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## Is "In the Interests of Justice" in the Interests of Lawyers? A Question of Power and Politics

### Cover Page Footnote

I would like to thank Richard Abel and Nancy Aries for comments on an earlier draft. Also, I thank Jean Kovath for research assistance.

# IS “IN THE INTERESTS OF JUSTICE” IN THE INTERESTS OF LAWYERS? A QUESTION OF POWER AND POLITICS

Carroll Seron\*

*In the Interests of Justice: Reforming the Legal Profession* presents an ambitious and comprehensive framework for rethinking the roles and responsibilities of the legal profession in American society. Historically, the American legal profession has enjoyed the unique privilege of self-regulation. Whether in the area of legal education, admission to the bar, or oversight of professional practice, lawyers have secured the authority, either directly or indirectly, to monitor and regulate themselves. While there are important legal and political rationales for the privileges granted to the legal profession, this institutional arrangement has not always been in the best interest of the public at large. As Rhode states, “[t]o be sure, lawyers need some measure of independence from governmental control if they are to check governmental abuses. But, prevailing regulatory frameworks overvalue autonomy at the expense of accountability.”<sup>1</sup> Through careful and detailed examination, Rhode demonstrates the ways in which self-regulation and an overzealous concern to ensure professional autonomy have compromised the need of American citizens for accessible and affordable legal services as well as the very legitimacy of the profession in the eyes of the public.

As a prelude to her proposal, Rhode reviews empirical research on the organization and structure of the American legal profession at work.<sup>2</sup> In addition to widespread discontent and a priority on earnings, this research shows that, in practice, lawyers work in various occupational spheres that are structurally different as measured by educational background, client base, firm size and organization, and income.<sup>3</sup> As Heinz and Laumann’s work makes clear, the private practice of law is best explained as “two hemispheres” organized around individual and organizational clients: To know an attorney’s

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1. Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* 19 (2000).

2. *See id.*

3. John P. Heinz & Edward O. Laumann, *Chicago Lawyers* (1994).

client base is to be able to predict his or her family background, educational attainment, professional networks, status, and income range.<sup>4</sup> While the entry of women and minorities into the profession, beginning in the mid-1970s, has not altered the composition of the elite of the profession at a rate that numbers alone would predict, its demographic profile is much more diverse than a generation ago.<sup>5</sup> Research also shows that with this change in demography, there have been demands to ensure greater balance between the demands of work and those of home and family.<sup>6</sup> Drawn empirically, the American legal profession presents a picture that is both structurally resilient yet also in flux.

It is time, Rhode argues, for the profession to recognize that its organization and structure is much more complex, stratified, and fragmented than normative claims to a common professionalism convey.<sup>7</sup> More importantly, holding on to this ideological claim that one size of legal education fits all compromises the public's need for fair, accessible, honest, and reliable legal service.

Once inside a lawyer's office, the profession claims that there is a need to protect client confidentiality at all costs. Here too, Rhode walks the reader through the shortcomings of this normative claim, demonstrating that it grants far too much discretion to the profession at the cost of competing ethical and moral considerations. Rather than operating in a world of absolutes where confidentiality is—at least in theory—the only operating ethical principle, the professional must balance responsibility to a client and to the public in a “contextual ethical framework.”<sup>8</sup>

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4. *Id.* at 138-39.

5. See Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *Fordham L. Rev.* 291, 311-16 (1995); see also Jonathan D. Glater, *Law Firms Are Slow in Promoting Minority Lawyers to Partnerships*, *N.Y. Times*, Aug. 7, 2001, at A1.

6. See David L. Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 *L. & Soc. Inquiry* 251 (1989); see also Cynthia Fuchs Epstein et al., *The Part-Time Paradox: Time Norms, Professional Life, Family, and Gender* (1999).

7. This is not the first time in American history that this claim has been raised. See, e.g., Alfred Zantzinger Reed, *Present Day Law Schools in the United States and Canada* 391-401 (1928) (arguing that there are two, separate legal professions and urging that separate modes of qualification and regulation should follow); Alfred Zantzinger Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States, With Some Account of Conditions in England and Canada* 57 (1921). Reed's report was quickly followed by Elihu Root's report to the Foundation which began with the premise of a single professionalism. Magali Sarfatti Larson, *The Rise of Professionalism: A Sociological Analysis* 157 (1977).

8. Rhode, *supra* note 1, at 77 (noting that medical doctors and psychotherapists have a professional duty to disclose confidential information obtained from a client that has the potential to threaten death or serious bodily harm to others).

Wherever one looks, either ethical guidelines for advising clients, the organization and substance of legal education, a citizen's right to know a practitioner's record of complaints and malpractice, or support for alternative forums for dispute resolution, there is a need for fundamental reform. In proposing an alternative framework, Rhode implicitly draws on the model of health care delivery where, historically, there has been a greater emphasis on professional specialization (e.g., doctor, nurse, paramedic), educational tiers, and demarcated forms of licensing and certification complemented by increasingly various and multifaceted points of access for healthcare delivery.<sup>9</sup> Just as effective healthcare delivery does not always require a doctor, Rhode analogizes that effective legal service may not always require a lawyer.<sup>10</sup>

A model of self-regulation is, however, incompatible with the implementation of a more effective and varied system of professional education, a more balanced approach to professional work and appropriate compensation, a model of responsible and ethical lawyer-client privilege, or a framework for a range of dispute resolution opportunities. It is time to turn the model of professional self-regulation with the goal of ensuring autonomy on its head. While Rhode does not claim to propose a complete panacea, she does argue that the profession of law should take steps wherein fundamental aspects of service are monitored through a regulatory schema, in which the several states or the federal government have responsibility for monitoring and reporting professional activities. The introduction of regulatory schema will ensure greater transparency so that, for example, the public may gain information about a lawyer's record of complaints, fee structures, bar admission, and so on.<sup>11</sup> In combination with a publicly accountable regulatory scheme, Rhode proposes that there should be a "less restrictive" model for licensing lawyers and allied professionals, such as paralegals and real estate agents. Finally, the profession needs to take seriously the values and commitments it imparts to future generations of lawyers through legal education and early socialization.

In sum, Rhode presents a cogent analysis of the ills facing the legal profession and thoughtful solutions from the standpoint of the public's right to know and to be informed about the inner workings of this highly powerful profession in American society. The word "power" raises my first concern with Rhode's analysis and solution. In brief, she is proposing that the profession give up many of its treasured

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9. See Paul Starr, *The Social Transformation of American Medicine* (1982); see also Mark A. Peterson, *Political Influence in the 1990s: From Iron Triangles to Policy Networks*, 18 *J. Health Pol. Pol'y & L.* 395, 395-438 (1993).

10. Rhode, *supra* note 1, at 190.

11. It is hard to gauge how effective this step might be in providing the public with information helpful for the selection of a competent attorney.

powers. Further, these powers are currently laced through a complex set of institutions from accrediting bodies to courts of law to professional associations.<sup>12</sup> The fragmentation of this system of self-regulation is itself an aspect of the profession's power and authority. It is somewhat unrealistic to expect a profession to give up these powers, even where compelling evidence may be gathered to demonstrate its low esteem in the eyes of its constituents.<sup>13</sup>

This is not to suggest that the profession of law, or the organization of power within the profession, has not changed in dramatic ways over time. But, many of the most significant changes have developed in response to broader social forces and political demands for change from constituencies external to the profession. For example, legal aid societies are a product of the Progressive Era and the complex ethos of that era to extend the powers of professional expertise in the name of social reform and betterment.<sup>14</sup> The Lawyers' Guild was organized during the Great Depression with the expressed goals of challenging the political agenda of the New Deal and including African-American lawyers, who, at the time, were denied membership in the American Bar Association; the Guild posed an alternative vision of the law's relationship to democratic institutions and is a direct outgrowth of the radical politics of that era.<sup>15</sup> At the height of the anti-Vietnam war and civil rights movement of the late 1960s and 1970s, large firms were expanding at a rapid rate, yet continued to recruit only from the half dozen or so elite law schools;<sup>16</sup> this configuration of events gave recent law graduates from those elite schools considerable leverage to demand that large law firms take a more expansive view of *pro bono* service to include cases that raise issues with broad, progressive, and social implications.<sup>17</sup> The concern to recruit and to sustain a more racially and ethnically diverse profession is an important legacy of the civil rights movement.<sup>18</sup> And, of course, the change in the gender composition of the legal profession and all of the attendant demands for reorganizing work that have followed are a direct result of the women's movement.<sup>19</sup> Historically, shifts in the power structure of the legal profession and particularly the demands on the profession to live

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12. See, e.g., Terence C. Halliday, *Beyond Monopoly: Lawyers, State Crises and Professional Empowerment* (1987); Larson, *supra* note 7.

13. See Rhode, *supra* note 1, at 3-8.

14. See Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976).

15. *Id.* at 198-200.

16. Richard Abel, *American Lawyers* (1989).

17. See Michael J. Powell, *From Patrician to Professional Elite: The Transformation of the New York City Bar Association 161-65* (1988).

18. David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 *Stan. L. Rev.* 1981, 1986-93 (1993).

19. Epstein et al., *supra* note 6, at 133-36.

up to its civic responsibilities have occurred in the context of broader movements for progressive social change.

The audience for *In the Interests of Justice* is the profession, its leaders, the public at large, and by implication, lobbyists who represent the public interest in judicial and court reform. Through a clear, rational analysis of the ills facing the legal profession and its surrounding institutions, including courts of law, Rhode's book must also be read as a political document; that is, as a document that seeks to persuade and to induce public action. If, for the reasons noted above, it is unrealistic to expect the profession to act on these recommendations or to bring about reform by ceding authority for professionalism to public regulatory bodies, then what may we expect the response to be from the broader public?

That is, what is the likelihood of demands for reform from its users, the public? First, research demonstrates that the public's use of lawyers is highly episodic, much more than the law's more powerful competitor, medicine.<sup>20</sup> Many of the reforms in medicine—for good or ill—have come from the close and consistent relationship that the public has with this area of service delivery and the consequent greater demands on legislative bodies to be responsive.<sup>21</sup> From the standpoint of the public and its potential representatives through legislative bodies, there are important structural impediments to challenge and organization for reform. After all, like elected judges, as Rhode points out,<sup>22</sup> legislators also seek to secure campaign support from members of the legal profession and may not have many incentives to put winning ahead of their responsibilities to their constituents. Sociological research demonstrates that reforms from below are often the result of the formation and organization of social movement organizations that build coalitions, negotiate, and demonstrate to make their voices heard.<sup>23</sup> The history of the civil rights movement, the labor movement, and the women's movement

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20. Barbara A. Curran, *The Legal Needs of the Public: The Final Report of a National Survey 143-63* (2d ed. 1989); cf. Phoebe Lindsey Barton, *Understanding the U.S. Health Services System 30-36* (1999).

21. See generally H. Jack Geiger, *Community Health Centers: Health Care as an Instrument of Social Change, in Reforming Medicine: Lessons of the Last Quarter Century 11* (Victor W. Sidel & Ruth Sidel eds., 1984) (noting the legislative responses to public outcries over inadequate health care); Alice Sardell, *The U.S. Experiment in Social Medicine: The Community Health Center Program, 1965-1986* (1988); see also Rashi Fein, *Medical Care, Medical Costs: The Search for a Health Insurance Policy* (1986).

22. Rhode, *supra* note 1, at 212.

23. See generally Joel F. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978); see also Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (1994). But see Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* (1991).

each demonstrate this point.<sup>24</sup> In the absence of regular and consistent use of a legal delivery system, an incentive on the part of legislators to propose reform that is not on the public agenda, and a social movement from below to demand reform, it is not clear how users of legal services might bring about the changes advocated by Rhode.

As I have just suggested, power resides in structures. But, power also resides in ideas. Rhode recognizes some of the ideas she is challenging are part and parcel of the very fabric of American political values. Self-regulation of the legal profession is designed, in part, to protect citizens from an all-powerful state. While Rhode explores all of the ways in which this institutional arrangement falls short of its aspiration, she does not explore American attitudes toward the expansion of government through administrative oversight and regulation and the impediments this may pose. The American experience with health care reform may provide some useful insight. Despite more frequent use of health care services, as noted above, and profound dissatisfaction with current health care arrangements,<sup>25</sup> Americans do not support a system of publicly regulated health care delivery.<sup>26</sup> Whatever their skepticism of the market, evidence suggests that Americans have even greater skepticism of the government's ability to ensure accountability.<sup>27</sup> This increasing distrust of governmental institutions<sup>28</sup> is a serious development in American

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24. See, e.g., Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 Am. J. of Soc. 1201-25 (1991); see also Sara Evans, *Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left* (1979); Sara M. Evans & Barbara J. Nelson, *Wage Justice: Comparable Worth and the Paradox of Technocratic Reform* (1989); William E. Forbath, *Law and the Shaping of the American Labor Movement* (1989); Richard Kluger, *Simple Justice: The History of *Brown v. Board of Education* and Black America's Struggle for Equality* (1976); Doug McAdam, *Political Process and the Development of Black Insurgency: 1930-1970* (1982); Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (1984); Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (1974).

25. Robert J. Blendon & John M. Benson, *Americans' Views on Health Policy: A Fifty-Year Historical Perspective*, Health Affairs, Mar./Apr. 2001, at 33, 33-46.

26. Older Americans, however, are highly supportive of Medicare. See Laurence S. Seidman, *Prefunding Medicare Without Individual Accounts*, Health Affairs, Sept./Oct. 2000, at 72, 72-83. For a general discussion of Americans' attitude toward managed care, see Theda Skocpol, *Boomerang: Clinton's Health Security Effort and the Turn Against Government in U.S. Politics 168-71* (1996). With the expansion of managed care, there is some growing support for greater regulation. See Donald W. Moran, *Federal Regulation of Managed Care: An Impulse in Search of a Theory*, Health Affairs, Nov./Dec. 1997, at 7, 8-10.

27. See generally Garry Wills, *A Necessary Evil: A History of American Distrust of Government* (1999).

28. In the aftermath of the terrorist attacks in New York, Washington, and Pennsylvania, surveys show significant changes in citizens' attitudes toward and trust in government. Dana Milbank & Richard Morin, *Public is Unyielding in War Against Terror; 9 in 10 Back Robust Military Response*, Wash. Post, Sept. 29, 2001, at A1



society and one that needs to be weighed in light of the proposals put forward by Rhode.

Thus, it would have been helpful for Rhode to consider how to organize interest groups to secure the reforms she proposes. What is the political strategy for achieving these reforms? What coalitions might provide a viable foundation for building a movement to demand the reforms outlined in her book? In an era when there is little public support for expanding the responsibilities and scope of governance, it is not clear how Rhode's proposals may move from proposal to implementation.

It is hard to disagree with Rhode's proposals to reform the legal profession and the system of justice of which it is a part. The legitimacy of the profession's institutional autonomy to self-regulate rests on important political values in American society, particularly the right to be protected against the over incursion of government into our lives. Even at this complex juncture of the rationales for self-regulation, Rhode presents a compelling argument for rethinking the ethical contours that frame traditional claims to lawyer-client privilege. Further, as a student of the legal system who has studied empirically many of the institutions she examines, I share her commitment to legislating, implementing, and evaluating alternatives to legal representation, as well as the blending of professional expertise when appropriate. But, I am left to reflect: where is the will in American society to move this proposal from a blueprint to practice?

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(discussing a Washington Post poll administered between September 25 and 27, 2001, finding that nearly two-thirds of the American public report that they trust their political institutions to do the right thing, the highest level of trust reported since 1966); see also Robin Toner, *Now, Government Is the Solution, Not the Problem*, N.Y. Times, Sept. 30, 2001, at B1.

*Notes & Observations*