Professional Responsibility: Lawyers, a Case Study

Elizabeth Chambliss

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PROFESSIONAL RESPONSIBILITY: LAWYERS, A CASE STUDY

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INTRODUCTION

In my preceding chapters I have tried, by going into the minutiae of the science of piloting, to carry the reader step by step to a comprehension of what the science consists of; and at the same time I have tried to show him that it is a very curious and wonderful science, too, and very worthy of his attention. If I have seemed to love my subject, it is no surprising thing, for I loved the profession far better than any I have followed since, and I took a measureless pride in it. The reason is plain: a pilot, in those days, was the only unfettered and entirely independent human being that lived in the earth. Kings are but the hampered servants of parliament and people; parliaments sit in chains forged by their constituency; the editor of a newspaper cannot be independent, but must work with one hand tied behind him by party and patrons, and be content to utter only half or two-thirds of his mind; no clergyman is a free man and may speak the whole truth, regardless of his parish's opinions; writers of all kinds are manacled servants of the public. We write frankly and fearlessly, but then we "modify" before we print. In truth, every man and woman and child has a master, and worries and frets in servitude; but, in the day I write of, the Mississippi pilot had none. The captain could stand upon the hurricane-deck, in the pomp of a very brief authority, and give him five or six orders while the vessel backed into the stream, and then that skipper's reign was over. The moment that the boat was underway in the river, she was under the sole and unquestioned control of the pilot. He could do with her exactly as he pleased, run her when and whither he chose, and tie her up to the bank whenever his judgment said that that course was best. His movements were entirely free; he consulted no one, he received commands from nobody, he promptly resented even the merest suggestions. Indeed, the law of the United States forbade him to listen to commands or suggestions, rightly

* Research Director, Program on the Legal Profession, Harvard Law School. I am grateful to Professor Warren Hagstrom, University of Wisconsin-Madison, who assigned Life on the Mississippi in his class on occupations and professions, and to my students. Special thanks also to Richard Abel and David Wilkins, for their commitment to research and teaching on the profession.
considering that the pilot necessarily knew better how to handle the boat than anybody could tell him.¹

Mark Twain arguably was the first American sociologist of the professions. Twain took his literary name from his profession, or at least from his favorite profession, riverboat piloting.² He recalls the “rank and dignity of piloting”³ with great affection in *Life on the Mississippi*, and at the same time offers a sociological primer on the stages of professional development. He explains how the pilots formed a voluntary association for sharing (and hoarding) up-to-the-minute knowledge about the conditions of the mighty river.⁴ He describes how association pilots refused to work with non-association pilots,⁵ and how the pilots’ association gradually gained control over the training and licensing of new pilots.⁶ And he laments the decline of the pilots’ association from “the compactest monopoly in the world, perhaps” to an association of the “dead and pathetic past” with the diversion of passenger travel to the railroad.⁷

I start my class on professional responsibility with Twain’s book for two reasons: it explains the dynamics of professional development in a brief and humorous way, thus serving as an accessible overview to the various topics in the course; and it focuses on a profession other than the legal profession, which invites students to approach the class theoretically. In this essay, I pitch the advantages of this sociological approach to teaching professional responsibility. I argue that by focusing on the professions generally, and treating the legal profession as an extended case study, students end up better-equipped to recognize and address the ethical and regulatory challenges confronting individual lawyers, law firm managers, and the profession as a whole.

Part I of the essay describes several problems with the traditional approach to teaching professional responsibility. Part II explains how the sociological approach improves on the traditional approach, and defines the basic themes of a “sociological” course. Part III responds to potential objections to the sociological approach, and explains how a sociological course can be organized to satisfy traditional coverage requirements.

². "Mark twain" means two fathoms in piloting jargon. *Id.* at 66 n.2.
³. *Id.* at 118-26.
⁴. See *id.* at 127-42.
⁵. *Id.* at 136-37.
⁶. *Id.* at 138-39.
⁷. *Id.* at 141-42.
I. THE TRADITIONAL APPROACH

The traditional course on professional responsibility focuses on the Model Rules of Professional Conduct,\(^8\) one rule at a time. Typically, particular attention is devoted to the rules governing conflicts of interest, the lawyer's duty of confidentiality, and the difference between the duty of confidentiality and the attorney-client privilege. Most students expect the course to prepare them for the Multistate Professional Responsibility Exam (MPRE),\(^9\) and most teachers defer in whole or in part to this consumer demand. (This is, of course, a caricature,\(^10\) or what sociologists call an "ideal type."\(^11\))

There are a number of drawbacks to this approach. First, it assumes the centrality of professional discipline within the regulatory system, when in fact most scholars and practitioners would agree that professional discipline is only marginally relevant to lawyers' day-to-day conduct and the management of professional organizations such as law firms.\(^12\) The vast majority of disciplinary actions are brought against solo practitioners,\(^13\) who constitute a small (and diminishing).

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10. As a caricature, it would require many footnotes, documenting the tradition but at the same time acknowledging the many variations on it, and lauding recent pedagogical and curricular innovations. If the reader will indulge me, I will sidestep this exercise by defending my characterization of the "traditional approach" as an ideal type.
11. An ideal type is an intellectual construction (such as "bureaucracy" or "the competitive market") that is not intended to represent reality, but rather to help make sense of it intellectually. To construct an ideal type, the observer selects certain defining characteristics and exaggerates them to form a coherent construction against which to compare reality. "Ideal" signifies pure, or abstract, rather than normatively desirable. Nicholas Abercrombie et al., The Penguin Dictionary of Sociology 104 (2d ed. 1984).
12 See, e.g., Richard L. Abel, Why Does the ABA Promulgate Ethical Rules?, 59 Tex. L. Rev. 639, 642 (1981) (arguing that "the Model Rules are drafted with an amorphousness and ambiguity that render them virtually meaningless"); Deborah L. Rhode, The Rhetoric of Professional Reform, 45 Md. L. Rev. 274, 288-93 (1986) (arguing that disciplinary committees are inherently biased in favor of lawyers); David B. Wilkins, Who Should Regulate Lawyers? 105 Harv. L. Rev. 801, 867 (1992) (arguing that "disciplinary controls do little more than mirror the norms of the marketplace"); American Bar Association, Comm'n on Evaluation of Disciplinary Enforcement, Report to House of Delegates xxii (1991) [hereinafter McKay Report] (noting that the funding and staffing of disciplinary committees "have not kept pace with the growth of the profession," and that "some agencies are so underfunded and understaffed that they offer little protection against unethical lawyers"). See also Ronald Pipkin, Law School Instruction in Professional Responsibility: A Curricular Paradox, 1979 Am. B. Found. Res. J. 247, 272-75 (arguing that the traditional course on professional responsibility is largely irrelevant to the actual practice of law).
13. In 1981-82, over 80% of those disciplined in California, Illinois and the District of Columbia were solo practitioners, and none practiced in a firm with seven
fraction of all lawyers, and the vast majority of complaints are dismissed with “little or no investigation.” Penalties for those few lawyers who are disciplined tend to be exceedingly light. Meanwhile, lawyers who work in medium-sized and large law firms are practically immune from professional discipline.

Second, the traditional approach implicitly provides a distorted empirical picture of the profession. Given the overwhelming focus on conflicts and confidentiality, someone who did not know better might imagine that the legal profession is made up primarily of migrating, large firm lawyers and criminal defense attorneys. Most casebooks or more lawyers. See Richard L. Abel, American Lawyers 145 (1989) [hereinafter Abel, American Lawyer]. See also Ted Schneyer, Professional Discipline for Law Firms?, 77 Cornell L. Rev. 1, 6 n.39 (1991) [hereinafter Schneyer, Professional Discipline] (noting that the incidence of professional discipline tends to be higher in rural areas where solo practitioners and small firm lawyers predominate).


15. Abel, American Lawyers, supra note 13, at 147 (reporting that over 90% of disciplinary complaints are dismissed).

16. Id. at 145-50 (reviewing the frequency and severity of sanctions resulting from disciplinary actions). In 1986, only 1,147 out of 54,600 complaints nationwide resulted in disbarment or suspension (2.1%). Id. at 291. See also William T. Gallagher, Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar, 22 Pepp. L. Rev. 485, 538-39 (1995) (noting that a six-month investigation of the lawyer discipline system in California in the 1980s found that over 80% of complaints received by the bar remained uninvestigated; few investigations led to any disciplinary action against an attorney; and most discipline, when it did occur, consisted of minor sanctions, such as a private reprimand).

17. Disciplinary proceedings against lawyers in large and even medium-sized firms are very rare; yet, judging by the frequency with which large firms and large firm lawyers are the target of civil suits, motions to disqualify, and sanctions under the rules of civil procedure, misconduct occurs with some regularity in those firms. See Schneyer, Professional Discipline, supra note 13, at 6-7. In response to blatant ethics violations committed by “partners at major establishment law firms,” the American Bar Association Section on Litigation convened a task force to study the problem. See Lawrence J. Fox et al., Report, Ethics: Beyond the Rules: Historical Preface, 67 Fordham L. Rev. 691, 691 (1998).

18. In 1991, the most recent year for which national data are available, 72.9% of all lawyers were in private practice, and only 12.6% of these lawyers worked in firms of 101 lawyers or more. See Barbara A. Curran & Clara N. Carson, The Lawyer Statistical Report 24-25 (1994). In 1991, only 8.6% of all practicing lawyers were federal, state or local government employees, and only a fraction of this 8.6% were employed as public defenders. See Lewis A. Kornhauser & Richard Revesz, Legal
pay little attention to the development of the profession, its current structure, or how the American profession compares to legal professions in other countries.

Third, the traditional approach tends toward particularistic analysis: a particular profession, a particular problem, and the application of a particular rule. Though most casebooks provide an analytical framework (for instance, the pros and cons of zealous advocacy), the framework itself is not the focus of analysis and tends to be invoked sporadically. Thus, whereas in most law classes we encourage the development of an analytical framework, in professional responsibility, we tend toward narrow lessons about the application of particular rules. Perhaps in part for this reason, the traditional course on professional responsibility tends to be boring and unpopular with both students and faculty.19

Finally, the traditional course on professional responsibility, like the Model Rules themselves,20 focuses on lawyers' individual conduct and

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19. See Roger C. Cramton & Susan P. Koniak, Rule, Story and Commitment in the Teaching of Legal Ethics, 38 Wm. & Mary L. Rev. 145, 146 (1996) (stating that "legal ethics remains an unloved orphan of legal education," and that many law teachers "remain convinced that the subject is unteachable"); David Luban & Michael Millemann, Good Judgment: Ethics Teaching in Dark Times, 9 Geo. J. Legal Ethics 31, 37-38 (1995) (stating that "the legal ethics course is - not to put too fine a point on it - the dog of the curriculum, despised by students, taught by overworked deans or underpaid adjuncts and generally disregarded by the faculty at large"); Deborah L. Rhode, Ethics by the Pervasive Method, 42 J. Legal Educ. 31, 40-41 (1992) (reviewing students' critiques of law school ethics instruction); William H. Simon, The Trouble With Legal Ethics, 41 J. Legal Educ. 65, 65 (1991) (noting that "[a]t most law schools, students find the course in legal ethics or professional responsibility boring and insubstantial, and faculty dread having to teach it").

20. The Model Rules of Professional Conduct are aimed entirely at individual lawyers - at regulating the conduct of lawyers as individuals, rather than the practices of work organizations such as law firms. It is true that some of the rules have implications for law firm management, such as the rules prohibiting conflicts of interest and the supervisory duties spelled out in Rule 5.1(a). See Model Rules, supra note 8, R. 5.1 (a) (requiring partners in law firms to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct"). The Model Rules also restrict the organizational forms in which lawyers may practice, by prohibiting fee-sharing and non-lawyer partnerships. See Model Rules, supra note 8, R. 5.4. Yet, while some of the rules have implications for law firms, none regulates them directly, as entities, with their own set of professional responsibilities. See Schneyer, Professional Discipline for Law Firms?, supra note 13, at 4 ("Disciplinary agencies have always taken individual lawyers as their targets... The traditional focus on individuals has probably resulted from the system's jurisdictional tie to licensing, which the state requires only for individuals, and from the system's development at a time when solo practice was the norm."). To the extent that law firms have instituted management practices designed to promote ethical and regulatory compliance, such developments have been in response to other regulatory incentives (such as judicial enforcement of Rule 11, judicial disqualification motions, administrative agency enforcement, and the threat of civil malpractice). See Ted Schneyer, A Tale of Four
makes the lawyer-as-individual the primary unit of analysis. Such an approach is seriously at odds with the reality of modern law practice, in which a majority of lawyers practice and are professionally socialized within organizations. Moreover, by making the individual the unit of analysis, the traditional approach leaves out a whole set of "professional responsibilities" having to do with the stewardship of the profession and its institutions and organizations.

II. THE SOCIOLOGICAL APPROACH

The sociological approach avoids these problems and, I will argue, makes the most of the subject. Rather than assuming the centrality of professional discipline, it treats the role of professional discipline as an empirical and theoretical question. Rather than implicitly providing a distorted empirical picture of the profession, it makes the empirical study of the profession a central feature of the course, and places the American legal profession within a historic and cross-national context. And rather than narrowing the scope of the course—and the concept of "professional responsibility"—the sociological approach broadens the subject by comparing the legal profession to other professions within a theoretical framework. This section provides an overview of the components of a "sociological" approach.

A. Theoretical Framework

The central theoretical question in the sociology of the professions is the relationship between knowledge and power. There are two classic theoretical positions, which can be labeled "functional" and "conflict" theory. I spend the second day of class introducing these positions and defining a conceptual shorthand ("K" for knowledge and "P" for power) to which I return throughout the course.

Functional theory holds that knowledge comes first: that professional power—i.e. monopoly over tasks and the right of self-regulation—is justified and indeed necessitated by the "asymmetry of expertise" between professional and client.21 Because clients do not have sufficient knowledge to judge the quality of professional service,
they must be protected from incompetent practitioners through state licensing requirements and professional self-regulation. In other words, professional knowledge precedes and necessitates professional power (or K→ P). The paradigmatic functionalist sociologist is Talcott Parsons, who writes of the professions:

Among their basic characteristics is a level of special technical competence that must be acquired through formal training and that necessitates special mechanisms of social control in relation to the recipients of services because of the "competence gap" which makes it unlikely that the "layman" can properly evaluate the quality of such services or the credentials of those who offer them.22

This is the legal profession's own justification for its monopoly over law practice23 and its right (and responsibility) of self-regulation.24


23. See, e.g., State v. Sperry, 140 So. 2d 587, 595 (Fla. 1962) ("The reason for prohibiting the practice of law by those who have not been examined and found qualified to practice is frequently misunderstood. It is not done to aid or protect members of the legal profession either in creating or maintaining a monopoly or closed shop. It is done to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control . . ."). See also Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1189 (Fla. 1978) (quoting Sperry); Charles Wolfram, Modern Legal Ethics 828-34 (1986) (explaining the justification for the enforcement of unauthorized practice legislation).

Lawyers have offered four justifications to explain the bar's fervor for pursuing unauthorized practitioners: protecting clients against harmful incompetence; protecting the legal system against the consequences of incompetence or lack of integrity by nonlawyers; providing the necessary framework for regulating lawyers; and, although rarely admitted, enhancing the economic position of lawyers. Taken separately or together, the arguments are strikingly problematical as justification for the wide sweep of current unauthorized practice law. They also closely resemble arguments that arborists, architects, cosmetologists, dentists, plumbers, and a host of other occupational groups have made for costly monopolies in their areas of business.


24. The traditional goal of professional discipline is to protect the public from incompetent and otherwise "unfit" practitioners. See, e.g., In re Echeles, 430 F.2d 347, 349 (7th Cir. 1970) (stating that the purpose of disciplinary proceedings is "to protect the courts and the public from the official ministration of persons unfit to practice"). Bar leaders argue that disciplinary agencies are the most effective enforcement authority because lawyers are uniquely qualified to determine whether an ethical breach has occurred. See Wilkins, Who Should Regulate Lawyers?, supra note 12, at 812 (citing Special Committee on Evaluation of Disciplinary Enforcement, American Bar Ass'n, Problems and Recommendations in Disciplinary Enforcement 136-37 (1970)). See also McKay Report, supra note 12, at 5 (arguing that self-regulation is the only enforcement system compatible with the separation of powers and lawyers' status as independent professionals).
Conflict theory challenges this explanation for professional power. Conflict theory argues that power comes first: that traditionally powerful members of society are able to convince others of their special expertise and its societal importance, and thereby to secure state support for monopoly and self-regulation.\(^{25}\) (That is: P → K.) Conflict theory argues that the "professions" are distinguished from other occupations by their success in achieving market closure,\(^{26}\) not by the objective technical or intellectual demands of their work:

> Political power is involved in almost all successful professions; they achieve their monopoly and self-governing rights by getting the force of the state to license them and back up their collective authority over members.\(^{27}\)

Many of the techniques by which the professions of today became organized originally and achieved their high status were based on mystification and secrecy regarding their real skills and use of their status background rather than their technique per se. The elite professions in America [i.e. medicine and law] grew out of older gentry elites: their communal organization from upper-class clubs and their legitimating ideology from the traditions of upper-class altruism and religious leadership.\(^{28}\)

This debate about the sources of (and justifications for) professional power is part of a broader sociological debate about the functions of social inequality, or "stratification," more generally. The functional theory of stratification holds that some jobs (such as the professions) are objectively more important to society than others; and that, in order to adapt and survive, societies must insure a meritocratic matching of individuals to jobs. To attract and motivate the most

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26. See Abel, American Lawyers, supra note 13, at 40-141; Collins, supra note 25, at 1-48; Larson, supra note 25, at 49-52.

27. Collins, supra note 25, at 133.

28. Id. at 135. Collins offers medicine as a primary example:

> What is striking about the traditionally high status of medicine is the fact that it was based on virtually no valid expertise at all. The training on which physicians prided themselves consisted of ancient works like Galen, containing physiological theories whose practical application were [sic] not merely wrong but positively harmful. Prevailing theories of disease led to practices such as bleeding and purging as major cures. The most renowned physician of colonial America, the scholarly and genteel Philadelphian, Benjamin Rush, promulgated a theory whose recommendations for all ailments consisted of massive doses of enemas. In general, with the exception of Jenner's smallpox vaccination developed in 1798, there were no valid medical treatments at all until 1850.

Id. at 139 (footnotes omitted).
capable people to perform the most important jobs, societies must distribute rewards (such as income and status) unequally, with the highest rewards reserved for the most important jobs. Functional theory therefore argues that stratification is functional for society, that is, that it contributes to the survival of society as a whole:

If the rights and perquisites of different positions in a society must be unequal, then the society must be stratified, because that is precisely what stratification means. Social inequality is thus an unconsciously evolved device by which societies insure that the most important positions are conscientiously filled by the most qualified persons. Hence every society, no matter how simple or complex, must differentiate persons in terms of both prestige and esteem, and must therefore possess a certain amount of institutionalized inequality.

Conflict theory emphasizes conflict between groups within society. Conflict theory argues that the functional hierarchy of jobs is ideologically constructed, and that even for jobs requiring special training, there are more potentially qualified individuals than jobs. Conflict theory therefore argues that stratification is (also) dysfunctional for society, because it breeds resentment between groups and artificially limits societies’ productive capabilities:

Social stratification systems function to limit the possibility of discovery of the full range of talent available in a society. This results from the fact of unequal access to appropriate motivation, channels of recruitment and centers of training. Social stratification systems function to provide the elite with the political power necessary to procure acceptance and dominance of an ideology which rationalizes the status quo, whatever it may be, as “logical,” “natural” and “morally right.”

The obviously mixed character of the functions of social inequality should come as no surprise to anyone. If sociology is sophisticated in any sense, it is certainly with regard to its awareness of the mixed nature of any social arrangement.

“Stratification” is an exceedingly easy concept to teach to law students. What, I ask them, is the function of grades in law school? What do grades measure? Does your theory depend on your grades? Who benefits from the law school grading system? Students? Faculty? Employers? Clients? What qualities are required to be a good lawyer? What is the relationship between these qualities and law school

29. See Kingsley Davis & Wilbert E. Moore, Some Principles of Stratification, 10 Am. Soc. Rev. 242 (1945) (for the classic functional account).
30. Id. at 243.
32. Id. at 393.
33. Id.
grades? What is the relationship between these qualities and law school admission criteria? What is the function of U.S. News and World Report's annual ranking of law schools? Who benefits from this ranking? And so on. Inevitably, students reproduce an extremely sophisticated version of the functional-conflict debate and at least some students make the argument that it is not all one way or the other.

This is a good time to bring the discussion back to the relationship between professional knowledge and professional power. Twain's account is helpful here, because it acknowledges the importance of both knowledge and power in the rise and fall of the riverboat pilots. In describing "a pilot's needs," for example, Twain first emphasizes the importance of memory:

One cannot easily realize what a tremendous thing it is to know every trivial detail of twelve hundred miles of river and know it with absolute exactness.

Besides memory, Twain argues that pilots also need good judgment and "pluck":

A pilot must have a memory; but there are two higher qualities which he must also have. He must have good and quick judgment and decision, and a cool, calm courage that no peril can shake. Give a man the merest trifle of pluck to start with, and by the time he has become a pilot he cannot be unmanned by any danger a steamboat can get into; but one cannot quite say the same for judgment. Judgment is a matter of brains, and a man must start with a good stock of that article or he will never succeed as a pilot.

Memory, judgment and pluck, however, are not the sole or most immediate bases of pilots' professional success. In Twain's account, pilots' success as a group stems from their strategy of professional organization; that is, the formation of a closed association with control over the training and supply of new entrants.

The association had a good bank account now and was very strong. There was no longer an outsider. A by-law was added forbidding the reception of any more cubs or apprentices for five years; after which time a limited number would be taken, not by individuals, but by the association, upon these terms: the applicant must not be less

34. Twain, supra note 1, at 107-17.
35. Id. at 107.
36. Id. at 109-10.
37. Id. at 113.
than eighteen years old, and of respectable family and good character; he must pass an examination as to education, pay a thousand dollars in advance for the privilege of becoming an apprentice, and must remain under the commands of the association until a great part of the membership (more than half, I think) should be willing to sign his application for a pilot's license.38

Twain's account thus illuminates the interactive nature of knowledge and power (that is: \(K \rightarrow P \rightarrow K \rightarrow P \rightarrow \ldots\)), and shows how both functional and conflict theory provide useful "frames" for empirical analysis. One may start with knowledge (\(\ldots K \rightarrow P \rightarrow K \ldots\)) or with power (\(\ldots P \rightarrow K \rightarrow P \ldots\)) without claiming that either is independent of the other. Twain's account also provides an opportunity to flesh out the theoretical framework of the course by comparing the nature of pilots' knowledge and power to that of, say, lawyers. What, for instance, is the difference between pilots' knowledge and lawyers' knowledge? How easy is it for outsiders to judge whether someone is a good pilot or lawyer? Who defines the goals of piloting or lawyering? Why were the railroads a threat to the pilots? Who are the main competitors for lawyers' work? Under what conditions might we expect lawyers to lose their professional power? What kinds of lawyers currently enjoy the most professional power and why? What are the sources of stratification within the American legal profession?

At this point, students begin to elucidate key theoretical issues in the sociology of the professions, such as the importance of formal, abstract knowledge39 and interprofessional competition.40 Students

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38. Id. at 138-39.
39. See Abbott, supra note 21, at 52-58 (discussing the importance of abstract knowledge in professional claims for exclusive jurisdiction over tasks); Friedson, Profession of Medicine, supra note 25, at 1-16 (defining "professionals" as agents of formal knowledge). As one commentator states:

It is clear that not all occupations can become professions in the strong sense of the term.... Special conditions are necessary. A strong profession requires a real technical skill that produces demonstrable results and can be taught. Only thus can the skill be monopolized, by controlling who will be trained. The skill must be difficult enough to require training and reliable enough to produce results. But it cannot be too reliable, for then outsiders can judge work by its results and control its practitioners by their judgments. The ideal profession has a skill that occupies the mid-point of a continuum between complete predictability and complete unpredictability of results. At one end are skills like those of plumbers and mechanics, which do not give rise to strong professions because outsiders can judge whether the job is well done; supervisors know whether the machinery runs or not, although they may not know why. At the other end are vague skills like administrative politicking or palm reading; these cannot be monopolized because they are too unreliable or idiosyncratic for some to successfully train others in them. See Collins, supra note 25, at 132-33 (citations omitted).
40. Recent sociological literature on the professions has moved away from the field's initial focus on case studies of single professions and begun to focus instead on the task-based "jurisdictions" over which professions compete. According to Abbott:
also begin to focus on the many divisions within the legal profession and the implications of these divisions for self-regulation. With this theoretical framework in place, I begin the first main section of the course: the empirical study of the American legal profession.

B. The History and Structure of the American Legal Profession

This section of the course has two pedagogical aims: to show how the American legal profession secured its professional monopoly, and to give students an empirical overview of the current structure of the profession. Both aims are best accomplished through the use of a comparative framework; that is, through comparisons to other professions, and to legal professions in other countries.

In my own presentation, I draw heavily on sociologists and historians of the legal profession, such as Richard Abel, Lawrence Friedman, and Willard Hurst, and sociologists of the professions generally, such as Andrew Abbott and Randall Collins. As a group, these authors provide a detailed case study of the American profession's development as well as rich comparative data about legal professions in other countries (particularly Britain). I focus especially on the emergence of law schools and their impact on the profession's development; the emergence and impact of the large law firm as an organizational form; sources of competition for lawyers' work; and sources of stratification within the profession. One could rely on other sources, however, and emphasize different aspects of the profession's history and structure, without compromising the basic goal of this section of the course. The key is to locate the American legal profession within a historic and comparative framework and, in doing so, to make students aware that the American profession is a particular case—just one example—of professional development.

1. The Development of Lawyers' Monopoly

The foundation of a professional monopoly is control over the supply and training of new members. Once entry barriers are

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The professions... make up an interdependent system. In this system, each profession has its activities under various kinds of jurisdiction. Sometimes it has full control, sometimes control subordinate to another group. Jurisdictional boundaries are perpetually in dispute, both in local practice and in national claims. It is the history of jurisdictional disputes that is the real, the determining history of the professions. Jurisdictional claims furnish the impetus and the pattern to organizational developments. Thus an effective historical sociology of professions must begin with case studies of jurisdictions and jurisdiction disputes.

See Abbott, supra note 21, at 2.

41. See Abel, American Lawyers, supra note 13, at 26 (identifying restrictions on entry as "the foundation of market control"); Harold L. Wilensky, The Professionalization of Everyone?, 70 Am. J. Soc. 137, 142-46 (1964) (describing the ideal typical stages of professionalization).
established, the profession can profitably turn its attention to restricting competition from outsiders; that is, to protecting and expanding its jurisdiction over certain types of work.\textsuperscript{42}

a. Control over Supply and Training

Students generally are surprised to learn that American lawyers' monopoly is relatively recent, having been established (as we know it) only in the mid-twentieth century.\textsuperscript{43} Though lawyers in colonial America, many of whom were trained in London, retained the status and organization of the British profession (including the division between barristers and solicitors),\textsuperscript{44} the Revolutionary war severely disrupted colonial lawyers' nascent professional development,\textsuperscript{45} and ushered in an era of egalitarian sentiment that proved hostile to state-supported monopolies.\textsuperscript{46} After the war, most jurisdictions significantly relaxed the apprenticeship requirement (then the only requirement for admission to the bar),\textsuperscript{47} and colonial bar associations, having lost their de facto control over admission, eventually "crumbled and disappeared."\textsuperscript{48} Control over admission to practice devolved to local courts with little centralization or policing of standards.\textsuperscript{49} Bar examinations were typically "oral and administered in a very casual

\begin{footnotes}
\textsuperscript{42} See Abel, American Lawyers, \textit{supra} note 13, at 112 (arguing that these two components of professional monopoly are "necessarily sequential"). Additionally, Abel argues that "[m]embers of an occupational category within the division of labor first must control entry.... Only when social closure is well advanced can a profession turn to the second element: restricting competition." \textit{Id.} at 123.
\textsuperscript{43} See Abbott, \textit{supra} note 21, at 247.
\textsuperscript{44} See Abel, American Lawyers, \textit{supra} note 13, at 40 (Colonial lawyers "retained their links to England, preserving the division between barristers and solicitors by sending some students to the Inns of Court in London to prepare for call to the English Bar."); Collins, \textit{supra} note 25, at 148-49 (stating that "[t]he practice of law... in the prerevolutionary period was virtually monopolized by the upper class of wealthy merchants and planters, who did their best to emulate the English pattern of the closed legal caste"); James Willard Hurst, \textit{The Growth of American Law: The Law Makers} 253 (1950) (noting the adoption of the barrister-solicitor distinction in prerevolutionary America).
\textsuperscript{45} Many of the most prominent practitioners were British sympathizers who emigrated to England to escape wartime persecution of Tories. See Abel, American Lawyers, \textit{supra} note 13, at 40; Collins, \textit{supra} note 25, at 149.
\textsuperscript{46} See Abel, American Lawyers, \textit{supra} note 13, at 40; Collins, \textit{supra} note 25, at 149; Hurst, \textit{supra} note 44, at 251, 267, 275-77.
\textsuperscript{47} In 1800, 14 out of 19 jurisdictions required lawyers to complete an apprenticeship, typically lasting five years (the length required of English solicitors). By 1840, only 11 out of 30 jurisdictions required apprenticeship, and by 1860, only 9 out of 39 jurisdictions required it. See Abel, American Lawyers, \textit{supra} note 13, at 40-41; Collins, \textit{supra} note 25, at 150. See also Robert Stevens, \textit{Two Cheers for 1870: The American Law School}, in \textit{Law in American History} 403, 412-13 (Donald Fleming & Bernard Bailyn, eds., 1971).
\textsuperscript{48} Collins, \textit{supra} note 25, at 149; \textit{see also} Hurst, \textit{supra} note 44, at 285.
\textsuperscript{49} Collins, \textit{supra} note 25, at 149; \textit{see also} Abel, American Lawyers, \textit{supra} note 13, at 71; Hurst, \textit{supra} note 44, at 279-82.
\end{footnotes}
fashion." Between the American Revolution and the Civil War, therefore, "virtually any white male could become a lawyer." The following story is illustrative:

L.E. Chittenden, in Vermont in the 1850s, was chairman of the committee to examine candidates for admission. Two young men came before him: "Of any branch of the law, they were as ignorant as so many Hottentots.... I frankly told them that for them to attempt to practice law would be wicked, dangerous, and would subject them to suits for malpractice. They begged, they prayed, they cried." Anyway, they wanted to go west: "I, with much self-reproach, consented to sign their certificates, on the condition that each would buy a copy of Blackstone, Kent's Commentaries, and Chitty's Pleadings, and immediately emigrate to some Western town."

After the Civil War, several developments led to tightened control over entry. First, the nature of legal work changed with the emergence and growth of corporations, and a nationally prominent group of business lawyers began to develop and organize. These elite lawyers formed bar associations made up of the "decent part" of the bar, with the aim of raising standards for admission and policing the activities of non-elite lawyers involved in local political machines. In 1878, the American Bar Association was founded in Saratoga, New York by a group of wealthy business lawyers who vacationed at

50. Collins, supra note 25, at 149; see also Lawrence M. Friedman, A History of American Law 652-53 (2d ed. 1985) (describing the perfunctory nature of bar admission in the late 1850s); Hurst, supra note 44, at 281-84 (same).
51. Abel, American Lawyers, supra note 13, at 71.
52. Friedman, supra note 50, at 653 (quoting L.E. Chittenden, Legal Reminiscences, 5 Green Bag 307, 309 (1893)).
54. Friedman, supra note 50, at 652. The self-proclaimed "decent part" of the bar consisted of "well-to-do business lawyers, predominantly of old-American stock." Id. at 648.
55. Between 1870 and 1878, sixteen city and state bar associations were established, including New York City (1870), Cleveland (1873), Chicago (1874), Iowa (1874), St. Louis (1874), and Boston (1877). Almost all had a reform ideology, aimed at combating political corruption, raising the standards for admission to practice, and improving the image of the profession. See Abel, American Lawyers, supra note 13, at 44-45; Friedman, supra note 50, at 648-52; Hurst, supra note 44, at 286; Stevens, supra note 47, at 456.
Saratoga Springs. Upon its founding, the ABA established a Committee on Legal Education to promote stricter educational requirements for admission to the profession.

Around the same time, university law professors began to promote the “scientific” study of law and law schools began to proliferate. Before the Civil War, there were few incentives to pursue a formal legal education. No state required a law degree (or college degree) for admission to the bar, and formal preparation was unnecessary to pass most bar examinations. In 1860, there were only twenty-one law schools in the entire country, most offering informal, short courses based on lectures by notable practitioners, with no attendance requirement and minimal educational standards. Even after the war, office apprenticeship remained the primary method for legal training. As late as 1891, 80% of lawyers entered practice without attending any law school.

Well past 1850, the chief method of legal education was the apprenticeship: The student read law in an older lawyer’s office; he did much of the hand copying of legal instruments that had to be done before the day of the typewriter; and he did many small services in and about the office, including service of process. Sometimes the older man might take these incidental services as his pay for his preceptorship. But stiff fees were paid for the privilege of reading in the office of many a leader of the bar. Legal biography amply witnesses that such training was of widely varying thoroughness and quality; that it was typically not of great length of time; and that much of it, as in the interminable copying of documents, was of a rote character.

After the Civil War, however, there began a revolution in legal education. In 1870, Christopher Columbus Langdell was appointed Dean of Harvard Law School, where he introduced the “case method” that defines law teaching today. The case method is based on the

56. See Collins, supra note 25, at 153; Friedman, supra note 50, at 650; Hurst, supra note 44, at 287.
57. See Abel, American Lawyers, supra note 13, at 46.
58. See Collins, supra note 25, at 152; Hurst, supra note 44, at 261-62.
59. See Robert B. Stevens, Law School: Legal Education in America from the 1850s to the 1980s 74-75 (1983); see also Abel, American Lawyers, supra note 13, at 41, 277 (noting the establishment of part time programs).
60. Friedman, supra note 50, at 606.
61. See supra notes 54-56 and accompanying text.
62. Friedman, supra note 50, at 607.
63. Abel, American Lawyers, supra note 13, at 41; Collins, supra note 25, at 150.
64. See Abel, American Lawyers, supra note 13, at 41 (citing ABA Committee on Legal Education, Report 318 (1891)).
65. Hurst, supra note 44, at 256.
view that law is a science, built on a small number of fundamental principles that are best learned inductively through close study of selected judicial opinions. As Langdell wrote in the preface to his classic casebook on the law of contracts:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied.

Langdell also introduced the hiring of full-time instructors whose careers were devoted to scholarship (versus practice), and annual written exams to determine students' eligibility for further study. In 1896, Harvard became the first law school to require a college degree as a prerequisite for law school admission.

The 'Harvard model' of legal education initially was slow to catch on, and did not become firmly established outside of Ivy League universities until well after 1900. Its primary competition as an educational model came from part-time night schools that catered to working students. In contrast to full-time "day" schools such as Harvard, which emphasized fundamental legal doctrine, the night schools emphasized practical training and the particulars of local law. Between 1890 and 1900, the number of night schools grew from nine to twenty, and their combined enrollment increased from 1027 to 3477 students. By 1920, the number of students enrolled in part-time

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67. See Friedman, supra note 50, at 613-14.
68. Hurst, supra note 44, at 262, quoting Christopher C. Langdell, Selection of Cases on the Law of Contracts (1871). Langdell did not invent the case method, but was the first to make it the foundation of the law school curriculum. Id. at 261.
69. Friedman, supra note 50, at 609 (crediting Langdell with introducing the practice of hiring full-time law teachers); Hurst, supra note 44, at 264 (discussing the appointment of James Barr Ames to the Harvard law faculty).
70. Hurst, supra note 44, at 263 (discussing Langdell's introduction of year-end written exams).
71. Collins, supra note 25, at 152.
72. Id.
73. See Stevens, supra note 59, at 74-76.
74. See Friedman, supra note 50, at 619 (discussing the "striking cleavage" between part-time night schools and full-time day schools); Hurst, supra note 44, at 273 (same).
75. Friedman, supra note 50, at 619.
76. Abel, American Lawyers, supra note 13, at 254.
programs (11,982) exceeded the number enrolled in full-time schools (11,764).  

The Harvard model nevertheless appealed to bar leaders who were attempting to tighten control over entry into the profession. Elite lawyers, especially in the East, began to push for law school training as a requirement for bar admission, and to push law schools themselves to raise their educational prerequisites. In 1896, only 7 out of 76 law schools required a high school diploma for admission; by 1903, 51 out of 104 law schools required it. Following Harvard, many full-time schools also began to require at least two years of college. In 1900, the ABA Section on Legal Education organized the American Association of Law Schools as an accrediting association, and in 1923, the ABA began to publish law school ratings based on conformity with the Harvard model.

The ABA's efforts to increase educational requirements initially were hampered by law schools' competition for students, and states' reluctance to make law school attendance a prerequisite for bar admission. In 1890, only 50% of states required any definite period of legal study for admission to the bar, and as late as 1936, only six states required study in an ABA-approved law school. Nevertheless, there was a growing market for law school training, which in many states was more accessible—and cheaper—than office apprenticeship. Between 1890 and 1914, most state licensing authorities had created centralized boards of bar examiners, and introduced written bar exams patterned after law school exams. Moreover, many degree-conferring schools offered their graduates automatic admission to the bar (known as "diploma privilege").

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77. Id.
78. See Collins, supra note 25, at 154-55 (discussing the tension between upper-class lawyers in the East, who favored exclusionary policies, and rural and ethnic minority lawyers, who resisted the imposition of such policies).
79. Abel, American Lawyers, supra note 13, at 48.
80. Id.
81. Abel, American Lawyers, supra note 13, at 46-47; Collins, supra note 25, at 154-55 (discussing the battle against "unqualified" schools).
82. See Abel, American Lawyers, supra note 13, at 48, 54 (discussing changes in law school admissions requirements between 1890 and 1950).
83. See Collins, supra note 25, at 155; Hurst, supra note 44, at 272-73; see also Abel, American Lawyers, supra note 13, at 49, 51-53 (discussing changes in state requirements for admission to the profession).
84. Collins, supra note 25, at 155.
85. See Abel, American Lawyers, supra note 13, at 43; William R. Johnson, Schooled Lawyers: A Study in the Clash of Professional Cultures 56, 71-72, 81, 86, 95, 100 (1978) (discussing the advantages of law school training over apprenticeship during this period).
86. See Abel, American Lawyers, supra note 13, at 43 (noting that law schools were perceived to offer better bar exam preparation than apprenticeships); Collins, supra note 25, at 154 (noting that bar exams were written and graded by lawyers with close ties to leading schools).
87. Abel, American Lawyers, supra note 13, at 62.
1910, law school attendance had displaced apprenticeship as the primary method of preparing for the bar.88 and by the late 1930s, ABA-approved law schools had captured the market for legal education.89

The transformation from apprenticeship to law school had profound consequences for the profession.90 The rapid proliferation of law schools and their initially minimal entry requirements significantly expanded entry opportunities between 1900 and 1930.91 Though apprenticeship requirements had been relatively lax, many lawyers did not accept apprentices and some states limited the number of apprentices that a lawyer could supervise.92 Further, law school training was available to immigrants and members of the working class, who "were not likely to be welcomed as apprentices by lawyers of different class, ethnicity, religion, and culture."93 Although immigrants and working class students were concentrated in the "unapproved" schools, states were slow to require attendance at ABA approved schools, and until the late 1930s, the unapproved schools enrolled a significant percentage of all law students.94 Somewhat paradoxically, then, the campaign by the "decent part" of the bar to raise educational standards—which had been tied to efforts to prevent "overcrowding" by non-elite lawyers (especially immigrants and Jews)95—created a market for legal education that initially could not be tightly controlled.96

Theoretically, the inability to control entry makes for a weak profession, and compared to American doctors during the same historical period, American lawyers were relatively weak.97 As it turns

88. See Hurst, supra note 44, at 272; see also Abel, American Lawyers, supra note 13, at 41-42 (noting that the speed and timing of the transformation varied somewhat by city and state).
89. See Abel, American Lawyers, supra note 13, at 54-58. In 1935, enrollment in ABA-approved law schools (19,824) for the first time exceeded enrollment in unapproved schools (17,498). By 1938, ABA-approved schools enrolled 68% of all law students, and by 1948, they enrolled 82 percent. Id. at 254.
90. See id. at 42 (stating that "[t]he importance of this transformation cannot be exaggerated").
91. Id. at 43. By 1900, there were 102 degree-conferring law schools in the United States (up from 21 in 1860). In 1920, there were 146, and in 1940, there were 190. See Hurst, supra note 44, at 272.
92. See Abel, American Lawyers, supra note 13, at 43.
93. Id. at 43.
94. At their high point in 1928, there were over 31,000 students enrolled in unapproved schools, compared to 15,000 students enrolled in ABA-approved schools. See id. at 277-78.
95. See id. at 47, 85-87; Collins, supra note 25, at 155-56.
96. See Abel, American Lawyers, supra note 13, at 71-73; Collins, supra note 25, at 156-57; see also Stevens, supra note 59, at 73-84 (discussing the explosion in the number of law schools at the turn of the century).
97. See Abel, American Lawyers, supra note 13, at 55; Collins, supra note 25, at 142-47; see also Paul Starr, The Social Transformation of American Medicine 79-144 (1982).
out, however, the move to law school as the primary method of training laid the foundation for the future strength of the American legal profession. The bar’s initial inability to impose prerequisites for law school admission resulted in a timely, dramatic growth in the number of lawyers. Between 1880 and 1920, the number of lawyers in the United States doubled from 60,626 to 122,519. By 1930, the number of lawyers grew to over 160,000. As a result, American lawyers were poised to capture the expanding market for legal services created by the rise of corporations and the emergence of the administrative state.

The creation of a vertically integrated (if highly stratified) educational system also has contributed significantly to the creation and maintenance of a “unified” profession. Contrary to Britain, for instance, which maintains the division between barristers and solicitors, and most civil law countries, which recognize multiple legal specialties with separate training and admission requirements, the American legal profession is formally unified despite the wide variety of jobs and career paths available to lawyers, and despite the informal status distinctions between lawyers educated at different schools. This characteristic of American lawyers has made them a

98. Abel, American Lawyers, supra note 13, at 280.
99. Id.
100. See Abbott, supra note 21, at 247-54, 275-79 (comparing American lawyers to British solicitors).
101. See Collins, supra note 25, at 159. This vertical integration is characteristic of the educational system in the United States generally. As Collins writes:
Where the European type of branching into specialized training produces distinctive types of careers at early choice points (e.g., medical or legal training are entered directly at the end of secondary school), the U.S. system continually puts off final professional identification to the very end of the sequence. In brief, the contrast is between a system in which elite occupational access is marked off early by horizontal branchings and one in which there is a continuous set of vertical ranks, formally accessible to everyone with sufficient perseverance.

Id. at 91-92.
102. For a historical sociology of barristers and solicitors, including the development of entry requirements, governance structures and current demographics, see generally Richard L. Abel, The Legal Profession in England and Wales (1988).
103. See generally Lawyers in Society: The Civil Law World (Richard L. Abel & Philip S.C. Lewis eds., 1988) (covering the structure and organization of legal professions in Norway, Germany, Japan, the Netherlands, Belgium, France, Geneva, Italy, Spain, Venezuela, and Brazil).

The civil law world is dramatically different from its common law counterpart in every respect. To begin with, there is no “legal profession.” Indeed the very title of this chapter is an ethnocentric misnomer. The common law folk concept of “lawyer” has no counterpart in European languages.

104. See Hurst, supra note 44, at 293 (noting that legal education furnished “the most consistent thread of unity among lawyers”).
powerful lobbying force in their efforts to secure state protection from occupational competition.\textsuperscript{105}

\textbf{b. Jurisdiction Over Work}

This brings us to the second step in securing a professional monopoly: securing the profession's jurisdiction (P) over certain types of work (K). Before the Civil War, American lawyers were concerned primarily with establishing their exclusive rights to advocacy in the courts.\textsuperscript{106} Their primary competitors in this contest were lay representatives and court personnel, such as clerks.\textsuperscript{107} After the war, the profession fought to define its monopoly more broadly, to include nonlitigation activities such as will drafting, conveyancing, title transfers, debt collection, and tax consulting, as well as the all-purpose (and ill-defined) business of "giving legal advice."\textsuperscript{108} Lawyers' primary competitors in these contests were other professionals, such as bankers and accountants, as well as corporations, such as title companies, mortgage companies, insurance companies, and collection agencies.\textsuperscript{109}

Lawyers relied on a variety of strategies in these jurisdictional battles, the most important being state-by-state campaigns for protective legislation.\textsuperscript{110} Early efforts to stave off competition met with populist opposition, however, and many were unsuccessful. In a number of states, nonlawyers were permitted to represent parties in litigation until as late as the 1930s.\textsuperscript{111} Other states, such as California, limited lawyers' monopoly to the courts, and explicitly permitted laypersons to perform all other legal functions.\textsuperscript{112} As a result, a

\textsuperscript{105} See Abel, \textit{Lawyers in the Civil Law World}, supra note 103, at 22-24 (noting that the relative unity of the U.S. profession contributes to lawyers' control over the market for legal services).

\textsuperscript{106} See Abel, American Lawyers, \textit{supra} note 13, at 112. Historically, such advocacy is the core of Anglo-American lawyers' jurisdiction: in England, the first professional lawyers emerged in the twelfth and thirteenth centuries as specialists in the king's court, and gradually came to monopolize pleading before the royal judges. See Carr-Saunders & Wilson, \textit{supra} note 21, at 37-55; Collins, \textit{supra} note 25, at 147.

\textsuperscript{107} See Abel, American Lawyers, \textit{supra} note 13, at 112.

\textsuperscript{108} \textit{Id.} at 113; \textit{see also} Abbott, \textit{supra} note 21, at 259; Hurst, \textit{supra} note 44, at 320-21; Wolfram, \textit{supra} note 23, at 825.

\textsuperscript{109} See Abbott, \textit{supra} note 21, at 265; Abel, American Lawyers, \textit{supra} note 13, at 112.

\textsuperscript{110} See Abel, American Lawyers, \textit{supra} note 13, at 113. Between 1870 and 1920, seventeen laws were passed protecting lawyers' exclusive rights to various types of work. \textit{Id.}

\textsuperscript{111} Laypersons were allowed to represent parties in some California courts until 1933. \textit{See id.} Until 1933, the Indiana constitution allowed any person to practice law in the state courts, whether admitted by the courts or not. \textit{See Wolfram, supra} note 23, at 824. Until 1930, any person could represent parties in Massachusetts courts as long as they had a written power of attorney. \textit{Id.} at 825 n.4 (citing E. Griswold, \textit{Law and Lawyers in the United States} 15-16 (1965)).

\textsuperscript{112} See Abel, American Lawyers, \textit{supra} note 13, at 113 (discussing California's
“vigorous and expansive doctrine of unauthorized practice” did not take hold in most jurisdictions until well after World War I.113

The profession’s initial efforts to secure state protection were hindered in part by a lack of reliable information about the sources and extent of competition, and by the absence of an authoritative definition of “the practice of the law.”114 By the 1920s, however, the ABA had become seriously concerned about nonlawyer competition, and in 1930, it launched a national campaign against unauthorized practice.115 The ABA also formed a committee on unauthorized practice and urged state and local bar associations to follow suit.116 It published a newsletter to help coordinate state and local efforts, and published articles on unauthorized practice in the American Bar Association Journal.117 By 1940, 400 state and local bar associations had formed unauthorized practice committees.118 These committees “hound[ed] alleged unauthorized practitioners with a zeal and sense of purpose... not often matched by bar disciplinary committees in their attempts to control wayward lawyers.”119

The campaign paid off, and in the 1930s, lawyers began to win protection from the courts, which announced “sweeping common-law doctrines of exclusive lawyer competence” in cases brought by bar associations against nonlawyer competitors.120 Lawyers also negotiated a series of favorable interprofessional treaties that defined broad areas of practice as off-limits to would-be competitors, such as collection agencies (1937), claims adjusters (1939), law book publishers (1941), banks (1941), realtors (1942), accountants (1951) and social workers (1964).121 By the 1960s, American lawyers enjoyed a more expansive monopoly than any other legal profession in the world.122

What accounts for American lawyers’ success in securing such an expansive monopoly? Part of the answer, as noted above, is the move from apprenticeship to law school training. The supply of lawyers in the United States expanded—and was capable of expanding—at

strong populist tradition and its effect on lawyers’ efforts to regulate unauthorized practice).
113. Wolfram, supra note 23, at 825.
114. See Hurst, supra note 44, at 320-21.
115. See Abel, American Lawyers, supra note 13, at 113; see also Abbott, supra note 21, at 255 (chronicling the ABA campaign).
116. See Wolfram, supra note 23, at 825.
117. Abel, American Lawyers, supra note 13, at 113.
118. Id.
119. Wolfram, supra note 23, at 825.
120. Id. at 825-26.
121. Id. at 826.
precisely the right time to capture emerging markets for "legal" work.\textsuperscript{123} This characteristic distinguishes American lawyers from British solicitors, for example. Although the growth of corporations and the rise of the administrative state occurred in Britain at about the same time that it occurred in the United States, solicitors at the time were required to undergo five years of clerkship under an articled solicitor, and therefore were locked into a "rigid demographic structure" that left them unable to respond to the sudden increase in demand.\textsuperscript{124} Thus while British solicitors at the turn of the century enjoyed far more professional power than American lawyers, by 1950 American lawyers had "clearly surpassed" their British counterparts.\textsuperscript{125}

Another part of the answer is the size and market orientation of the American private bar. The proportion of lawyers in private practice is larger in the United States than in most other countries, with the exception of Great Britain.\textsuperscript{126} Further, historically United States private practitioners enjoyed less monopoly protection than private practitioners elsewhere, and therefore had to compete more for business. In civil law countries, the state historically controlled the number of private practitioners through the use of admissions quotas, and private practitioners in some countries continue to be so protected.\textsuperscript{127} In 1966, British solicitors derived half their income from their lucrative monopoly over conveyancing (transfer of real property).\textsuperscript{128} American private practitioners, by contrast, had to fight for state protection in an era of populist sentiment and rapid entry into the profession and, as many have noted (usually with regret), have embraced the demands of market competition.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{123} See Abbott, supra note 21, at 251-52.
\item \textsuperscript{124} Id. at 249, 251-53, 275-76. The length of "articles" has since been reduced to two years for law graduates. The number of students with law degrees has increased substantially, however, which has intensified competition for articles. See Richard L. Abel, England and Wales: A Comparison of the Professional Projects of Barristers and Solicitors, in Lawyers in Society: The Common Law World 23-75, 31 (Richard L. Abel and Philip S.C. Lewis eds., 1988) (describing changes in the entry requirements for solicitors since World War II).
\item \textsuperscript{125} Abbott, supra note 21, at 247 (contrasting solicitors' isolation with American lawyers' "intense involvement" in both business and government).
\item \textsuperscript{126} See Abel, Lawyers in the Civil Law World, supra note 103, at 4-6, 10-11, 44-45 (comparing the number and proportion of lawyers in private practice in different countries).
\item \textsuperscript{127} Id. at 10-11 (discussing the history of admissions quotas in Germany, Italy and France). Some civil law countries in the 1950s and 1960s prohibited private practitioners from accepting any form of employment or engaging in business activities, and many civil law countries continue to impose significant restrictions on lawyer advertising. Id. at 25-27 (discussing restrictions on competition among private practitioners in Germany, Italy, France, and Denmark).
\item \textsuperscript{128} See Abel, The Legal Profession in England and Wales, supra note 102, at 219 (reporting solicitors' incomes from different types of work).
\item \textsuperscript{129} See Mary Ann Glendon, A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society 69-71 (1994) (discussing the
Finally, part of American lawyers' success in securing an expansive professional monopoly must be credited to the emergence and growth of large law firms in the United States. In response to the increasing demand for corporate legal services, American business lawyers moved relatively early to a bureaucratic organizational form. This form, which relies on internal hierarchy, specialization and economies of scale, helped American lawyers maximize individual productivity during a period when demand was outpacing supply:

As a social form for organizing the delivery of comprehensive, continuous, high-quality legal services, especially to businesses, the large law firm is unsurpassed. Like the hospital as a way to practice medicine, the big firm has provided the standard format for delivering complex legal services. Even as the big firm is criticized, features of its style—specialization, teamwork, continuous monitoring on behalf of clients, representation in many forums—have been emulated in other vehicles for delivering legal services. The specialized boutique firm, the public-interest law firm, the corporate law department—all model themselves on a style of practice developed in the large firm. And legal professions around the world have increasingly emulated the American big firm, especially in breadth of legal services.

c. Current Contests


130. See Abbott, supra note 21, at 252.


lawyers and their competitors. My goal is to show how jurisdictional contests continue to shape the profession's development and how the outcomes of such contests affect the boundaries between professions. In recent years, I have focused particularly on the competition between lawyers and accountants and the related debate about multidisciplinary practice, and on the profession's efforts to regulate self-help and internet providers. Exploring these issues requires students to apply functional and conflict theory to current regulatory problems, and to critically analyze the scope and content of the current Model Rules.

The emergence of multidisciplinary practice, for instance, raises a host of ethical and regulatory issues covered by the Model Rules, including professional independence, unauthorized practice, confidentiality, conflicts of interest, and the regulation of ancillary

133. See Model Rules, supra note 8, R. 5.4 (prohibiting a lawyer or law firm from sharing fees with a nonlawyer or forming a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law). Protecting lawyers' professional independence is the chief rationale behind Rule 5.4 and a chief concern of opponents of multidisciplinary partnerships (MDPs). See, e.g., Edward S. Adams & John H. Matheson, Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms, 86 Cal. L. Rev. 1, 8-11 (1998) (reviewing the history of Rule 5.4 and its relationship to the MDP debate); Mary C. Daly, Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership, 13 Geo. J. Legal Ethics 217, 240-47 (2000) (discussing the ABA's long-standing prohibitions against fee-sharing and partnerships between lawyers and non-lawyers); New York State Bar Ass'n Special Comm. on the Law Governing Firm Structure and Operation, Preserving the Core Values of the American Legal Profession 324 (April 2000) [hereinafter MacCrate Report] (arguing that "[u]nrestricted multidisciplinary practice would pose a substantial threat to the roles and independence of the bar."). See also American Bar Ass'n Comm. on Multidisciplinary Practice, Report to House of Delegates, Recommendation 1 at http://www.abanet.org/cpr/mdpfinalrep2000.html (last visited Oct. 9, 2000) [hereinafter ABA MDP Commission Report] (urging amendment of Rule 5.4 to allow MDPs as long as lawyers retain "control and authority" over legal work).

134. See MacCrate Report, supra note 133, at 366-67 (urging the New York State Attorney General to execute prohibitions against the unauthorized practice of law by accountants); Daly, supra note 133, at 250-61 (discussing the "seeming impossibility" of defining the "practice of law" and distinguishing it from the "practice of tax" by accountants).

135. Lawyers and accountants have different and in some cases conflicting disclosure requirements. For instance, a lawyer's duty to maintain client confidences is incompatible with an auditor's duty to disclose all facts that would be material to the audit. Compare Model Rules, supra note 8, R. 1.6, with Code of Professional Conduct of the American Institute of Certified Public Accountants Rule 101 [hereinafter AICPA Code]. The SEC has taken the position that the role of auditors and attorneys are incompatible under Federal Securities Law, and that multidisciplinary partnerships between lawyers and accountants threaten auditor independence. See SEC Commissioner Norman Johnson Has Grave Reservations About MDPs, BCD News & Comment, Apr. 19, 2000.

136. The rules prohibiting conflicts of interest are stricter for lawyers than for accountants. Compare Model Rules, supra note 8, Rules 1.7-1.10, with AICPA Code, supra note 135, Rule 102-2. According to Larry Fox of Drinker Biddle & Reath in Philadelphia:
business. It also highlights professional responsibilities not covered by the Model Rules, such as the responsibilities of law firm managers to create firm-level ethics controls, and the responsibility of the profession to regulate law firms' ethical infrastructure. Likewise, the regulation of self-help legal software and online legal services requires an analysis of the Model Rules governing competence, diligence, confidentiality, and solicitation, as well as issues not directly (or

What we're really fighting about [in the MDP debate] is whether our rules governing conflicts of interest will survive.... Accounting firms got to be as big as they are because they don't impute conflicts.... Every morning, an accounting person gets up and he only has to worry about the clients he's working for—no one else's. They have a subjective standard. The person only has to look in the mirror and say, "How do I feel about it?" If I feel okay, fine. Nobody comes along and judges them and says, "It's fine you feel fine, but no reasonable person would...." They also have no concept of a nonwaiveable conflict. Any conflict is waiveable. The example they give is classic. They say [Accounting Firm A] can represent two enterprises competing for one television or one local telephone license without getting clearance. That's a nonwaiveable conflict in the world of Drinker, Biddle & Reath.


137. See, e.g., MacCrate Report, supra note 133, at 342 (proposing that the New York Code of Professional Responsibility be amended to "facilitate the growth of ancillary ventures through which lawyers will be able to provide integrated professional services to their clients' business, while protecting the public against the risks of nonlawyer involvement in the practice of law").

138. Proponents of MDPs look to firm-level structural controls to prevent ethical problems. See ABA MDP Commission Report, supra note 133, Recommendation 1 (proposing that MDPs be allowed as long as lawyers have the "control and authority necessary to assure lawyer independence in the rendering of legal services") and Recommendation 2 (explaining the implications of the "control and authority" principle for the organizational structure of MDPs). Some argue that law firms, too, should be required to maintain firm-level ethics controls. See Schneyer, Professional Discipline, supra note 13, at 4-6 (arguing that law firms as entities should be subject to professional discipline under the Model Rules, so as to encourage law firm partners to take collective responsibility for instituting firm-level ethics controls); Schneyer, A Tale of Four Systems, supra note 20, at 247-54 (same).

139. See Model Rules, supra note 8, R. 1.1 (stating that "competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); Ross D. Vincenti, Self-Help Legal Software and the Unauthorized Practice of Law, 8 Computer/L.J., 185, 203 (Spring 1988) (discussing the profession's responsibility to protect the public from incompetent advice).


141. See generally Lucy Schlauch Leonard, Comment, The High-Tech Legal Practice: Attorney-Client Communications and the Internet, 69 U. Colo. L. Rev. 851 (1998) (discussing confidentiality problems created by attorneys' use of e-mail); Jonathan Rose, Note, E-Mail Security Risks: Taking Hacks at the Attorney-Client Privilege, 23 Rutgers Computer & Tech. L.J. 179 (1997) (discussing problems and possible solutions to e-mail communications between attorneys and their clients);
adequately) covered by the Model Rules, such as the profession’s responsibility to insure access to legal services,\(^\text{143}\) and the boundaries of the profession’s monopoly over the giving of legal advice.\(^\text{144}\)

Juxtaposing the interprofessional conflict between lawyers and accountants with the professional-lay conflict over the regulation of self-help software\(^\text{145}\) provides an opportunity to further consider the relationship between professional knowledge and professional power.

I also have experimented with requiring students to identify jurisdictional contests between occupations and professions other than the legal profession, and to analyze these contests from both

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144. Bar associations in some states, most notably Texas, are fighting the self-help software industry, arguing that self-help software providers are engaged in the unauthorized practice of law. In 1999, the Texas Unauthorized Practice of Law Committee (UPLC) won an injunction against Parsons Technology, which publishes Quicken Family Lawyer, a will drafting software. In a 23-page summary judgment opinion, the district court held that the interactive software (which includes an “Ask Arthur Miller” help feature) “adapts the content of the form to the responses given by the user” and thus constitutes the unauthorized practice of law. See Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. 97-CV-2859-H, 1999 WL 47235, at *7 (N.D. Tex. Jan. 22, 1999). In response to Parsons, the Texas legislature revised its 1939 unauthorized practice law to make room for legal self-help books and software. The revised law states that written materials, books, forms, computer software or similar products do not constitute the practice of law as long as they carry “clear and conspicuous” labels that the products are not a substitute for an attorney. The UPLC objects to the revised law on separation of powers grounds, arguing that the court (that is, the UPLC) retains the ultimate authority to define what constitutes unauthorized practice. See Polly Ross Hughes, *Bill to Lay Down the Law on Self-Help Software; Controversial Measure Reversing Statewide Ban is Awaiting Gov. Bush’s Signature*, Hous. Chron., June 13, 1999, available at 1999 WL 3995519. Parsons currently is on appeal to the Fifth Circuit.

145. One can frame this as a conflict between lawyers and consumers, or as a conflict between lawyers and self-help publishers. I invite students to consider the implications of each frame for regulatory policy.
functional and conflict perspectives. Which is more important, knowledge or power, in explaining who wins jurisdictional contests? What type of evidence is relevant to this inquiry? Which of the contests that we have discussed provides the best example for each theory?

This exercise is pedagogically useful, in that it requires students to apply the ideas that they have been learning in a new context, and many students find the opportunity to talk about other professions refreshing. This exercise also helps combat students' temptation to become cynical about the legal profession. One of the most important benefits of a sociological (that is, comparative) approach to the subject of professional responsibility is that it places the legal profession within a critical—but *generically* critical—analytical framework. The legal profession, this framework reminds them, is not fundamentally different from any other profession (or organized occupational group). Lawyers' efforts to protect their shared economic interests do not differentiate them from other occupational groups; they are no more—and no less—self-serving than doctors, accountants, or riverboat pilots. In an era of increasing public disdain for lawyers,146 students may find this a welcome insight.

2. The Current Structure of the Profession

In tracing the development of lawyers' monopoly, students already have been alerted to several important structural characteristics of the American legal profession. First, unlike legal professions in other countries, the United States profession is at least formally a unified profession.147 The vast majority of American lawyers graduate from ABA-approved law schools with fairly standardized curricula148 and take the bar examination required in their jurisdiction.149 Law schools do not require students to declare subspecialties and there is considerable mobility lawyers between different legal jobs.150

Second, the percentage of lawyers engaged in private practice is higher in the U.S. than in most other countries, with the exception of

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146. See Abel, American Lawyers, *supra* note 13, at 163 (discussing the decline in lawyers' prestige during the twentieth century); Chris Klein, *Poll: Lawyers Not Liked*, Nat'l J.L., Aug. 25, 1997, at A6 (reporting that the percentage of people viewing the law as an occupation “of very great prestige” dropped from 36 to 19% between 1977 and 1997).
147. See *supra* notes 101-04 and accompanying text.
149. *Id.* at 52-58. As of 1985, only five states admit lawyers through “diploma privilege,” and only 1.3% of all entrants qualify via this route. *Id.* at 62, 263. See *supra* note 87 and accompanying text.
150. See Abel, American Lawyers, *supra* note 13, at 175-76 (describing patterns of career mobility among American lawyers); Abel, *Lawyers in the Civil Law World*, *supra* note 103, at 6 (comparing the United States to civil law countries).
Great Britain. There is some evidence of convergence: the percentage of lawyers engaged in private practice in the United States (and other common law countries) is declining, whereas the percentage in many civil law countries is increasing, but the American profession nevertheless remains more independent from government employment than legal professions in most other countries.

Finally, despite the absence of formal structural divisions within the profession, American lawyers are highly stratified by class, race and gender as well as by the type of client served. As students have learned, the bar's efforts to raise requirements for entry into the profession were tied to broader ethnic, religious and class conflicts in nineteenth—and twentieth-century America. In the late nineteenth century, the self-appointed "decent part" of the bar was made up almost exclusively of wealthy WASP men, and their campaigns against "overcrowding," "corruption" and the "unqualified" (part-time) schools were simultaneously (and often explicitly) campaigns against immigrants, working class lawyers, and religious minorities.

Lawyers also are highly stratified according to the wealth, social status and political resources of their clients. The most prestigious and remunerative jobs are those serving the financial interests of large corporations, such as partnerships in large corporate law firms, and the least prestigious and remunerative are those serving poor and politically powerless individuals. Moreover, students are sorted into this client-based system of intraprofessional stratification long before they take their first legal job: the most important determinant of

151. Abel, Lawyers in the Civil Law World, supra note 103, at 4-8.
152. Id. at 38-40, 42-43. In the early 1980s, the ratio of lawyer-civil servants to private practitioners was 15:100 in England, 20:100 in Scotland, 1:1 in Germany, 1:1 in Venezuela, and 106:100 in Finland, compared to 14:100 in the United States. Id. at 44-45.
154. Id. at 153, 155-56 (discussing the role of ethnic conflict in the development of the legal profession); see also Abel, American Lawyers, supra note 13, at 85-90 (discussing efforts to exclude immigrants and ethnic minorities from admission to the bar); Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 106-29 (1976) (describing the conflict within the bar concerning the admissions of minorities); Friedman, supra note 50, at 638-69 (discussing ethnic and class divisions in the nineteenth century bar); Wayne K. Hobson, The American Legal Profession and the Organizational Society, 1890-1930 301-04 (1986) (discussing the conflict surrounding the admission of minorities to the bar); Stevens, supra note 59, at 74-81 (discussing the ethnic composition of part-time versus full-time schools).
156. See Abel, American Lawyers, supra note 13, at 202-07 (reporting patterns of stratification by type of client); Heinz & Laumann, supra note 155, at 91 (reporting social prestige rankings of 30 fields of law) and 103 (reporting imputed characteristics of different practice areas); 1999 NALP Report, supra note 14, at 33-40 (reporting median starting salaries for law graduates by employer type).
American lawyers’ career track and professional status is the rank of the law school that they attend.\textsuperscript{157} I emphasize these characteristics in explaining the current structure of the profession, focusing primarily on the sources of stratification within the private bar. I begin by tracing changes in the demographic composition of the profession and reviewing the empirical literature on the sources of gender and race stratification among lawyers.\textsuperscript{158} This discussion leads directly to the debate about affirmative action in law school admissions and the appropriate role of numerical criteria such as the LSAT.\textsuperscript{159} I link the law school admissions debate to a discussion of law school rankings and the criteria and methodology used by \textit{U.S. News & World Report}.\textsuperscript{160} From a sociological perspective, these issues of ranking are of central relevance to the study of professions, because they capture the chief theoretical debate about the functions and dysfunctions of stratification.\textsuperscript{161}

I also use this section of the course to introduce students to the variety of organizational contexts in which lawyers practice\textsuperscript{162} and the

\textsuperscript{157} In 1962, more than 70% of the lawyers in New York’s leading law firms had graduated from Harvard, Columbia or Yale. See Erwin Smigel, \textit{The Wall Street Lawyer: Professional Organizational Man?} 39 (1969). Heinz \& Laumann report similar patterns in Chicago. See Heinz \& Laumann, \textit{supra} note 155, at 192.


\textsuperscript{161} See \textit{supra} Part II.A. (contrasting functional and conflict theories of social stratification).

\textsuperscript{162} See Chambliss (2000), \textit{supra} note 14, at 1-21 (providing an overview of the distribution of lawyers across different employment settings); Abel, \textit{American Lawyers}, \textit{supra} note 13, at 166-81 (same); Curran \& Carson, \textit{supra} note 18, 23-26
importance of organizational structure and culture in shaping individual conduct. I focus particularly on the growth of law firms and the bureaucratization of law firm structure, and the sources of structural and cultural variation among firms. I also cover recent studies of the structure of lawyers' careers, devoting special attention to lawyers' careers within (and across) large law firms.

My focus on large firms in part reflects the fact that a large majority of my students begin their careers as large firm associates; thus the organization of work and careers in such firms is relevant to most of the class. Further, most of the recent empirical literature on the organization of private law practice and the structure of lawyers' careers focuses on large firm practice. Part of my justification for focusing on large law firms, however, stems from their historic neglect—and growing importance—as a regulatory target. As noted above, the Model Rules are based on an individualistic paradigm that arose in an era in which most lawyers practiced alone or in two-man partnerships. As a result, the Rules have little to say about the

(same); 1999 NALP Report, supra note 14, at 27-40 (examining the distribution of 1998 law graduates across different employment settings).


164. See Chambliss (1997), supra note 158, at 713-24 (discussing structural variations across firms); Galanter & Palay, Why the Big Get Bigger, supra note 132, at 756-65 (same); Nelson, supra note 132, at 37-124 (discussing the changing economic and social structure of large law firms).


166. But see Seron, supra note 129; Van Hoy, supra note 165.

167. See supra note 20 and accompanying text; see also David B. Wilkins, Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics, in Everyday Practice and Trouble Cases 68-108 (Austin Sarat et al. eds., 1998) [hereinafter Wilkins, Everyday Practice Is the Troubling Case] (arguing that the traditional view of
professional responsibilities of professional organizations such as law firms.

This is likely to change in the near future. Recently, two states, New York and New Jersey, amended their rules of professional conduct to include the regulation of law firms as entities. In 1996, New York amended its disciplinary rules to extend to law firms the same prohibitions against unethical conduct that apply to individual lawyers. The New York rules also establish an entity-level duty of supervision, requiring law firms to "make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules." In 1998, New Jersey followed New York, when the Supreme Court of New Jersey amended the Rules of Court to allow for the imposition of ethical sanctions on law firms, including fines in "exceptional circumstances." The amended rules provide that "every attorney and business entity authorized to practice law in the State of New Jersey... shall be subject to the disciplinary jurisdiction of the Supreme Court.

The ABA Standing Committee on Professional Discipline also recently considered (and rejected) a proposal for law firm discipline as part of its year 2000 amendments to the Model Rules of Professional Conduct. Like the New York rules, the Standing Committee's proposal would have made law firms subject to general disciplinary enforcement, and created an entity duty of supervision. Under this duty, firms would be required to have in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct:

This presumably would include... systems for checking conflicts of interest... [and] a means for updating conflicts of interest data...; procedures for quality control of product created by new

168. See N.Y. DR 1-102(A) (providing examples of misconduct to be applied to individual lawyers or law firms); New York Adopts New Rules Subjecting Firms to Discipline, 12 ABA/BNA Lawyers' Manual on Professional Conduct 191-7 (June 12, 1996).

169. N.Y. DR 1-104(A). Similar rules were considered in 1996 by the State Bar of California, but were shelved when Governor Pete Wilson vetoed state bar dues legislation. See Mark Hansen, Taking a Firm Hand in Discipline: New York Ethics Rules Pinpoint Law Firms—Some Say More States Should Follow, A.B.A. J. 24 (Sept. 1998).

170. See New Jersey Practice 1, Court Rules Annotated (Rule 1:20-15(j)) (Klock 5th ed. 1999). The change was prompted in part by the Supreme Court's reprimand of national personal injury firm Jacoby & Meyers the previous year. See Dana Coleman, Fines for Firms? On the Horizon! New Jersey Law., Dec. 15, 1997.

171. New Jersey Practice 1, Court Rules Annotated (Rule 1:20-1) (Klock 5th ed. 1999).


173. Id.
associates...; and adequate systems for ensuring proper and appropriate billing of clients and the proper handling of clients' funds. 174

The primary impetus for law firm discipline is concern about ethical accountability in large law firms. Under the current rules, large firm lawyers are practically immune from professional discipline.175 Because of the nature of large firm practice, it is often difficult to pinpoint responsibility for ethical violations that occur in large firms. Lawyers tend to work in teams with loose organization, little formal supervision, and diffuse responsibility for decision-making.176 Holding individual lawyers accountable for ethical lapses in this context in some cases may amount to scapegoating.177

Further, many of the ethical issues large firm lawyers face (such as conflicts of interest, billing and discovery abuse) are matters governed by firm-wide policy. Thus, the line between ethics and management blurs. As Ted Schneyer writes, "[the] quality of lawyering today often depends not just on individual skills and values... but also on a law firm's management and committee structure, its firm-wide or departmental policies, and its standard operating procedures."178

Future generations of lawyers inevitably will be forced to grapple with issues of law firm management in a context of increasing professional (and external) regulation. The emergence of new organizational forms such as multidisciplinary partnerships can only hasten the arrival of a new entity-level regulatory paradigm.179 Neglecting this topic in the one required law school course on professional responsibility therefore does students (and the profession) a serious disservice.

C. The System of Professional Regulation

This all sounds fine, the reader is thinking, but does she ever teach them the rules? The short answer (I now confess) is no. At least, I do not organize any part of the course (including this section on professional regulation), around a comprehensive survey of the current Model Rules. Instead, I organize this section around specific

174. Id.
175. See supra note 17 and accompanying text.
176. See Galanter & Palay, Why the Big Get Bigger, supra note 132, at 748.
177. See Schneyer, Professional Discipline, supra note 13, at 19-20; Report to House of Delegates, supra note 172, at 5-6 (discussing the infirmities of the current system). The current rules "expose individual lawyers to discipline for activities conducted or authorized either by other lawyers in their firm or by a decision of the firm's or legal department's hierarchy. This discipline may be imposed even where the respondent lawyer may have objected to, or even been unaware of, the offending conduct." Id.
179. See supra note 138 and accompanying text.
ethical and regulatory problems, with coverage dictated in part by student demand.

I begin by providing students with a comparative overview of the regulatory system, based on David Wilkins' classic article, *Who Should Regulate Lawyers?* Wilkins identifies four categories of professional regulation—disciplinary controls, liability controls, institutional controls, and legislative controls—and compares their strengths and weaknesses for addressing particular regulatory problems. I couple excerpts from Wilkins' article with excerpts from Ted Schneyer's article, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, which compares the effectiveness of professional discipline, judicial regulation, agency regulation and civil liability as sources of entity regulation. Together these articles provide an excellent framework for in-depth inquiries into specific ethical and regulatory problems.

I follow the introduction of this framework by asking students to write an ethics code for law students and propose a means for enforcing it. I require them to: (1) identify specific ethical and/or regulatory problems with law student conduct; (2) research existing regulation relevant to the issues that they have identified (including honor codes and other law school and/or university regulation, as well as any ABA or AALS regulation that might apply); (3) propose standards for compliance and mechanisms for enforcement (including specification of regulators and sanctions); and (4) identify the contribution of the strategy that they propose to the overall regulatory system. An allowable response to this assignment is to propose that no new code be adopted, but students taking this approach still must identify specific ethical problems arising in the law school context, and justify the no-code strategy in terms of existing regulation.

This has been an extremely successful assignment at both schools where I have tried it. Students enjoy identifying specific problems, some serious (cheating, harassment) and some more humorous (gunning in class, sucking up to faculty). The divisions that emerge—between top and middling students, students on different career tracks, and students with different values—provide an opportunity to review sources of division within the profession and the implications of these divisions for professional self-regulation. Considering the

181. *See id.* at 805-09.
182. *Id.* at 822-47.
184. *See id.* at 245-46.
potential contribution of a formal ethics code also provides an opportunity to identify sources of informal regulation, such as peer and market pressure and law school socialization.

I devote the remainder of the section on professional regulation (about one-third of total class hours) to in-depth analyses of specific ethical and regulatory problems raised by students. In the first week of class, I survey students about their intended careers. (By the second or third year of law school, most students have a general idea about the type of law they want to practice, or their intended non-legal career, and the type of organization in which they intend to work.) I require students to identify a specific ethical or regulatory problem associated with their intended practice, and to write a short essay critically reviewing the content of current regulation. I then fix a schedule for discussion during this section of the course. I organize coverage of student essays by employment sector: private practice (organizational client sector); private practice (individual client sector); and public sector employment. Half of the grade in the course is based on this and other written projects (such as the project on interprofessional competition and the student ethics code, noted above).

I do not actually require students to make oral presentations. Instead, I require them to turn in their essays a week before our coverage of their intended employment sector begins, and to be on call as a regulatory expert on the day that their topic is discussed. Typically, I group two or three topics together to serve as the content for each class period. I make all information presented in class fair game for the final exam (the other half of the grade for the course).

I conclude this section on the system of professional regulation by requiring students to turn in written comments relating the material presented to previous sections of the course. I use these comments as a vehicle for reviewing the entire course. I typically spend the last two class periods on this comprehensive review.

III. Response to Objections

A. What About the MPRE?

Most students initially are suspicious of the sociological approach. I tell them explicitly on the first day of class that the course is not

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186. I do not allow duplication of topics and award popular topics (e.g., sex with clients) to first comers.
187. See supra Part II.B.1.
188. See id.
189. See Levin, supra note 9, at 396 (stating that the MPRE “may be more challenging for applicants who actually know something about state professional responsibility rules than for those who do not”).
intended to—nor will it—sufficiently prepare them for the MPRE. I also make clear that the course is demanding, requiring several written projects in addition to a final exam. A few students immediately switch to another professor after reading the syllabus, but not as many as one might expect. No more than normally switch out of law classes during the first week. Despite their suspicion, students are curious about the subject matter of the course, and many are eager to avoid the alternative; that is, the traditional rule-by-rule course.

The tension between bar exam preparation and free intellectual curiosity nevertheless persists throughout the semester, as it does in all law school courses. Adopting a sociological approach does not exacerbate this tension, but simply resolves it in favor of intellectual curiosity at the expense of bar exam preparation, rather than the other way around. I justify this pedagogical choice on two grounds. First, as a normative, professional matter—here the profession of interest being law teaching—the MPRE should not drive law teaching on the subject of professional responsibility. The MPRE is seriously deficient as a measure of anything other than a superficial mastery of the Model Rules. Its coverage is narrow; it tests “model” or hypothetical rules that do not necessarily apply in the jurisdiction in which students will practice (or, in some cases, in any jurisdiction); and it covers some topics that are inapplicable to graduates about to enter the profession (such as judicial ethics). Further, teaching “professional responsibility” as if it could be reduced to rules completely trivializes the subject and encourages “tunnel vision” among students.

Instead, law teachers (and law schools, as professional institutions) have a professional responsibility to improve teaching on the profession, and to take the lead in identifying and addressing its ethical and regulatory problems. There is some evidence that this is already occurring: in the past ten years, there have been numerous

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190. Id. at 404-05 (arguing that the MPRE’s focus on “model” rules makes it difficult for students to take it seriously, and is “somewhat akin to requiring them to sit for bar exams that test them on the law of a mythical jurisdiction”).

191. Id. at 397 n.8 (stating that 10-15% of the MPRE focuses on judicial ethics, despite the fact that less than one percent of all lawyers are state court judges).

192. See Cramton & Koniaz, supra note 19, at 171; Levin, supra note 9, at 405; David A. Logan, Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility, 56 Wash. & Lee L. Rev. 1023, 1028 (1999) (arguing that many of the most important questions of professional responsibility “cannot be answered by reference to any ABA code” (emphasis omitted)).

193. See generally Cramton & Koniaz, supra note 19; Russell G. Pearce, Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School, 29 Loy. U. Chi. L.J. 719 (1998); Rhode, supra note 19; David B. Wilkins, The Professional Responsibility of Professional Schools to Study and Teach About the Profession, 49 J. Legal Educ. 76 (1999) [hereinafter Wilkins, The Professional Responsibility of Professional Schools].
symposia (such as this one) devoted to the subject of professional ethics and the improvement of ethics teaching in law school. There also have been recent efforts to reform the MPRE, to make it more inclusive of the "law governing lawyers," rather than focusing only on the ABA Model Rules. Professional responsibility teachers should build upon this momentum, rather than deferring to demands for MPRE preparation.

The second justification for privileging intellectual curiosity over bar exam preparation is that the MPRE is a relatively easy exam. It is scored on a 150-point scale, and roughly half of all jurisdictions require only a 75 to pass. (After all, how would it look to nonlawyers if a large proportion of would-be lawyers consistently flunked the ethics exam?) Most professional responsibility teachers are probably familiar with the all-purpose tip for passing the MPRE: when in doubt, pick "the second most ethical answer." As one professional responsibility teacher notes, "a few hours with bar review materials is all that it takes for a student to get his or her MPRE ticket punched.

B. What About the Model Rules?

A more serious objection to the sociological approach is that it provides insufficient coverage of the issues raised by the Model Rules. I offer several responses to this objection. First, the course does cover a number of issues traditionally covered in professional responsibility, both in the section on the history and structure of the profession, and in the section devoted specifically to the regulatory system. A full third of the course is devoted to covering specific ethical and regulatory issues associated with different employment sectors. The chief difference between the course I propose and the traditional survey course, besides total time allotted, is in the organization of coverage. Instead of beginning with—and building out from—the individual lawyer-client relationship, the sociological approach begins with—and builds in from—the social organization of the profession.

Second, in terms of time allotted, no single course can do justice to the issues raised by the Model Rules, much less to the "law of

195. See Levin, supra note 9, at 409-10.
196. National Conference of Bar Examiners, The MPRE Information Booklet 1 (2000); see also Logan, supra note 192, at 1031 n.37 (reporting that over 80% of examinees score high enough to pass in any jurisdiction).
197. See Logan, supra note 192, at 1030; Rhode, supra note 19, at 41.
199. See supra Part II.B.1.c.
200. See Wilkins, Everyday Practice Is the Troubling Case, supra note 167, at 70-97 (critiquing the traditional approach from the perspective of sociolegal scholarship).
lawyering” more broadly. Professional responsibility, broadly defined, ideally would be taught by the so-called “pervasive method”, that is, integrated into the law school curriculum as a key feature of every course. As others have noted, professional responsibility is the only law school subject that will be relevant to all lawyers’ careers. If there is not enough room in the one required course on professional responsibility to cover the basic history and structure of the profession itself, and to provide students with a theoretical framework for understanding this history and structure, then additional courses should be required.

In the meantime, I defend my allocation of time to the sociology of the profession on two grounds. First, although the sociological course that I have outlined does not survey the Model Rules, it does provide in-depth coverage of the rules (and law of lawyering) most relevant to students’ intended careers. This targeted approach keeps students’ interest and builds on their summer practice experiences.

Second, the sociological approach equips students to spot issues that they have not covered, find the applicable regulatory standards, and work through their application. In this respect, the approach I am pitching is more “traditional” than the traditional course. The “case method” made popular by Langdell emphasizes fundamental principles and the development of an analytic framework (at the expense of survey coverage), so that students will be able to apply legal principles “with constant facility and certainty to the evertangled skein of human affairs.” This approach recognizes that the specific content of law and other regulation varies across jurisdictions and inevitably will change over time. This is no less true for professional regulation than for any other area of law. Indeed, the ABA currently is engaged in a wide-ranging effort to amend the Model Rules. In this context, it is the traditional survey course that requires a defense.

Finally, one might argue that the sociological approach suffers from a lack of emphasis on the moral and philosophical aspects of professional responsibility. I have purposely shied away from the use of the term “ethics” in this essay, and I shy away from it in the course as well. In part this reflects my skepticism that one can teach adults to be ethical by way of a law school course—a criticism that is often raised about the professional responsibility requirement.

201. See Rhode, supra note 19, at 50-52 (discussing the inherent limitations of any single ethics course); Levin, supra note 9, at 406, 408 (same).
202. See generally Rhode, supra note 19 (making the case for the pervasive method).
203. See Pearce, supra note 193, at 735-36.
204. See supra notes 66-68 and accompanying text.
205. Hurst, supra note 44, at 262 (quoting Langdell).
206. See supra note 172 and accompanying text.
207. See Pearce, supra note 193, at 732-35 (reviewing and responding to this critique); Rhode, supra note 19, at 44-48 (same).
Nevertheless, I can see the argument for a moral-philosophical approach to the subject of professional responsibility. Though one may not be able to teach adults to be ethical (or even conscientious), one can expose them to the issues and channel whatever good intentions they already have.

The chief response I have on this point is that the sociological approach does expose students to important moral issues, but it focuses on the moral responsibilities of the profession as a whole, and of lawyers as members of a profession, rather than treating individual lawyers as if they operated independently of any organizational or professional context. The sociological approach thus makes explicit the organizational, professional and societal implications of lawyers' individual actions, as well as alerting students to the external pressures that can lead to unethical behavior. In my view, this approach better-equipss students to identify and address the moral implications of their individual practice than a course organized around abstract issues of individual morality.

C. Faculty Competence

Another objection that I can imagine to the sociological approach—one that I have heard, in fact—is that you need to be a sociologist to teach it. This is not the case. Although, as a credentialed sociologist, I would like to believe that it helps, as a sociologist of the professions, I have been trained to question the relationship between credentials and skill.

The fact is, any law professor with sufficient interest could teach this course. For people who already are teaching professional responsibility, it requires only a few adjustments, mainly at the beginning of the course. The most important components of the sociological approach are: (1) the theoretical framework; (2) a commitment to comparative analysis; and (3) a commitment to grounding ethical and regulatory issues in a robust empirical context.

The theoretical framework is laid out above; students can learn it in a week. In my experience, the sociological framework comes naturally to law students. Students' lives in law school are all about the relationship between knowledge and power: the relationship between studying and grades; the relationship between faculty and students; the relationship between credentials and jobs. (Law professors' professional lives arguably have a little something to do with this relationship as well.)

The comparative framework has several dimensions: comparisons between American lawyers in different historical periods, comparisons between American lawyers and lawyers in other countries, and comparisons between the legal profession and other occupations and professions. One can teach the entire course by comparison, which is what I try to do, but one could also be more
sparing with course coverage in this regard. The comparative framework is more important than any particular content; the point is to keep reminding students of key theoretical issues by stepping back, every so often, away from the particulars of any one issue, any one era, and any one profession.

The empirical component requires teachers to have a working knowledge of the empirical literature on the profession, and no doubt many do. Although I have caricatured the traditional approach for purposes of comparison, I suspect that most professional responsibility teachers already cover at least some aspects of the history and structure of the profession, and few would claim that such topics are completely irrelevant to the subject. Still, this is probably the component that, when taken seriously, is likely to raise the strongest objection from adherents to the traditional approach. Is it appropriate to sacrifice coverage of the Model Rules in order to provide coverage of historical and sociological studies of the profession?

I submit that it is not only appropriate, but that it is inappropriate to do otherwise. The ABA accreditation standard requires that all students in the J.D. program receive instruction in "the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct...."\textsuperscript{208} Based on this standard, one could argue that half the course should be devoted to history, goals and structure, with the other half being reserved for duties, values and responsibilities.

Moreover, law schools have a professional responsibility to educate students about the profession; one that they currently are failing to fulfill.\textsuperscript{209} Though there have been some important innovations in teaching professional responsibility, on the whole law schools still exhibit little institutional commitment to research and teaching on the profession. As a result, most students graduate with only the sketchiest information about the norms and conditions of law practice and the many challenges that they will face. The sociological approach is designed to begin to address this "ethical failure" by the legal academy. As Wilkins writes:

\begin{quote}
[T]he law school's systematic and pervasive failure to study and teach about the profession ... is more than just a pedagogical oversight or a scholarly shortcoming. Instead, it is nothing less than an ethical failure by the legal academy to meet the legitimate needs of its three principal constituencies—students, the bar, and society.

At a time when the American legal profession is being radically
\end{quote}

\textsuperscript{208} American Bar Association Standards for Approval of Law Schools & Interpretations 302(b) (1996).

\textsuperscript{209} See Wilkins, The Professional Responsibility of Professional Schools, supra note 193, at 76.
transformed on almost every dimension, law schools can no longer credibly assert that by simply teaching students to "think like lawyers" they have given their graduates all the tools—or even the most important tools—that they will need to become successful and satisfied practitioners. If individual lawyers, the bar, and the public we serve are to emerge from this time of change with a legal profession capable of meeting the enormous challenges it now faces, then the legal academy must become an active participant in developing and transmitting the empirical and theoretical knowledge about legal practice that will allow us to construct a vision of legal professionalism fit for the twenty-first century instead of for the nineteenth.210

D. Workload

Finally, a note on workload. The sociological approach is more demanding of students and faculty than the traditional approach. To be successful, it requires student engagement and the tailoring of course content to specific student interests, which in turn requires periodic written assignments in addition to a final exam. I have mentioned several assignments that I use: requiring students to identify jurisdictional conflicts involving professions other than the legal profession, requiring students to write an ethics code for law students and propose a means of enforcing it, and requiring students to write an essay on a specific ethical or regulatory problem associated with their intended practice. I refer to these structured assignments as "projects." I also typically require students to write "comments" at various points in the course, such as comments tying the various sections of the course together. I do not impose any structure on "comments," except that they must address the reading (or some point of class discussion), rather than simply describing or summarizing it.

Some students balk at the workload and switch courses immediately. In general, however, I have been successful in persuading students that it will not be too bad, and here I hope to persuade readers (as potential teachers) as well. First, I impose page limits on all assignments: two single-spaced pages for "projects" and one single-spaced page for "comments." Page limits take the pressure off students and limit the time that it takes to grade and comment on their submissions. Second, I grade all "projects" on a five-point scale, and "comments" on a three-point scale, with any thoughtful effort earning a 4 (in the case of projects) or a 2 (in the case of comments). Thus, I emphasize effort and timely completion of the assignment rather than style, neatness, or length. I write comments in the margins of all submissions, and hand them back at the beginning of the class in which the topic is to be discussed. I find that this exchange with

210. Id. at 76-77.
students greatly improves both the quantity and quality of class participation.

Finally, I tailor the number of assignments required to the size of the class. Although I always require all students to write about a specific ethical or regulatory problem associated with their intended practice, the submission and grading of this project is staggered according to the employment sector that the student intends to enter. Thus my workload for this particular project occurs in three small clumps, about two weeks apart, rather than all at once. I fix the number of additional projects according to the size of the class. For big classes, I might require only one additional project, allowing students to choose between the jurisdictional project and the ethics code project (and requiring them to sign up in advance). For smaller classes, I might require all three, and make the projects component of the course count more than half of the final grade. Or, I might require each student to turn in three sets of comments, one during each main section of the course.

The main point is that it is relatively easy to design a manageable grading system based on periodic written assignments. Indeed, despite the carping I always get at the beginning of the course, many students tell me at the end how much they enjoyed the written exchange and my attention to their individual interests. Further, despite the additional work that the written assignments create for me, I find that the exchange with students significantly enriches my own thinking and the substance of the course.

**CONCLUSION**

The Mississippi is well worth reading about. It is not a commonplace river, but on the contrary is in all ways remarkable.\(^{211}\)

In this essay, I have pitched the virtues of a "sociological" approach to teaching professional responsibility, as well as the virtues of the sociology of the legal profession more broadly. I am enthusiastic about the subject, and like all enthusiasts cannot imagine that others, if properly exposed, can resist its attractions. My students, on the whole, have rewarded my optimism. At the risk of sounding self-congratulatory, most students love this course. They attend, they work, they give rave reviews. And they leave, I think, with pride and interest in the profession they have chosen. What better preparation could be offered for maintaining high standards of professional conduct, both individually and as stewards of a mighty profession?

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\(^{211}\) Twain, *supra* note 1, at 1.