization is the creation of an ideological rather than a purely contractual community. This community genteelly resists the "commodification" of its output—resists, that is, the commercial values of competition, innovation, consumer sovereignty, and the deliberate pursuit of profit. "Plumbing is still prosecuted too largely for the plumber's profit. It is therefore a handicraft, not a profession."²⁵ We can hear the echo of the quality argument for restricting competition. For an ethic of individuality and rivalry is substituted one of cooperation and solidarity.

A profession is a brotherhood—almost, if the word could be purified of its invidious implications, a caste. Professional activities are so definite, so absorbing in interest, so rich in duties and responsibilities that they completely engage their votaries. The social and personal lives of professional men and their families thus tend to organize around a professional nucleus. A strong class consciousness soon develops.²⁶

Central to this consciousness, despite Flexner's dismissive attitude toward mere "handicrafts," is a mystique akin to artisanship. Brandeis liked to boast that judges—unlike other high government officials, who preside over

23. A qualification is necessary. Reducing the length of law school to, say, two years could, by making a legal education much cheaper, so increase the number of entering students as to offset the loss of students in the third year.

24. Again, subject to the qualification in the preceding footnote.

25. Abraham Flexner, *Is Social Work a Profession?*, 1 SCH. & SOC'Y 901, 905 (1915); see also LOUIS D. BRANDEIS, *BUSINESS—A PROFESSION* 2 (1914).

26. Flexner, *supra* note 25, at 904.

bureaucracies akin to those of large business firms—do their own work; and Henry Hart wrote, with what in retrospect seems astonishing naïveté, that “writing opinions is the most time-consuming of all judicial work, and the least susceptible of effective assistance from a law clerk.”²⁷ He either did not know or would not say that by 1959 a majority of the Supreme Court’s opinions were being written by law clerks; today, a judge-written opinion, at any level of the American judiciary, is rare. The fact that legal services are personal services rather than products, and hence resistant to automation, made plausible the idea that artisanship, epitomized in the “handcrafting” of a judicial opinion, supplies the criterion of professional excellence. Some personal services, it is true, have become highly standardized, but the arts remain a bastion (albeit an embattled one) of artisanship and to its votaries law is an art—so that the open acknowledgment that neophytes can, after only three years of professional instruction and no professional experience, do much of the principal work of judges more or less satisfactorily, or at least not shockingly badly, still has the capacity to undermine professional self-esteem. It is a little as if brain surgeons delegated the entire performance of delicate operations to nurses, orderlies, and first-year medical students—and patients were none the worse for it. Of course only judges (and there are some, but not many) who allow their law clerks to dictate the judges’ votes are delegating the *entire* performance of the “operation.” Nor is the judicial function exhausted in voting and opinion writing; there are also conferring, editing, questioning counsel, and other tasks. Still, so central has judicial opinion-writing seemed to the conception of legal “craft” that revelations about how heavily appellate judges and even Supreme Court Justices rely on ghostwriters²⁸ continue to roil the smooth surface of professional self-esteem.

To put all this very succinctly, the professions advance “[c]laims to esoteric knowledge and unselfish service.”²⁹ In the even more cynical summary of the eighteenth-century Scottish professor of medicine John Gregory, professionals practice “unworthy arts to raise their importance among the ignorant,” including “an affectation of mystery in all their writings and conversations relating to their profession; an affectation of knowledge, inscrutable to all, except the adepts in the science; an air of perfect confidence in their own skill and abilities; and a demeanor solemn, contemptuous, and highly expressive of self-sufficiency.”³⁰ We shall see some of these qualities reflected in Professor Wechsler’s famous article on neutral principles in constitutional law.

Restrictions on the size of enterprises and the delegation of work to subordinates help enforce the ideal of artisanality by retarding the adoption of mass production methods. Emphasis on formal education attracts

27. Hart, *supra* note 1, at 91.

28. See, e.g., Jeffrey Rosen, *The Next Justice*, NEW REPUBLIC, Apr. 12, 1993, at 21.

29. Marie Haug, *The Sociological Approach to Self-Regulation*, in REGULATING THE PROFESSIONS, *supra* note 7, at 61, 63.

30. JEFFREY L. BERLANT, *PROFESSION AND MONOPOLY: A STUDY OF MEDICINE IN THE UNITED STATES AND GREAT BRITAIN* 89 (1975).

intellectually agile aspirants whose forensic and analytic efforts intellectualize professional activity, making that activity increasingly impenetrable by the lay understanding. And the homogeneity of the required training produces a degree of consensus on professional issues that convinces the practitioners that they have a pipeline to the truth—techniques of discovery comparable to that of natural scientists. Thus, the intellectual characteristics of the activity of law—the complexity of its doctrines, the obscurity of its jargon, and the objectification of “the law”—are, in part at least, endogenous to the organization of the legal profession, rather than exogenous factors to which the profession has adapted by, for example, setting high and uniform standards for qualification.

The point about the objectification of law is particularly important for understanding what I am calling “jurisprudence.”³¹ Two circumstances among others can generate agreement on disputed matters. One is an external reference point to which the disputants can appeal for an authoritative determination. The referent to which natural scientists appeal is the set of things (“nature”) that exist independently of human thought. Another enforcer of consensus is the homogeneity of the inquirers. People who have the same training and experiences tend to look at things the same way. But they are unlikely to conclude that they agree because they are alike as peas in a pod. Instead, they will ascribe their agreement to the fact that they are wielding tools of inquiry powerful enough to penetrate appearances to a reality that exists outside themselves and that furnishes the same kind of guidance that nature furnishes to natural scientists. (To believers in natural law, it is indeed the same “nature” that is guiding both inquiries.) Most scientists would say that they believe that the earth revolves around the sun because the earth really *does* revolve around the sun, and they would be right; and most lawyers would say that the Supreme Court held that public school *sé*gregation violates the law because such *sé*gregation really does violate “the law.” Are they right in the same sense? Jurisprudence has long been preoccupied with the exploration of this mysterious politico-ethical entity, which has a more than accidental resemblance to corresponding entities in religion, such as “God” in monotheistic religions. Were the legal profession socially heterogeneous, it would not delude itself that legal consensus was as it were coerced by external reality. So, with the profession becoming in fact more heterogeneous in recent decades, belief in “the law” has, indeed, diminished.

If religious fanatics succeed through the persecution of dissenters in enforcing uniformity of religious belief, they do not infer that the resulting lack of disagreement is the result of persecution. They infer that it is the result of the fact that theirs is the true faith.

The radical wing of the legal profession—the critical legal studies movement—has nothing but contempt for the traditional lawyer’s belief in the objectivity of his inquiry. Inconsistently, however, it does not advocate the

31. What follows in this paragraph is a principal theme of my book, RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990).

deregulation of the legal services industry. Duncan Kennedy, who advocates the random assignment of faculty and students to law schools and a Chinese Cultural Revolution style rotation of law jobs among lawyers and janitors, accepts "the forced exclusion of many aspirants to legal careers."³² For him, the injustice is not that people can buy legal services only from licensed sellers, but that the licenses are not assigned to the right people. I conjecture that the cause of this blind spot in the radicals' critique of the legal profession is not only self-interest; it is also nostalgia for the communitarian ideology of a craft guild or a professional cartel, because it is an ideology that elevates solidarity and cooperation over individualism and competition.

VI. THE JURISPRUDENCE OF THE CARTELIZED PROFESSION

With the benefit of hindsight, 1960 can be identified as the highwater mark of the American legal profession's cartel, and hence of jurisprudence conceived of as the ideology of the legal profession's guild or cartel, rather than merely as a stuffy, old-fashioned term for legal theory. All the restrictions that the organized bar had striven for were in place, and the number of lawyers who had hurdled the fence before it had been raised—that is, had become lawyers before lengthy formal education had become a prerequisite to admission to the profession—was in irreversible decline. Potentially rival systems of regulation and dispute resolution, such as the administrative process and arbitration, which the judiciary and the legal profession had once fought, had been successfully lawyerized and were no longer a competitive threat. Among symptoms of noncompetitive pricing and other monopolistic behavior in the heyday of the cartel were the prevalence of "value of service" pricing (billing by the hour became common and eventually dominant only after 1960),³³ the cult of meticulous craftsmanship and of long hours (representing the transformation of price into nonprice competition), the queuing for places in law school classes and for admission to the bar in desirable locations such as California and Florida, and discrimination by elite firms against Jews,³⁴ women, and other "nongentlemanly" sorts who might be less prone to cooperate in preventing and avoiding competition and whose presence might in addition reduce the nonpecuniary income of the members of these firms by requiring undesired personal associations.³⁵ The "ethical"

32. DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 53 (1983).

33. William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 *RUTGERS L. REV.* 1, 11 (1991). On price-fixing by lawyers, see Richard J. Arnould, *Pricing Professional Services: A Case Study of the Legal Service Industry*, 39 *S. ECON. J.* 495 (1972).

34. Though already on the wane by 1960, it was an old concern. STEVENS, *supra* note 17, at 184 n.41, records concerns voiced in 1929 about the entry of "Russian Jew boys" into the profession. Compare Wigmore's call for "a requirement of two years of college" as "a beneficent measure for reducing hereafter the spawning mass of promiscuous semi-intelligence which now enters the bar." John H. Wigmore, *Should the Standard of Admission to the Bar Be Based on Two Years or More of College-Grade Education? It Should*, 4 *AM. L. SCH. REV.* 30, 31 (1915).

35. For analogies in medicine, see REUBEN A. KESSEL, *ESSAYS IN APPLIED PRICE THEORY*, chs. 1-3, 9 (R.H. Coase & Merton H. Miller eds., 1980).

obligation of lawyers to devote a certain amount of their time to "pro bono" (unpaid) work—an obligation that has no counterpart in competitive markets and that is now in decline as the legal profession has become more competitive—limits the supply of legal services to the market while jacking up the demand, since the more legal assistance that indigents have, the more paid legal assistance their adversaries (mainly prosecutors, landlords, finance companies, and installment sellers) need. One bit of evidence of the relation between the price of legal services and competitive restrictions on their supply is that in this period, German lawyers had on average higher relative incomes than American lawyers—and restrictions on competition in the German legal profession were more severe than in the American profession.³⁶

The condition of the profession in 1960 helps explain the celebration of traditional legal craftsmanship by Henry Hart³⁷ and, less obviously, the puzzling discomfiture of the professional elite with the decision in *Brown v. Board of Education*, which held that public school segregation was a denial of the equal protection of the laws.³⁸ The problem with *Brown* from the perspective of professional ideology was threefold:

1. The minor premise of the decision—that segregation was harmful to blacks, whether by stamping them with a badge of inferiority, depriving them of a quality education, or denying them valuable associations with white persons, or all three, and that this stigmatization and these deprivations were the original and continuing objectives of segregation—was obvious and had been so from the inception of the practice. This was embarrassing in two ways. First, if so palpable a form of deliberate and invidious racial discrimination had existed for more than a century, as it had, why had the Supreme Court taken so long to invalidate it? Why in particular had it upheld segregation in 1897, in the *Plessy* opinion which *Brown* in effect overruled?³⁹ (Needless to say, neither the *Brown* opinion itself nor the uncomfortable professional commentary remarked this point.) Second, a judicial decision based on grounds obvious to the lay public is professionally uninteresting, even a little threatening. Nothing in Chief Justice Warren's opinion marked it as the product of a first-rate legal mind. It lacked subtlety, elegance, and eloquence. In fact the opinion, probably written by Warren himself rather than by a law clerk, was not the product of a first-rate legal mind. Much intelligent lawyerly maneuvering had occurred behind the scenes and the "all deliberate speed" remedial formula announced in the second *Brown* opinion was a neat bit of legal legerdemain.⁴⁰ But the Supreme

36. For both points, see RUESCHEMEYER, *supra* note 21, at 63-65, 132, 135-38.

37. See *supra* text accompanying note 27.

38. *Brown I*, 347 U.S. 483 (1954); see also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-35 (1959). Wechsler's article was published in book form as HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* (1961), but my page references are to the article.

39. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

40. *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955) (*Brown II*); see also RICHARD KLUGER, *SIMPLE JUSTICE* (1976); Philip Elman & Norman Silber, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History*, 100 HARV. L. REV. 817 (1987);

Court's main opinion in the most important judicial decision of the century was banal.

2. While the minor premise of the decision was too obvious to be congenial, the major premise was too difficult. It was unclear, to say the least, that the framers or ratifiers of the Fourteenth Amendment had intended the Equal Protection Clause to prevent racially segregated public education. To decide whether their intentions should count—even how their intentions should be characterized (because they could have had general intentions, such as to promote racial equality, that were inconsistent with their specific intentions, such as to preserve the subordinate social position of blacks)—would have required a theory of interpretation that the legal profession lacked in 1954, as it lacks today, so that the debate over the soundness of *Brown v. Board of Education* as constitutional interpretation continues.⁴¹ The suspicion persists that the Court outlawed public school segregation because it thought it an evil practice rather than because it suddenly woke up to the fact that the practice had been declared unlawful in a constitutional amendment ratified almost a century earlier.

3. Whatever its motive or juridical content, the *Brown* decision was politically highly consequential—it thrust the Supreme Court into the midst of a power struggle between the southern and the northern states and in that respect could be thought a reprise of the *Dred Scott* decision. The artisanal perspective is resolutely antipolitical. It wants law for law's sake (like art for art's sake), not for politics' sake. To alter the analogy, the farther the courts steer clear of political controversy, the more likely judicial inquiry is to resemble scientific truth-seeking. Scientists want to keep clear of politics too, and for the same reason. The professional is happy to be thought of as a kind of artist or a kind of scientist, even as a kind of social scientist, or a "social engineer," but not as a kind of politician. He is content, though perhaps not ecstatic, to be thought an artisan, surrendering any claim to originality, vision, or audacity in exchange for society's acknowledging his possession of unchallengeable expertise within however narrow a sphere of social governance.

One might suppose that these points against *Brown* would be thought merely costs to be traded off against the social benefits from invalidating an unjust institution. But it is no part of professional ideology to run risks for the sake of social gains. The risks are to the profession, the gains to the larger society. Lawyers, like other people, are inclined to set their own welfare, and that of their profession, above the interests that they have in common with the population at large.

Mark Tushnet, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867 (1991).

41. See, e.g., Lino A. Graglia, 'Interpreting' the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1037-43 (1992).

VII. THE CRISIS OF THE PROFESSION

So stood the American legal profession in 1960, on the eve of revolution. Today all is changed, changed utterly.⁴² Although the profession has not been thrown open to free entry, an accelerating accumulation of legal and especially economic changes over the past three decades has transformed the profession decisively in the direction of competitive enterprise. It is not so profound a transformation as that from the medieval weavers' guild to the modern mass production textile industry—it does not signify the deprofessionalization, let alone the proletarianization, of the legal profession.⁴³ But there are sufficient parallels between the transformation of weaving and the recent changes in the structure of the legal profession to make the analogy an illuminating one.

Although part of a larger movement aptly described as the "industrialization of service,"⁴⁴ the fundamental cause of the transformation of the legal profession has undoubtedly been the surge in demand for legal services. The causes of the surge are not well understood, though some causal factors, such as the creation of new rights, much higher crime rates, greatly relaxed rules of standing, more generous legal remedies (including relaxed standards for class actions) as part of a general tilt in favor of civil plaintiffs and against civil defendants, and the increased subsidization of lawyers for indigent criminal defendants and indigent civil plaintiffs, can readily be identified. But its existence cannot be doubted. The most conspicuous manifestations are the "litigation explosion" and the concomitant rapid growth in the number of lawyers.⁴⁵ While it is popularly believed that lawyers create their own demand, it is hardly plausible that the vast expansion in legal rights and regulations in recent decades is the consequence of an increase in the number of junior lawyers. For when the legal profession expands, it does so much less by lateral entry of mature, influential persons (for although some people do switch into law from other occupations, they invariably are junior members

42. For documentation, see, most recently, Sharyn L. Roach Anleu, *The Legal Profession in the United States and Australia: Deprofessionalization or Reorganization?*, 19 *WORK & OCCUPATIONS* 184 (1992). See also ABEL, *supra* note 17; MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991); ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988); Robert A. Rothman, *Deprofessionalization: The Case of Law in America*, 11 *WORK & OCCUPATIONS* 183 (1984); Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 *J.L. & SOC. INQUIRY* 431 (1989). Of course, lawyers have been crying "crisis" for a long time. Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 144 (Robert L. Nelson et al. eds., 1992). But the wolf is finally at the door.

43. Anleu, *supra* note 42, at 194, points out sensibly that specialization, large firms, advertising, and other trends in the legal profession need not result in "deprofessionalization" in the sense of loss of autonomy and status, though it is likely to alter the distribution of rewards within the profession.

44. Theodore Levitt, *The Industrialization of Service*, *HARV. BUS. REV.*, Sept.-Oct. 1976, at 63. Levitt points out that the service sector was built on the model of the traditional relation between a servant and his master. The idea of the lawyer as a high-class servant of the rich is traditional. It is illustrated by Dickens's treatment of the lawyer Tulkinghorn in *BLEAK HOUSE*.

45. See Sherwin Rosen, *The Market for Lawyers*, 35 *J.L. & ECON.* 215, 219 (1992).

of those occupations) than by an expansion in the number of law students which gradually works its way through the profession.

The accommodation of the vastly increased demand for legal services has taken a variety of forms, all of which involve expanding the supply of those services. That was not an inevitable response. As I suggested earlier, the greater demand could in principle have been accommodated if not exactly satisfied by price rationing that would have shunted people into other systems of dispute resolution—political, arbitral, informal, internal, whatever.⁴⁶ Instead, the supply of legal services was expanded through increases in the number of suppliers, increased competition among suppliers, and technical and organizational innovations that enhanced the productivity of legal services. The first response is illustrated by the creation of new law schools, the expansion of existing ones, and the reduction in the rate of flunking out students—developments that together enabled an enormous increase in the size of the legal profession, which has grown from 213,000 lawyers in 1960⁴⁷ to almost 800,000 today. The motor for this expansion in supply was competition among law firms to add new associates and partners in order to supply the rising demand for legal services. The competition increased the incomes of lawyers, thereby attracting more students to law school. The surge in demand for places in law school enabled the law schools not only to expand (and enabled new law schools to be created) but also to screen applicants more carefully (since the pool was larger and abler) and thus increase the percentage of students that actually graduated and became lawyers.

The second response to the rising demand for legal services—increased competition within the profession—is the result in part of a series of decisions by the Supreme Court that invalidated, on one ground or another, a number of traditional restrictions on competition among lawyers. The judge-made exemption of the learned professions from antitrust law has gone, and with it price-fixing by bar associations. Most limitations on lawyers' advertising, not only media advertising but also the direct solicitation of legal business from persons having potential legal claims, have been invalidated, as have many barriers to lawyers' relocating to other states than the ones in which they were originally licensed.

Technical and organizational innovations have increased the vigor of competition in the legal services market, but they also have an independent significance for the transformation of the profession. The rise of the paralegal, for example, has demonstrated that much of the traditional work of lawyers can be and is being done by nonlawyers. It has also made the production of legal services a less homogeneous activity. The heavy use of computers for document preparation, indexing, and legal research, and of facsimile machines and other communications equipment, has increased the traditionally low

46. For example, a wave of mergers between firms standing in a supplier-customer relation to each other will transform many disputes between suppliers and customers, disputes characteristically resolved by litigation, into intrafirm disputes resolved by the fiat of supervisors.

47. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 80 (1985).

capital requirements of law firms, raising the minimum efficient size of firms and hence contributing to the astonishing growth in the average size of firms, some of which now have more than a thousand lawyers.⁴⁸ Another factor in that growth has been the increasing importance of litigation in law firms' mix of business, a change due in part to corporate clients' taking more of their nonlitigation legal business in-house. The incidence and demands of litigation are inherently unpredictable, so an increase in the size of a firm enables a better smoothing of the firm's load.

Old believers in antitrust law might suppose that a growth in average firm size would conduce to monopoly or oligopoly. That has not been the experience of the legal services industry. The growing size of firms has facilitated their expansion into different geographical and service markets, increasing competition. (The analogy is to banking: an unregulated banking industry that had ten banks in it would probably be more competitive than our existing, regulated industry which contains 14,000 banks.) As the legal problems of business firms grow, more and more firms find it profitable to create large in-house legal staffs, which not only provide greater competition for law firms but also enable corporate clients to engage in shrewder negotiations with them—to play off one against the other, to solicit competitive bids, and so forth—thus further stimulating competition among law firms. We should not be surprised that the price of legal service fell, not as popular and professional opinion alike supposes rose, between 1970 and 1985.⁴⁹ The increasing ratio of associate to partner income is consistent with the hypothesis of growing competition: the reduction in monopsony power has increased law firms' labor costs.

As law firms grow, opportunities for professional specialization—for a more complete division of labor—grow apace. I mentioned the paralegal. Large law firms also hire professional managers, English professors, accountants, economists, computer experts, and other nonlawyer specialists to perform services formerly performed by lawyers. Lawyers become proficient in narrow fields of law or in particular techniques, learn to work in large teams, and engage in activities characteristic of competition—such as marketing—or of large enterprises—such as supervision. Competition makes them work harder, too, and reduces their security of tenure—so there are more and more cases of firms dissolving, restructuring, regrouping; of firms firing associates and even partners; and of wide fluctuations in earnings within firms.

These changes have psychological as well as narrowly economic consequences. Harder work, even when well remunerated, greater uncertainty of tenure, and the inevitably bureaucratic "feel" of practicing law in a huge organization all reduce job satisfaction. Many lawyers claim with evident sincerity not to enjoy the practice of law as much as they once did. Many say they would not have gone to law school had they known what the practice of

48. The increasing sophistication of personal computers, and the falling price of electronic products generally may, however, be reducing minimum efficient firm size.

49. Sander & Williams, *supra* note 42, at 451.

law would become. The increasingly competitive character of the legal services market makes lawyers feel like hucksters rather than the proud professionals they once were, and brings forward to positions of leadership in the profession persons whose talents, for example for marketing (“rainmaking”), are those of competitive business rather than of professionalism. Gone are the joys of artisanality and the security of the guild.

We can find traces of the changes in lawyers’ work in two characteristic products of the legal profession—the appellate brief, and the appellate opinion. It used to be that both sorts of documents were the product of a legal professional, whether mature lawyer or judge, working essentially by himself, though with advice from others. The author of the brief or opinion was not only—it went without saying—an experienced professional; he was an experienced legal writer. The craft of writing legal-rhetorical documents, such as briefs and opinions, was central to his professional self-image. No longer. Brief writing in large law firms, government agencies, and other influential legal enterprises is now generally delegated to the least experienced lawyers—new associates and summer associates. True, these young lawyers work under supervision; theirs is first-draft, not final-draft, responsibility. But anyone who writes knows that he who writes the first draft controls to a great extent the final product. The craft of the senior lawyer in relation to brief writing is now that of a supervisor skilled at eliciting and improving the best work of his juniors.

A parallel evolution has occurred with respect to opinion writing. Today, as I have said, the vast majority of judicial opinions at all appellate levels are drafted by law clerks, most of whom are only a year or two out of law school. The appellate judge’s main role remains that of deciding the case, but for the secondary role of writer he (or, increasingly, she) has substituted that of supervisor. This division of labor, with its echo of the transformation from guild to factory production, enables the judiciary to dispose of a vastly larger number of cases with no marked (perhaps no) diminution of average quality. It is an efficient adaptation to the greater demand for the subset of legal services that consists of judicial decision-making. But we should not expect, save possibly from the tiny and shrinking minority of old-fashioned appellate judges who continue to write their own opinions, the literary or rhetorical gems that we associate with such names as Holmes, Hand, Cardozo, and Jackson, or the powerful essays in social and political theory of a John Marshall or a Brandeis; and the tiny minority’s ability to come up to the standard of these illustrious predecessors is imperiled by the demands for quantity of output that are placed on the modern judge. There is craft in supervision; perhaps in the fullness of time the profession will recognize a new sort of master judge, one who elicits outstanding product from a staff as distinct from producing his own carefully wrought opinions. But it is different from the (figuratively speaking) artisanal craft of the famous judges of yore.

Although the average quality of judicial opinions has probably not diminished as a result of the delegation of the opinion-writing function to law clerks, the *variance* in quality surely has, as is implied in my remarks about

the decline of the great judge. Law clerks, drawn as they are from the best students, are intellectually more homogeneous than the judges. The tendency to uniformity of output, which I believe is also characteristic of legal briefs, has its counterpart in the evolution toward mass production of industrial products. Despite the emphasis laid by the medieval craft guilds on the importance of uniformity, handicrafts are less likely to be of uniform quality than machine-made products, because machine production facilitates standardization and testing. Law clerks are not machines, but the division of labor in the judiciary as elsewhere facilitates a comparable type of standardization. It buffers the differences between individual judges. The Bachrach studio is not Rembrandt or even Brady (and Brennan is not Brandeis), but modern photography provides a better, or at least more uniform, average quality of portraiture than the artisanal methods that preceded it.

As part of the research for *Cardozo: A Study in Reputation* (1990), I read the briefs that had been submitted to Cardozo's court (the New York Court of Appeals) in the twenty cases, decided mainly in the 1920's, that I planned to discuss in the book. Although Cardozo's opinions owed little to the briefs, I was struck by the individuality of the briefs, their thoroughness, their meticulous grammatical and typographical accuracy, and the obvious care with which they had been planned and drafted. The authors were not legal geniuses (with the possible exception of Robert Jackson, who wrote one of the briefs), but they were true craftsmen. I was struck by the contrast with the mass-produced uniformity, the characterlessness, the impersonality, and the evident hastiness of the vast majority of the "good" briefs submitted in Seventh Circuit cases in the 1980's. It was in fact my reflection on this contrast that led to this paper.

Do not suppose, however, that the growing uniformity of legal output spells a growing uniformity of lawyers' earnings. A competitive legal profession offers an opportunity for entrepreneurial returns that a cartelized one does not, in the same way that the advent of mass production offers profit opportunities that dwarfed the monopoly returns of guild producers. Indeed, one thing that makes cartels, including professional cartels, fragile is that some producers can make more money as members of a competitive industry. Thus at a time when legal restrictions made it essentially impossible to create a nationwide law firm, lawyers whose talents ran to the organization of large enterprises and the penetration of new markets were unable to cash in on their talents.

VIII. THE TWILIGHT OF JURISPRUDENCE

In discussing *Brown v. Board of Education*, I offered a glimpse of the world of legal thought as it stood on the eve of law's industrial revolution, described above. It is the world of thought epitomized by Professor Wechsler's article on neutral principles, criticizing *Brown*. The analytical shortcomings of the article, one of the most heavily cited in legal history, have been documented

by others⁵⁰ and need not detain us here. It is its representative character that interests me. What it represents is the juristic counterpart of artisanality.

The form is that of a personal statement. "Let me begin by stating that I have not the slightest doubt respecting the legitimacy of judicial review [of the constitutionality of federal or state legislative or executive actions]."⁵¹ This would be a curious beginning for a scientific or social-scientific article, because it assumes that the author's inner mental state, his doubts or confidences, have a significance independent of the reasoning or evidence that he offers in support of his views. When craft is a mystery, the identity of the craftsman conveys valuable information. The article identifies Wechsler as the holder of a named professorship in constitutional law at a major law school, Columbia, and explains that the article is the text of the Oliver Wendell Holmes Lecture, given annually at the Harvard Law School, then the world's preeminent law school. The lecture series was named after the Anglo-American world's most illustrious jurist, himself the most famous graduate of, (briefly) a professor at, and long identified with that law school. Wechsler notes in his first paragraph that the previous year's Holmes lecturer had been Learned Hand, the greatest judge in the history of the federal courts of appeals. Wechsler's article begins on page one of the seventy-third volume of the *Harvard Law Review*, at the time the nation's foremost legal journal. The article is thus more (or less) than an effort at scholarly analysis; it is the self-conscious performance of a master craftsman of the guild of lawyers.

We should not be surprised that Wechsler's tone is patronizing. The conception of the Supreme Court "as an ever-open forum for the ventilation of all grievances that draw upon the Constitution for support," a plausible conception one might have thought as an original matter, is derided as the view of "the uninstructed," who ignore the need for "rigorous insistence on the satisfaction of procedural and jurisdictional requirements—[an insistence] fundamental in the thought and work of Mr. Justice Brandeis"⁵²—so nothing more need be said in justification of it. The cynic might have wondered whether Brandeis's insistence on these technicalities may not have been intended to inhibit the Court from reaching substantive questions that a majority of the Justices were likely to answer in a way unpleasing to Brandeis, a man of emphatic substantive views. But the idea that Brandeis might not have been a perfectly disinterested professional, might in fact have been influenced by political and strategic considerations, is not allowed to intrude; it would be like imputing the profit motive to a respected member of a medieval craft guild.

It soon becomes clear that one of the most important duties of judges, according to Wechsler, is to resist the pull of common sense and laymen's justice. Even a lay person understands, or should understand, that judges have not been given a blank check on which to write their personal and political

50. See, e.g., Gary Peller, *Neutral Principles in the 1950's*, 21 U. MICH. J.L. REF. 561 (1988).

51. Wechsler, *supra* note 38, at 2.

52. *Id.* at 6.

preferences and call them the Constitution. But Wechsler wants to identify cases in which lay intuition fails because they involve palpable, or at least plausible, violations of the Constitution yet the judges refuse to do, or at least they *should* refuse to do, anything about them: infringements of the guarantee of a republican form of government; gerrymanders, and legislative malapportionment generally; laws forbidding marriage between persons of different races; laws prohibiting blacks from voting in the Democratic or Republican primaries; and laws prohibiting blacks from attending the same public schools as whites (and vice versa). Only the last two examples are discussed at length. The objection to rectifying these apparent denials of the equal protection of the laws is that Wechsler cannot find an adequately general principle to cover them. A principle is adequately general, he believes, only if it treats consistently not only the case at hand but any hypothetical or actual case within the principle's semantic scope. We can see in this proposal the technique of the law school classroom—where students' attempts to formulate legal principles are challenged by the teacher's putting hypothetical cases that test the scope of the principle—being elevated to a methodological requirement of constitutional adjudication.⁵³

The approach is hardly inevitable. One might have supposed that the central question in *Brown v. Board of Education* was whether racial segregation of public facilities in the South was intended to keep the blacks in their traditionally subordinate position and likely to contribute to that goal. This was a factual question, the answer to which was obvious, although it might have been impolitic for the Supreme Court to utter it; this may be why the Court focused not on the motives or political consequences of public school segregation but instead on the consequences for the educational attainments and psychological well-being of blacks. Wechsler is not interested in the motives for, or the effects of, segregation. He wants to restate the constitutional question as whether there is a principle of freedom of association that would permit blacks to complain about being kept out of white schools but forbid whites to complain about having to go to school with blacks.

That is *a* way of looking at the case. But the only reason that I can think of for why Wechsler thought it was *the* way is that it is more congenial than factual inquiry to the type of rhetoric characteristic of lawyers, with their fondness for abstract concepts ("freedom of association"), arguments from logic, and hypothetical cases.⁵⁴ Professionals do not want to risk undermining their claim to professional autonomy by getting into areas where they do not command all the tools of inquiry. They want to do well what they do well,

53. Wechsler himself has said, "I found myself developing the neutral principles idea as a pedagogical instrument for pushing students into subjecting their own immediate reactions of approval or disapproval of the results of a particular decision, to a more searching type of criterion of evaluation." Norman Silber & Geoffrey Miller, *Toward 'Neutral Principles' in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 925 (1993).

54. The case method "puts a premium on verbal manipulation and encourages a tendency to look inward at the consistency of the system rather than outward at the relation of the system to the real world, and at its impact on people and events." Erwin N. Griswold, *Intellect and Spirit*, 81 HARV. L. REV. 292, 299 (1967).

even if they could make a greater social contribution by performing a more important task, such as rendering social justice, less well. Implicitly, they place the welfare of the profession above the welfare of the community. The analogy is to the medieval physicians who emphasized prognosis so that they could decline patients likely to die and concentrate on those who were likely to recover with or without medical attention.

I call what lawyers do well (I mean lawyers in their forensic or argumentative capacities—not as counselors, advisors, negotiators, or draftsmen of contracts or other instruments) *rhetoric* rather than *reasoning* because so much forensic legal writing, even of the most celebrated sort, has only the form and not the substance of intellectual rigor. Wechsler's article does not explain, or adequately define, or indicate the provenance of, or justify, his central concept of "neutral principles." I think all he means is that decisions should be "principled," and that all *that* means is that judges should avoid grounds of decision which would require them to engage with the messy world of empirical reality—to inquire, for example, into the motives and consequences of public school segregation. On this interpretation of what Wechsler is saying, a comparable decision by a legislature might be principled. That is, the term may be relative to the capabilities, traditions, and so on of the institution making the decision in question, although as Peller points out, Wechsler never allows the court to inquire into the actual competence of the legislature—it assigns spheres of competence in an empirical void.⁵⁵ Maybe Wechsler thinks that the decision in *Brown* was redistributive in character—shifting wealth from whites to blacks—and that redistributive judgments, however just, are for legislatures to make rather than courts.

Wechsler never gets around to sorting out any of these matters or engaging in any other close analysis because his preferred method of argument is the posing of rhetorical questions, of which I count sixty in his thirty-five page article. The rhetorical question is the literary counterpart to the coerced confession: it forces the reader's agreement. The cascades of rhetorical questions in the neutral-principles article force upon the reader a predetermined choice: agree with Wechsler, or join the idiots who "perceive in law only the element of fiat," or, even worse (in an image that has come to seem almost obscene), who believe "that the courts are free to function as a naked power organ."⁵⁶

Rhetorical questions are not the only rhetorical technique Wechsler used heavily. The article does not fail to mention the famous cases that he had argued in the Supreme Court, and it harps on the deep liberal sympathies that make it painful for the author to expose the inadequacies of the Supreme Court's racial jurisprudence⁵⁷—but his sense of craft permits no less. The article, assisted by its occasion and its setting, richly illustrates the "ethical

55. Peller, *supra* note 50, at 611-13.

56. Wechsler, *supra* note 38, at 12.

57. As Wechsler has said, "Indeed, one of the elements of rhetorical effectiveness in the piece was precisely that I persuaded people that I liked the results [of the race cases] and still felt it important to question the grounds." Silber & Miller, *supra* note 53, at 926 (citation omitted).

appeal” of classical rhetoric, in which the speaker enhances the persuasive power of his argument by persuading the audience that he is the kind of person who ought to be believed whatever he says. And there is a teasing coyness, the lawyer’s traditional evasion of straight talking. For Wechsler never does say that the decision in *Brown* was actually wrong, but only that no one has yet come up with a persuasive rationale—not even he.

The rhetorical character of Wechsler’s article, reinforcing the rhetorical character of the mode of reasoning commended by it, points up the artifactual quality of traditional legal writing and reasoning, and in doing so can help us understand the artisanal character of the traditional, competitively restricted legal profession. Like an artist or an artisan, the traditional legal advocate, professor, or judge produced neither a replicatable or otherwise verifiable argument or proof, nor a standardized product could be readily evaluated in the marketplace for legal services or academic scholarship. He produced an essentially literary product in which to display mastery of the rhetorical skills that are the distinctive fruit of lawyers’ talent, training, and experience. Holmes was never farther off the mark than when he called law the calling of thinkers, not poets.⁵⁸ Not all by any means, but much of his celebrity, like that of the other great figures in the history of the Anglo-American legal profession up to and including Herbert Wechsler, is due to the power of his rhetoric.⁵⁹

I have been picking on Wechsler not (I hope) out of malice or envy but because, like Henry Hart, he is a leading figure of the “legal process” school, Harvard’s answer to legal realism, a synthesis of Langdell and Holmes. Wechsler is not a strict constructionist, and I daresay would not like to be called a formalist. Yet if the neutral-principles article is representative, as I think it is, of the legal-process school, rather little of substance separates the Harts and the Wechslers from the Langdells and the Beales. The vocabulary is different, more modern; the touchstones are reasonableness and institutional competence rather than authoritative legal texts and fundamental jural concepts; but at bottom there is the same unspoken conviction that the relations among legal concepts are rightly the focus of legal analysis, and the same unacknowledged dependence on homogeneity of outlook and of values as the real motor of consensus, and the same confident feeling of being in possession of cogent tools of inquiry, and the same sense of the judge or the Supreme Court Justice as a kind of failed law professor.

It is not easy to imagine an article like Wechsler’s being written today. The Harvard Law School, wracked by internal political struggles unthinkable in

58. Oliver W. Holmes, Jr., *The Profession of Law*, in *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 218 (Richard A. Posner ed., 1992).

59. I argue this point in RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 133-34 (1990), and in RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 281-89 (1988). The role of bluff and posturing in the success of the professions is not limited to law—how else to explain the prestige and profitability of medicine in the many centuries before scientific advances finally made the net expected benefits of medical treatment positive? Cf. FREIDSON, *supra* note 6, at 16.

the 1950's, has lost its unchallenged preeminence; the *Harvard Law Review*, with its epicycles of affirmative action, is on its way to becoming a laughing stock; the Holmes Lectures have lost much of their luster; and there is no longer anyone in the legal profession who has the kind of stature that a Wechsler achieved, with his service at Nuremberg, his Supreme Court advocacy, his coauthorship of the most famous casebook in legal history (the Hart and Wechsler federal courts book), his authorship of the Model Penal Code, and his directorship of the American Law Institute when that institution had an eminence it no longer has. Of course, giants are not always visible to contemporaries; the necessary perspective is lacking. But as the legal profession becomes larger, more specialized, more diverse, more commercial, one has increasing difficulty imagining a career, a confidence, a consciousness of authority, of self-sufficiency, like Wechsler's, that would enable a member of the profession to mount the rhetorical high horse from which Wechsler declaimed the neutral-principles paper.

I have said that a competitive industry does not have an ideology.⁶⁰ So I expect that as law becomes more and more competitive, jurisprudence, in its sense as ideology (not critique) of law, will become increasingly irrelevant to those not engaged in the production of jurisprudence. The mission of jurisprudence was to show that law was more than politics and rhetoric. Writing at a time when most intelligent lawyers no longer believed (or found it expedient to believe or claim) that the text of the Constitution provided an algorithm for deciding all cases, Wechsler proposed "neutral principles" as an alternative to strict construction as a guarantor of law's objectivity, its impersonality, its freedom from politics and public opinion. The homogeneity of the elite professional community that Wechsler addressed assured an audience predisposed to agree with one of its intellectual leaders. Not only the messenger, but the message, was welcome. So it was not at first scrutinized critically, even though, as Peller and others have shown, its analytical faults are both very great and very near the surface of the piece, and, as I have argued, it subordinates analysis to rhetoric. What oft was thought (the conventional, guild-edged wisdom of the professional elite) but ne'er so well expressed.

All the criticisms of Wechsler's article, however, may seem wide of its basic point, which surely no one will disagree with, that judicial decisions should be principled. Yet this insistence itself bespeaks guild thinking. As the hearings on the nomination of Judge Robert Bork to the Supreme Court showed, the people want two things from judges: they want particular results (such as capital punishment and the decriminalization of abortion), and they want judges who find rather than make law. These things are incompatible. Judges nevertheless find it fairly easy to satisfy the public's demands by giving them the results they want, clothed in the rhetoric of passive obedience to "the law" (including law the judges may have made up last week). This

60. I acknowledge an exception for industries that produce a product that many people want to ban, like cigarettes or napalm.

lends a hypocritical tone and illogical content to many judicial opinions, offending guild norms, or, what is closely related, professional norms, of lofty personal morality and scrupulous craftsmanship. It is steadfast adherence to those norms, not, as Wechsler predicted in the neutral-principles piece, the failure to adhere to them steadfastly, that endangers popular support for judicial independence.

As the legal profession opens up to diverse viewpoints and backgrounds; as paralegals become authorized (as I hope and believe they someday will be) to form their own law firms and compete with "real" lawyers; as bankers, accountants, statisticians, economists, computer engineers, and management consultants play an increasing role in the formulation and application of law; as law firms grow, diversify, and become increasingly international; as legal education becomes more optional, hence more practical, and its frills discarded; as judiciaries become larger and more specialized; as law, like the rest of social life, becomes more and more quantitative and computerized, I think the traditional preoccupations that go by the name of jurisprudence will seem and be increasingly irrelevant. The sort of people who believe that the important thing is to police the boundaries between law and other forms of discourse and of policy intervention—who think it rewarding to ask whether the "law" applied at the Nuremberg trials of the Nazi war criminals was "really" law—who think it illuminating to list the "ten major criteria [that] may be relevant to evaluating the appropriateness of a given type of substantive reason for use in the law"—to wit, "(1) intrinsic justificatory force, (2) conventional justificatory force, (3) commensurability with other reasons, (4) intelligibility and persuasiveness, (5) transmutability into stable rules, (6) 'guidesomeness,' (7) efficient constructability, (8) possible arbitrariness of 'boundary conditions,' (9) general 'range' of the reason, and (10) suitability for court use"⁶¹—will come to seem as irrelevant to the theory and practice of law as the writings of the lesser medieval canonists, whom they resemble. Their hermetic discourse befits a profession that seeks to justify its privileges by pointing to the high obscurity of its thought. I think too that academic lawyers will abandon the hope expressed by Professor Rakowski, that jurisprudence can produce roadmaps for judges.⁶² Like most philosophy, all that jurisprudence can do is to arm one against philosophical arguments. It is therapeutic, but not curative.

Once lawyers could be said to serve "the law." Now they serve the client. It is a profound difference. The word "law" has, it is true, a number of uses. One is to denote an ingenious machinery for social control that is based on widely shared social values such as liberty and efficiency and that is operated in accordance with norms of disinterestedness and predictability. That such a machinery is a public good of great value would be obvious even without the example of the former communist states, whose people understand better than

61. Robert S. Summers, *Jurisprudence and Political Theory: Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302, 1333 (1991).

62. Eric Rakowski, *Posner's Pragmatism*, 104 HARV. L. REV. 1681 (1991).

we—or at least more consciously than we—that the creation of such a machinery is a prerequisite to freedom and prosperity. Indeed, this has been understood since Aristotle’s day. But “law” is not just a system of social control; the word is also used to denote a ghostly entity that somehow subtends, organizes, validates, and criticizes the system. That entity—which is not a real entity, but a fantasy—is, I have been arguing, the intellectual by-product of the cartelization of the legal profession. It is a thing, or nonthing, not to be venerated, or even to be mastered, but to be unmasked, to be overcome, and to be replaced by—but that is a story for another day.