THE LEGAL PROFESSION:

Responsibility And Regulation

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PART II. PROFESSIONAL ROLES

INTRODUCTION *

Interest in the legal profession as a serious academic subject is a relatively recent phenomenon. Until the last two decades, the subject generally held a peripheral position on the academic agenda. Courses on professional responsibility, if taught at all, tended to be perfunctory. All too frequently, they vacillated between anecdotal excursions and doctrinal exegeses. Much of the literature on professional ethics was similarly unsatisfying. Formalist analysis, moralist polemics, and tepid apologia were common genres. But rarely did serious scholarship focus on the bar's social organization or the premises underlying its regulatory efforts.

In the late 1960s, issues of professional roles and responsibilities started to come under more searching scrutiny. Critics, courts, and educators began to give greater attention to the social, economic, and ideological underpinnings of professional governance. This volume is designed to present various dimensions in which such analysis has proceeded.

The readings and references collected here are neither exclusive nor exhaustive. Rather, they identify topics that can form the core of a basic course on the legal profession or serve as background for a more focused scholarly agenda. The organizing premise is that inquiry into attorneys' individual and collective responsibilities should be informed by a variety of intellectual disciplines. The following excerpts survey historical, sociological, economic, and philosophical perspectives that should illumine contemporary debates over the legal profession's ideals and institutions.**

* The authors gratefully acknowledge the editorial contributions of Stanford Law student Susan A. Dunn, and the assistance of Shannon L. Temple in preparing this manuscript.

** Almost all of the material appearing in this collection has been edited. The deletion of sentences and paragraphs is indicated by ellipses. Most footnotes and citations have been omitted. The remaining footnotes retain their original numbers.

Part I

HISTORICAL AND SOCIOLOGICAL PERSPECTIVES ON PROFESSIONAL REGULATION

I. THE ATTRIBUTES OF A PROFESSION: THREE VIEWS OF THE CATHEDRAL

INTRODUCTION

Sociological theories of professions have been traditionally dominated by a functionalist approach. Analysis has focused on explaining the professions' societal role and status in terms of certain functional characteristics. Emphasis generally centers on professionals' claim to special expertise and ethical responsibilities, which in turn give rise to other defining attributes such as regulatory autonomy, economic monopoly, codes of conduct, associational structures, and a common vocabulary, education, and sense of purpose.[1]

This analytic framework builds on various sociological traditions. The focus on professional ethics draws force from Emile Durkheim's concept of normative occupational communities, which were to occupy the void left by breakdowns in other secular and religious institutions.[2] The significance of professional expertise is consistent with Max Weber's theories of specialization and technical rationality.[3] Such characteristics also occupy a central place in Talcott Parsons' analysis of the legal profession. For Parsons, the central distinction between professions and other vocations arises from their functional characteristics rather than the personal objectives of their membership. While professionals, like businessmen, are motivated by the same central desires, "objective achievement and recognition," the accepted means of attaining and realizing those ends vary in accor-

1. *See* A. Carr-Saunders and P. Wilson, *The Professions* (1933); W. Moore, *The Professions: Roles and Rules* 5–6 (1970); Hughes, "Professions" in *The Professions in America* 1–14 (K. Lynn ed. 1965); Greenwood, "The Attributes of a Profession" in *Professionalization* (H. Vollmer & D. Mills eds. 1966); Goode, "Community Within a Community: The Professions," 22 *Am. Soc. Rev.* 194 (1957).

2. *See* Emile Durkheim, *Professional Ethics and Civil Morals* (1940 ed.), *infra* at 80.

3. Max Weber, "On Law," in *Economy and Society* (M. Rheinstein ed. 1922).

dance with occupational roles.[4] In Parsons' view, the bar acts as a "mechanism of social control," both by providing assistance and forestalling deviance; the lawyer's function is

> often to resist [clients'] pressures and get them to realize some of the hard facts of their situations . . . . In this sense then, the lawyer stands as a kind of buffer between the illegitimate desires of his clients and the social interest. Here he 'represents' the law rather than the client.[5]

These functional accounts of the profession have drawn increasing criticism from both the left and right. The more radical critiques proceed on several levels. The ahistorical focus of conventional paradigms, and their assumption of a monolithic occupational community, ignore the variation across time, place, and professional subcultures. The attempt to construct taxonomies of vocational characteristics has been denounced as mindless "definition mongering." [6] And Parson's more ambitious framework has been thought to leave all the interesting questions unanswered. Thus, Terence Johnson argues that functional accounts border on the tautological: the theorist simply hypothesizes objectives, such as "achievement and recognition," on such an abstract level that no one can disagree, and then asserts with some confidence that professionals seek those goals.[7] What such analyses leave out is how those general objectives are pursued in particular social settings and whether that pursuit is consistent with broader societal interests.

As to those questions, theorists such as Richard Abel, Magali Larson, and Milton Friedman have provided different perspectives. Abel and Larson's approach, which borrows heavily from contemporary Marxist scholarship, emphasizes both the professions' role in creating a market for their claimed expertise, and their reliance on that claim to legitimate professional power and prerogatives.[8] Neoclassical economic analysis interprets professionalism as an elaborate form of market restraint.[9] Other critics have focused less on profes-

4. Talcott Parsons, "The Professions and Social Structure," in *Essays in Sociological Theory* 43–46 (rev. ed. 1954).

5. "A Sociologist Looks at the Legal Profession" in Parsons, *supra* note 4, at 384.

6. Terence Johnson, *Professions and Power* 31 (1972).

7. *Id.* at 33–34.

8. M. Larson, *The Rise of Professionalism: A Sociological Analysis* (1977), *supra* at 20; R. Abel, "Delegalization," in *Alternative Rechtsformen und Alternativen zum Recht: 6 Jahrbuch für Rechtssoziologie und Rechtstheorie* (E. Blankenburg, E. Klausa & H. Rottleuthner eds. 1979); "The Rise of Professionalism, R. Abel," 6 *Brit. J. Law & Soc'y* 82 (1979).

9. *See, e.g.*, M. Friedman, *Capitalism and Freedom* (1962).

sions' collective interests than on their client relationships. While Parsons stressed the positive functions of professionals in mediating public and private concerns, theorists such as Maureen Cain and Ivan Illich have emphasized the preemptive and disabling consequences of such mediation.[10] In their analysis, professions are more than trades with pretensions. Rather, professional practitioners occupy a position of dominance that enables them unilaterally to define, assess, and mystify the terms of their assistance.[11]

A.A. Berle, Jr., "Legal Profession and Legal Education"

9 Encyclopaedia of the Social Sciences 340–45 (1933).

A survey of the legal profession of modern times shows the need in every country of a group equipped to deal with the complex problems of law and administration under the wide variety of institutional set ups. But this group is rarely popular. In Russia a body of theorists, practitioners and administrators of the old regime were swept away by the Soviet state on the theory that they could be dispensed with in a non-exploitative society; yet the multiplication of administrative machinery and the need for interpreting rules and applying some process of justice called back into existence in fact, if not formally, a profession skilled in interpreting the regulation of a communist system. There have been other cases in continental Europe of similar hostility to the legal profession—notably in France during the revolution. In that case too the lawyers were identified in the minds of the revolutionists with the entire system of oppression and privilege of the *ancien regime.* But the profession has invariably reemerged.

In civilizations like the west European, dominated by economic and psychological individualism, the advocate is the fine flower of the bar, leaders of the profession are engaged rather in arguing the rights of the individual before criminal courts than in handling the rights of individuals in civil suits. The continuity of the historic drive from the code of Justinian through the *Code Napoléon* and into the modern French, German and Italian codes has maintained a uniformity of position as between the barrister in Europe and the Byzantine logothete of the later, particularly the Eastern Roman Empire. The need for reconciling the importance of the individual with the de-

10. I. Illich, *Disabling Professions* 86–87 (1977); Cain, "The General Practice Lawyer and the Client: Towards a Radical Conception," 7 *Int'l J. Soc. & Law* 331 (1979). *See also* J. Lieberman, *Tyranny of the Experts* 55–68 (1970).

11. *See* sources cited *supra* note 10.

mands of a crowded, close knit society has also thrust the legal philosopher into prominence. Continental Europe unlike eastern Europe or the common law countries has also a separate category for lawyers who are to be judges. In the common law system the judges are recruited from the legal profession, without, however, any special training for the function; in continental systems one line of legal training leads to the judicial posts exactly as another line leads from apprenticeship through the grades of attorney and counselor to the dignity of the barrister.

In both England and the United States the dominance of the commercial and industrial structures, the complexity of business organization and the position of world economic leadership steadily thrust upon the legal profession problem after problem which was not originally intended to form a part of legal practise. In both countries the legal profession in addition to exercising its historic monopoly over control of the machinery of the courts and over the giving of private counsel to parties with respect to their legal rights became virtually an intellectual jobber and contractor in business matters. The British system, seeking to preserve the ancient supremacy of the barrister, kept the two functions separate within the profession (and incidentally separated the bar even from its clients) by assigning the legal burden of the new economic system to solicitors—men trained differently from the barristers and not privileged to practise before courts but skilled in interpreting law, drafting documents, handling the many problems of conveyancing a property, organizing business enterprises, securing the orderly course of credits and managing the entire paper work of commerce. In the United States no such distinction was formally made. In theory all lawyers were alike; all had the same rights and were supposed to be able to perform the same duties. In fact, however, the functions diverge as they do in England, so that one branch of the American profession, rarely appearing in the courts, devotes itself to handling business matters, giving business counsel, drafting documents and the like; another branch to handling litigious matters, trying cases in the courts and working the judicial machinery. Still others develop specialties—patent law, admiralty law, customs and tariff matters—and practise before various administrative tribunals. The division is informal and one of choice but none the less real.

The position of the legal profession in American life illustrates in clearest relief the consequences for the profession of the rapid industrial and financial growth of the community. One of the results of capitalistic organization in the United States lay in the transfer