

"Trajectories of Professionalism?": Legal Professionalism After Abel

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I. INTRODUCTION

FEW SCHOLARS HAVE INFLUENCED THINKING about any area of scholarly enquiry in the way Richard Abel has influenced contemporary research on the legal profession. During the 1980's he chaired (with Philip Lewis) the influential "Working Group on Comparative Study of Legal Professions of the Research Committee for Sociology of Law of the International Sociological Association" and co-edited (again with Philip Lewis) three "state of the art" collections of essays produced by members of the Working Group: *Lawyers in Society: The Common Law World*,¹ *Lawyers in Society: The Civil Law World*,² and *Lawyers in Society: Comparative Theories*.³

In addition to this, Abel has authored two books of quite intimidating reach and scholarly completeness. His *The Legal Profession in England and Wales*⁴ is the most complete study available of the English legal profession from (roughly) 1800 to the present and is richly packed with information, much of it never previously available

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¹ Richard L. Abel and Philip S. C. Lewis (eds.) *Lawyers in Society: Volume One, The Common Law World*, (Berkeley: University of California Press, 1988) [Henceforth CLW].

² Richard L. Abel and Philip S. C. Lewis (eds.) *Lawyers in Society: Volume Two, The Civil Law World*, (Berkeley: University of California Press, 1988).

³ Richard L. Abel and Philip S. C. Lewis (eds.) *Lawyers in Society: Volume Three, Comparative Theories*, (Berkeley: University of California Press, 1988).

⁴ *The Legal Profession in England and Wales* (Oxford: Basil Blackwell, 1988) [Henceforth "LPEW"].

to researchers. At 548 pages including extensive bibliographies, an extraordinarily useful index, and nearly 200 tables, graphs, and charts the book would be a worthy *magnus opus* for any scholar. It was however only one of two such books published by Abel in a one year period - his *American Lawyers* is a comparable achievement in every respect.⁵

This alone would establish Abel's work as by far the most important body of scholarship on the legal profession to date. It is not all however. In addition to two substantial books, three co-edited collections of essays, and the administrative work involved in co-managing the working group, Abel has published at least 10 articles in learned journals in both the U.S.A. and England and edited a special issue of *Law and Policy* on the theme of "Lawyers and the Power to Change."⁶

⁵ Richard L. Abel, *American Lawyers* (N.Y.: Oxford University Press, 1989, 406 pp. incl. bibliography and index).

⁶ Richard L. Abel (ed), *Lawyers and the Power to Change* (special issue of *Law and Policy*, January, 1985); R. L. Abel, (1981) "Why does the A.B.A. Promulgate Ethical Rules?" (1980-81), 59 *Texas L. R.*, 639-688; "Law Without Politics: Legal Aid Under Advanced Capitalism" (1985), 32 *U.C.L.A. Law Rev.*, 474; "Comparative Sociology of Legal Professions: an Exploratory Essay" (1985), 1 *Am. Bar Foundation Research Journal*, 1-79; "The Underdevelopment of Legal Professions: Review Article on Third World Lawyers" (1982), 3 *Am. Bar Foundation Research Journal*, 871; "The Sociology of American Lawyers: A Bibliographical Guide," (1980), *Law and Policy Quarterly*, 335; "The Transformation of the American Legal Profession" (1986), 20 *Law & Society Rev.*, 7-18.; "Toward A Political Economy of Lawyers" (1981), 5 *Wisconsin Law Rev.*, 1117-1187; "The Decline of Professionalism" (1986), 49 *Modern Law Rev.*, 1-41.; W. Felstiner, R. Abel, and A. Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." (1980-81), 15 *Law & Society Rev.*, 631-54; "Between Market and State: The Legal Profession in Turmoil" (1989), 52 *Modern Law Rev.*, 285-325; "Taking Professionalism Seriously" (1989), 1 *Annual Survey of American Law* 41-63; "The Rise of Professionalism" (1976), 6 *British Journal of Law & Society*, 82. See also "Lawyers" in Leon Lipson and Stanton Wheeler (eds.) *Law & The Social Sciences* (N.Y., Russell Sage Foundation, 1986); and "The Contradictions of Legal Professionalism" in School of Justice Studies, Arizona State University, *New Directions in the Study of Justice, Law and Social Control* (N.Y.: Plenum Press, 1989), 17-42. Incredibly, this has not been at the expense of research and publication in other areas. Abel has also made major contributions to the study of tort law and delegalization. See: "A Critique of American Tort Law," (1981), 8(2) *British Journal of Law and Society*, 199-231; *The Politics of Informal Justice* (ed.) (N.Y.: Academic Press, 1982, 2 vols.); Lawyers in society. 1988; "Should Tort Law Protect Property Against Accidental Loss?" (1986), 23 *San Diego Law Review*, 79-123; "A Socialist Approach to Risk" (1982), 41 *Maryland L. R.*, 695-754; "Delegalization: A Critical Review of its Ideology, Manifestations and Social Consequences" (1980) 6, *Jahrbuch Fur Rechts-soziologie und Rechtstheorie*, 27-43.

This body of work is important for its breadth, its volume, and for the persuasiveness and consistency of the arguments presented. There is a focused intellectual power here which is unusual in legal scholarship. In very real ways, Richard Abel has defined the state of the art in this area. The appearance of five major books during 1988 and 1989 makes it possible to pause for breath - to reflect critically on where he has taken us and where we go from here. Future work will necessarily respond to Abel's formulations and in the last decade of the century scholarship will proceed from the baseline he has established.

Any summary of so much work produced over the period of a decade must inevitably over-simplify and, thereby, distort. At the acknowledged risk of sacrificing subtlety and nuance I will offer a brief account of Abel's conceptualization of the legal profession as a prelude to assessing the strengths and weaknesses of the model which he has championed. This paper concludes with speculation as to the directions in which scholarship might turn as a new millennium approaches. For convenience and because it is the legal profession I have studied most fully I will focus my comments largely on the formulations found in *The Legal Profession in England and Wales*. While his work on the U.S.A. legal profession (mis-named "American" lawyers) is more immediate, more engaged, and perhaps more sensitive to diversity, dissensus, and complexity within the profession, the two "volumes share the same analytic framework, [and] their theoretical chapters are similar."⁷

II. CRITIQUE OF STRUCTURAL-FUNCTIONALIST PERSPECTIVES ON PROFESSIONALISM

TO A LARGE EXTENT Richard Abel has championed a single cause: the assault on structural-functionalist models of professionalism. One of the great paradoxes in the historical development of common law capitalist states has been the simultaneous development of free market economies and modern "professionalism." According to the received historiography the nineteenth century golden age of laissez-faire witnessed a rampaging expansion of "professional" monopolies. State power, it is said, was routinely invoked in order to impose draconian limits on freedom of contract in huge areas relating to the

⁷ Richard L. Abel, *American Lawyers* (N.Y.: Oxford University Press, 1989), "Preface," at viii.

provision of services. Historians, economists, and sociologists have long posed the question of how and why almost fanatically free-trade economies permitted or encouraged the expansion of monopoly in the provision of legal services and health care, amongst others.

The structural-functionalist response is simple: professions serve to restrain the otherwise unfettered pursuit of self-interest in areas of work too important to be left to an unregulated free market and too sensitive or arcane to trust to state regulation. In Durkheim's classical formulation, the

amoral character of economic life amounts to a public danger... [T]he unleashing of economic interests has been accompanied by a debasing of public morality. We find that the manufacturer, the merchant, the workman, the employee, in carrying out his occupation, is aware of no influence set above him to check his egotism; he is subject to no moral discipline whatever and so he scouts any discipline at all of this kind.⁸

Structural functionalism asserts that the inevitably destructive consequences of unleashed egotism, are staved off in particularly sensitive areas by professionalism. In this vision professions are specially exempted from the ordinary rules of capitalism or social democracy under arrangements designed to ensure that service, not profit becomes the professional ideal. Assistance to clients and advance of the public good is said to supplant greed in professions: educational standards are established in order to protect the public, anti-commercial codes of ethics are articulated and enforced by self-governing professional organizations. As a sort of *quid pro quo* professions are granted a state-enforced monopoly to provide services, unlicensed competitors are suppressed, and very special powers of self-governance are granted to professional organizations. As Everett C. Hughes explained, professions are "occupations in which *caveat emptor* cannot be allowed to prevail and which, while they are not pursued for gain, must bring to their practitioners income of such a level that they will be respected and such a manner of living that they may pursue the life of the mind."⁹

⁸ Emile Durkheim, *Professional Ethics and Civic Morals* (1957) excerpted in Geoffrey C. Hazard, Jr. and Deborah Rhode, *The Legal Profession: Responsibility and Regulation* (2d ed.), (Westbury, N.Y.: Foundation Press, 1988) 86-90 at 89.

⁹ Everett C. Hughes, *The Sociological Eye*, 2 vols., (Chicago: Aldine-Atherton, 1971), vol. 1, p 364.

Structural-functionalist approaches have generated a set of "professional traits" - a sort of score-card by which occupations can be classified as professional or not. Adopting this framework, the English Royal Commission on Legal Services (Pearson Commission) reported in 1979 that a profession involved:

A governing body (or bodies) [that] represents a profession and ... has powers of control and discipline over its members.

[mastery of] a specialised field of knowledge. This requires not only the period of education and training ... but also experience and continuing study of developments in theory and practice.

Admission ... is dependent upon a period of theoretical and practical training ... in the course of which it is necessary to pass examinations and tests of competence.

[A] measure of self-regulation so that it may require its members to observe higher standards than could be successfully imposed from without.

A professional person's first and particular responsibility is to his client. ... The client's case should receive from the adviser the same level of care and attention as the client would himself exert if he had the knowledge and the means.¹⁰

The trouble with this structural-functionalist vision, as Abel comments, is that it reduces "sociological analysis to little more than professional apologetics."¹¹ In truth, governing bodies are rarely genuinely representative of the members of the profession and are grossly ineffectual in exercising control and discipline over their members. No study of legal education has yet been able to articulate clearly what exactly lawyers are supposed to derive from their University and/or professional educations, much less whether educational structures in place actually deliver the goods. The relationship of theory to practice is strained at best and no competent examination of the practical abilities of, for example, para-legals and lawyers, has demonstrated any superior degree of competence in the

¹⁰ *Royal Commission on Legal Services*, (London: H.M. Stationary Office, 1979), vol. 1, 28, 30, as quoted in Abel, LPEW, *supra*, note 4, at 6-7.

¹¹ LPEW, *supra*, note 4, at 7.

legal profession.¹² Correspondingly, while admission may be based on passing tests of various sorts the relevance of those tests to the tasks ultimately performed in practice has proved incapable of demonstration: we examine because we examine. Moreover, policies regarding transfers from other jurisdictions always strain the rationality of admissions decisions beyond the breaking point. Self-regulation may be merely regulation in self-interest. Sometimes it amounts to no regulation at all,¹³ while on other occasions it is transmogrified into brutal repression of practitioners who simply don't fit in.¹⁴ Client service is certainly a feature of professions but so also is domination of client, more or less deliberate efforts to engage in social control, exploitation of clients for one's own career advancement, and active efforts at silencing clients for a variety of reasons.¹⁵

III. ABEL'S MARKET CONTROL MODEL

THE MOUNTING WEIGHT of sociological, economic, and historical evidence against the structural-functionalist model has persuaded Abel - in common with many other scholars - that some other explanation for the phenomena of "professionalism" must be sought. Rejecting straight marxian frameworks of analysis as too crude ("class analysis is not a particularly powerful tool for understanding the legal

¹² Rhode, Deborah L. "Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions" (1981), 34 *Stanford L. R.*, 1-99.

¹³ See the discussion in Joan Brockman and Colin McEwan, "Self-Regulation in the Legal Profession: Funnel In, Funnel Out, or Funnel Away?" (1990), 5 *Canadian Journal of Law and Society*, 1-46. Much of Abel's work suggests this conclusion.

¹⁴ See J.S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America*, (New York: Oxford University Press, 1976); Pue, "Becoming Ethical: Lawyers' Professional Ethics in Early Twentieth Century Canada" (in Dale Gibson and W. Wesley Pue (eds.) *Glimpses of Canadian Legal History* (forthcoming); *Re Martin* [1949] 1 D.L.R. 105.

¹⁵ See variously Richard Ericson and P. Baranek, *The Ordering of Justice* (Toronto: University of Toronto Press, 1982); Douglas E. Rosenthal, *Lawyer and Client: Who's In Charge?* (New York: Russell Sage Foundation, 1974); Ivan Illich, et. al., *Disabling Professions*, (London: Marion Boyars Inc., 1977); Zenon Bankowski and Geoff Mungham, *Images of Law* (London: Routledge & Kegan Paul, 1976).

profession"¹⁶) and structural-functionalism as too uncritical, Abel declares himself in favour of an eclectic approach which fuses the best of these traditions with the insights of a version of market-control theory developed from the works of Max Weber, Terence Johnson and Magali Sarfatti Larson.¹⁷

By and large, however, the Abel thesis is centrally about market control.¹⁸ If structural-functionalism posits professionalism as serving the public interest, Abel's modified Weberian model posits professionalism as promoting the profession's *self* interest. The central purpose of professions is said to have little to do with community service, public good, advance of knowledge or the appropriate division of labour. Rather, professional structures are said to be created to facilitate control of the market for "professional" services in order to better advance the professional's self-interest: all the other "attributes" of professionalism are mere consequences of this urge to monopoly - window-dressing, if you wish. In Abel's formulation, professionalism is

a specific historical formation in which members of an occupation exercise a substantial degree of control over the market for their services, usually through an occupational association...

The foundation of market control is the regulation of supply... [O]ccupations that produce services constrain supply principally by regulating the production of producers... Market control is inextricably related to occupational status, not only symbolizing status but also enhancing it instrumentally, both by restricting numbers (because scarcity is an intrinsic measure of status as well as a means of increasing income) and by controlling the characteristics of entrants. Professions pursue market control and status enhancement through collective action. Having erected barriers to entry, professional associations seek to protect their members from competition, both external and internal. In order to avert external surveillance, they engage in self-regulation.¹⁹

Abel's great contribution to scholarship during the past decade has been to expand upon this vision, argue for it, develop it, constantly

¹⁶ LPEW, *supra*, note 4, at 25.

¹⁷ *Ibid.*, at 31.

¹⁸ *Ibid.*, at 7.

¹⁹ R. Abel, "England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors" in Abel & Lewis, CLW, *supra*, note 1, 23-75, at p.23-24.

prodding professional apologists to be more clear, precise, and coherent in articulating their own interpretations.

The modes of analysis employed have varied according to the subject matter and objects of a particular piece of writing. Always his writing is insightful, empirically well grounded, analytically well developed *and* highly critical of the legal/professional status quo. His discussions of codes of professional conduct ("etiquette," or "ethics") develop textual arguments to the effect that such codes are always so open-textured as to virtually fail to achieve rules whatsoever, that most explicit prohibitions are in principle unjustifiable, and that discipline is in any event so lax as to be meaningless. As regards legal education, he asserts that there is a massive degree of overtraining in relation to the law-jobs to be done and points to the fact that no study has ever demonstrated a close relationship between what law students learn and what lawyers do. Why then do lawyers have "ethical" codes and stringent educational requirements? Why, the better to effect market control of course!²⁰

IV. HISTORICAL FOUNDATIONS OF THE MARKET CONTROL MODEL

ABEL'S CONCEPTION OF "PROFESSIONALIZATION" is to a large extent developed from his understanding of the history of the legal professions in the United States of America and in England and Wales.²¹ The history of the last two centuries, he says, "offers unparalleled insights into the trajectory of professionalism."²²

Historical foundations are thus crucially important and they ground entirely his understanding of market control in the context of the professional "project."²³ Indeed, the core thesis may be said to involve

²⁰ Abel is, of course, more nuanced in his conceptualization than this short hand may suggest. See "Why does the A.B.A. Promulgate Ethical Rules", *supra*, note 6. The essentially materialist explanations he invokes do however lend themselves to summarization in this way. See LPEW, *supra*, note 4, at 61.

²¹ Abel has acknowledged the inadequacy of this model in relation to civil law jurisdictions. See his introductory essay in *The Civil Law World*, *supra*, note 2.

²² *Ibid.*, at 61.

²³ The designation of a "project" follows M. S. Larson's formulation in her *The Rise of Professionalism: A Sociological Analysis* (Berkeley: University of California Press, 1977) [henceforth, "Rise"]. Larson explains that "project" does not imply "that the goals and strategies pursued by a given group are entirely clear or deliberate for all the members,

the linked notions that professions are dynamically constituted as a result of historical processes, that modern "professions" derive their form from the specific circumstances relating to the market for services in the nineteenth century industrial world, and that evolving market conditions are making the continuation of this particular professional form increasingly unlikely.

Despite Abel's prodigious efforts to reclaim the history of the two legal professions in England, the portrait that emerges is significantly distorted in several crucial respects. In part this is merely a necessary consequence of any effort to present a coherent thesis at any reasonable level of generalization: specificity is the enemy of all theory.²⁴ It emerges also as an unfortunate, if unavoidable, by-product of reliance on extensive (and original) empirical research. As he observes, "quantification frequently sacrifices depth for breadth and complexity for the memorable but incomplete summary."²⁵ It also reflects the inadequacy of available secondary literatures. Histories of the professions are few and far between; many are incomplete, flawed, fragmented and/or partial. This is as much (or, more so) the case with respect to the legal profession as in any field of professional history. Eminent Australian historian, Wilfrid Prest, has observed that the study of professions suffers from "the dominance of a paradigm derived from a body of sociological theory which in turn rests on inadequate historical foundations."²⁶

Two problems arise from the present paucity of secondary sources on the history of the professions. The first is mere absence of research: "we simply do not have sufficient evidence - or rather, the evidence is

nor even for the most determined and articulate among them. Applied to the historical results of a given course of action, the term 'project' emphasizes the coherence and consistence that can be discovered *ex post facto* in a variety of apparently unconnected acts." So defined the term implies a degree of abstraction and essentialism which is no longer fashionable. It is, of course, anathema to history.

²⁴ On this point, see Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989), Ch. 4, "The Quest for a Feminist Jurisprudence"; W. Wesley Pue, "Wrestling with Law: (Geographical) Specificity vs. (Legal) Abstraction" (*Urban Geography*, 1990, 11, 6, pp. 566-585 [henceforth, "Wrestling"]).

²⁵ LPEW, *supra*, note 4, at 31.

²⁶ Wilfrid Prest, "Why the History of the Professions is not Written" in David Sugarman and G. R. Rubin (eds.) *Law Economy & Society: Essays in the History of English Law, 1750-1914* (Abingdon: Professional Books, 1984), 300-320, at 300.

not yet sufficiently explored - to determine whether or not the characteristics and functions of the professions changes drastically during, and as a result of, what it is convenient to call the Industrial Revolution.²⁷ The second problem is more subtle: existing research has tended to focus primarily on the development of professional organizations or institutional structures to the exclusion of research on other aspects of professional thought, life, culture.²⁸ This both blinds the researcher to processes of metasomatism within apparently unchanging professional forms (e.g. the English Inns of Court) and captivates her with mesmerizing dances of institutional transformation which, though intriguing in their own right, may ultimately signify little. The available historical work on professions is held captive to a sort of "teleological functionalism."²⁹ Both apologists for and critics of existing professional forms are equally within its grip. There is little evidence to be found in most research on the nineteenth and twentieth century legal professions of the more sensitive understandings that social historians would have us seek:

...the professions are not to be understood solely in material or social-structural terms, but also as cultural and intellectual artifacts; attitudes and beliefs held by and about members of the professions, the changing meanings attached to the term 'profession' itself, and the impact of professions upon the definition of particular areas of knowledge all form an integral part of their history.³⁰

None of this, of course, is the fault of Richard Abel. His work has sharpened focus, inspired debate and breathed new life into the (previously moribund) field of history of the legal profession. His writings have inspired others to take up the task and his own

²⁷ *Ibid.*, at 304.

²⁸ This is most evident in sociological writing which focusses attention on an alleged "wave of association" during the nineteenth Century. See: Larson, "Rise" *supra*, note 23, at 5, and Appendix Table 1.

²⁹ Prest, *supra*, note 26, at 305.

³⁰ Wilfrid Prest, "Introduction: The Professions and Society in Early Modern England," in Wilfrid Prest, (ed.) *The Professions in Early Modern England* (Beckenham: Croom Helm, 1987), 1-24 at 7. For a critique of the Prestian method see: W. Wesley Pue, "Rethinking 'Professionalism': Taking *The Professions in Early Modern England* Seriously" (1989), 4 *Canadian Journal of Law and Society*, 175-187 [henceforth, "Rethinking"].

historical research has been immensely valuable. He has dug deeper into professional history than almost any other researcher. Nevertheless, one has to make do with the tools available and the inadequacy of the developed literatures has hindered Abel's work. In the following section I will identify a few of the ways in which I believe that the state of existing literature has skewed the theorizations which Abel derives from the history of the profession. Because I too labour under similar conditions the following observations are tentative and partial. They are necessarily idiosyncratic though each, I believe, raises points which should be of general concern to students of professionalism.

V. PROBLEM 1: THE PECULIARITIES OF THE YANKS

ONE OF THE CENTRAL PROBLEMS facing historians of professions is the danger of being taken in too much by professional propaganda. In particular, caution is needed when approaching the frequent claims of professional leaders that long-standing tradition requires or permits one or other sort of action, institutional arrangement, or whatever. Here, as always, it is important to beware the invented tradition.³¹

The most pervasive myth associated with the legal profession is the notion that more or less "modern" professional forms have existed since time immemorial. Proponents of this historical interpretation assert that the Bar of England (falsely taken as coterminous with the "legal profession" in many such accounts) has enjoyed full rights of self-governance (including an associational framework, the right to restrict admissions, the power to engage in professional discipline, the regulation of professional conduct), independence from the state and a state-protected monopoly of legal practice since the origins of civilization itself.³²

³¹ See, E. Hobsbawm & T. Ranger (eds.), *The Invention of Tradition*, (Cambridge: Cambridge University Press, 1983).

³² Some take this search back to Roman times. For example, Roscoe Pound, "What is a Profession? The Rise of the Legal Profession in Antiquity" (1944), 19 *Notre Dame Lawyer*, 203; Roscoe Pound, *The Lawyer from Antiquity to Modern Times: with particular reference to the development of bar associations in the United States* (St. Paul, Minn.: West, 1953).

In a thoroughly reckless statement, the Law Society of Alberta put the virtually unintelligible position that despite its statutory creation in 1907, "[t]he origins of an independent legal profession can be traced to England in early times and are part of the development of constitutional government in both England and Canada." ("Submission by the Law Society of Alberta to the Council on Professions & Occupations Regarding

Well known developments in the United States of America in the nineteenth Century are projected as anomalous, a quirk, an outrageous example of democracy run amok. For students of comparative legal professions this raises the tricky historical question of how and why it came about that in the U.S.A. the organized legal profession was all but obliterated during the nineteenth century reign of "Jacksonian democracy"?³³ It has long been a starting point of "historical" studies of the common-law legal professions on both sides of the Atlantic that the socio-political culture of the U.S.A. during the nineteenth century was radically different from that which existed in the United Kingdom and that this, in turn produced importantly distinct professional forms. The argument from U.S.A. exceptionalism is usually couched in terms of a contrast between an alleged continuity of professional development from aristocratic roots in the U.K. with an asserted discontinuity under pressure from "extreme" forms of democracy in the Jacksonian era United States of America. Authors as diverse as Griswold,³⁴ Chroust,³⁵ Johnson,³⁶ Duman³⁷ and Larson³⁸ ritually invoke the theme that popular sentiments opposed to monopoly were peculiarly strong in the U.S.A. and that this

Discussion Paper: Principles and Policies Governing Professional Legislation in Alberta," January, 1990 p.8).

³³ Note, however, that "A revisionist historiography (Bloomfield, 1976; Calhoun, 1965) no longer uncritically accedes to Pound's (*supra*, note 32) sweeping judgment that 'an Age of Decadence' reigned from ... 1836 to ... 1870." [i.e. period of Jacksonian attacks]. [Wendy Espeland and Terence C. Halliday, "Resurrecting the Dead: Obituaries, Eulogies, and the Reconstruction of Professional Legitimacy in the Post Civil War Chicago Legal Profession", (paper presented at the session on Documents of Death and Stories of Life, annual meeting of the Social Science History Association, Chicago, November 1988).]

³⁴ Erwin N. Griswold, *Law and Lawyers in the United States: The Common Law Under Stress* (London: Stevens & Sons, 1964).

³⁵ Anton-Herman Chroust, *The Rise of the Legal Profession in America, Vol. II: The Revolution and the Post-Revolutionary Era* (Norman: University of Oklahoma Press, 1965).

³⁶ Terence J. Johnson, *Professions and Power* (London: MacMillan, 1972).

³⁷ Daniel Duman, *The English and Colonial Bars in the Nineteenth Century* (London: Croom Helm, 1983).

³⁸ Rise, *supra*, note 23.

produced a nineteenth century nadir of professionalism in that country.³⁹

While Abel is not taken in by the myth of British professional continuity he does go some considerable distance along the path of U.S. exceptionalism. Some sense of this is communicated under the heading "Lawyers Without a Profession" in *American Lawyers*:

The first hundred years of independence did not provide a favorable environment for the development of the professional configuration. Associations of lawyers were weak or nonexistent and confined to cities or counties, while states were becoming the significant unit of economic and political activity. The egalitarian ideology of the Jacksonian era was hostile to state-supported monopolies, as it was to all forms of inequality. But even before Jackson's election, several states and territories had abolished or greatly abbreviated apprenticeship, then the only requirement for entry to the profession. The frontier constantly beckoned to any lawyer who found it difficult to enter the bar in the more restrictive states or was unable to obtain sufficient business on the eastern seaboard. In 1800, fourteen out of nineteen jurisdictions required all lawyers to complete an apprenticeship, often extending five years...; by 1840 only a third of the states did so (eleven out of thirty), and twenty years later the proportion had dropped to less than a fourth (nine out of thirty-nine).⁴⁰

Rumours of professional stability in nineteenth century England have, however, been much exaggerated. The Bar for example was weak and its institutions were largely confined to London, while significant economic and political activity had shifted to the provinces. Prevalent political ideology was hostile to all monopolies, and entry standards to both the Bar and the attorney's branch were lax. Opportunities in the provinces, in the Imperial service, or in overseas colonies provided a "frontier" of diverse opportunities for lawyers unable to succeed in the capital.

Newly available evidence goes some considerable way towards putting the lie to grand theories of professionalization which rest on

³⁹ See: D. Boorstin, "The Colonial Experience," in *The Americans*, Chapter 7 (Harmondsworth: Penguin, 1965); J.F. Kett, *The Formation of the American Medical Profession: The Role of Institutions, 1780-1860* (New Haven: Yale University Press, 1968).

⁴⁰ *American Lawyers*, *supra*, note 5, at 40. At p. 10 Abel makes explicit the perceived contrast with European patterns of professional continuity: "Legal professions in other countries had evolved over long periods of time and could invoke tradition to justify contemporary practices. American lawyers, however, have twice suffered serious ruptures with their past - the revolutionary break with England at the end of the eighteenth century and the egalitarian attack on privilege that lasted from Andrew Jackson's election in 1840 until well after the Civil War."

some alleged fundamental structural, or ideological distinctiveness of "America." Far from finding any want of utilitarian or laissez-faire pressures being brought to bear on the English legal professions of this period, research on nineteenth Century England has revealed a country and legal professions awash with enough utilitarianism and laissez-faire spirit to make even the most committed Jacksonian proud. The rhetorics of reform and of free trade were everywhere: in the popular press, in professional journals, in speeches of attorneys attacking the prerogatives of the Bar, and in writings of barristers who happily cast 'etiquette' aside in order to engage in open competition with attorneys. Reports of Parliamentary committees investigating matters touching on the professions, legislation such as the County Courts Acts and their various provisions regarding representation, and debates about successive proposed reforms were all imbricated with ideologies which, in the United States of America, would have been denoted "Jacksonian." Such ideologies constituted a political mainstream, and not the utopian vision of some lunatic fringe.⁴¹

At the level of ideology and rhetoric, therefore, theses of professionalism which rely on U.S.A. exceptionalism seem doubtful at best. It might be protested however that this does not dispose effectively of such arguments. After all, it may be that the *effects* of "Jacksonianism" in deregulating legal practice were more destructive of inherited ("aristocratic") professional forms in the U.S.A. than was the case in the United Kingdom.

There are however any number of problems with this reformulation. In the first place the English Bar was in fact virtually without regulation of day to day practice throughout the period from *at least* 1846 to some time in the early to mid-1860's. This point was not lost on contemporaries.⁴² Both the Inns of Court and the Circuit Messes

⁴¹ I have probed these issues in several articles. See: "Moral Panic at the English Bar: Paternal vs. Commercial Ideologies of Legal Practice in the 1860's" (1990), 15 *Law and Social Inquiry* 49-118 [henceforth, "Moral Panic"]; "Guild Training versus Professional Education: The Department of Law at Queen's College, Birmingham in the 1850's" (1989), 33 *The American Journal of Legal History*, 241-287 [henceforth, "Guild Training"]; "Rebels at the Bar: English Barristers and the County Courts in the 1850's" (1987), 16 *Anglo-American Law Review*, 303-352 [henceforth, "Rebels"]; "Exorcising Professional Demons: Charles Rann Kennedy and the Transition to the Modern Bar" (Spring, 1987), 5 *Law and History Review*, 135-174 [henceforth, "Exorcising"].

⁴² See "Rebels", *supra*, note 41.

were ineffective and, for the most part, simply not interested in regulating the professional lives of practitioners. There were virtually no educational hurdles for aspiring barristers to overcome prior to admission⁴³ and, while social screening no doubt existed, this did not preclude the entry of individuals whose immediate origins lay in a relatively wide range of the professional and business classes. Indeed, sometime between 1835 and 1885 the percentage of barristers with landed origins actually declined.⁴⁴ Even after admission, the new barrister was often effectively immunized from mechanisms of informal socialization. These proved ineffective in an era in which local practices were established and railway commuting wreaked havoc on the social life of Circuit Messes.⁴⁵

It is important to remember too that any trans-Atlantic comparisons of "professionalization" in the practice of law must incorporate reference to both the attorney's and barrister's branches in England if the fused legal profession of the U.S.A. is to be reasonably approximated. The attorney's branch however had no national institution - effective or otherwise - during the crucial period.⁴⁶

⁴³ See "Guild Training", *supra*, note 41.

⁴⁴ See Duman, *supra*, note 37, Chapter 1, "The Character of the Profession," 1-32, at 16.

⁴⁵ See: "Rebels", *supra*, note 41; Raymond Cocks, *Foundations of the Modern Bar* (London: Sweet and Maxwell, 1983) [henceforth, "Foundations"].

⁴⁶ Abel quite properly points out that the Law Society of England and Wales was by and large a "local" London association during the nineteenth Century (LPEW, *supra*, note 4, at 242). Numerous local law societies were far more important in professional affairs than the Law Society of England and Wales well into the nineteenth Century [see, for example, the *Report of the Committee on Legal Education*, 1846]. Larson's dating of the Law Society of England and Wales, as a national qualifying association as of 1825 seems peculiar to say the least. In fact, the Law Society of England and Wales was formed in 1823, though not incorporated by Royal Charter until 1832. The office of National Registrar was not created until 1839, and the Society did not take over administration of the "roll" until 1843. Examinations only began in 1836 and 1837, and the Law Society did not begin providing regular courses of lectures for students until 1853. Only in 1860 did it become an offence to act as an attorney or solicitor without being on the Roll, and pretending to be a solicitor was not an offence until 1874. It was not until 1872 that the Metropolitan and Provincial Law Association merged with the Law Society, thus permitting the latter, for the first time to claim to speak authoritatively for all solicitors in the Country. Only in 1888 did the Law Society obtain the right to remove a solicitor's name from the Rolls. Membership of the Law Society - distinct from inclusion on the Rolls - was not compulsory and only in the 1930's was legislation passed under which membership might be made compulsory at some future date. [See: Brian Abel-Smith and

Educational standards were low, barriers to entry relatively undaunting, types of practice widely varied,⁴⁷ and on-going regulation of "ethics" non-existent. On neither side of the English legal profession is the monolithic, aristocratic, socially restricted, effective "profession" so beloved in the mythology of professionalism apparent.

None of this is counter-intuitive though it does run contrary to most of the received wisdom. Abel, who is not taken in by the mythology of professionalism, nonetheless relies largely on secondary literature, and has consequently been led down paths that are not always helpful. He is at pains, for example, to emphasize both peculiarities of the English legal professions (in order to account for the assumed divergence from the U.S.A. pattern of development) and distinctions between the two principal English legal professions (in order to account for their distinct "trajectories of professionalism"⁴⁸). Thus, his assumption that the Bar "always wielded complete control over its members"⁴⁹ certainly overstates the case and the purported contrast with the situation of the Law Society (which "had to work hard to persuade the courts to grant it control over misconduct"⁵⁰) is overdrawn. In fact no professional association of barristers enjoyed an uncontested legal right to adopt or enforce rules of etiquette or to discipline lawyers for misconduct until well past the mid-nineteenth Century.⁵¹

Both the composition of the two English legal professions and the workings of certain key institutions have been misunderstood in much of the historical writing relating to the period and this too has led astray those who write with a broad sweep. As regards composition, Abel asserts that the nineteenth century similarity of background of members of each "branch" made regulation easier in England and

Robert Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System, 1750-1965* (London: Heinemann, 1967), 53, 62, 188-192.]

⁴⁷ Complaints about "attorneys in low practice" were common. See W. Wesley Pue, "The Criminal Twilight Zone: Pre-Trial Enquiries in the 1840's," (1983), 21 *Alberta L. Rev.* 335-363 [henceforth, "Twilight Zone"].

⁴⁸ "The trajectories of professionalism" is the title of Ch. 19, LPEW, *supra*, note 4.

⁴⁹ LPEW, *supra*, note 4, at 305.

⁵⁰ *Ibid.*

⁵¹ The turning point was a peculiar "moral panic" at the English bar in the early 1860's. See Pue, "Moral Panic" *supra*, note 41; Pue "Exorcising", *supra*, note 41.

Wales than in the U.S.A..⁵² He subscribes to the view that “[t]he Bar was a small, homogeneous, geographically centralized collectivity performing a limited repertoire of functions”.⁵³ With respect to institutions, Abel follows Raymond Cocks in conceiving of the Bar’s Circuit Messes as efficient and sufficient organs of professional control⁵⁴ standing in sharp contrast to the Inns of Court, which he considers to have “exercised little formal control over either entry into the profession or practice by barristers”.⁵⁵

Again, however, the received wisdom misleads. Contrast, for example, the assumption that the attorney’s branch of the legal profession consisted of men drawn from a narrow social strata and engaged in a similar type of practice in juxtaposition with Sir George Stephen’s testimony before the 1846 *Select Committee on Legal Education*:

I should say that the attorney was selected from three classes. Sometimes tradesmen and shopkeeper have a very extensive business arising from their book debts and from doubtful securities; and they consider that it would be worth their while to place a son in the profession, in order that he may enjoy a business of that description. Merchants, for a similar reason, but with a higher class of business in view, are very frequently in the habit of placing their sons with solicitors. Another class, I may say consists of gentlemen of moderate means, of small and independent fortunes, not adequate to sustain the expense of educating more than one son or two for the Bar or Church; if they happen to have a third or a fourth, or if it so happens that one of their sons has been idle at Eton or Winchester or Harrow, and proves himself deficient in that kind of application which is essential to the study of the superior profession, the attorney’s is still a gentleman’s business, and they send him there, superseding the necessity of sending them to college, either to Oxford or to Cambridge, and thereby saving that expense.

⁵² LPEW, *supra*, note 4, at 307.

⁵³ CLW, *supra*, note 1, at 62.

⁵⁴ “Throughout most of the nineteenth century, the circuits rivalled the Inns as centres of social and professional life... For the first half of the century they remained sufficiently small to exercise considerable control over their members by means of informal sanctions... The circuits influenced entry and conduct through relatively unstructured patterns of authority that emerged gradually and depended on seniority and tradition...” (LPEW, *supra*, note 4, at 126). This analysis is based on the findings of Cocks, “Foundations”, *supra*, note 45.

⁵⁵ LPEW, *supra*, note 4, at 127.

...Then there is a third class of attorneys, who come from a much lower stock; they are young men who have probably been introduced in early days, at their early boyhood, at the age of 10 or 12 or 13, as soon as they could write, into an attorney's office, and employed as copying clerks. They pick up there a great deal of practical knowledge, more especially a great deal of familiarity with the peculiar business and papers of the clients of their employer; they remain in this office probably for five or six years, or perhaps seven or eight years, and they become of extreme value to him; and then the attorney, with a view to retain them upon a very moderate salary, and probably with a view of ultimately making them partners, to take off the burthen of his business, will article them; and you may say with great respect to a man of that sort, that he is suckled and cradled as an attorney.⁵⁶

Nor can it be assumed that some crucible of practice reduced this diverse raw material to a single social entity: nineteenth century literature is replete with both references to "attorneys in low practice" and tributes to the well bred leaders of that profession.⁵⁷

As regards the Bar too this assumption of homogeneity seems unsupported by the evidence. It is certainly logical to infer that a profession which required "gentlemanly" status, relatively heavy fees, high professional expenses *and* significant opportunity costs of its entrants would draw its members from a narrow class spectrum. The notion of a largely homogeneous bar is however derived from too simple a vision of class and culture. Nineteenth Century observers of the English legal professions were acutely aware of the diverse backgrounds from which barristers were drawn as well as of the very great variation in practices, life-styles, politics, and wealth which was actually attained by barristers in practice.⁵⁸ The *Law Lists* for the middle years of the nineteenth Century indicate that many barristers were involved in "local" (as opposed to Inns-based, metropolitan) practices. There was a widespread perception that this was common at the time and some such barristers achieved a considerable degree

⁵⁶ House of Commons, *Report From the Select Committee on Legal Education*, 25 August, 1846, 144-145.

⁵⁷ Some sense of this division of the attorneys profession is communicated in the 1846 Select Committee on Legal Education. Some similar remarks are recorded in Pue, "Twilight Zone", *supra*, note 47, (and sources cited therein).

⁵⁸ Some of this evidence is canvassed in my articles "Exorcising", *supra*, note 41, "Rebels", *supra*, note 41, "Moral Panic", *supra*, note 41.

of fame or notoriety.⁵⁹ If the Bar became small, homogeneous, geographically centralized and limited to a narrow range of functions, this was the result of processes played out during the nineteenth Century and was not an uncontested, "given" historical "fact."

The greater part of the Bar generally had little to gain and much to lose by adherence to Bar "etiquette" and many chose to be true to their own interest rather than to the artificial professional good manners prescribed by others. This has been obscured by histories which falsely presume tranquility in professional life. The outstanding historian of the English Bar, Daniel Duman, for example, takes the position that the threat of professional unemployment from increasing numbers of barristers was more apparent than real in the nineteenth century. He quite properly emphasizes that a variety of career routes were available to individuals who had been called to the bar (including private business, the colonial service, colonial bars, and the domestic civil service) but inaccurately presumes that "severe overcrowding at the English bar coincided with the emergence of new employment opportunities in the public service and in the law itself."⁶⁰ "These employment opportunities," he asserts, "prevented the emergence of a militant and powerful group of barristers who could have posed a major problem for Britain and may even have become a focus for social and political discontent, as had other lawyers in the not-so-distant past."⁶¹ While there seems little point in disputing that the revolutions in France and in the thirteen colonies during the previous century were more generally disruptive than anything which took place in England in the nineteenth, it seems unhelpful to evaluate developments within a profession in such apocalyptic terms.

It is apparent that an unruly mob of barristers - radical in their conception of appropriate barristerial practice - did indeed arise in the mid-nineteenth Century. This group was powerful enough to pose a serious threat to the continuation of more or less established relations between bar, attornies, and clients. Duman's methodology, however,

⁵⁹ For example, Charles Rann Kennedy, Solomon Atkinson, Charles Claydon. No adequate study of the practices of such barristers has ever been undertaken though each of these individuals is discussed in another context in Pue, "Exorcising", *supra*, note 41, "Rebels", *supra*, note 41, "Moral Panic", *supra*, note 41.

⁶⁰ Duman, *supra*, note 37, at 207.

⁶¹ *Ibid.* In a footnote Duman indicates that he is here referring to the English civil war and the revolutions in France and by thirteen North American English colonies.

involved statistical comparisons over long periods, inadvertently obscuring developments over five or ten years which had quite devastating impacts on the lives and careers of a generation of practitioners. Moreover, a certain present-mindedness intrudes. By inquiring into those "traits" of professions which are ascribed significance in modern theorizations, Duman tends to overlook some matters which were extremely important to contemporaries. This puts the theoretical cart before the empirical horse. In fact, of course, there *were* major disruptions in employment opportunities for barristers, there *were* crises of unemployment, and this *did* produce a professional "revolt" amongst junior - and some established - barristers. In the reality of human experience, significant dislocations take place in months and years, not the decades which are so convenient for historians. Again, "must have been" histories evaporate under investigation.

VI. PROBLEM 2: LACK OF KNOWLEDGE REGARDING 19TH CENTURY BAR INSTITUTIONS

OTHER, LESSER, MIS-INTERPRETATIONS permeate the histories of the English Bar, further eroding confidence levels in available theorizations. Contrary to received wisdom, for example, it cannot be said with any degree of confidence that Circuit Messes provided effective locii of discipline or socialization in the nineteenth Century Bar. Certainly, Raymond Cock's exemplary work has illustrated that the Norfolk Circuit Mess acquired significant "professional" (as opposed to purely social) functions early in the nineteenth Century⁶², but historians simply do not know whether this was replicated elsewhere in England. It is much to the shame of the English Bar that its nineteenth Century circuit records are not carefully maintained, are not inventoried, have not been studied by researchers, have not been deposited in archives, and may in many cases not even be preserved. What is known is that the Midland Circuit Mess was a remarkably ineffectual professional organ until scandal propelled it into action in the early 1860's. What happened outside of these two circuits (and within them at different times) is entirely unknown.

Similarly, the impotence of the Inns as disciplinary bodies is grossly overestimated. These institutions did not develop into full-fledged disciplinary regimes until late in the nineteenth century (if then). This

⁶² Foundations, *supra*, note 45.

is a far cry however from suggesting that disciplinary action by the Inns of Court was non-existent or ineffective. Indeed, construing discipline widely to include, as I believe we must, anticipatory discipline (admissions screening), censures (such as that implied by refusal to admit newly appointed Queen's Counsel to the Bench table), as well as ex post facto punishment for discreet offences to the Bar's sense of propriety, the Inns of Court were remarkably effective in suppressing certain kinds of voice within their profession. Throughout the nineteenth Century their disciplinary power was exercised with remarkable consistency to suppress *political* dissent, silencing, expelling or ruining a wide array of political radicals, chartists, democrats, republicans and overly zealous Liberal reformers.⁶³ Thus, while it is in a sense accurate to assert that "until the end of the nineteenth century the Inns exercised little formal control over either entry into the profession or practice by barristers"⁶⁴, it is important to be aware that small numbers of disciplinary cases does not necessarily connote small effect on the nature of legal practice. In very real ways "professional discipline" constrained the developing professional and political discourses of nineteenth Century England.⁶⁵

⁶³ This is apparent from a review of the disciplinary proceedings as recorded in the Bencher's minutes of the four Inns of Court from 1800 to 1900.

⁶⁴ LPEW, *supra*, note 4, at 127.

⁶⁵ In general, the pattern of disciplinary proceedings (as such) in the nineteenth Century Bar reveals hesitant and sporadic disbarments prior to about 1860 and a quickening pace and increasing confidence of professional discipline following the disciplining of Edwin James, Charles Rann Kennedy, Charles Claydon and Digby Seymour in the early 1860's. Discipline in other guises, however, limited admissions and calls in the earlier period. Professional "etiquette" was viewed by contemporaries as "somewhat vague and difficult to define precisely" (Art. IV.- "The Etiquette of the Bar," *Law Magazine*, 1857, 236-259, at 237) but generally was characterized by a heavy emphasis on the qualities of "gentlemen," and a strikingly anti-commercial conception of legal practice. In fact, most of the distinctions between eighteenth and nineteenth century professionalism which Duman, (*supra*, note 37, at 178-179) points to were matters of hot contention in the 1850's. The danger of overgeneralization when ideology is described is ever-present but it may be said with some confidence that the appearance of Mr. J.S. Shaw-Lefevre's 1863 pamphlet "The Discipline of the Bar" (*Law Amendment Society Transactions*, 1860 - 1863, February 2, 1863, p. 32; cited approvingly by Dicey, "Legal Etiquette," 8 *Fortnightly Review* 169 at 175), offering an extensive account of the rules of etiquette "fixed" etiquette in a new way. (cf. LPEW, *supra*, note 4, at 133, following Cocks and Duman in identifying the first published account of Bar etiquette in 1875.).

This raises another key point: much of the literature on the development of the legal profession directs attention to the matter of professional discipline but leaves unaddressed the crucial questions of who is disciplining whom for what. An abstract, decontextualized approach to any invocation of punitive power is inadequate; specific, context sensitive analysis is needed. Much work on the legal profession, including some⁶⁶ (not all⁶⁷) of Abel's work falls into an unfortunate naivete regarding the enforcement of ethics. Professional discipline is equated with "professionalism" and its absence is assumed to indicate a failure to protect the public. While such a strategy is useful in pricking holes in the overweening self-confidence of structural-functionalism's emphasis on protecting the public interest, it ignores fundamental questions regarding the potential for abuse of power within professions and a number of wider political issues.

VII. INTO THE FUTURE: BEYOND MARKET CONTROL?

ALL OF THIS SUGGESTS that there may be problems with the market control model - at least with respect to the historical interpretations on which it is based, its historical explanatory power, and the issues which it obscures. The model itself imports overtones of determinism notwithstanding the best efforts of its promoters to distance themselves from any such unfashionable intellectual position.⁶⁸ In order to discern any coherent professional "project" whatsoever, great damage is inevitably done to cultural and historical specificity of every sort.

The market model cannot sufficiently account for the role of the state in the construction of professionalism. It also renders clients largely invisible, writing them out of both history and contemporary society.⁶⁹ The model obscures the contested nature of "professionalism" both in the larger society and within the bounds of the legal

⁶⁶ For example, LPEW, *supra*, note 4, at 249-250; 254.

⁶⁷ See, for example, Abel, "Why does the A.B.A. Promulgate Ethical Rules?" (1980-81) 59 *Texas L. R.*, 639-688.

⁶⁸ *Ibid.*, for example (denying any intent to promote a "conspiracy" thesis - which admittedly is not the same thing as philosophical determinism).

⁶⁹ See, however, Abel, "Lawyers" in Lipson and Wheeler (eds.), *supra*, note 6.

profession. There is a tendency for profound and deep divisions within the profession(s) to be ignored or under-emphasized in all research which purports to salvage a discernible "project" from the messiness which is history.

In a sense this is but one manifestation of the inability of the market-control model to accommodate a sophisticated appreciation of professional "ideology." Like all variations of economism it tends to reduce ideology to little more than a mystification trick deliberately designed to dupe outsiders into acquiescence in their own exploitation. Professional ideology is not taken seriously on its own terms, and the relationship of professional ideology to larger currents of intellectual thought is under-emphasized.⁷⁰

"Culture" is mere "epiphenomena" in accounts which privilege the economic. This is as true of market control theories of the legal professions as it is of social theory more generally. "Market control" - even adapted, as Abel would have it, to accommodate the pursuit of status as well as the pursuit of wealth - is not a framework into which an appreciation of the culture of professionalism can easily be integrated. "Professionalism" was rampant in Anglo-American society during the nineteenth Century (as market-control theorists acknowledge) and was far more pervasive in its reach than explanations which focus on the internal manipulations of professional self-interest can accommodate.⁷¹ In an outstanding treatment of professional culture in nineteenth century United States of America, Burton Bledstein emphasizes the ways in which "professionalism" resonated with (indeed, was) Victorian middle-class culture.

For middle-class Americans, the culture of professionalism provided an orderly explanation of basic natural processes that democratic societies, with their historical need to reject traditional authority, required. Science as a source for professional

⁷⁰ For example, in LPEW, *supra*, note 4, Abel treats the development of various sorts of legal aid schemes in the United Kingdom as being a consequence of the economic circumstances of the legal professions. Here he ignores larger ideological contexts including the professional commitment to public service, the ideology of equality before the law, the advance of social democracy in the United Kingdom between WWII and 1979, the youth movements of the 1960's, a genuine paternalism which infused British elites, and an honestly held belief in the desirability of the Rule of Law. As regards legal aid arrangements, see LPEW, (228-234); see also the discussion of professional discipline at 248 ff. Contrast however Abel, "Law without Politics" *supra*, note 6.

⁷¹ See, for example, Harold Perkin, *The Rise of Professional Society: England Since 1880*, (London: Routledge, 1989).

authority transcended the favoritism of politics, the corruption of personality, and the exclusiveness of partisanship.⁷²

Again, Bledstein argues that

Mid-Victorians would structure life, its space, its words, its time, and its activities. And professionalism with its cultural rituals, ceremonies, and symbols satisfied this need. Mid-Victorians cultivated a new vision, a vertical vision that compelled persons to look upward, forever reaching toward their potential and their becoming, the fulfillment of their true nature. This new vision liberated Americans skyward, in space, time, and rhetoric.⁷³

So conceived, professionalism with its barriers to entry, educational requirements, disciplinary policing, and other accoutrements, is much, much more than the assertion of a deliberately protectionist monopoly: it is a working out of modernity in public life. Professionalism is imbricated in a vision of society in which *rationaly* constructed *expert* knowledge is brought to bear on the problems, great and small, facing humanity. Bledstein's "culture of professionalism" mirrors Habermas' "project of modernity" which, according to Harvey,

came into focus during the eighteenth century. That project amounted to an extraordinary intellectual effort on the part of Enlightenment thinkers 'to develop objective science, universal morality and law, and autonomous art according to their inner logic.' The idea was to use the accumulation of knowledge generated by many individuals working freely and creatively for the pursuit of human emancipation and the enrichment of daily life. The scientific domination of nature promised freedom from scarcity, want, and the arbitrariness of natural calamity. The development of rational forms of social organization and rational myths of thought promised liberation from the irrationalities of myth, religion, superstition, release from the arbitrary use of power as well as from the dark side of our own human natures. Only through such a project could the universal, eternal, and the immutable qualities of all humanity be revealed.⁷⁴

⁷² Burton J. Bledstein, *The Culture of Professionalism: The Middle Class and the Development of Higher Education in America* (New York: W.W. Norton & Co., 1978), 90. [henceforth, "Culture of Professionalism"].

⁷³ *Ibid.*, at 105.

⁷⁴ David Harvey, *The Condition of Postmodernity: An Inquiry into the Origins of Cultural Change* (Oxford: Basil Blackwell, 1989), 12. The quotation is from J. Habermas, "Modernity: an incomplete project" in H. Foster (ed.) *The Anti-Aesthetic: Essays on Post-Modern Culture* (Port Townsend: Bay Press, 1983), at 9.

This homology between modern professionalism and "modernity" raises three implications which are hard to accommodate within a market control model. First, it raises questions about the historical sociology on which contemporary understandings of professionalism are founded. Second, it directs attention to aspects of contemporary professional practice which may sit uneasily with notions of "market control". Third, it raises questions relating to the future of professionalism itself (not just the future of scholarship on professionalism).

Resort to a cultural explanation of "professionalism" allows a fuller understanding as to why something like modern professions arose in all of the developed world (and its colonies) during the nineteenth and twentieth centuries despite wide variations in local economies. Professionalism became an ideology on which the sun never set in part because of a seemingly inevitable logic: it is so very *rational*. Sensitivity to the cultural construction of professionalism also suggests reasons why "professionalism" was fought for in times past and why it was resisted. Properly understood, professionalism was part of a *political vision* which rocked pre-existing structures of power and authority while simultaneously constraining populist political activity. "Professionalism's" insistence on cognitive exclusivity, education, a systematic body of knowledge and the virtues of practical experience assailed traditional elites, promising newly democratizing societies a way of transcending "the favoritism of politics, the corruption of personality, and the exclusiveness of partisanship."⁷⁵ Its dark side, however, is the elitism which lurks in meritocracy: "...the culture of professionalism required amateurs to 'trust' in the integrity of trained persons..." and "[n]o metaphysical authority more effectively humbled the average person."⁷⁶

⁷⁵ "Culture of Professionalism", *supra*, note 72, at 90.

⁷⁶ *Ibid.*, at 90, 105. Blaine Baker's writing has made it clear that the motivation for many actions of the law society in nineteenth century Ontario was to create an indigenous ruling class of elite, Tory lawyers: "education, occupational status, and manners distinguished the Upper Canadian gentleman, since land was so easily acquired and commercial opportunities were few." (Blaine Baker, "Legal Education in Upper Canada 1785-1889: The Law Society as Educator" in David H. Flaherty (Ed.) *Essays in the History of Canadian Law* (Toronto: Osgoode Society, 1983), 49-142, at 57-58.

A number of authors have pointed to the "disabling" character of professionalism whereby citizens see their autonomy diminished by the claims of experts to deference. For example, Ilich *et. al.*, *supra*, note 15; Z. Bankowski, and G. Mungham, *Images of*

If "the logic that hides behind Enlightenment rationality is a logic of domination and oppression,"⁷⁷ so too the logic of professionalism is at once a logic of liberation and of bondage. Recognizing this provides motivation for historians to reclaim from posterity's condescension the resistances which have confronted developing forms of professionalism in each generation - resistances which are themselves obscured, glossed over, or written out of histories which seek to describe coherent professional "projects." Conceiving of professionalism as a cultural construct developed within an irrepressible wave of "modernity" directs attention to the deliberate *political vision* of lawyers whether Tory (as in the case of Blaine Baker's nineteenth Century Ontario lawyers⁷⁸), Whig (as in the case of England's insurrectionist barristers Kennedy, Seymour and James⁷⁹), populist (eg. Kenealy)⁸⁰ or radical (eg. Roberts,⁸¹ Harvey⁸²). It directs atten-

Law (London: Routledge & Kegan Paul, 1976).

Taking similar issues somewhat more widely, H.W. Arthurs has directed attention to the dis-empowering politics of "legalism" at length in his *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985). Mr. Justice Sopinka of the Supreme Court of Canada developed quintessentially "professional" arguments as to why Canadians should not have the benefit of public review of appointments to that court in his "Limited Value in Confirmation Ritual," *Financial Post*, August 15, 1988.

⁷⁷ M. Horkheimer and T.W. Adorno, *The Dialectic of Enlightenment*, John Cumming (trans.) (New York: Herder & Herder, 1972) as accounted for in Harvey, *supra*, note 74, at 13.

⁷⁸ See: G. Blaine Baker, "The Juvenile Advocate Society, 1821-1826: Self-Proclaimed Schoolroom for Upper Canada's Governing Class", [1985] *Historical Papers*, Canadian Historical Association, 74 (1986); "Legal Education in Upper Canada, 1785-1889: The Law Society as Educator", in David H. Flaherty, ed. *Essays in the History of Canadian Law*, vol. 2, 49 (2 vols.) (Toronto: Osgoode Society, 1981-3); "The Reconstitution of Upper Canadian Legal Thought in the Late Victorian Empire" (1985), 3 *Law and Hist. Rev.*, 219; "So Elegant a Web: Providential Order and the Rule of Secular Law in Early Nineteenth Century Upper Canada" (1988), 38 *University of Toronto Law Journal* 184-205.

⁷⁹ See Pue, "Moral Panic"; "Rebels"; "Exorcising" all *supra*, note 41.

⁸⁰ Arabella Kenealy, *Memoirs of Edward Vaughan Kenealy LL.D.* (8 vo., 1908); Michael Roe, *Kenealy and The Tichborne Cause: A Study in Mid-Victorian Populism* (Melborne: Melborne University Press, 1974).

⁸¹ See: Raymond Challinor, *A Radical Lawyer in Victorian England: W. P. Roberts and the Struggle for Workers' Rights* (London: I. B. Tauris & Co. Ltd., 1990).

tion to the distributive, racial, class and ethnic consequences of otherwise unproblematized notions of "professional ethics"⁸³) and explains, perhaps, why legal education is perpetually in turmoil!⁸⁴

Adopting a cultural rather than merely economic account of professionalism also permits account to be taken of aspects of legal work which are not easily accommodated within a market control model. It is only superficially paradoxical that the model fails to account for *both* lawyering as social control *and* the role of lawyers as conceptive ideologists for hire: intellectuals for rent who think, and therefore constitute the form of, the emergent relations of capitalist society.⁸⁵ Both the silencing of clients and the reformulation of their demands by professional "advisers" has profound political, economic, and moral implications, albeit most lawyers do not deliberately manipulate their clients for their own (or anybody else's) ends.⁸⁶

⁸² British Hansard Debates 13 May 1834 Vol. #23 Col. 893-937 (Reproduces speeches of Baring, O'Connell, Lennard, Scarlett, Hill, Halcombe, Lord Althorp, Cutlar Fergusson, Dr. Lushington on motion to appoint a Select Committee to investigate governance of Inns and admissions to the Bar - Extensive discussion of Wooller and Harvey cases).

⁸³ See Auerbach, *supra*, note 14; Pue, "Becoming Ethical: Lawyers' Professional Ethics in Early Twentieth Century Canada" (in Dale Gibson and W. Wesley Pue (eds.) *Glimpses of Canadian Legal History* (forthcoming); Philip Schuchman, "Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code" (1968) 37 *George Washington Law Review*, 244; Jerome E. Carlin: *Lawyers on their Own: A Study of individual practitioners in Chicago* (New Brunswick, N.J., Rutgers University Press, 1962), esp. Ch. 4 and Ch. 5. In *Lawyers' Ethics: A Survey of the New York City Bar* (N.Y.: Russell Sage Foundation, 1966) Jerome E. Carlin observes that "the few lawyers who are officially disciplined are, for the most part, precisely those whose low status renders them least capable of conforming to the ethical standards of the bar." (at 162)

⁸⁴ See Pue, "Guild Training", *supra*, note 41. I have provided a brief and admittedly idiosyncratic account of more contemporary developments in "Wrestling", *supra*, note 41.

⁸⁵ Maureen Cain, "The General Practice Lawyer and the Client: Towards a Radical Conception" 7 *I.J.S.L.* (1979), 331-354 at 335.

⁸⁶ Maureen Cain, *op. cit.*, has suggested that it is naive and implausible to assume that lawyers actively subvert their clients' wishes in the bulk of lawyering work. Certainly, her arguments are powerful and persuasive - at a macro-scale. Nonetheless, the silencing of clients is too well documented in certain areas to overlook. See, for example, Ericson & Baranek, *supra*, note 15; Rosenthal, *supra*, note 15; Austin Sarat and William Felstiner, "Law and Strategy in the Divorce Lawyer's Office" (1986), 20 *Law & Society Review*, 93; Austin Sarat and William Felstiner, "Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction," (1980), 22 *Law & Society Review*, 737.

One important aspect of recent scholarship touching on the practice of law deals with the relationship between legal knowledge and social life. These should not be conceived of as two distinct spheres occasionally colliding and bouncing off each other but rather as inseparable elements of interpenetrated, fluid, complex and continuously transforming wholes. The insights of Llewellyn and Hurst respecting the political-economic effects of drafting have entered into a sort of mainstream conception of lawyer's work. It is flattering from one point of view to think that ordinary lawyers in their offices may have facilitated the transition to modern mass-market capitalism. The more significant point is however much deeper - and much more finely textured - than this. Quite apart from "doing" or "facilitating," legal practitioners are also, as Robert Gordon points out, "engaged in the task of trying to explain and rationalize what they see happening in the world in terms of some general normative conceptions... [E]very legal practice - from drafting a complaint for simple debt to writing a constitution - makes a contribution to building a general ideological scheme or political language out of such explaining and rationalizing conceptions."⁸⁷

In part, this recognition arises from a sophisticated version of contemporary social thought nascent within theory of ideology, language theory, cultural theory or the study of representations. Harrington and Yngvesson make explicit the consequences of such conceptions of ideology for an appreciation of day to day legal work, pointing to

the differences between an analysis of ideology as consciousness and an analysis of ideology as practice and suggests the political significance of this move in decentring the role of law. Law as ideology is not a sphere from which meanings emerge and to which meanings are carried back, and practice is not a process separable from law. Rather, law is found, invented, and made in a variety of locations (mediation sessions, clerks' hearings, welfare hearings, social movements, lawyers' offices, classrooms), through a variety of practices *which are themselves ideological*. Key symbols such as 'neutrality,' 'community,' 'family trouble,' 'neighborhood disturbance,' or 'lovers' quarrel' are produced

⁸⁷ Robert W. Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920" in Gerald Geison (ed.) *Professions & Professional Ideologies in America* (Chapel Hill: University of North Carolina Press, 1983), 72.

in these practices rather than simply imposed by legal authorities or 'brought into contact with one another' through the agency of legal officials.⁸⁸

This "decentring" of law writ large logically requires a *recentering* of lawyers work at even the most mundane level.⁸⁹

As a matter of both historical understanding of the legal profession and a contemporary sociology of lawyering a recognition of this ideological function "at every bloody level" suggests research questions and insights which might otherwise be unavailable. Lawyers and those concerned with lawyering have, of course, long understood that more is at stake in the system of legal representations than mere "dispute resolution," "facilitation," planning or whatever. This simple appreciation has produced far-reaching consequences. Quite extraordinary oppressions of legal practice have arisen out of a desire to silence potentially dangerous discourses within the (privileged) "legal" arena. The history of various silencing strategies and resistances to them can make little sense if this is not appreciated. Lawyers' obsession with courtroom architecture, dress, mannerisms &

⁸⁸ Christine B. Harrington & Barbara Yngvesson, "Interpretive Sociolegal Research" (1990) 15 *Law & Social Inquiry* 135-148, 142. M. S. Larson, "Rise", *supra*, note 23, in fact directed the attention to the role of professionals as "organic intellectuals" in the preface to that book (xiv-xv). Her work at that point in time, and most of what has been inspired by it, has however failed to tease out the implications of this acknowledgment and largely glosses over what she identifies as the "normal" professional role: "consciously articulating, propagating, and organizing culture and ideology..." (xiv). In any event, that work (to be distinguished from Larson's subsequent publications) largely adopts a vision of "dominant" or subordinate ideologies which does not permit of the same degree of fluidity as contemporary social theory of the sort Harrington & Yngvesson promote.

⁸⁹ Harrington & Yngvesson, *op. cit.* at 143: "In this relational concept of power, officials are seen as participants in power relations, both as constrainers and the constrained. While official power is often more studied and even at times more obvious than power that is not officially recognized; interpretive analysis of power at work in everyday practices examines how common-sense understandings are forged. The authority of official power is produced not simply within the legal system but in local interpretive communities where the common sense of law in society is created. When sites for the production of law are classified as 'low' or 'trivial', or when disputes in "lower" courts and mediation programs are labeled 'petty,' a hierarchy of law is created, implying that there is a more or less 'real' centre of law... distancing law from the sites where it is produced, and locating power outside the relational contexts in which it operates."

speech is one manifestation of this awareness⁹⁰ and none of the hotly contested history of the English Bar's admission standards or disciplinary regimes can be the least intelligible if this is not appreciated.

For example, one of the most arcane of nineteenth Century Bar rules was that prohibiting clergymen from becoming barristers - a rule that even Victorian barristers could not hope to understand.⁹¹ To know that the "rule" was first discovered at a time when radical clergyman John Horne Tooke sought admission⁹² however makes

⁹⁰ See, for example, Bankowski & Mungham, "The 'Dramaturgical' Perspective on Courtroom-Tribunal Settings," in Bankowski, *supra*, note 15, at 100-102; *Re: Samson & the Queen* (1975), 50 D.L.R. (3d) 365 (N.S.S.C.) 369 (on issue of whether, in order to create an atmosphere conducive to justice, a magistrate could compel barristers to robe); Douglas Hay, "Contempt by Scandalizing the Court: A Political History of the First Hundred Years" (1987), 25 *Osgoode Hall Law Journal*, 431-484; Pue, "The Clash over the Image of the Legal System and Reality" *Globe and Mail*, December 30, 1986; Marion MacRae and Anthony Adamson, *Cornerstones of Order: Courthouses and Town Halls of Ontario, 1784-1914* (Toronto: Osgoode Society, 1982); Peter Gabel and Paul Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law," (1982-83), 11 *New York University Review of Law and Social Change*, 369.

⁹¹ The Inns of Court became obsessed with this issue in the mid- nineteenth Century. See for example: Gray's Inn Pension Minutes, Vo. XVII, 1882-88, 65, 66, 192, 191, 195, 210; Inner Temple, Bench Table Orders, 13 January, 24 January, 27 January, 31 January, 8 February, 16 February, 25 April, 28 April, 2 May, 5 May, 1865; Parliament Minutes of Middle Temple, 1840-1855; April and May, 1865 ff.472, 484, 485.

See also Index to Lincoln's Inn Black Book, Vol. 30, 1863-1865; *The Jurist* (n.s.) 1865 Vol.# 11 pt. 2, 51-52, which discussed the case of F.H. Lascelles as the first barrister to be called *after* taking holy orders and suggests that clergymen will flood the Inns of Court for admission now as the former barrier appears to be removed with the admission of Lascelles. (Previously, the only clergymen at the bar were those who were called before they were ordained.)

⁹² John Horne Tooke, (1736-1812) *Webster's Biographical Dictionary* (Springfield: G. & C. Merriam Company, 1976) 1478 was an English political radical and philologist; ordained to a curacy (1760); he met Voltaire and John Wilkes when traveling abroad as a tutor. He was fined and imprisoned for 1 year (1778) for promoting subscription for relief of relatives of Americans "murdered" at Lexington and Concord; refused admission to bar; elected as M.P. in 1801 but excluded by special act rendering clergymen ineligible. See also: *Dictionary of Biographical Quotation* (New York: Alfred Knopf, 1978) Pages: 739-740. Also discussed in Henry Brougham, *Statesmen in the Time of George III*; William Hazlitt, *The Spirit of the Age, or Contemporary Portraits*, (London: Oxford University Press, 1904). The political character of the Bar's decision to exclude clergy from admission is made clear in: T.J. Wooler, *The Case Between Lincoln's Inn, the Court of King's Bench and Mr. T.J. Wooler with a Critical Commentary* (London: Henry Butterworth, 1826) [henceforth, "Wooler's Case"]; British Hansard Debates 13 May

sense of that which is otherwise nonsensical. So too, a "rule" was nearly developed to prevent the admission of individuals who earned their living by writing for the press⁹³ and, at all events, means were found to exclude the likes of Thomas Wooler, editor of the *Black Dwarf*.⁹⁴ The rules against attorney admissions to the Bar were tightened up specifically in order to prevent the radical Member of Parliament Daniel Whittle Harvey from gaining admission.⁹⁵

What is in issue in all cases of this sort is much more serious than a mere attempt to preserve an economic monopoly. In each such situation the protagonists *and* their opponents were acutely aware that their battles were grounded in - and had consequences for - fundamental visions of social ordering. The "official" sanctioning of expertise speaks not just to technical competence but also to visions of social ordering and appropriate conduct. All aspects of barristering, from the courtroom through providing "counsel's opinions" and legal drafting, directly impacts on conceptions of what it means to be human and the related question of how social co-existence should be managed: politics, in short.⁹⁶ At all times established elites have an

1834, Vol.# 23, Col. 893-937; D.W. Harvey, *The Speech and Reply of D.W. Harvey ... In the House of Commons, on Moving for Leave to bring in a Bill to Empower the Court of King's Bench to Regulate the Admission of Students and Barristers*. (London: James Ridgway, 1832).

⁹³ *Lincoln's Inn Black Book, Vol. 19, 1806-1815*, 15 May, 1809 (f.) 68 records a resolution of 1807 "That no person who has written for hire in the Newspapers shall be admitted to do Exercises to entitle him to be called to the Bar." - [this is crossed out with the notation that the Order was rescinded 16 May, 1810.].

⁹⁴ *Lincoln's Inn Black Book, Vol. 21, 1823-1829*, 11 February, 1825; *Lincoln's Inn Black Book, Vol. 21, 1823-1829*, 7 November, 1825, 170-71; "On the Power to Disbar" 28 *Legal Observer* (1844) 465-67; "Wooler's Case"; *British Hansard Debates* 13 May 1834 Vol.# 23 Col. 893-937 (extensive discussion of Wooler and Harvey cases); "The Bar, the Benchers and the Judges" 4 *Law Review* (1846) 183-208; *The King v. The Benchers of Lincoln's Inn 2 Property Lawyer* 1825, 256-60; D.W. Harvey *supra*, note 92; *Mirror of Parliament* 13 May 1834 [Reproduced in D.W. Harvey, "Letter to Lord John Russell," 1852 at pp. 17-52]; *R. v. The Benchers of Lincoln's Inn 28 The Revised Reports*, 482-487 (1825) (4 B & C p. 855).

⁹⁵ See sources cited, *supra*, notes 78, 90.

⁹⁶ Michael Mandel's brilliant, if controversial, book, *The Charter of Rights & the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989) develops an extended argument along these general lines with reference to Canadian constitutional adjudication, taking as his starting point the assertion that law is "politics by other

interest in ensuring that the blessing of certain voices as authoritative - being designated "barrister at law," for example - is carefully restricted. The issue of control becomes hotly contested at times of social flux such as, for example, McCarthyite British Columbia, "Progressive" America, populist Alberta, or England during the extended assaults on "Old Corruption," the rise of Chartism and the blossoming of the Trade Union movement. "Expertise" is ideology and powerful interests have a stake in channelling the flow and dissemination of ideology. Free trade in ideas is always potentially disruptive. Hegemonic struggles take place at the point of organic intellectual practice,⁹⁷ as many contemporary theorists of so-called "progressive" and "feminist" legal practice are coming to recognize.⁹⁸

means"!

⁹⁷ These battles over the designation of social "authority" may indeed in themselves constitute "professionalism". This is briefly addressed in Pue, "Rethinking".

⁹⁸ On "progressive" legal practice, see: Peter Gabel and Paul Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law," (1982-83) 11 *New York University Review of Law and Social Change* 369-412.

The works of Carrie Menkel-Meadow are extraordinarily valuable on "feminist" legal practice: "Women in Law? A Review of Cynthia Fuchs Epstein's *Women in Law*," [1983] *Am. BF Research Journal* 189; "Portia in a Different Voice: Speculations on a Women's Lawyering Process" (1984), 1 *Berkeley Women's Law Journal* 39-63; "Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law" (1987), 42 *University of Miami L.R.*, 29; "The Comparative Sociology of Women Lawyers: The 'Feminization' of the Legal Profession" (1987), 24 *Osgoode Hall Law Journal*, 897-918; "Feminist Legal Theory, Critical Legal Studies, and Legal Education or 'The Fem-Crits Go to Law School'" (1988), 38 *Journal of Legal Ed.* 61; "Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change" (1989), 14 *LSI*, 289-319.

Mary Jane Mossman has also addressed this issue in a number of important articles: "Feminism and Legal Method: The Difference It Makes" (1986), 3 *Australian J. Law and Soc.* 30; (1987), 3 *Wisconsin Women's L.J.*, 147.; "Otherness and the Law School: A Comment on Teaching Gender Equality" (1985), 1 *Canadian Journal of Women & the Law* 213-218; "Educating Men and Women for Service Through Law: Osgoode Hall Law School, 1963-88" (1989) *Dal L.J.*; "Invisible' Constraints on Lawyering and Leadership: The Case of Women Lawyers" (1988), *Ottawa Law Review*.

The issues of "ideological" dimensions of law in Canadian history have been addressed by Dr. Barry Wright, "The Ideological Dimensions of Law in Upper Canada: The Treason Proceedings of 1838" (1989) 10 *Criminal Justice History*, 131-178; "Ned Slinker and England's Order", 24 *Osgoode Hall Law Journal* (1986), 700-714. Such questions of conceptualization may lie behind the Romeny-Baker debate in Ontario historiography.

VIII. AT THE EDGE OF THE ABYSS?

ONCE IT IS ACKNOWLEDGED that lawyering is concerned with the ways in which certain social visions are privileged, others deprecated, and cacophonous "discourses" worked out⁹⁹ two consequences follow. First, and simply, to the extent that attempts to explain "professionalism" by reference to market-control theories fail to take account of this dimension, that model must give way to new interpretations of professionalism, new accounts of its historical trajectories, and new ways of speculating about future trends.¹⁰⁰

The second consequence is more complex. It is apparent that "professionalism" as we know it is the cultural product of very specific historical circumstances. A distinction between "technical" knowledge (which is purportedly "rational," "objective," "neutral," universal, verifiable) and political opinion (emotive, irrational, subjective, parochial, biased) lies at the core of modernity. The consequent designation and privileging of "experts" silences many voices.¹⁰¹ If, as many observers of the contemporary conjuncture believe, western culture has slipped into a "post-modern" era, the continuance of professionalism seems in doubt.

Patron saint of post-modernism, Terry Eagleton, has observed:

⁹⁹ In Carol Smart's formulation: "Law has its own method, its own testing ground, its own specialized language and system of results. It may be a field of knowledge that has a lower status than those regarded as 'real' sciences, none the less it sets itself apart from other discourses in the same way that science does." [See Smart, *supra*, note 24.]

¹⁰⁰ One such attempt to transcend the limits of market-control theory in prognosticating is notable though it fails to respond to the post-modern challenge: Yvette Michaud and Nere St-Amand, *MultiDisciplinarity: An Innovative New Approach?* (Moncton: Community Law Centre, University of Moncton, New Brunswick, 1985).

¹⁰¹ The crucially important work of Yves Dezalay ("From Mediation to Pure Law: Practice and Scholarly Representation within the Legal Sphere," 14 *International Journal of the Sociology of Law*, 89, at 101-103) has been summarized by Philip Lewis and Richard Abel as follows: "He sees academics and the higher judiciary engaged in a joint enterprise of purifying the law of social conflicts and ordinary language. By preserving their monopoly over legitimate interpretations, they can dismiss the unapproved innovations of practitioners as 'so many marks of incompetence and error'. By subordinating themselves to the legality thus produced, they can claim social neutrality and technical expertise." Richard Abel and Philip Lewis, "Putting Law Back into Sociology of Lawyers" in Abel & Lewis, eds., *Comparative Theories*, 478-526 at 508.

Post-modernism signals the death of ... 'metanarratives' whose secretly terroristic function was to ground and legitimate the illusion of a 'universal' human history. We are now in the process of waking from the nightmare of modernity, with its manipulative reason and fetish of the totality, into the laid-back pluralism of the post-modern, that heterogeneous range of life-styles and language games which has renounced the nostalgic urge to totalize and legitimate itself... Science and philosophy must jettison their grandiose metaphysical claims and view themselves more modestly as just another set of narratives.¹⁰²

As with science and philosophy, so too with law. If indeed the entire cultural framework of metanarratives, universalizing discourses, manipulative reason and the "fetish of totality" is crumbling then lawyer's authority, market, and professional structure must also crumble: law is *nothing but* a metanarrative and universalizing discourse!¹⁰³

Ironically, both modern professionalism and its "opposite," market control theory, are thoroughly imbricated in modernity. Each incorporates visions which effectively exclude considerations of other ways of seeing the world or of accounting for historical phenomena. Each universalizes and neither can tolerate "laid-back pluralism". Both structural functionalism and market control theory *tend* towards deterministic historical accounts which emphasise a "necessity" or inevitability of that which has in fact come to pass. Both silence the multitude of voices of the past in favour of uncomplicated straight-line interpretations.

At the brink of a post-modern abyss then the legal profession is confronted with fundamental challenges which go far deeper than the simple questioning of monopoly. Scholarship *about* the legal profession will have to transcend market control rather than merely renounce it. Scholars will have to direct considerably more attention than in the past to the multiple fracturings of professions from within, to the contested nature of professionalism both within and without. Visions of lawyering will need to be related much more directly than has been the norm to wider cultural understandings. Clients - who are largely ignored in most studies of professionalism - will need to be

¹⁰² Eagleton as quoted in Harvey, *op. cit.*, 9.

¹⁰³ See: Gary Peller, "The Metaphysics of American Law" (1985), 73 *Cal. L.R.* 1151-1290; Gordon L. Clark, "Law and the Interpretive Turn in the Social Sciences" (1989), 10 *Urban Geography* pp. 209-228; Nick Blomley & Gordon Clark, "Law and Geography: Introduction to the Special Issue" (1990) 11 *Urban Geography* 5, pp. 433-446; Pue, "Wrestling", *supra*, note 24.

acknowledged as central. The role of lawyers *outside* of narrowly defined professional roles merits attention.¹⁰⁴ All of this will need to be done with a recognition of the limits of scholarship and with sensitivity to the unremarkable understanding that reality is socially constructed. In interpreting professions (and interpretations of professions) it is important to acknowledge that interpretation is constrained by inherited milieu, customary practices (“interpretive communities”) and designated audiences.¹⁰⁵ All theory is ideology.¹⁰⁶

Two distinguished scholars have aptly argued that

A vital inquiry thus becomes what lawyers actually do for their clients and employers (public and private), how this is shaped by lawyer-client and employment relationships, and what difference it makes that *lawyers* are doing these things... [Scholars] must encompass the entire range of legal thought, the ways in which it is produced and validated, and relationships among the different forms as exhibited by law students, legal scholars and educators, private practitioners, laypersons, clients, and government officials (administrators, police, welfare officers), as well as judges and lawmakers. Sociologists also must examine the extent to which technical legal expertise confers moral and political authority by contrasting it with other forms of knowledge - scientific, medical, economic, and religious.

By considering what distinguishes lawyers from other professionals rather than the traits that lawyers share with other workers, we will advance the broader ambitions of the sociology of law.

The quotation is from the editors’ concluding article of the Abel and Lewis trilogy on *Lawyers in Society*.¹⁰⁷ Abel himself has thus provided an extraordinarily useful preliminary chart for “post-Abel” scholarship!

¹⁰⁴ See, for example, Rande Kostal, “Capitalism in the Lawyers’ World: Railways, Private Acts and Parliamentary Legal Culture, 1830-1870” (D. Phil. thesis, Oxford); C. Wilton-Siegel (ed.), *Lawyers and Business in Canada 1830-1940* (Toronto: Osgoode Soc., 1990); Richard Willie, “These Legal Gentlemen: Becoming Prominent in Manitoba, 1870-1900” (University of Alberta, Ph.D. thesis, 1989).

¹⁰⁵ Gordon L. Clark, “Law and the Interpretive Turn in the Social Sciences” (1989) 10 *Urban Geography* pp. 209-228, 219-220.

¹⁰⁶ For a critique of this view see: Bruce Trigger, “Hyperrelativism, responsibility, & the social sciences” (1990), 26 *Canadian Review of Sociology & Anthropology*, 776-797.

¹⁰⁷ Abel & Lewis, “Putting Law Back into Sociology of Lawyers”, at 514.