

THE TRANSFORMATION OF THE AMERICAN LEGAL PROFESSION

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Professions are historically specific institutions for organizing the production and distribution of services. American lawyers constructed the contemporary legal profession between the 1870s and the 1950s by forming local, state, and national bar associations through which they sought, with considerable success, to control the production of and by producers of legal services. In the last two decades, these structures of control have significantly eroded. Lawyers exerted no restraint over the threefold increase in law students since the early 1960s or the changes in the composition of that student body. Restrictive practices taken for granted for half a century have been summarily eliminated by judicial decisions and executive action. To the extent that lawyers have responded by seeking to create new demand, they run the risk of intensifying competition, becoming more dependent on the state, and organizing hitherto atomistic consumers into collectivities that can challenge professional dominance. The image of the profession as a homogeneous collection of independent practitioners is harder to maintain. The proportion of employees is growing, solo practitioners are declining in the face of a hostile economic environment, and units of production are growing in size and becoming more bureaucratic. Divisions of race, gender, age, and class, superimposed over the differentiation of lawyers among structures of practice and the stratification of private practice into two hemispheres, make professional unity increasingly problematic. For similar reasons, self-regulation is being undermined from within while it is challenged from without. These cumulative transformations demand that we reconsider whether it is useful to continue thinking of the practice of law as a profession.

During the last two decades, the American legal profession has undergone changes whose speed and magnitude are without precedent in its history. The number of lawyers more than doubled between 1950 and 1980 and seems likely to do so again by the end of the century. As a result, the profession is becoming dramatically younger. Once almost exclusively a white male enclave, the profession now is admitting significant numbers of women and members of ethnic minorities, if still considerably fewer than their proportions of the general population. In addition, the dominance of private practice and of solo and small firm practitioners within that category—which long has been more pronounced in the United States than in any other country—is declining with the growth of public and private em-

ployment and the expansion in size of law firms. Although we will not be able to assess the full ramifications of these changes until the turn of the century, when the cohorts that entered the profession before the mid-1960s have retired, the new patterns established during the last twenty years are sufficiently clear and striking to allow, and indeed demand, some provisional reflections.

Unfortunately, the principal source for the sociography of the American legal profession—the *Lawyer Statistical Report*, prepared by the American Bar Foundation—last appeared in 1972 (Sikes *et al.*). Now, with the publication of the 1984 report (Curran *et al.*, 1985), we can begin to identify and evaluate the trends of the last fourteen years. In the symposium that follows, Curran (1986), author of the 1984 report, summarizes and interprets its important findings. Halliday (1986) places the events of the last few decades in the perspective of American history since 1850, using previously unanalyzed United States census data to reveal major differences by geographic region and economic sector that suggest the beginnings of a theory of lawyer demand. Lewis (1986) also offers a broader context for understanding both the distinctive and the generic features of the American experience by comparing it with that of the legal professions in other advanced Western countries. My goal in this introduction is to situate within a theory of the professions the changes that have occurred and will continue to occur. I hasten to add that this is only one of several competing theoretical interpretations; although I find it the most convincing, others remain unpersuaded.*

All occupations in capitalist societies seek to control their markets. Professions are distinguished from other service occupations by both their choice of strategies and their relative success. American lawyers constructed the contemporary legal profession between the 1870s and the 1950s. They developed local, state, and national bar associations; promulgated ethics codes; and established disciplinary procedures. These associations were instrumental in controlling the production of qualified producers of legal services by redefining and tightening professional entrance requirements. Around the turn of the century, formal legal education rapidly displaced the appren-

* The theoretical structure I advance here is adapted from Freidson (1970) and Larson (1977). I have developed it in Abel (1979; 1981a; 1985a; 1986b). The data on American lawyers that constitute the basis for the following abbreviated description can be found in Abel (1980; 1986a; in press). Because the vast literature is extensively presented and analyzed in those articles, I have omitted such references here.

ticeship system. Law schools lengthened the period of study required from one or two years to three and instituted examinations that weeded out many students. Part-time evening schools unaccredited by the American Bar Association gradually disappeared as state bars refused to accept their degrees. Law school tuition rose. Law schools and state bars began to require an undergraduate degree as a prerequisite for admittance. Bar examinations became universal, written and difficult, and the examiners also insisted that prospective legal practitioners possess American citizenship, state residence, and good character. My data indicate that, partly as a result of these controls on entry, the population to lawyer ratio was exactly the same in 1951 as it had been in 1900, despite a half-century of phenomenal economic growth and the expansion of government. Indeed, Halliday's census figures (1986: 59) make an even stronger case for the efficacy of supply control: As late as 1970, this ratio, which had risen in the early years of the century, still had not fallen back to the level of 1890.

Professional associations also sought to control production by the producers of legal services. They waged campaigns against the unauthorized practice of law by other occupations, entering into written agreements that divided the market with realtors and bankers. They prohibited advertising and solicitation by lawyers, sporadically enforcing these bans in highly publicized campaigns against low-status "ambulance chasers." They attacked and successfully curtailed prepaid legal services plans, which threatened to take business from nonmember lawyers. They promulgated minimum fee schedules, punishing those who engaged in price competition. Some state bars erected high protective walls against out-of-state lawyers. Bar associations maintained that legal services to the poor should be provided only through the charitable efforts of philanthropies and volunteer lawyers; when Britain established a state-supported legal aid scheme in 1949, American lawyers recoiled in horror at the threat to professional independence posed by this specter of creeping socialism.

The legal profession that emerged in the first half of the twentieth century was distinctive in both its composition and its structure. Despite the strong nativist sentiments of professional elites and the xenophobia of bar associations, the relatively lenient entry standards that prevailed until the late 1930s and the availability of part-time legal education allowed large numbers of second-generation immigrants, whose parents were skilled workers or small entrepreneurs, to become lawyers. But the profession explicitly discriminated against both blacks,

who were excluded from the American Bar Association and many law schools, and women, who were denied entry to some law schools until the 1950s and 1960s. In consequence, blacks remained about 1 percent of the legal profession and women less than 5 percent as late as 1970. Because the number of entrants declined from 1928 to 1947, under the influence of the Depression and even more of World War Two, the profession grew progressively older and, presumably, more conservative. The post-war profession also was dominated by private practitioners, who were almost 90 percent of all lawyers in 1948 and, among them, by solo practitioners, who were more than 60 percent of all lawyers.

Thus, at the beginning of the 1960s American lawyers displayed all the characteristics associated with the archetypical profession. The American Bar Association, together with state bars, exercised the gatekeeping function, limiting the number of lawyers produced and controlling the characteristics of those who became lawyers. Criminal prosecutions, ethical codes, and informal understandings restricted competition among lawyers and from outsiders. The profession was overwhelmingly white and male. Private practice, and within it solo practice, were by far the largest categories.

When we assess the changes of the last two decades against this background, we find that each element of the professional configuration has been seriously eroded. Although lawyering remains a distinctive occupation, sharply demarcated within the division of labor, the profession no longer possesses the same features of control, composition, and structure. First, the entry barriers painfully constructed over half a century have failed to withstand the assaults by the growing numbers aspiring to become lawyers. This should not be surprising. Supply control in a capitalist economy can never be more than temporary; its very success engenders more vigorous attacks. Restrictions on the production of lawyers during the boom years of the 1950s and 1960s created an imbalance between the supply of legal services and the demand, leading to a rapid increase in the starting salaries of law-school graduates. Beginning associates in large firms, who earned seven thousand dollars in the mid-1960s, command fifty thousand dollars twenty years later. But money has not been the only attraction of law as a profession; the civil rights, women's, consumer, and environmentalist movements all made law an integral part of their social activism. Furthermore, the first two movements irretrievably delegitimated the ascriptive barriers of race and gender, more than doubling the numbers who could aspire to be lawyers.

The growth of public tertiary education also greatly expanded the population qualified to enter law school, while credential inflation made the acquisition of a professional degree more essential to continued membership in the middle class. At the same time, better educated students found it easier to graduate from law school and to pass the bar examination. The United States Supreme Court struck down barriers against entry to the profession by noncitizens, out-of-state residents, and those who deviated from the political or sexual mainstream. Although the American Bar Association continued to exercise its accreditation powers, the number of approved law schools rose by more than 25 percent in fifteen years, and student enrollments in those schools more than doubled. Thus, although the profession still exerts some control over entry, the rate of production of lawyers has risen greatly. In the last few years, that rate appears to have stabilized, albeit at a level more than three times what it was in the mid-1960s.

The declining control over the production *of* producers has been accompanied by an erosion of control over production *by* producers. It seems plausible that the former is at least partly responsible for the latter. The greater number of lawyers, especially in recent cohorts, must compete with each other more aggressively. Furthermore, there is evidence that younger lawyers are more critical than their elders of restrictive practices, which tend to favor the more established practitioner. But the attack on professional privilege also has been waged by a constellation of external forces as incongruous as the liberal consumer movement and the laissez-faire economists who criticize any state regulation. In response to these diverse stimuli, the Supreme Court has invalidated minimum fee schedules and most restrictions on advertising (although not rules against solicitation), and the United States Justice Department forced the American Bar Association to stop favoring open-panel over closed-panel group legal service plans by threatening an anti-trust prosecution. Legal clinics have pioneered the mass production of routine legal services for middle-class individuals through advertising and price cutting. The professional market also is threatened by lay competitors, who publish handbooks, produce forms, offer advice, and represent clients before administrative tribunals—indeed, do everything except appear in court.

Faced with an excess supply of law graduates and heightened competition from both within and outside the profession, lawyers are displaying greater interest in demand creation as a strategy of market control. Advertising, legal clinics, and pre-

paid plans all are examples. But the greatest transformation has occurred in the profession's attitude toward state support for legal services to the poor (Abel, 1985b). In the 1950s, lawyers were united in opposing any governmental role. When President Kennedy launched the OEO Legal Services Program in 1965, Sargeant Shriver, the OEO director, secured the support of the ABA governing body, but state and local bar associations and many rank-and-file lawyers remained skeptical of the program or openly hostile. Yet when President Reagan sought to abolish the Legal Services Corporation in the first year of his administration (and each year thereafter), he was greeted with protests from every bar association in the country, whether national, state, or local, specialist or generalist, liberal or conservative. Furthermore, the profession has pushed steadily (although with limited success) for the diversion of funds from staffed offices employing full-time salaried lawyers to *judicare* programs that would reimburse any private attorney who represents poor clients. The fear that state intervention would curtail professional autonomy seems to have evaporated in the face of potential economic benefits.

Many of the same forces that explain the growth of the profession also account for changes in its composition. Today, women are nearly 40 percent and racial minorities almost 10 percent of entrants to what had been virtually a white male profession. Although both figures fall considerably short of proportional representation (and seem to have stopped growing), the profession has become significantly more heterogeneous. An important question (although one that cannot be answered for some years) is how women and minority lawyers will be distributed across the professional strata. We have known for several decades that lawyers are sharply stratified in terms of prestige and wealth, along such variables as clients served, subject-matter specialization, employment versus independent practice, firm size, and location within the public or the private sectors. There is reason to believe that the changes described above—both the growth of the profession and the erosion of restrictive practices—have intensified this stratification and will continue to do so. Solo and small firm practitioners are most deeply affected by competition from new entrants, who engage in advertising and price cutting. At the same time, as I will discuss below, the upper echelon of the profession enjoys ever-greater wealth, power, and status. There is a substantial danger that disproportionate numbers of minority lawyers will be relegated to the bottom of this hierarchy by law-school grades that reflect inadequate prior education and continuing

economic disadvantage, by discrimination, and by their commitment to work that promotes social justice but offers meager material rewards.

The future of women lawyers is likely to be more complicated (Epstein, 1981). On the one hand, women have often chosen career paths different from those of men, partly by reason of the perpetuation of patriarchal relations within the family, partly in anticipation of discrimination at work. They tend to prefer salaried employment, especially in the public sector (such as work in legal aid and public defender offices, or in government), to private practice and, within the latter category, solo practice to small firms. On the other hand, women do at least as well as men in law school, and many have joined large firms, although they appear to attain partnership more slowly and less frequently than men. The increase in the entry of women seems to have narrowed the class backgrounds of lawyers (perhaps because upper-class women are better able to overcome sex discrimination), whereas the entry of minorities may have had the opposite effect. It would be hazardous to predict the long-term consequences of these changes, but to the extent that stratification within the professional hierarchy comes to be paralleled by differences of race and gender, it will be that much harder to legitimate.

The growth of the legal profession also poses another kind of challenge. The sequence of declining bar admissions from 1928 to 1946, a period of stasis until the early 1960s, and the recent era of dramatic growth has resulted in a situation in which a very small cohort of elderly white men are governing associations that deeply affect the lives of a very large younger cohort with significant female and minority membership. Since the younger generation of lawyers will not ascend to positions of power for another decade or two, given the strongly gerontocratic character of professional governance, the divergence of interests, styles, and demography between rulers and ruled is likely to generate considerable tension.

Greater numbers, together with other changes, also have influenced the structures within which lawyers practice. The solo legal practitioner—that paradigm of the independent professional—no longer dominates the profession. Although a larger fraction of American lawyers still practice by themselves than is the case in any other common-law country, it seems plausible to expect this category to shrink (at least proportionally) as a result of competition from legal clinics, prepaid plans, and laypersons, all of whom achieve economies of scale by investing heavily in advertising and word processing and by em-

ploying cheaper forms of labor. (On the other hand, solo practice continues to offer the only alternative for new entrants who cannot find jobs.) At the other extreme within the private-practice spectrum, large firms have been growing in size and numbers, augmenting their capital investments, and enlarging their subordinate labor force. Once again we can expect these trends to persist as firms compete for prestige (of which size is an important symbol), seek to gain and retain clients (corporate conglomerates and multinationals as well as wealthy individuals) by adding specialties and opening branch offices, and strive to enhance profitability (significantly correlated with the ratio of associates to partners).

The decline of solo practice and the growth of larger firms both contribute to a third trend—the increase in the number of employed lawyers. Firms not only employ recent graduates as associates but they also keep those lawyers in the status of employee for ever-longer periods, sometimes indefinitely, as permanent associates or salaried partners. The number of lawyers employed by business and government has also increased, although both categories remain smaller proportions of the American profession than in civil-law countries. More than nine out of every ten law-school graduates now begin their careers as employees, and many are content to remain in that status; women, for example, may want to limit their working hours in order to raise a family, and both female and minority lawyers may fear that client prejudices will deny them business if they open their own practices. If these trends are extrapolated into the future, a profession that was 85 percent self-employed in 1948 and about 60 percent self-employed in 1980 soon may be more than half employees.

Finally, the changes in size, composition, structure, and function have serious implications for one of the characteristics most central to the concept of the profession—self-governance. First, the growing number of lawyers and their greater diversity have made it difficult for any single professional association to speak on their behalf. The result has been less a struggle for power within traditional organizations (the ABA and state and local bar associations) than the proliferation of rival organizations based on gender, ethnicity, age, politics, or functional specialization. These centrifugal tendencies threaten to rip apart that bulwark of professional control, the integrated bar, which combines compulsory membership with state power. In its place we may find a plurality of voluntary (and thus weaker) trade associations, free to pursue their self-interests, arrayed against a state regulatory agency over which lawyers exert

greatly reduced control.

Second, there is growing doubt, both within and outside the profession, about the capacity and commitment of lawyers to regulate themselves and, perhaps in response, growing encroachments on professional autonomy by external regulators. The recent revision of legal ethics by the ABA, a mere decade after the last major overhaul, revealed considerable normative dissensus among lawyers, perhaps reflecting their growing heterogeneity (Abel, 1981b). State disciplinary processes are periodically wracked by scandals about systematic under-enforcement. Some bar associations have transferred disciplinary responsibility to an independent state agency to avoid charges of self-dealing. Changes in the composition and structure of the profession also make effective discipline problematic. On the one hand, the large firm is a powerful bureaucratic organization in its own right, jealously guarding its control over its members and remaining relatively impervious to external influence. Similarly, neither existing ethical rules nor disciplinary mechanisms speak meaningfully to lawyers employed by business or government. On the other hand, if disciplinary investigations and sanctions continue to be focused disproportionately on lower status practitioners, as they have been in the past, these processes may become suspect not only for their class bias but increasingly for their racial discrimination.

External forces are eager to fill the vacuum presently left by ineffective or illegitimate professional self-regulation. Clients can act directly, either individually, as when they sue their lawyers for malpractice (which now occurs with greater frequency), or collectively, as when a labor union oversees the competence of lawyers serving its members through a group plan. In addition, government can act on behalf of consumers, as when the Supreme Court, the Justice Department, or the Federal Trade Commission challenges restrictive practices. Although American government is not the paymaster of private lawyers, as government is under legal aid schemes in other countries, this may yet occur, and it would greatly enlarge the amount of state intervention within the market for legal services. Thus the changes of the last decade have impaired the capacity of the profession to take unified action and witnessed the growth of both the consumer and the state as competing loci of regulation.

Professions are historically specific institutions for organizing the production and distribution of services. Only a few occupations have succeeded in attaining the status of a profession during the last hundred years. Because those that have done so

have granted their members high prestige, considerable wealth, and insulation from capitalist relations of production, many other occupations have emulated them, although with only mixed success. For the same reasons, lawyers have sought to retain their professional privileges, deploying both the force of tradition and the sentiments of nostalgia in a vain effort to resist change. But the experience of the last two decades strongly suggests that we are witnessing the decline of the professional configuration, if not yet its demise (Rothman, 1984).

Today the production *of* producers is occurring at levels that lawyers did not choose and through mechanisms over which they exercise little influence. Attempts to reassert control—by creating specializations that require further training, for instance—are merely partial measures at best and have the unfortunate side effects of promoting intraprofessional rivalry and fragmentation. Lawyers also have lost considerable control over production *by* producers; as a result, they find it more difficult to defend the restrictive practices that survive and suffer more intense competition, which accelerates the spread of capitalist relations of production within legal practice. To the extent that lawyers respond to this erosion of market control by adopting a strategy of demand creation, they run the risk of intensifying rather than moderating competition, becoming more dependent on the state rather than regaining autonomy, and organizing hitherto atomistic consumers into collectivities that can challenge professional dominance.

Lawyers today look less and less like a homogeneous category of independent professionals. Employees are a growing minority and soon will be a majority. Stratification into two hemispheres divided by backgrounds, clients, functions, structures, rewards, and associations is irreversible and growing (Heinz and Laumann, 1982). At the base of this hierarchy, the solo practitioner, who long embodied the ideal of professional autonomy, is facing an ever-more hostile economic environment, lost prestige, and a decline in numbers. At the apex of the hierarchy, the large firm is growing in size and prominence while simultaneously becoming more bureaucratic and less independent. As heterogeneity within the profession increases, stratification may come to be associated with racial and gender differences. If so, it will be seen as a form of illegitimate discrimination rather than an indispensable aspect of a benign meritocracy. Divisions of race, gender, age, class, structure of practice, and politics make it increasingly difficult for a single association to represent all lawyers. For similar reasons, professional self-regulation is being undermined from within at the

same time that it is being challenged from without.

Is it useful to continue viewing lawyers as members of a profession when they no longer control their market, when they are divided by demographic characteristics, rewards, structures, functions, and voluntary associations, and when they are losing the privileges of self-regulation? The following articles help to answer this vital question.

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