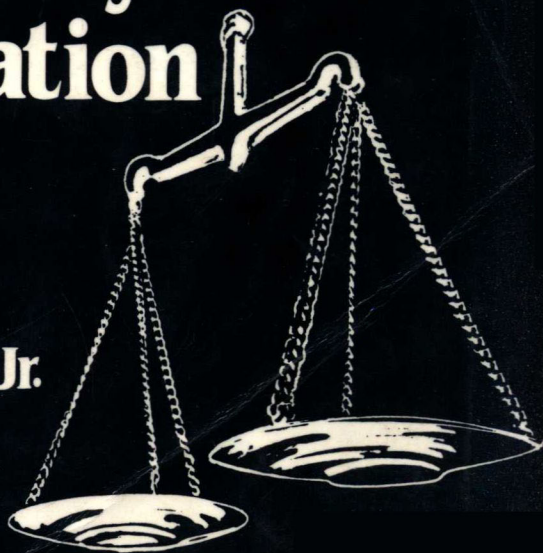


THE LEGAL PROFESSION:

Responsibility And Regulation

Second Edition

**Geoffrey C. Hazard, Jr.
Deborah L. Rhode**



FOUNDATION PRESS

THE LEGAL PROFESSION:

Responsibility and Regulation

SECOND EDITION

By

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*

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 assistance of Marilyn Hersey 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

In a book focussing on the legal "profession," it is appropriate to begin with certain fundamental questions about what that term implies. On a descriptive level, what are the social meanings and consequences of professional status? How do particular occupations achieve it and how does the process vary across time and culture? On a normative level, do concepts of professionalism serve useful purposes as theoretical tools, aspirational ideals, or regulatory frameworks?

Much of the theoretical work on professions has 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

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.

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 accordance 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 catalogues of vocational characteristics has been denounced as mindless "definition mongering."⁶

To rank occupations in terms of simple dichotomies—i.e., profession/non-profession—is elitist and reductive; it obscures the richness and variation among organizational cultures and reflects undefended value judgments about the relative worth of certain forms of labor. From many critics' perspectives, the claims of expertise and service orientations that professionals advance are not different in kind from those of other groups that are thought to lack professional status (*compare e.g.*, midwives and journalists).⁷

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

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); see also E. Freidson, "The Theory of Professions: The State of the Art in the Sociology of the Professions" (R. Dingwell & P. Lewis, 1983).

7. See e.g. *Frye v. Commissioner of Finance*, 466 N.Y.S.2d 3 (1983) (holding that journalism does not have the "hallmarks" of a profession within the meaning of New York City's unincorporated business tax provision since journalists need not complete an advanced course of specialized study and are not subject to the authority of a licensing agency, disciplinary body, or binding code of ethics).

Moreover, functionalist explanations have been thought to leave all the interesting questions unanswered. Thus, Terence Johnson argues that such accounts border on the tautological: theorists like Parsons simply hypothesize 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.⁸ 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.⁹ Neo-classical economic analysis interprets professionalism as an elaborate form of market restraint.¹⁰ Other critics have focused less on professions' 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.¹¹ 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.¹²

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

8. Johnson, *supra* note 6 at 33-34.

9. 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. Klaus & H. Rotleuthner eds. 1979); "The Rise of Professionalism, R. Abel," 6 *Brit. J. Law & Soc'y* 82 (1979).

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

11. 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).

12. See sources cited *supra* note 10.