

The Six Challenges of Legal Professionalism

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In pondering how the American legal profession should respond to the challenges of the 21st century it is useful to reflect on our history, compare us with other countries, and theorize the emerging patterns. To do so I will draw on my recent book, which analyzed the tumultuous experience of English lawyers in the 1990s in order to expose fundamental fault lines within the profession and tensions between it and the larger society.¹

Every profession must answer several questions.² *How* may members qualify and *how many* will do so (control over the production of producers)? *Who* will qualify (both to enter and to climb the career ladder) (the *collective status* project)? How may members and non-members *compete* (control over production by producers)? How can lawyers serve the unrepresented (*demand creation*)? How should we handle incompetence and misconduct (*regulation*)? And how can lawyers act collectively (*governance*)?

Occupations vary greatly in their entry barriers. Street performers lie at one extreme, European notaries protected by a *numerus clausus* at the other. In the course of the nineteenth and twentieth centuries both American and British lawyers progressively raised the bar: formal education, examinations, apprenticeship, first positions, residence, citizenship, character. Although a few have been struck down, the rest continue to create problems. Because of them supply and demand are often seriously out of synch. The rapid rise in the number of women solicitors, who interrupted or reduced their work to bear and raise children, caused a significant shortfall. The crash of the English property market (and the Silicon Valley dot.com implosion) created crises of oversupply. That problem is more acute in England because lawyers must complete a traineeship or pupillage and then obtain employment as an assistant solicitor or secure a seat in chambers. But American jurisdictions also deliberately manipulate entry barriers. New York recently justified raising its MBE passing grade on the ground that neighboring states required higher marks (although bar examinations have never been validated against lawyer performance). We should examine the consequences of and question the justifications for each entry requirement.

Entry barriers inescapably affect a profession's composition as well as its size; indeed, that may be the stronger motivation. Until recently the legal profession (like others) sought to elevate its status by recruiting elites and excluding undesirables. Applicants to the Inns of Court must disclose their *father's* occupation; the modal response used to be "gent," i.e., untainted by vulgar commerce. I.Q. tests were designed

¹ *English Lawyers between Market and State: The Politics of Professionalism* (Oxford: Oxford University Press, 2003).

² I developed this theoretical framework in reading Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* (University of California Press, 1977); see my review essay "The Rise of Professionalism," 6 *British Journal of Law and Society* 82 (1979); see also the introductory chapter in my book *American Lawyers* (New York: Oxford University Press, 1989).

partly to keep out Jews (not the smartest strategy). Legal professions excluded and then segregated women and racial minorities. But in a striking inversion of status warrants, legal professions today (like most privileged domains) compete in demonstrating how demotic they are, how representative of the larger population's ascribed characteristics. This creates potent tensions with the dominant legitimation of privilege: meritocracy. White men are resentful, racial minorities feel stigmatized. The backlash has forced public universities in states like my own to seek greater socio-economic representativeness, which creates its own problems and is no surrogate for race. Applicants have more than doubled with the fall of ascriptive barriers and education has progressively been privatized, significantly narrowing class recruitment. As labor markets (for professionals, like others) become national and even global, competition for position within the professional hierarchy also grows in extent and intensity. Whereas only a handful of law schools had national rankings when I matriculated 40 years ago, *US News* now ranks all 200, and students (and faculty) anxiously seek to maximize their human capital. We need to interrogate each measure of success within the professional hierarchy for its salience and demographic effect, as well as questioning the stratification system itself.

Professions paternalistically control competition, both to extract monopoly rents (thereby reducing intraprofessional income inequality) and to foster a reputation for disinterest. Neo-liberal reforms have eliminated some of the quainter rules: that a professional must relinquish a client before another could accept the client; fee schedules; partnership limits; self-promotion bans. But the legal profession unrepentantly protects the remaining restrictive practices. Solicitors resisted corporate conveyancing by lenders or real estate agents. Fearful of losing this lucrative work, they challenged the exclusive higher court audience rights of barristers, who defended themselves on grounds of superior competence and integrity—doubling insulting those they had long patronized as social inferiors. But American lawyers can hardly smirk. Their jurisdiction is hotly contested by paralegals, accountants, and foreign lawyers. Law firms are beginning to outsource routine work to cheaper labor markets, notably India. Information technology increases productivity but also lets laypeople lawyer for themselves. Restrictions on getting business (solicitation) and marketizing claims are vulnerable to the same arguments that felled the advertising ban. We must critically examine the justifications for restrictive practices (controlling quality and integrity) and direct as much attention to challenges from below (paralegals, IT) as we have to those from above (MDPs).

Professions are captives of their own success. In order to thrive they must convince consumers their services are indispensable: both intrinsically valuable and incapable of being performed by non-professionals. But that obligates professions to make those services available to everyone. This is particularly true for lawyers, who create the legal needs of opposed or affected parties. Professions initially responded with individual acts of charity. Indeed, French *avocats* make a virtue of such *désintéressement*. But the confluence of eroding professional control over the production of and by producers and the rise of the welfare state encouraged legal professions to embrace legal aid. This contains its own contradictions. Like doctors, lawyers may become dependent on powerful third-party payers (both government and insurance). The cost of demand driven social services like medicine and law grows faster than inflation. Taxpayer revolts, competing fiscal demands (today national security), and the assault on the welfare state

have drastically curtailed legal aid programs. After decades of dissing American "cowboys" for chasing ambulances, Britain replaced legal aid for money claims with conditional fees. American legal aid lawyers have been assailed for championing the poor! Ever since the Legal Services Corporation Act of 1973 its lawyers' hands have been tied ever more tightly. The budget has been frozen in unindexed 1980 dollars (i.e., cut by more than half). We must challenge these restrictions, devise new strategies for expanding civil representation, and expose the abysmal state of criminal defense. We need to find ways to sustain the public interest commitment that so many bring to law school—and lose there, overwhelmed by educational debt and lured by private sector salaries three to four times as large as those for the few public interest jobs. We should support the institutionalization of pro bono obligations by large firms and prepare our students to exploit those opportunities.

Professions define themselves as self-regulating, justifying that privilege by claiming unique expertise and altruism. But outsiders see this as circling the wagons: the thin blue line of police silence, doctors' conspiracy of silence about malpractice. Disciplinary mechanisms screen out the vast majority of complaints, take years to process the rest, and seriously punish very few. Discipline focuses on lower status lawyers who betray vulnerable clients out of self-interest. But scandals like Enron, Adelphia, Tyco, ImClone, and WorldCom have properly drawn attention to the far more serious offenses of higher status lawyers who betray others at the behest of their powerful clients. In recent years the disciplinary system in both California and the U.K. has ground to a halt from inadequate funding and case overload. Law schools could assist under-resourced disciplinary bodies to investigate and prosecute misconduct. Public anger threatens to displace self-regulation with malpractice suits (juries), mandatory insurance (which regulates by experience-rating premiums), regulatory agencies (the SEC), judicial oversight (sanctions), ombudsmen, and direct regulation. As legal ethicists we tend to be preoccupied with the content of rules, which are not unimportant but also not the only explanatory variable. We need to understand why lawyers betray the trust of clients, adversaries, and the institutions in which they practice if we are ever to strengthen incentives for good conduct and increase competence. We also need to identify and correct the incompetence and misconduct of the many early rather than punish the few severely after they have done the harm.

Controlling numbers and composition, constraining competition, addressing unmet need, and regulating members all require collective action. Until fairly recently lawyers did this informally. Local bars were sufficiently small, homogeneous, and stable to reach consensus easily. Leadership followed what the English call "Buggins' turn"—a reward of seniority for the few who coveted that prize. The explosion in numbers, growing heterogeneity, and geographic dispersion preclude this. The center cannot hold. Lawyers are more likely to join and be active in sub-groups organized by specialty, client, practice structure, or identity. Apathy is an even greater problem. Fewer than a quarter of solicitors voted in the most contentious Law Society elections. The ABA has never enrolled even half of American lawyers. Integrated bars respond to this free rider problem with compulsion, but that constrains their ability to take controversial positions. The strongest goad to involvement is fear—of losing money or status—but the protectionist response confirms outsider suspicions that all professions are conspiracies against the laity. The crucial question is the circumstances under which professional

associations act for the public good: defending legal aid, opposing abusive tax shelters, or championing the rule of law against a government eager to sacrifice fundamental rights in the name of national security.

The changes sketched above have transformed the dominant professional ideology. Traditional professions justified their privileged wealth, status, and power by proclaiming their paternalism as a warrant against market temptations to pursue self-interest at the expense of clients. Skeptics (including me) have argued that their restrictive practices did a poor job of ensuring competence and integrity—and a much better one of extracting monopoly rents. Recently, legal professions have emphasized the warrant of independence, claiming to champion clients vulnerable to abuse or exploitation by the state or capital. This, too, is a myth: the vast majority of lawyers greatly prefer to represent the powerful, who pay better, confer higher status, and offer greater intrinsic rewards of craftsmanship and efficacy. But all successful ideologies contain a kernel of truth. The question, then, is how to mobilize the aspiration to independence in order to motivate lawyers to speak law to power: refusing complicity in detention without trial, torture, and extraordinary rendition; defending the judiciary against blatant politicization; and opposing an arbitrary and discriminatory death penalty.