

Spring 2001

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Recommended Citation

Dean Kilpatrick & Robert L. Nelson, Professionalism from a Social Science Perspective, 52 S. C. L. Rev. 473 (2001).

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PROFESSIONALISM FROM A SOCIAL SCIENCE PERSPECTIVE

DR. DEAN KILPATRICK, Professor of Clinical Psychology; Director of the National Crime Victims Research and Treatment Center; and Director of the National Violence Against Women Prevention Research Center at the Medical University of South Carolina:

Thank you for inviting me. I was wondering why I was here, too. I first decided that it was probably because I was so ignorant that I could bring that perspective to the discussion, but then I thought about it a little bit further and decided that I actually might have something to offer. I am a clinical psychologist. I actually bring the pointy-headed intellectual researcher perspective to this topic today. Over the past twenty-five years, I have conducted research on the mental health impact of rape and other violent crimes as well as some research looking at the implementation of victims' rights, of crime victims' rights legislation, and on crime victims' rights satisfaction. This provided me with some useful information. It is not my day job, but I have participated as an expert witness in approximately eighty criminal and civil cases. This has given me exposure to the good, the bad, and the ugly of the legal profession, and I have actually been involved in a couple or three high profile cases such as the William Kennedy Smith rape trial, the Mike Tyson rape trial, and also the Exxon-Valdez civil case.

I've been involved in the profession of psychology for about thirty-five years: five years as a student and thirty years as a professor and teacher. I have also been involved at the professional level with our state's psychological association where I have served as president. In the public policy area, I have been invited, largely because of my research, to testify about public policy issues to both the United States Congress and Senate, as well as to the South Carolina General Assembly. I think these experiences have given me considerable exposure to the legal profession, and as I have said before, I have seen the good, the bad, and the ugly—some of which I am going to describe. I have also seen the profession of psychology struggle with some of the same issues that I think the legal profession is now trying to struggle with. And I would like to briefly answer three questions about professionalism.

The first question is whether there really is a problem with a lack of professionalism within the legal profession. The second question I want to briefly address is what can we learn from other professions and how they have dealt with these issues. The third question I would like to address is how the legal profession can increase its professionalism. I have a few modest proposals I would like to share with you. Turning to the first question: Is there a problem? Well, the first slide I am presenting contains a picture of a greeting card. What it says is "Future Lawyers of America." A group of law students are sitting there in class, and all of them saying, "What's in it for me?" I would bet

that greeting cards that say that the profession's image is "What's in it for me?" might be a problem.

There are other problems or examples of problems as well. I would just like to briefly touch on things that I have seen in my contact with lawyers. One of the things I have seen that disturbs me a great deal is basically a "win at any cost" kind of mentality, which was alluded to in the keynote this morning, as well as last night. In some of these high profile cases, I have seen social scientists spending hundreds of thousands of dollars on community research.

I have seen jury research done where they go into communities and spend hundreds of thousands of dollars on research identifying specific characteristics of jurors. Jurors are not selected to be fair but are selected to vote the way you want them to vote in a case. I would argue that is not really in the interest of justice. It is certainly in the interest of your client, but it certainly frustrates the purpose of the whole judicial process. I have also seen in depositions, both with clients or defendants, a scorched-earth policy where people ask questions that are so outrageous that they would never be admissible in court. It seems to me, just as a poor country clinical psychologist, that the major point of the question is to intimidate the witness and get them to back off the case, rather than let them know what they are in for when they go into court. I understand that there is more discretion in depositions than there is in trial, but in some cases I have personally experienced, as well as observed, people go way over the line. I have also seen lawyers basically take two days to ask thirty minutes of questions. It seems to me they are either totally incompetent or, more likely, they are padding the bill. I have had lawyers that I have worked with tell me that a good lawyer could get this information in thirty minutes, an average lawyer could get it in an hour, and this fool is taking two days to get it.

I have also seen judges, in the victims' rights legislation studies that we have done, who were unaware of whether their state had a constitutional amendment protecting victims' rights. This may not be a surprise to judges, but again, it is reasonable to expect that officers of the court should know what the relevant laws are. In summary, I believe that there is ample evidence that the legal profession is perceived negatively by many people and that there are many problems that suggest lack of professionalism exists within the legal profession.

What are some answers that other professions such as psychology have to offer? Psychology twenty-five years ago, or a little longer than that, had a situation where there was something that was undecided in the literature, or rather in the profession. There was not a clear consensus within the profession whether it should be ethically proscribed to have sex with your patients. Actually one time, in 1973 or 1974, I remember attending a convention of the American Psychological Association in which there was actually a panel discussion featured on the pros and cons of having sex with your patients. Now, any of you that are litigating are aware that this has totally changed. Not only is having sex with patients totally proscribed ethically, not just aspirationally, but if you do this, you are a dead man or woman. It is against the

law. The profession of psychology was able to take something which was a contentious issue, resolve the standard, and implement a massive change in terms of professional behavior in a fairly short time. I think that could also be done with respect to the legal profession.

Let me now offer a few modest proposals for increasing professionalism in the legal community.

The first modest proposal is that some empirical research would be helpful here. First of all, I believe that some surveys of the bar membership, including other stake holders and the general public, should be undertaken to identify specific behaviors that are viewed as problematic and that should be the focus of change efforts. My point is that unless the bar is really serious about the behaviors we are trying to change and reaches some degree of consensus by looking at what the public thinks as well as what other holders think, I think we are going to have a problem because, basically, there will be conflicting objectives and we are not going to know where to go.

Second, I think standards need to be set within the legal profession about the behaviors that are unacceptable. Specifically, I think the legal profession needs to develop some consensus on how far, and how low, a legal professional can go to represent the interest of their clients.

Third, I think that once the standards are set, and obviously that is the difficult part, we need to decide clearly, in behaviorally-specific terms, what the standards are. I mean, what you can do, what you cannot do, where the gray areas are, how you sort those out, and how you incorporate the gray areas into the legal professional guidelines of major professional organizations such as the American Bar Association. The standards have to be very specific and very behavioral. Once that is done, how do you change people's behavior? Well, I would like to offer two behavioral-change principles.

The first is from Al Capone. Al Capone, circa 1928, stated that, "You get more with a kind word and a gun than with a kind word alone." Are you with me on that? Or a gun alone, that is my codicil. The second statement is one I made up last week and would like to share with you. "You get more with carrots and sticks than with either carrots *or* sticks." Therefore, you need to develop some accountability mechanisms for compliance with the standards that you have developed. These mechanisms should utilize the time-tested principles of behavior change articulated by Capone and Kilpatrick: meaningful behavioral change can be accomplished if you use kind words, guns, carrots, *and* sticks.

Basically, you are trying to develop, within the profession, a norm that good things happen to people who conform with these standards, both in terms of social and professional approval. Behavior consistent with these standards should be rewarded in every way possible. For example, it does not work well when you say, "The lawyer from Texas—we hate him, he is an obnoxious jerk, but boy we sure do wish we had the \$900 million or \$90 million of whatever it is he abstained by winning the litigation using questionable tactics." Behaviors which are inconsistent with the behavioral standards should be

punished. Punished by peer disapproval, judicial admonishment, complaints to licensing boards, and some of the alternative mechanisms that others have mentioned.

In conclusion, let me just say—if you are going to increase professionalism, there are two elements of professionalism within any profession: one is technical competence and the other is ethical behavior. As was said earlier this morning, to date you have fudged the key ethical dilemmas as a profession. You fudged them in the sense that you said to “win at all costs, but do not be nasty doing it,” or conversely, “do not be nasty unless you really need to be nasty to win.” Until you resolve, as a profession, that particular dilemma, and until you come up with some consistent standards about it, I think the reform efforts will be mostly rhetoric. Because basically you do not change behavior. You can change attitudes somewhat, but you have to use the consequences of behaviors and attitudes to really get people to move forward. Therefore, I think that from my social scientist background I would also say that after you set these standards, you need to monitor these behaviors in a consistent way and see if there is some change in behavior and standards. Thank you very much.

ROBERT L. NELSON, Professor of Sociology and Law at Northwestern University and Senior Research Fellow at the American Bar Foundation:

When I was asked to give a social science perspective on the professional conduct of lawyers, and whether professionalism centers or professionalism conferences like this have any impact on professional behavior, I was reminded of a comedian I used to watch on television in the 1960s: Professor Erwin Corey. Professor Corey’s persona was the wacky professor. He would appear with an Einstein-like shock of hair and a badly tailored suit. He began one of his routines with the question, “Why are we here?” He would continue, “This really is two questions. The first question is: ‘Why?’ Why is a question that mankind has debated for millenia with no clear answer. The second question is: ‘Are we here?’ The answer is yes.

The social science perspective on professionalism also is both complex and simple. Why we are here and what effect it is likely to have is very difficult to analyze definitively. But will we continue to have these kinds of events--will we continue to be here? The answer is yes. Like Professor Corey, I will divide my presentation into parts, although I will do it in three parts instead of two. First, I offer some theoretical speculations about why we hold professionalism conferences and run professionalism centers. Second, I give a few empirical observations on trends in the legal profession that may be relatively commonplace, but that are crucial to how we try to affect professional behavior. Third, I will talk about evaluation and what evaluation programs have to try to accomplish in this arena.

When Martha Barnett was talking last night, she raised the question, “Why do we have to have conferences like these?” Historically, that is a question

many scholars have asked, not only about lawyers, but also about doctors, accountants, management in business, and others. There are at least two different explanations. The first is “the skeptical view” of why we have these conferences. There are various versions of the skeptical view. One version is that efforts at policing legal professionalism are really a mechanism to control the market for legal services; it is an effort by the elite of the bar. By controlling who is in and who is out, or by praising some segments of the bar, while criticizing others, professionalism activities elevate the status and prestige of the elite. Such activities shore up the legitimacy of the profession and help to deflect and diffuse more fundamental criticism of the bar. In the skeptical view, professionalism conferences and centers are just symbolic politics. They are not really intended to produce significant social change.

Deborah’s remarks earlier are one strand of this skeptical view. Deborah seems to imply that if there is a will, there is a way to deal with the kinds of problems she identifies. But if one accepts the skeptical view, one does not really expect an impact from professionalism campaigns. The reason is that no one talks at a deep level about what the roots of the problems are, they will never really address what is necessary to treat those problems.

The second broad view we might call “the positive” or “constructive view.” Currently in sociology, it is referred to as neo-institutionalist theory. This perspective acknowledges that conferences such as this one largely involve symbolic politics. Yet this view takes symbolic politics seriously and argues that the way much social change takes place is through changing world views. As changing worldviews begin to shape institutions and institutional practices, they begin to have an impact on the ground. Some changes take place through coercive mechanisms, sometimes through fads and mimicry. For example, why have we seen the spread of ethics courses throughout the profession? Well, in part, because there has been a mandate. In response, the ABA acted and it became, in most states, a requirement—most states began to require ethics courses.

Why do we see the spread of professionalism centers? It is a somewhat more complex process. No one has mandated the creation of professionalism centers. It probably is a matter of competition among different law schools, different sectors of the profession. Or perhaps schools are mimicking each other. A law school or a state bar decides that we should have a professionalism center as a mark of what a leading-edge law school and program should be. On the impact side, if you take this kind of institutionalist view, you can either say that the only thing that has happened is symbolic in character or that such changes will begin to have some kind of impact and may begin to change the nature of the game as it is played. It is interesting, as a sociologist looking at this, that professionals very often are looked at as agents of change. Not just in law, but in business and in other spheres of social activity, professionals are seen as individuals who go out with a certain set of norms and certain type of knowledge and begin to change the world. It is interesting to think that if we turn that model inside the legal profession, we begin to think of lawyers as

changing their view of what they do and becoming agents of change.

My second set of comments has to do with a few empirical observations on the legal profession. First, we obviously have a bar that has exploded in size over the last three decades. It went from a bar with 350,000 lawyers in 1971 to 850,000 lawyers now. We now produce approximately forty-eight thousand new lawyers every year, which means that there have been dramatic changes in the size of the profession in almost any context. A second trend is segmentation and inequality. We often talk about the two halves of the legal profession: the corporate sector and the personal-client sector. What we have seen over the last decade or so is that these sectors have moved farther and farther apart. The percentage of legal services expenditures devoted to business has increased. The following data is specifically on lawyers from Chicago, but is consistent with national census data as well: In 1975, fifty-three percent of the working time of lawyers in Chicago went to businesses, forty percent to personal clients. By 1995, sixty-four percent of lawyers' time was spent on business clients and twenty-nine percent on personal clients. Earnings trends of solo practitioners show solo practitioners have lost real income over that same twenty year period. The average real income in constant dollars of solo practitioners in Chicago has gone from \$115,000 to \$78,000 a year, while the average income of partners in large firms has gone from \$265,000 a year to \$345,000 a year. We have heard about the ramping up in the salaries of entry-level associates, but if you look at the ratio of partner earnings to associate earnings, in the mid 1970s it was 2.2 to 1. Partners made a little over twice as much as their associates. By 1995, the ratio was 3.5 to 1, with partners making on average three and a half times what the associates earned. Government lawyers have also seen a decline in real income from an average income of \$63,000 in 1975 to an average income of \$49,000 in 1995. These figures are in constant dollars.

There has been a dramatic change in the organizational scale of law firms and other law offices. The average size of law firms in Chicago in 1975 was twenty-seven lawyers, by 1995 it was 141 lawyers. Corporate counsel offices grew from an average of seventeen lawyers in 1975 to an average of fifty lawyers in 1995. Government law offices went from sixty-four lawyers to 399 lawyers. In addition, I think we are all generally aware, and I could present more complex data on this, but the profession has become more marketized. There is much more competition. There has been a shift, especially in the corporate sector, away from continuous relationships with clients to more transactional, specialized relationships with clients. And there has been an overall growth in specialization by areas of law.

These changes have several important implications for this conference. First, these sorts of changes are the motor that drives many of the concerns that are articulated under the rubric of professionalism. Second, it is very clear that there are different practice contexts within the legal profession that require different regimes of professional control. Different kinds of problems arise in different contexts and require different treatments. There are very powerful

market forces that continue to undercut financial rewards in less compensated fields. These trends will exacerbate the access problems to which Deborah alluded. The size of firms and the greater number of lawyers in many communities implies that informal structures are going to be less effective at maintaining social control within the profession. Because of the steadily increasing size of practicing organizations and the increasing number of lawyers, it is unrealistic to think that the profession can rely on individual professionalism to deal with unprofessional conduct. Yet, some other research that I have done involving leading law firms in Philadelphia and Chicago, suggests that law firms have not adopted a systemic approach to problems of ethical conduct and misbehavior that arise inside their firms. They still treat professional misconduct primarily as a problem of individual aberrations. They still work under a fairly traditional, individualist conception of practice.

My third set of comments concern evaluation. This should be the simple part for the social scientist. If the profession articulates its goals, tells the scientist what to measure, and then gives the social scientists enough research money, we should be able to figure out ways to evaluate impact. It is not so simple. I would be very encouraged if we see a commitment to systematic evaluation across professionalism programs. But it is not easy to clarify goals or to establish clearly what we mean by professionalism or professional conduct in various contexts. Definitions of professionalism often are politically contested—one part of a legal community will have one view of what is professional, which will vary from what another part of the legal community sees as professional. One of the big problems is that we mostly rely on post-hoc horror stories about what has gone wrong and use those stories to analyze the nature of the problem. It is a little like trying to figure out where to put the armor on an airplane based on the bullet holes in the planes that have returned from battle. Those are the planes that made it back. We do not know about the unprofessional conduct that goes unseen or unmeasured. I agree with Dean Kilpatrick's suggestion that we need systematic research, but simple tracking surveys about kinds of behavior that are relatively rare will not be easy and may not pick up unprofessional conduct in a systematic way. Rather I propose that we need to build a scholarly community—a stronger scholarly community that can grapple with these issues in the complex ways in which they come up. It is necessary to devise a variety of research projects to examine professionalism in different contexts.

Let me close very briefly with a note of skepticism. Unprofessional conduct seems to be produced in the workplace. Yet most of the action on professionalism seems to be located in law schools or bar associations, which are far removed from the context that produces the problematic behavior. While I would love to be disabused of this notion, I will remain skeptical about how much impact programs in professionalism centers and law schools will have unless they begin to focus on the dynamics of professional behavior in the legal workplace.

Thank you.

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