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Magali Sarfatti Larson

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DEPOLITICIZATION AND LAWYERS' FUNCTIONS: REFLECTIONS FOR A COMPARATIVE ANALYSIS

BY MAGALI SARFATTI LARSON*

Sociologists ought to have serious doubts about how much of the practice of an occupation and the meaning it holds for practitioners can be known from the outside. The doubts are compounded when the practice is based on esoteric knowledge, and even more so when the outcomes that can be attributed to the practice are not obvious but require interpretation and often difficult assessment.

Even considering systematic descriptions of legal professions, it is far from evident that one who is neither a lawyer nor a legal scholar can grasp the most significant implications of a descriptive sociology of lawyers as would be seen “from the inside.” What is most interesting and distinctive about lawyers is their relation to the law. Description, by itself, cannot touch the depth and complexity of that relationship.

Professions are phenomena of social practice. Their apparent unity is created by the images that different sectors of the public hold of various occupations and by their respective place in the social division of labour. Obviously, all categories of workers actively contribute to the formation of such public images, both self-consciously and by their practice. All workers, especially if they are organized, fight for a place — to gain or defend it — in the hierarchical organization of work. Professionals do this more deliberately than most other workers. They themselves decide what the general duties of their calling are and define, within these broad boundaries, some minimal guidelines of performance. Professionals have an interest in sustaining a consensus around the minimal “functional core” of expertness that is vaguely understood by outsiders as an area of interchangeability. Within this area, anyone who wears a generic professional label should be equivalent to anyone else. Professional dignity, in part, depends on refusing to perform functions other than

* Copyright, 1986, Magali Sarfatti Larson.
* Professor, Department of Sociology, Temple University.

1 My comments are based on the abundant literature that seeks to define the attributes of profession and, in my view, reflects commonly held views of what professions and professionals ought to be. For example, see E. Greenwood, “Attributes of a Profession” (1957) 2 Soc. Work 44; G. Millerson, The Qualifying Associations: A Study in Professionalization (London: Routledge & Kegan Paul, 1964).
those the professional can relate to that nebulous “core” unless the solicited performances pertain in some way to a social status above that of the professional’s own.  

As Howard Becker has observed, “profession” is a “folk concept.” However, so are the concepts of lawyer, physician, architect, engineer, or clergyman. It is both by a profession’s public discourse and by its members’ practices that such latent folk concepts are created. These form pieces of a larger cognitive map of the social division of labour and are in counterpoint with still broader notions of law, health and disease, aesthetic propriety, technological efficiency, and the divine. What professionals contribute to their society’s ideal values is difficult to determine. Their contribution is too variable, diverse, and closely intertwined with elements from other sources for its impact to be clearly discerned. In principle, it is easier to examine the received notions of what professionals do rather than their daily effect on societal values.

This paper will start with the “folk concept” of lawyer’s work, disentangle it with the help of comparative studies, and reach toward the “functional core.” From there, it should be possible to place lawyers more accurately within the organization of intellectual work.

The problems arise as soon as the two classical lawyerly functions of representation and defense are considered. The problems come not so much from the many variations these functions admit in form, scope, and relative importance; nor because it is not possible in the present state of our knowledge of legal professions to draw typical sequences of functional diversification. Rather, they come from the legal professions’ privileged relationship to the state which is suggested by the notions of representation and defence. The broadest definition of legal work involves, at the core, knowledge of the “language of the state” that entails speaking to the state and for the state. The notion of “speaking” suggests

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2 We may reasonably expect that a young lawyer in an important firm, who would not dream of typing a letter for a senior partner, would be glad to cook for him on a camping trip. “Dirty work” comes into existence when there are others of lower status to whom unpleasant or routine activities can be sloughed off.

3 It is obviously necessary to ask which sectors of the public hold what folk concept and what has formed it. Indirectly, we could presume that the appearance of legal aid services would have changed poor peoples’ perception of lawyers as they came into contact with them. Even independently of how many actually used their services, 60 percent of 1260 eligible poor people had never heard of legal aid in 1978, after federally funded legal services had been operating for thirteen years. Evidence from comparable studies made in the U.K., Australia, and Mexico is often more disappointing. See R.L. Abel, “Law Without Politics: Legal Aid under Advanced Capitalism” (1985) 32 U.C.L.A. Rev. 474 at 602 note 768. It follows that only very special sectors of the public would have concrete experiences with lawyers against which to check whatever “folk concept” they hold. This reinforces the notion that professionals themselves play the most important part in the definition or redefinition of their public image.

the constant innovation of innumerable performances governed by a system of rules. By analogy, legal professionals “make law” in their practice as one “makes language” in one’s speech — within rules.

The notion of law as the “language of the state” carries the traces of past political forms, political struggles, modes of behaviour, and relations of production and manifests them in the present. The whole institutional history of peoples and classes leaves its sediment in the “language of the state” which every competent citizen is supposed to know. This is the central difficulty of a sociology of lawyers: the legal profession characteristically knows and uses a language that is not its own. This belies simple notions of professional autonomy and immediately involves everyone with the structure and history of the state. Any attempt to transcend specific historical contexts by generalization is bound to be more difficult and misleading in the case of the legal profession than in any other professional group. The law is always specific, even if the concept of law is not.

This paper will clarify both the typical functions that legal professionals are said to perform in the courts and beyond, and their socio-political implications. In this way, a framework will be established within which it should be possible to ask some theoretical questions about lawyers in the Western-type nations.

The numerical growth of people with legal training is, with few exceptions, observed in all Western countries. There is a potential for the expansion of the legal services market and for an increase in the “transformation of experiences into grievances and grievances into disputes.” In some cases, the possible pressure from mounting numbers of available lawyers may be connected to the provision of legal aid and legal insurance schemes. Questions will be posed in this paper about the possible connections of law and lawyers with the transformation of political categories and political consciousness.

I. LAWYERS’ FUNCTIONS AND THE “PARADOX OF LAW”

A. Representation and the Constitution of Citizenship

Lawyers do not create the law. If judges are excluded from that category, lawyers are not even primarily responsible for its application.

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They are, however, often inevitable intermediaries in the initial mobilization of perceived legal rights, either on behalf of a particular interested party, or because they ask the courts to begin enforcement of accepted legal norms.

All the complexities of the concept of representation are inherent in these legal functions. Lawyers are, in part, mere agents of the law: they are supposed to speak for it fairly and disinterestedly. They are also the symbolic representatives of the state and the law. However, they are more than authorized agents and symbols because at this stage of complexity, citizens can no longer directly constitute the state and "speak the law." Therefore, lawyers become the only professionals who actually represent others.  

Other forms of representation can occur by custom. In many traditional societies, women are represented because they are not allowed to speak for themselves in public, while younger family members are represented without consultation by elders. In Western societies, the irrational or the feeble-minded are similarly obligatorily represented for some legal transactions, as are minors. This is not a right to representation, but rather an ascribed or delegated authority of the representative over the represented. Ascribed authority presumes the subordination of the represented, while delegated authority appears to be based on the superior competence of the representative and is, in principle, to be temporary. Representation by lawyers is of the latter kind.

In the tradition of private law, representation by either a partisan or an impartial solicitor is a right of the parties to an action. The asymmetry between the represented and the representative is in the knowledge of normative codes, conventional procedures, and the limits of interpretation. Representation by legal specialists ensures that codes are properly invoked and judgments are formally equitable, thus creating at least a presumption of equality before the law. Legal representation also implies a principle of professionalization of both judges and lawyers. The question of access to adequate representation then arises as a crucial practical expression of access to justice.  

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8 In traditional Indian law, family members are entitled to represent their relatives in court, but they do not appear to have any special legal competence. See J.S. Gandhi, "Report on the Legal Profession in India" (Address to the Working Group for the Comparative Study of the Legal Professions, International Sociological Association, Bellagio, 16-21 July 1984) [unpublished].

9 It must be noted, however, that this access represents only the last stage in the public adjudication of a grievance that must first be recognized as such, addressed to the culpable party, and rejected by him or her. See Felstiner, Abel, & Sarat, *supra*, note 5 at 635-37.
As professional representatives, lawyers become entangled in the far from seamless web of society's sense of justice. When a system of courts appears and unifies the legal codes, they become a primary reference point and a central battlefield for different conceptions of justice or, perhaps more accurately, of injustice. As Barrington Moore observes:

When people talk about justice in general they are liable to be a bit woolly because what they really have in mind is injustice and usually some specific injustice that affects them or people like them. . . . For the victim injustice takes the form of a painful intrusion upon one's private existence, an attack upon whatever limited autonomy the individual has managed to achieve. . . . Plain citizens are often willing to make painful sacrifices, to offer up life and limb for what they have learned to regard as the common good. . . . Injustice, on the other hand, always has an arbitrary component in the sense that what hurts has no believable justification.  

Moore implies that notions of injustice/justice are articulated at the boundary of what is considered public and private. According to the meaning assigned to the intrusion, this boundary varies not only historically and culturally, but also circumstantially. The boundary between what is justifiably private and what is public is drawn and redrawn. Legal representation can therefore be seen as a defense of private, but not individual, meanings in front of authorities that claim the upper hand in determining the legitimacy of intrusions.  

The ambivalence of legal representatives comes from the fact that they must accept not the event or the speech, but the system or the language. At times, lawyers may speak different languages representing varied sources of right. E.P. Thompson illustrates this point.

What was often at issue was not property, supported by law, against no property; it was alternative definitions of property-rights: for the landowner, enclosure — for the cottager, common rights. . . . For as long as it remained possible, the ruled — if they could find a purse and a lawyer — would actually fight for their rights by means of law; occasionally the copyholders, resting upon the precedents of

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11 The problem of definition is solved if one adopts, with Judith Shklar, the limited conception of justice. Justice, she says, is the commitment to obeying rules, to respecting rights, to accepting obligations under a system of principles. It is the individual's consistent adherence to the morality of role-following in a moral world where right and duty are the dominating issues. . . . Only one aim, one habit of mind, is constant in all possible occasions when justice is demanded: that a general rule be applied to an individual instance.

While I agree with Shklar that the ideology of legalism moves along a scale that goes from courts and legal systems at one end to personal morality at the other, a conception of justice such as hers assumes a high development of legalism both institutionally and culturally. It is a reasonable, albeit tautological, hypothesis to think that rule following as a moral good presumes the development (and perhaps even the codification) of a system of rules. In turn, this makes Shklar's conception compatible, if not overlapping, with Moore's, since a system of roles for living in society would include public private delineations. J. Shklar, Legalism (Cambridge, Mass.: Harvard University Press, 1964) at 113-14.
sixteenth-century law, could actually win a case. When it ceased to be possible to continue the fight at law, men still felt a sense of legal wrong: the propertied had obtained their power by illegitimate means.\(^\text{12}\)

The unity of the law depends on the affirmation of central power over and against the power of competing elites that render justice or make law in their own jurisdiction. The advance of one judicial system at the expense of another is both the mark and the instrument of centralization of state power. In times of transition, more than one set of legal principles may be in use until the dominance of a new legal system is established. As Stanley Diamond has suggested, this also exists in every confrontation between customary social morality and state law.\(^\text{13}\)

The germs of legalism as a political ideology are contained in representation: when subjects bring their grievances to a court of law, the authority they confer upon it implies that the court can be impartial and follow the law as something that is ‘there’, separate from power and politics, as rules that can be found.\(^\text{14}\)

Legal representation subverts authoritarian forms of patriarchal representation. At the same time, it establishes the law as the limits of state power that are essentially contested and shifting boundaries between the public and the private domains. Rights are articulated within these domains, but they are only as solid as the boundary between them. The boundary is solid if it is uncontested by individuals, groups, institutions enjoying different measures of power, or the state itself. Two very different historical examples illustrate this point.

In eighteenth-century France, centuries of access to royal courts had established the right of communities to sue as corporate bodies. In the second half of the century, often encouraged by the local representatives of the royal bureaucracy and spurred by urban lawyers in search of clients, many communes challenged seigneurial rights with new breadth and aggressiveness. In most cases the peasants lost, but, as Hilton Root observes:

> The new legal battles were important because what had been based on custom and tradition now became a problem to be discussed. . . . The Revolution accomplished in months what might have taken generations to achieve in the courts. But the language with which the Constituent Assembly dissolved the feudal system in 1789 was already present in court cases that pitted lord against peasant with increasing regularity during the last half of the eighteenth century.\(^\text{15}\)


\(^{\text{14}}\) Shklar, *supra*, note 11 at 9.

Litigation redefined seigneurial rights as intolerable intrusions upon the communities’ defensible area of liberty. The peasants’ lawyers turned whatever standardization of procedure the king’s courts had achieved into arguments against customary precedent, claiming that laws applying to the entire province overrode particular seigneurial rights.16

John Owen Haley’s discussion of Japanese informal justice shows a very different kind of perceived intrusion. By the late eighteenth century, Tokugawa Japan had developed a sophisticated legal system analogous in many ways to Western procedure in the areas of commercial law, registries, property claims, and the like. When the Meiji Constitution introduced private law at the end of the nineteenth century, the new notion of rights appeared to be deeply subversive to the familistic, neoConfucian moral order, even though purportedly it was applied to strengthen it. The sweeping patriarchal authority that had been granted as a right no longer tempered by traditional Confucian moderation, proved so insufferable to subordinate family members that judges were prompted to intervene on their behalf to restore some harmony between new law and ancient custom. A redefinition of private powers initiated in the public sphere appears to have so disturbed the private equilibrium of family relations that the magistrates used their prerogatives to remedy the new juridical powerlessness of wives and children, thus penetrating deeper beyond the boundary of the private domain.

By the end of World War I, the process of litigation had itself come to be seen both as a solvent of traditional piety, and as fuel for the social conflicts that were mounting in the economic sphere. To discourage litigation, the state restricted the number of judges, while legal traditionalists championed formal conciliation as an alternative to the alien legal order characterized by the assertion of rights. Not surprisingly, the traditionalists’ conciliation statutes were opposed first and foremost by lawyers for both practical and doctrinal reasons. In the 1920s, however, the modern lawyers lost. Litigation failed to replace, though perhaps not to modify, older patterned expressions of conflict and resistance.17

Root’s and Haley’s studies stand in useful counterpoint to the analysis that established seductive ahistorical homologies between the abstraction of the commodity form (functioning “to ‘extinguish’ the ‘memory’ of use-value and concrete labour”) and the abstraction of the legal form

16 Ibid. at 672-73.

17 In the mid-1930s, the number of practising lawyers followed the decline of both civil trials and binding conciliation cases, which had tended to become functional substitutes for the former. Proportionally, lawyers in Japan have not regained the numbers they had reached in the first decline of this century. K. Rokamoto, “The Legal Profession in Japan” (Address to the Working Group for the Comparative Study of the Legal Professions, International Sociological Association, Bellagio, 16-21 July 1984) [unpublished].
(functioning to "extinguish the memory of different interests and social origins").18 Both examples command one to consider the genesis of legal and political representation historically. It must be asked in which historical circumstances and by which specific processes the legal and the political orders have either tended to become alternative to one another (so that legal activation of the "language of the state" discourages and precludes the political performance of "speech acts" by mobilized citizens) or instead, have developed as mutually reinforcing arenas where citizens actively "speak" their rights. As Root's study suggests, the question is inseparable from what jurists may contribute to the constitution of the state in the form of legal discourse that develops dialectically from their representation of either the rulers or the ruled.

The homology between legal and commodity forms is not interesting in itself but for the underlying analogical reference to language. One author explicitly introduces this and shows that law, like grammar, is "autonomous and independent of meaning."19 Sharing a common code does not prejudge the semantic content of speech or the scope of discourse; it makes it possible to speak together. For Chomsky, linguistic competence is the acquisition (or the activation) of the generative rules of transformational grammar. Our only access to a speaker's competence is through his or her other linguistic performances. Competence, however, is the capacity to master structures which determine the possibility and the commensurability of performance in a language. The learning of a foreign language clarifies the difference. Without understanding the language (or even wanting to learn it), we know that it has rules. Through performance, however, apprentice speakers involve themselves ever more deeply in rule-governed creativity and innovation, and this makes the rules of the new grammar recede. They tend to be forgotten and to become less easily available as mastery of them becomes deeper.20

The implications of the linguistic analogy with the law are in part negative. Superficially, it is not difficult to see the parallel between competence/performance and legal codes/specific laws or applications.

18 I.D. Balbus, "Commodity Form and Legal Form: An Essay on the Relative Autonomy of Law" (1977) 11 Law and Soc'y Rev. 571 at 576. Alternatively, in the classic formulation by Pashukanis, cited in Balbus, "all the specific peculiarities distinguishing one representative of the species homo sapiens from another are dissolved in the abstraction of man in general as a juridic subject." Ibid. at 577.

19 It is interesting to note that the dissolution of ascribed inequalities, stigmatizing traits, and gender or racial peculiarities is not seen as a good in this kind of bizarre romanticism that contrasts concreteness to abstraction and takes for granted the superiority of the former. Even where commodities are concerned, mass production offers undeniable gains to the masses over craft or petty commodity production.

20 N. Chomsky, Selected Readings (London: Oxford University Press, 1971) at 21, c. 1, 6, 7.
Beyond this, there is also the rationalist notion of deep-seated formal linguistic universals and the notion of mind itself, by whose intrinsic properties universals must ultimately be explained. These are admittedly controversial notions, but it is heuristically interesting to suggest a parallel with the notion of normativity as a fundamental property of social life. A parallel can also be drawn with deep normative structures that conjugate such general concepts as agent, obligation, right, claim, possession, and the couples ego/alter, private/public, or right/wrong up to the sophisticated concepts that a philosophy of law would uncover.

On a less general level, grammar is universally, albeit unknowingly, shared by the speakers of a language, while the encoding of social reality into the language of law is not shared, at least not beyond the narrow limits within which direct democracy is possible. Law is the “language of the state,” spoken by its legal personnel, and they appropriate not the content of the language but its transformative rules.21 Theirs is the mastery of competence.

Once a system of laws is accepted (that is, once it can be routinely administered because of the stabilization of power relations), even the non-speakers must accept it as a meta-language of social life existing at, and in fact constituting, the boundary between legitimate and illegitimate intrusions. As non-speakers get involved (directly or indirectly) with legal performances in which only the competent speak, either they resist the translation of their claims into legal language (and they choose to fight for their “meaning” outside the law), or they gradually integrate their own notions of right and wrong, legitimate and illegitimate, with those performances. By analogy, the recognition of performances in the foreign language of law does not demand widespread competence but the awareness of a “linguistic” arena in which rival conceptions of rights appear to be translatable into one another. Jurists are the translators.

A similar idea can be expressed through the legalistic conception of justice as “the commitment to obeying rules, to respecting rights, to accepting obligations under a system of principles.”22 Consciously or not, lawyers and those who have absorbed the ideology of legalism try to reduce morality to this. It can never be effectively reduced to one system of rules in any but the most homogeneous society. Nevertheless, as soon as the language of the law is spoken with authority, the lawyers’ version of justice as impartial rule-following becomes admissible by all, and the possibility of translation into that system of rules becomes conceivable.

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21 In Chomsky’s theory of grammar, the transformative rules generate both deep and surface structures and express the relations between them. They are, as he says, the theory of a language.

22 Shklar, supra, note 11 at 113 and ff.
The heart of the notion of legal representation is the belief that one's substantive rights and claims shall be recognized in the legal system if properly expressed and heard. That is the paradox of law. As the linguistic analogy suggests, legality is never as deeply grasped as in the breach, in the same way that ungrammatical usage is immediately perceived as something that breaks rules one would not know how to state. In turn, the paradox of law further suggests a hypothesis that those social groups who carry substantive notions of justice, rooted in customary social morality and traditional social arrangements, need the foil of formal legality in order to fuse their own notions of rights with the vision of an extended universalistic order of social justice under the law. The generative experience can be one of either legal justice or injustice. What matters is the dialectics of usage and codes (or substantive and formal notions). For the minority who is ever represented by them, lawyers are the mediators of such dialectical experiences. They serve either as grammarians or as translators and can, if necessary, spell out the rules. The ease of performing this formal task varies with the level of codification of law. However, since even the application of detailed written codes requires difficult interpretation, the legalistic presumption (that rules are there to be found) becomes the cornerstone of a typical ideology. The occupational ideology of legalism is “the operative outlook of the legal profession” and should be of immediate political consequence.

Lawyers represent because it is the way they make a living: it is their duty. They may also represent on the basis of their convictions. Representation in courts of law constitutes an embryonic nucleus that contains the possibility of citizenship and, even at this stage, reveals its

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23 The Durkheimian notion that deviance is there to be punished, that is, to strengthen the norms of the collective consciousness, is, of course, the functionalist version of what I am saying. I do not wish to imply any function. Although it is obvious that acceptance of the law is indispensable for a social order to exist and to continue existing, discovery of injustice at law can be a most powerful mobilizing experience for social movements seeking “the true law.” Shklar expresses the same notion of reinforcement of adherence to the law, though in the pejorative sense of the ideology of legalism:

Without consensus, the appearance of [judicial] neutrality evaporates. Every offended party characteristically responds to a decision by accusing judges of “legislating.” It is not the law, which is clearly far from self-evident, but the judge, who is at fault, and an erring judge is a legislating judge, since the losing party begins its case by presenting its version of the true law. The result is that, as denunciation of “law making” multiply, the legalistic ethos is reinforced and the likelihood of judges satisfying it becomes increasingly rare. Shklar, supra, note 11 at 12-13.

24 Ibid. at 8.

25 Throughout this discussion I have taken representation to include defense. This is not to deny the differences between the two classic functions, which are as great and as theoretically important as are the differences between civil and criminal law, but rather to avoid a discussion that I am not competent to conduct. It would not change the basic fact of representation: speaking for someone, in order to bestow upon him or her the benefits of superior judicial competence, and in his or her interest.
conditions and limitations. In the classical liberal sense, citizenship can be said to extend notions of personal rights and delegation of powers from the legal to the political arena. The parallel between these two dimensions of representation is obviously rooted in their common genesis within the same Western European and bourgeois matrix. More than a parallel, it is, in fact, a commonality of structure and form in which the lawyer's role prefigures that of the professional politician in representative democracies. Lawyers continue to be chosen as speakers for their forensic bravura just as politicians are elected for their eloquence or their media appeal. The emphasis on rhetorical talent corresponds to the function of symbolic representation/personalization: jurists represent and personify the law and therefore the state; politicians represent and personify the sovereignty of their constituents and therefore the nation. Both are dramatic figures on a public stage watched with passion by participants and indifference by others. Neither, however, are merely symbolic representatives.

In modern representative democracies, the politician cannot legitimately represent individual interests. Arguably, the function of politics is to transcend the liberal conception of representation as representation of persons. If we take "interests" in the pejorative sense of American political terminology as selfish "special interests" indifferent to the "common good," politics is the means by which persons transcend their private interests and discover public or collective ones. Lawyers, however, are professional representatives of persons whose function is, in principle, purely instrumental. They represent because they are ordered by clients to act on their behalf.

26 There is also what is suggested by a reading of Foucault: the courtroom becomes integrated with society and its ways of knowledge, signalling that the subjects have become something separate from their king and that a different notion of sovereignty is therefore becoming possible to conceive. As the trial of criminals in the age of Enlightenment gradually becomes subject to common truth conditions (the same that are accepted in society at large), their punishment becomes increasingly governed by almost utilitarian estimations of deterrence: the horrible rituals of torment by which the King demonstrated his excess of power are dangerous occasions of arousal for a populace no longer held in a symbiotic unity with its ruler.

The lawyer's entrance into the courtroom under new competence requirements is part of the gradual change in the articulation of domination between state power and the ruled. The new juridical rituals and the spectacle of the courtroom are thus part of the establishment of the new disciplines. M. Foucault, Discipline and Punish trans. A. Sheridan (New York: Vintage Books, 1979).

27 I am not competent to discuss what is involved in representing a corporate entity, although I know, of course, that the matter was resolved in American law by accepting that corporate entities be treated at law as persons. In sociological terms, the question is empirical: who monitors and directs legal services to the corporation? Part of the answer is obvious: it depends on the client's power and on the internal organization of the corporate entity. For many corporate entities today, the task is performed by lawyers from their own legal departments. While this may restrict the autonomy and even the discretionary freedom of outside counsel, it should at least have the merit of making the relationship more technically legal than before, therefore freeing the negotiations from a good deal of "translation" work. While this may reduce the primacy of outside counsel in giving to the problem its legal expression, it augments, if anything, the thoroughness of legal transformational work.
The level of truth of this proposition corresponds to the level of sophistication of the client or the simplicity of the case. Lawyers have total primacy in redefining the client’s situation so as to adjust his or her needs to the rules of the legal system. In the negotiations between individual clients and their lawyers, empirical evidence suggests that “a legal picture of the client” emerges, “a picture through which a self acceptable to the legal process is negotiated and validated.”28 The construction is necessarily formalistic and reductionist. The clients’ meanings (their sense of justice and injustice) may be violated as they discover simultaneously that they have rights, but that they do not make for good legal argument. Yet, there is no possible way in which a person, acting on his or her own, or speaking for a corporate entity would lose the notion that this is his or her case and that it involves personal interests. Even if the client finds that these interests have been too narrowly construed and comes to feel betrayed by the lawyers, the interests are recognized because they are individual. The analogy with translation is apt — there is reduction, loss, and distortion of meanings, but recognition of a basic semantic core remains. The politician does not translate interests but rather interprets, invents, and transforms them.

In the liberal tradition, the principle of representation of persons is only coherent in the legal arena where it is first articulated. As a foundation for the conception of citizenship, it harbours inescapable inconsistencies, for individual interests cannot be added and still be recognized. The principle of politics is that the active transformation of private into public must be consciously admitted and accepted by individuals. This means that a new kind of interest must emerge.29

Here, then, is a first indication of why and how the persistent recourse to legal strategies for the solution of problems or disputes belonging in the public realm is profoundly depoliticizing: legal representation inevitably reinforces the ideological primacy of private interests by the mere fact that they are easiest to recognize and articulate in the language


29 I am restating Bentham’s dilemma: a purely individualistic concept of interest would cancel the possibility of political representation. Bentham postulates that there is a selfish (self-regarding) interest and a social one. See Pitkin, supra, note 7 at 198-208.
of claims. It is the image of a substantive public interest that is weakened, not a private one. This is despite the fact that citizens become attached to the idea of legal justice and radical formal equality while exercising their right to representation. These confrontations with authority are mediated by specialized speakers. The represented thus unlearn the effectiveness of their own speech. The lawyer's role is, from very early, one of specialized competence. Therefore, the embryonic image of citizenship contains, at birth, the shadow of the experts' appropriation of public things.

B. The Appropriation of State-Constituent Functions

The classic representational function of lawyers is both a dimension and a source of the liberal conception of citizenship. Rights can be invoked as shields by citizens who appeal to the state in the "language of law." Lawyers, as the most competent speakers, are mediators between state power and citizens. The advocate's role has two faces: translation of rights and interests (defence representation), and, transmission of state law (subjection of the represented to the power of law). This is recognized in all state forms that have reached a modicum of complexity, even though the subjects may not have the right to speak back or initiate the exchange as they formally have in the liberal tradition.

Establishing a judicial system that would "speak" the state or the king's law to hitherto deaf or unattainable subjects has been, as Foucault observes:

... a fundamental historical trait of Western monarchies: they were constructed as systems of law, they expressed themselves through theories of law, and they made their mechanisms of power work in the form of law ... Law was not simply a weapon skilfully wielded by monarchs; it was the monarchical system's mode of manifestation and the form of its acceptability.

State power, by definition, must claim to be hegemonic. In the Western tradition, hegemony is claimed in the name of a transcendent law which

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30 Recourse to legal strategies is not depoliticizing because it reduces the legal actor to his or her atomized individuality as found by Balbus (supra, note 18). The legal process can also serially aggregate individual interests into classes, in the mode of additive depoliticized politics. It is also not merely because the legal process contains social conflict within an arena where the rules of the game are so often biased against the powerless, for this too can be an educational and even a transformative process. P. Gabel & P. Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1982-83) N.Y.U. Rev. of L. and Soc. Change 369.

31 This attribute is so commonplace that the Working Group on the Comparative Study of Legal Professions includes this mediation function in its protocol definition of lawyer, jurist, attorney, legal profession, et cetera.

must be followed by kings in order to be obeyed by subjects. This founds the right to representation. Thus, when the rulers of new states or new regimes want to present and develop their power in the guise of law (their “power-as-law”33), they need a body of jurists to staff the judicial branch of their state apparatus. Because the jurists must “speak” in a transcendent code, they cannot be simply appointed; they must also be independently trained. Either self-producing corporations of professionals or appointed law faculties will have to do the teaching.34 The degree of formalization of teaching will obviously vary, with apprenticeship at the low end and teaching for a quasi-civil service at the high end. The distinction between a state-sponsored profession and a free profession is significant in many respects but does not change the general implications of the transcendence of law. Mastery of the codes qualifies legal professionals for interpreting, elaborating, and applying them.

The legal function of representation appears to qualify lawyers for political representation and to account, in part, for the disproportionate role lawyers have played in representative democracies. Because lawyers can appropriate the “language of the state” directly, their noncontentious functions can also easily extend from private advice, negotiations, and drafting of institutionalized arrangements to what can be called a state-constituent or constitutional function (preparatory legislation and crafting of statutes), legal codes, and public charters. Legists appear to be most directly qualified for public service as both servants of the state and representatives of the people, as long as the state speaks primarily a juridical “language,” rather than a “language” of economic development, or public works, or war.

Western ideas of hegemony in the law and conceptions of legal rights were carried the world over in the wake of European expansion. These forms appeared in other lands either as open contradictions of colonial rule or as alien ideology imposed (more rarely, borrowed) in the context of unequal power and unequal exchange. European legal traditions and instruments were used as a rhetorical cloak in the dependent parts of the world to justify expropriation, desecration, and ruthless violations of human rights. Yet, the struggles they set in motion were shaped by the paradox of law. Here, the paradox must be expressed as that which, in setting limits to the arbitrariness of power, constitutes the political struggles of peoples or classes as struggles to take over in the name of a law. As Foucault so clearly states, the constitution

33 Ibid.
of hegemonic power under the law produces at all levels ("... [T]he subject opposite the monarch, the citizen opposite the state, the child opposite the parent, or the disciple opposite the master.") "a legislative power on one side, and an obedient subject on the other." 35 Ideally, "power must be exercised in accordance with a fundamental lawfulness." 36 Thus, the role of jurists appears to be as ancient and continuous as the very assertion of hegemonic power. At this level of generality, lawyers of all kinds always speak for "power-as-law." Their role is essentially and inescapably conservative. Even when they write codes of law inspired by new principles of rights or contribute to the fundamental charters of revolutionary states, the state-constituent function of lawyers is to lay down stable, defensible foundations for powers whose justice need go no farther than that law.

If it is granted that the basis of conservative continuity in the lawyers' role is their special functional relation to state power, one must consider the discontinuities that lie immediately beyond the general and essentialist level. From the eighteenth century on, lawyers have been salient actors in the movements against absolutist monarchies and in the movements of national independence against colonial rule. As Hilton Root suggests, the lawyers' need to make a living prompted them to seek clients among the better off peasant communities. The substance of their expertise was to blend legal argument with the peasants' own memory of rights and common sense critique of obsolescent feudalism. Challenging customary law in royal courts and preparing a revolutionary legal discourse as they did in France or throwing back in the face of the colonial rulers their own violated principles of right as they did in India, the most farsighted among lawyers may indeed have joined the bravest in opposition. Revolution and national independence tend to split the category of legal specialists in two: those who can still practice and those who cannot. For the former, opportunities to provide the new state with new codes and the legal profession with new statutes are greatest in post-revolutionary times. 37

Revolutionary situations are only one extreme example of the paradoxical effects that the connection with the "census-tax-conscription system" has upon the category of the jurists. It also gives the occupation a basic functional continuity of form, while subordinating its internal structure and the contents of its practice to the discontinuous historical developments of state forms and political regimes.

35 Foucault, supra, note 32 at 85.
36 Ibid. at 88.
37 M. Burrage, "Revolution as a Starting Point for the Comparative Analysis of the Legal Profession" (Address to the Working Group for the Comparative Study of the Legal Professions, International Sociological Association, Bellagio, 16-21 July, 1984) [unpublished].
In England, before the revolution, the Crown had been quite successful in reducing the power of the nobility. At the national level, the Crown's hegemonic drive was supported by the unification of English society after the Norman conquest, the early centralization of royal power, the Crown's large manorial possessions, and the contingency of a full treasury.\textsuperscript{38} Two particular features can be schematically singled out in the failure of English absolutism in the seventeenth century. First, the tripartite nature of the ruling class implied that Henry VIII would need the support of the nobility in his move against the church.\textsuperscript{39} Second, the interpenetration of royal and feudal institutions at the local level precluded the segregation of royal and seigneurial jurisdictions. The Crown allowed the formation of "an unpaid aristocratic self-administration . . . which was later to evolve into the Justices of the Peace of the early modern epoch."\textsuperscript{40} In the early sixteenth century, the rising gentry, encouraged by the Crown, had begun to concentrate in its hands both land and county offices. At the local level, it replaced the power of the absentee magnates. The gentry's growing control over the Commissions of the Peace was an extremely significant tool of class organization. The Justices had the possibility of interpreting the common law systematically in their own class interest therefore acquiring a legal upper hand in their battle against the peasants' customary rights.\textsuperscript{41} The early judicialization of the conflict between landlord and peasant appears related to at least two class features of the gentry: it included an influential contingent of professionals, especially solicitors and barristers, and it was particularly well educated in the law. These traits went well with the legalism of English Puritanism and imparted a specific ideological vision of the common law and the constitution to the conflict between Parliament and Crown.\textsuperscript{42}

In France, the centrifugality of a larger and more divided territory had to be controlled by the kings in order to gain direct access to the surplus produced by the peasantry. Segregation of jurisdictions followed logically from the battle for control of local institutions between king and nobles, laying the base for the professionalization and standardization of the centralized royal system of justice. While the advance of the

\textsuperscript{38} P. Anderson, \textit{Lineages of the Absolutist State} (London: Verso, 1974) at 113-42.


\textsuperscript{40} Anderson, \textit{ibid.} at 116.

\textsuperscript{41} R. Lachmann, "Feudal Elite Conflict and the Origins of English Capitalism" (1985) 3 Pol. and Soc. 349.

\textsuperscript{42} Stone, \textit{supra}, note 39 at 72-76, 97-105.
Depolitization and Lawyers' Functions

monarchic state apparatus in the seventeenth century delivered the middle and lower orders to the oppressive fiscal demands of the French Crown, it also maintained continuously open the possibility of conflict regarding levels of taxation between the nobility and the king. The presence in the provinces of a reliable corps of tax farmers, intendants, and other royal representatives both augmented the king's power and exasperated the opposition. From this, the revolutionary storm was in part nourished. The success of absolutist monarchy, as well as its failure in England, depended partly on constructing above the piecemeal edifice of feudal particularism a system of legal legitimizations for central power. The revival of Roman law not only introduced into the civil society of late medieval Europe the Roman conception of "unconditional private property," but it also reestablished, in the public sphere, legal justifications for administrative centralization and discretionary power:

... just as it was the canon lawyers within the Papacy who had essentially built and operated its far-reaching administrative controls over the Church, so it was semi-professional bureaucrats trained in Roman law who were to provide the key executive servants of the new royal States. ... It was the imprint of this international corps of lawyers, more than any force, that Romanized the juridical system of Western Europe in the Renaissance.

These historical references illustrate the discontinuity in the continuous state-constituent function of legal specialists. They remind one of the role jurists played in "the fundamental transition of the relationship of obedience from personalism to objectivism." They also suggest that, in some places and circumstances, the availability of lawyers for hire made them into free agents who could thereafter advocate whatever class interests they found to represent. Thus, English common lawyers could become representatives for the parties in a protracted class struggle. In France, the meaning of common law was different. Lawyers challenged customary rights rooted in obsolete feudal or manorial arrangements or

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43 Per capita taxation levels in England and France were almost the same around 1550; one century later, per capita taxation, bearing mainly on the peasantry and the middle strata of the Tiers État, was three to four times what it was in England. Nef estimates that "considerably more than ten per cent of all French income, as compared with some two or three per cent of all English income, was collected by the crown." J.U. Nef, Industry and Government in France and England, 1540-1640 (New York: Russell and Russell, 1957) at 129. By the early eighteenth century, however, the Crown's power had diminished, the nobility was more unified and was trying to revive its autonomy and challenge the tax levels imposed by the Crown. E. Kiser, "The Formation of State Policy in Western European Absolutism" (1986-87) 3 Pol. and Soc., 259-95. On the French Revolution, see generally: G. Lefebvre, The Coming of the French Revolution (Princeton, N.J.: Princeton University Press, 1947); T. Skocpol, States and Social Revolutions (New York: Cambridge University Press, 1979).

44 Anderson, supra, note 38 at 28.

defended communal property rights which the Crown was also interested in protecting. The law these lawyers “spoke” was that of the central power and not the customary law used by the landed classes. When two different legal systems are invoked in judicialized forms of class struggle, law is more likely to be perceived as a human creation, a willed and deliberate emanation of the state. Attacking the legal system then becomes a political action. Because the limitations of legal redress are more visibly connected with forms of domination, the reconstruction of the state, in turn, cannot be conceived outside of the reconstruction of the law. The judicialization of class conflict always, to some extent, politicizes litigation, thereby compromising the pure objectivity of the law’s appearance.

The kind of services lawyers render, and their position in an incipient market marks them as a special category of intellectual producers that can never as a whole become “traditional” as can priests and academic humanists (in the sense of Gramsci’s theory of intellectuals). Because lawyers represent interests, they can attach themselves to any class comprised in a “historical block.” If the coalition claims a hegemonic role, it “both rules and directs.” Its intellectuals therefore play an “organic” role that is “directive and organizing, that is to say, educational, that is to say [properly] intellectual.” If the class for whom lawyers work is no longer hegemonic, it is incapable “of intellectual light, of any program, of any impulse toward reform or progress.” If the intellectuals attached to this class become “traditional.” Even in this case, however, the lawyers and notaries play “a most important political-social role” because they connect the peasant mass to the local or state administration bringing them within the nation’s sphere of law.

The law is not a mere superstructural mask of class domination that the dominated could cast off as the unnecessary relic of the pre-liberation past. It is an essential part of the organizing and connective functions exercised from the platform of the state and throughout civil society by a hegemonic class. Hegemonic power resides in a class’ capacity for harnessing “objectivity” from different sources (law, technology, military superiority, and later economics and science) to its rule. Effective counter-hegemonic challenges must necessarily include a demonstration that objectivity is constructed socially by identifiable agencies and can be recuperated into different visions of the legal system.

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47 Ibid.
In this respect, it is important to note that the venality of the market can function to prepare a counter-hegemonic discourse within the existing legal system. The contingent conditions for this occurrence are related to the foundation of new states or new regimes. The citizen constitutive function of lawyers must first merge with their state constituent function. This happens when the claims that lawyers represent are increasingly political and politicized. By “increasingly,” it is meant that litigation expressing society-wide conflict spreads, involving larger numbers of people and claims, and at the same time, the legal arguments mobilized in litigation delineate a challenge to the dominant conception of rights. Thus, in periods of political mobilization triggered or punctuated by interests which seek and find a legal expression, juridical practice is the most likely to produce politically meaningful legal discourse. For this, lawyers must be available to private interests that are neither controlled by the sponsoring state apparatus, nor entirely under the thumb of the local ruling class. Their availability requires the existence of a market (or proto-market) of legal services.

Politicized legal discourse is likely to emerge in troubled times, particularly in historical conditions where access to courts allows the judicialization of class conflict. It is not, however, a direct political instrument. It hovers between state and market where legists, working in the courts to render “objective” justice (justice embodied in transcendent law), participate in the institutional space where the eighteenth-century bourgeoisie strove to create a public sphere. According to J. Habermas, the arena of public opinion began to be formed with the Reformation, when legally protected religious freedom became the first area of private autonomy. The public sphere emerged gradually with the public assembly of private individuals (those who held no office). Public authority came into being with national and territorial states. Within it, the power of the ruler was effectively depersonalized by the development of a state apparatus. The lifeblood of the public sphere is public discussion. The private bourgeois, in laying claim to the printed word (even the officially regulated newspapers, journals, pamphlets, books), infiltrated the very principle of absolutist power (from which, as private individuals, they

48 Root's Burgundian study is a significant example. He writes:

From the legal briefs one cannot easily distinguish the lawyers' attitudes from the peasants'. . . .

As for the question of intent, lawyers and peasants had different interests. By challenging seigneurial authority, lawyers could increase fees; the peasants could hope to reduce feudal dues. Invoking the idea of a class alliance to account for their collaboration is gratuitous; the notion that hostility to privilege motivated the lawyers is likewise gratuitous. Lawyers were being paid to do a job and drew whatever legal arguments were at hand.

The result of the interaction between lawyers and their peasant clients was, nonetheless, that lawyers' insistence that seigneurial rights had to be uniform through the province, and their interpretation of the lord's terrier as having "originated in violence and . . . being maintained by force" prepared a revolutionary legal discourse. Root, supra, note 15 at 673, 678.
were excluded) by means of "that very principle which demands that proceedings be made public."\(^4\)

The judicialization of class conflict constitutes an alternative to the liberal model of the public sphere articulated principally by the press — alternative both because it is part of the state apparatus and because the typical cast of characters may be different. The bourgeois principle of publicity was directed against absolutist court proceedings as a primary target; this pulled the administration of justice from the sphere of public authority toward the public sphere. Legal discourse became part of the latter through the practical political application of the publicity principle.

Politics, not law by itself, carries the transformative content of new legal discourse to the levels where it can become anew the "language of the state." In a corollary movement, when bureaucratic authoritarian regimes destroy even the pretense of liberalism, the judicial system may once again become a battlefield, in which it is possible to maintain the memory of an authentic public sphere.\(^5\)

Throughout the history of the modern state, law has been the form in which the exercise of power, by accepting limits, seeks universal truth conditions.\(^6\) In the courts, the constituent/constitutive function of lawyers has articulated these limits into public and private domains. The courtroom has been one of the stages where the spectacle of power-as-law is enacted. Lawyers representing corporate entities or private individuals try to influence, by argument, other lawyers who embody the impersonal power of the law. The classic citizen constitutive functions of representation and defense opened, for jurists, a special door to state-constituent and legislative functions by giving them access to the courts. Both by their structural position in the social division of labour and by the content

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\(^5\) In the contemporary period, the function of reconstituting liberal bourgeois guarantees of rights is sometimes assumed by lawyers' organizations which thereby pass into the opposition. See J.C. Viladas, "The Legal Profession in Spain" (Address to the Working Group for the Study of the Legal Professions, International Sociological Association, Bellagio, 16-21 July 1984) [unpublished]; J. Falcao, "The Legal Profession in Brazil" ibid. [unpublished]. Sometimes the opposition to torture, despite the deep change of meaning and systematic contemporary uses of physical violence, seems to recover in discourse some link to the past by implying there was a kind of barbarism which we had "left behind." On the subject of the symbolism of torment, as against the uses of direct (though non-cruent) control of bodies, see Foucault, supra, note 26.

\(^6\) This does not mean to endorse the reduction of legitimation to pure legality, such as is effected by Niklas Luhmann's interpretation of Weber. Habermas objects to Luhmann's legal positivism that procedural legality "guarantees as such only that the authorities ... bear the responsibility for valid law. But these authorities are part of a system of authority which must be legitimized as a whole if pure legality is to be able to count as an indication of legitimacy." J. Habermas, Legitimation Crisis, trans. T. McCarthy (Boston: Beacon Press, 1978) at 101. I tend toward the position that legitimation depends on the successful assertion of hegemony, which includes the objectivity of law in its arsenal of instruments.
of their activities, lawyers are the most immediately and inherently political of all organized occupations.

The jurists' appropriation of legal discourse can become either a prelude to the development of properly political discourse or an alternative to the latter. The outcome is determined by the whole complexity of structure and historical conjuncture. A few crucial conditions have been identified. These include: the articulation of private and public domains with a sense that private boundaries cannot be legitimately transgressed by the state, the emergence and advance of systems of justice attached to centralizing (or centripetal) power, the consequent professionalization of the judicial personnel and a basis for standardization and unification of the law, codification of the law and the possibility of teaching it as a formal discipline, the right of subjects to address the courts and to be represented in them, the emergence of a potential market for lawyers' services, the development and maturation of a public sphere, and the public opinion formed therein about justice and the legal system.

C. The Matrix of Depoliticization

Professions are occupations that, by virtue of their special characteristics and their expertise, claim control of the services they render to society. Control involves gatekeeping and patrolling both the borders and the territory so defined. Within this protected territory, professions claim autonomy in the name of monopolized competence. Autonomy and competence are inseparable in theory and also as practical objectives. The practical conditions of even the lowest levels of professional autonomy (operational discretion in ordinary practice) cannot be permanently secured because they are contingent on too many factors that professions in no way control. At the most general level, the constellation of relevant factors is defined by the mode of production, the nature of the state and its apparatus, basic characteristics of civil society (for instance, the position of women), and the broad idiosyncrasies of the culture. The

52 These conditions are more basic than, for instance, the judicial right of legislative review, so often highlighted in the case of the United States. R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (Cambridge, Mass.: Harvard University Press, 1977); S.P. Huntington, "Political Modernization: America vs. Europe" (1966) 18 World Pol. 378. Most institutional arrangements come into use as a consequence of political developments, such as these conditions essentially are.


In an insightful article on "Status Strain in the Professions," Andrew Abbott implies that the "great transformation" led to a cultural shift in the criteria by which public status was generally accorded to professionals: from gentlemanliness (and therefore closeness to the aristocracy in practice as well as in manners) to a particular view of professional effectiveness ("effective contact with the disorderly"), that I would connect with deeper changes in the relationship of society and culture to the transformation and the domination of nature. A. Abbott, "Status and Status Strain in the Professions" (1981) 86 Am. J. of Soc. 819.
combination of factors obviously varies in time, as does the factors' relevance to the profession considered.

For lawyers, the most important elements in the constellation are the structure of the state and the extension of its powers. The size, recruitment, and organization of the judicial branch of the profession are immediately dependent upon the state, as is the existence and openness of state-constituent functions for jurists in general. The most significant impact of the state on the category of lawyers may well have been indirect. The expansionist tendency of public systems of education in response to demographic and social pressure has affected all occupations based on educated labour, though perhaps none as much as the legal profession.54 In addition, the functions assumed by the state have grown in number, diversity, depth, and extension, especially in those countries whose governments have been under social democratic control or influence. This has provided lawyers with new tasks of mediation and representation to perform. The number of lawyers employed at all levels by the state has grown faster than the number of private practitioners in almost all Western-type countries.55 The expansion and diversification of functions into various welfare state configurations redraws the boundaries between the public and the private. Private life is penetrated by many bureaucratizing effects, rules, and regulating influences that can be resisted or broken by one or the other side. The sphere of legal defense is therefore potentially enlarged.56 At the same time, the mechanisms by which the state has performed or delegated its more benign functions perfect the transformation of power from power-as-law and repression into a multiplicity of points of intervention at which human existence and human bodies are directly taken in charge. Foucault writes that the juridical system is:

... utterly incongruous with the new methods of power whose operation is not insured by right but by technique, not by law but by normalization, not by punishment.

54 The numbers of lawyers have grown at an accelerated rate in all the countries studied by the Working Group for the Comparative Study of Legal Professions. These include, alphabetically: Australia, Belgium, Brazil, Canada, England and Wales, France, Germany, India, Italy, Japan, the Netherlands, New Zealand, Norway, Scotland, Spain, the U.S.A., Venezuela, and Yugoslavia. For a summary of the figures on growth, see R.L. Abel, “Comparative Sociology of Legal Professions: An Exploratory Essay” (1985) A.B.F. Research J.

55 Ibid. at 25-26. The combined effect of these trends related to the expansion of state functions includes, in some countries, the appearance of paraprofessionals of various types, representation by non-lawyers in administrative courts, and the increase in the ratio of lawyers per judge, with the consequent increase in litigation and in court backlog.

but by control, methods that are employed on all levels and in forms that go beyond the state and its apparatus. . . . [T]he juridical is increasingly incapable of coding power, of serving as its system of representation.57

The expansion of the rule-governed areas of life independent from the legal form can also occur under various forms of "delegalization" that return certain disputes to prepublic and more or less authentic communal handling. In all cases, complementary or alternative rules have important implications for legal practice.

The second important extraprofessional factor for lawyers has been the concentration and centralization of units of production with the attendant phenomena of rationalization of production and worldwide expansion of markets.58 The large corporation, with its vocation and capacity for planning, is a legal actor whose influence and effects, both in society and on the law, are of the same order as those of the contemporary state, though not quite of the same depth and extension. It is an artifact created and perfected by lawyers, thus its growth has logically found an echo in the growth of the large legal firm that serves its needs. The continued growth and diversification of the bureaucratized units of capitalist production involve them with the law in anticipation of its rulings, in the preparation of contracts, in the ubiquitousness of their relationships with governments, in the extreme complexity of the relationships of competition, combination, and merger with other entities in the late days of monopoly capitalism, and, of course, in litigation. Therefore, in practically all the capitalist economies, corporations have their own legal departments that, in some countries, occupy the place of the American large law firm in the prestige hierarchy of the legal profession.59

Beyond the prevention of legal problems, one of the most important tasks of inside counsel is to organize and oversee the legal services

57 Foucault, supra, note 32 at 89.

58 Ever since the first period of growth in lawyers' numbers in sixteenth and seventeenth-century Europe, the numerical fluctuations in the legal profession have been related to the volume of business both directly and indirectly insofar as business enriched at least some sectors of the upper and middle classes from which lawyers' clients were (and still are) mostly drawn. Sixteenth-century English solicitors, for instance, were involved in conveyancing although they did not yet monopolize it; they must have benefitted greatly from the large increase in land transactions after Henry VIII's appropriation of church lands. Stone, supra, note 39 at 73-74. During the nineteenth century, lawyers' numbers seem to have fluctuated irregularly in the U.S., in England, Scotland, and Belgium "perhaps in response to the business cycle of booms and busts." Abel, supra, note 54 at 19.

59 See, for instance, reports by John Johnson and Luc Huyse about the prestige of legal counsel for large corporations in Norway and Belgium, respectively. J. Johnson, "The Legal Profession in Norway" (Address to the Working Group for Comparative Study of the Legal Profession, International Sociological Association, Bellagio, 16-21 July 1984) [unpublished]; Luc Huyse, "The Legal Profession in Belgium" Ibid. [unpublished].
provided by outsiders. The legal department of the large corporation has thus become a centre for what Daniel Bell calls "the management of organized complexity" and for the coordination of important litigation, collective bargaining, and intercorporate relations. The resolution of these matters in courts or, most frequently, by negotiation, institutionalizes organizational and power shifts rooted, though not contained, in the economy.

Routine matters are handled differently. The same industrial conditions which called for the internalization of legal services allowed the standardization of products and of specifications. Most of what inside counsel does is not properly legal, but bureaucratic, relying on records and regulations. Lawyers are likely to preside over the rationalization of documents, rules, and procedures, and, like any bureaucrat, are quite likely to produce rigidification. The preparation of such measures with a "legal eye" may represent the major form of prevention (through standardized planning), making lawyers' interventions unnecessary in the future. These practices (that may be called "antilegal" or "paralegal") include the unilateral terms imposed on the less powerful business associate or on the consumer. This is often done through the fine print of order forms and standard guarantees, or in the contractual substitutes used by insurance companies. Beyond this are the technical specifications of mass production drafted by non-lawyer experts.

Major trends in social and cultural life are much more difficult to isolate, even tentatively, since not many features of contemporary social

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61 The parallel between the corporation and the modern state lies in the structural features common to both. These include the corporate form, the bureaucratic organization, the deployment of expertise, the centralization/decentralization of decisions, the disproportionate resources which can be mobilized by a single giant unit, the planned management of uncertainty, a structural bias against democracy and publicity beyond the circles of 'the competent', the reliance on manipulation through mass media, and many others. The large corporation penetrates social life more effectively by means of its products than through its advertising. The commodities put in circulation by mass production incorporate the kind of scientific management, engineering design, and standardized pre-legal planning that permit the emergence of one variety of legal counterattack by organized consumers or their advocates.

It is important to note here that the conditions for the assignment of blame to producers are complex and ambiguous: on the one hand, it could be argued that the idea of responsibility for the quality and integrity of a product placed on the market goes back, ultimately, to guild regulation of craftsmanship. On the other hand, while individual consumers' grievances are often against retailers, class actions seek monetary compensation from large producers because that is all the compensation tort law allows. Also, it is difficult to imagine claims lodged against manufacturers whose small scale and technologically backward or underdeveloped methods would exclude 'scientific' control of the product. It seems to me that the vast zone of production in between production controlled by the individual worker (as in craft-organization) and production controlled by a bureaucracy is where most ambiguity lies. See A.L. Stinchcombe, "Bureaucratic and Craft Administration of Production: A Comparative Study" (1959-60) 4 Admin. Sci. Quart. 168.
life are independent from the state or the large corporation. Cultural and ideological traits, including those that condition the perception of injurious experiences, are variable and fluid, with effects almost impossible to demonstrate. Habermas characterizes the socio-cultural system in advanced capitalist societies as “civil privatism” corresponding to “the structures of a depoliticized public realm.” It is complemented by “familial-vocational privatism,” which “consists in a family orientation with developed interests in consumption and leisure on the one hand, and in a career orientation suitable to status competition on the other.” The crisis of motivation diagnosed by Habermas lies both in the dismantling of pre-bourgeois traditions and the undermining of “core-components of bourgeois ideology, such as possessive individualism and achievement orientation . . . by changes in the social structure.”

The entirety of Habermas’ typification and its exact implications for a sociology of lawyers will not be examined here. It is, however, a good theoretical background on which to begin mapping the political implications of lawyers’ work as a comparative basis for analysis. Out of this historically grounded theoretical matrix, the study of lawyers can move more securely into societies which neither structurally nor culturally have developed along the same lines or gone as far.

At the most general level, the relevance of Habermas’ diagnostic matrix for the analysis of the legal profession is immediate. The objective conditions of civil and familial-vocational privatism include both a depoliticized public realm and the expansion of the educational system and other branches of the welfare state. The privatism of career choice is the motivational base to which ultimately corresponds the over-supply of professional workers. The demand for this kind of labour power originates in the rationalization of industrial production and in the

62 Felstiner, Abel, & Sarat, supra, note 5 at 652.
63 Habermas, supra, note 51 at 75 passim. In Habermas’ legitimation crisis, the concept of “privatism” is developed as the central element of the motivation crisis. The socio-cultural system primarily feeds into the society “syndromes of civil and familial-vocational privatism.” Obviously, the underpinnings of such motivational inputs are institutional and structural. Thus, civil privatism means that most citizens are interested in “the steering and maintenance performances of the administrative system,” though not much in its legitimation (efficiency and effectiveness, in other words, are their own legitimation). Their desiccated participation in properly political aspects is what the institutions of governance actually call for. Too much democratic participation would be seen at the levels of command as a “crisis of governability.” Ibid.
64 Ibid. at 79 passim.
65 Since my comments are based on existing studies of lawyers and lawyering, much of their content has obviously already been hypothesized and partly tested. The most complete bibliography on “the emergence and transformation of disputes” is that given by Felstiner, Abel, & Sarat, supra, note 5 at 632. See also A. Sarat & L.F. Felstiner, supra, note 28.
expansion of both the commercial service sector and the state. Through these processes of rationalization and expansion, the commodity form and bureaucratic or legal rules penetrate areas of private and public interaction that were before only informally regulated.

The erosion of traditional authoritarian patterns within the family and communal solidarity relations renders interpersonal conflict increasingly difficult to contain. Young people and women increasingly seek emancipation (both collectively and individually). The support of relatives, friends, and comrades is often either unavailable or insufficient. The implication is that disputes emerge more frequently out of the family context and into a semi-public arena where lawyers can intervene. In turn, the increased availability of lawyers makes it more likely that a grievance will become a claim. This speculation is, however, misleading. In most countries, “people remain reluctant to consult lawyers even when their services are free and accessible.” The organization of familial relations is highly influenced by religion and race and plays a large part in determining who is likely to see a lawyer about such matters as divorce, alimony, and child support.

The blended borderline between the private and the public domain is now inhabited by a variety of professional workers (state-subsidized workers in the social field, in physical and mental health, and the still very important minister or priest) who compete successfully with lawyers in the handling of grievances. In fact, the matters for which most individuals use lawyers are still likely to be property matters and not interpersonal conflicts. The former are predictably differentiated by income and class.

The penetration of experts into private areas of social life and the corollary exposure of more people to professional services (in particular health-related ones) has complex effects on the legalization of interpersonal disputes. If it is true that “there is probably a low level of perceived injurious experience in the relationship between lay persons and pro-

66 The most obvious and important example is that of offenses against women, which are more readily recognized as injurious to the victims in the general ideological climate created by the women’s movement. N.H. Rafter & E.A. Stanko, eds., Judge, Lawyer, Victim, Thief: Women, Gender Roles and Criminal Justice (Boston: Northeastern University Press, 1982) c. 2-4.

67 Felstiner, Abel, & Sarat, supra, note 5 at 81.

68 Abel, supra, note 54 at 35; Abel, supra, note 3 at 602, note 768.


70 Felstiner, Abel, & Sarat, supra, note 5 at 639-49.
fessionals,” much of the potential conflict arising from these contacts remains unprocessed.71

The way in which the delivery of legal services is structured makes a difference in the perception and handling of injuries. In the United States, the contingency fee enables many medical malpractice suits to be attempted. The contingency fee may contribute to keeping open the rewards of entrepreneurship and the promises of a free-lance career in law. Much more interestingly, however, it has become an avenue through which the legal profession uses its position as gatekeeper to state sanctions, with the unintended consequences of transforming practice and recruit-

One of Habermas’ central propositions is that the reproduction of bourgeois culture as a whole has always depended on the mobilization of traditional residues. This is because bourgeois ideology has been too “disconsolate, individualistic, and objective” to offer sufficient moral support for individual life.72 One can speculate that liberal justice (an essentially bourgeois creation) may tend to take the place of waning traditional beliefs. Formal justice may subconsciously appear to some people as a form of reordering what is disordered or as an authentic way of setting things right. Jurists are the official gatekeepers of this form of invocation and, therefore, its beneficiaries. They are, however, also exposed to the cynicism and mistrust created by disappointment. Several studies have found an inverse relationship between positive attitudes toward the courts and direct experience with them.73 Even before getting to the courts, ordinary individuals are warned against litigation. If the case is accepted, the pressure to settle out of court or to bargain in a plea is high.74 Lawyers fear the loss of potential business clients or trade union retaliation and seek to avoid the risks of losing time and money involved in representing clients who belong to discriminated social categories and are likely to face a handicap in court.75

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71 Ibid. at 653.
72 Habermas, supra, note 51 at 77-78.
Evidence from the United States suggests that the experience of ordinary citizens with formal justice is likely to undermine their sense of confidence and empowerment as citizens, even as they participate in the actualization of their rights. The legalization of disputes expropriates the lay person's problem, reducing him or her to an accessory role as the esoteric language and complexity of procedure exclude from participation all but the “competent speakers.” Consultations and negotiations offer the client “vision of law in which particular parts of the self are valued while others are denied.” The legal self constructed by lawyers outside and inside of court “legitimate[s] some parts of human experience and den[ies] the relevance of others,” but it does so implicitly, without revealing the reductions, excisions, and reordering of priorities operating upon the litigant’s experience. In the United States, the experience of tort litigation inevitably converts the search for redress and reordering into the acceptance of compensatory payments. The monetization of a majority of common disputes effectively reinforces the ideological one-dimensionality of capitalist society. The expression of worth, right, recognition, and participation in the institutional world is always ultimately reducible to money terms.

The mediation that lawyers perform between individuals and the legal system continues to have essential implications for the constitution of citizenship. The defense and advocacy of civil rights through the courts, the rights implicitly actualized in the public defense of criminal cases, the advancement of economic rights that is sometimes achieved against corporate defendants in personal injury litigation, and class actions all indicate the fundamental political importance of the representation and defense functions of lawyers. Their indispensability is most clearly revealed

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76 Evidence drawn chiefly from the United States is obviously not conclusive. The particular organization of the delivery of legal services, the strong market ideology, the multiplicity of often overlapping jurisdictions, the nature of the adversarial system, and specific features of the law are among the surface factors that demand comparative review. In other societies, (for instance, Germany. See D. Rueschemeyer, Lawyers and their Society: A Comparative Study of the Legal Profession in Germany and the U.S. (Cambridge: Harvard University Press, 1973), legal practice is not as determined by the nature of the client, nor as subordinate to the client's will. More importantly, the absence of a strong labor movement and of strong left parties in the United States precludes developments characteristic of western European social-democracies: not only the different forms of provision of legal aid by trade unions, social democratic parties, or the social democratic state (Abel, supra, note 3), but also the participation of lawyers in drafting the architecture of neocorporatism. See L. Huyse, “The Legal Profession in Belgium” (Address to the Working Group for the Comparative Study of the Legal Professions, International Sociological Association, Aix-en-Provence Meeting, 1985) [unpublished].

77 Sarat & Felstiner, supra, note 28 at 132.

78 Ibid. at 117.
in their breach, in the violation of rights, and of due process. What is necessary, however, even indispensable, is not always sufficient. In advanced capitalist societies, legal representation contributes to forming an image of citizenship that is individual, technical, partial, monetized, and, especially, non-autonomous.

The legal construction of the political self goes beyond the actual experience of negotiation and litigation. The legalization of collective conflicts does more than extract the potential for violence from the civil society and encode conflict into legal frameworks designed to blunt its meaning. It also diverts the protagonists from seeking redress through political pressure and, eventually, through legislation as opposed to litigation. The diffusion of knowledge about legalization, moreover, often induces politically active people to anticipate possible lawyers' moves and to censor properly political actions in accordance.

The citizen constitutive function of lawyers logically contributes to the general depoliticization of advanced capitalism. What alternative discourse or arena is open for the stubborn hope of setting things right if the ordinary person's experience with formal justice is likely to be depoliticizing, disempowering, and substantively unjust? Politics is the only democratic way, but one increasingly desiccated by privatization and the objective disenfranchisement of the mass of citizens in neo corporatist bourgeois democracies. An old way of asking for order is prayer. We now turn to the expert discourses of medicine, science, and medicine.
technology. The latter has become the fundamental expression of power. It is as servants and gatekeepers of this power that jurists can occasionally orchestrate the interventions of experts and assign them responsibility vis-à-vis those who have neither the authority nor the power to speak. In the delivery of state-sponsored adjudications (malpractice litigation), jurists can appropriate a meta-professional role through their capacity to legalize personal and collective catastrophes and to manage the resulting procedural complexity. This is a relatively new political role that jurists perform, although they do so haphazardly, only where and when it is possible, and with unclear consequences.

What is the contemporary counterpart of the jurists' state-constituent functions, if one leaves aside their diminishing overrepresentation in government82 Lawyers have a secure hold on the elaboration of corporative agreements between actors representing interest associations (mainly economic, but also political, religious, and cultural) and the state.83 What is significant in such agreements, according to Luc Huyse, is that “all its actors...perform as full-bodied decision-makers...parliament mostly can take no other action than as an applause machine.”84 Social democratic countries are the examples most often cited. There, neo-corporatist trends arise from the state’s attempt to establish with its guidance and assistance “private interest governments with devolved public responsibilities—agencies of regulated self-regulation of social groups with special interests that are made subservient to general interests by appropriately designed” institutional arrangements.85

The jurists’ familiarity with the contractual prefiguration of contingencies prepares them for the role of providing “precise and complex procedural scripts to guide negotiations between corporatist interest groups, and between them and the state.”86

In countries where neither social democracy nor neo-corporatism are developed, lawyers nevertheless perform a comparable structural function. The inter- or intra-organizational agreements lawyers help to draft (such as collective bargaining agreements, tender offers, mergers, patents, loans, bond issues, et cetera) are private only in appearance. Their hidden “public” character is revealed by four features. First, in many

82 Abel, supra, note 54 at 27-28.
84 Huyse, supra, note 76 at 6.
86 Huyse, supra, note 76 at 7.
of these cases, the very size of the actors makes their behaviour immediately relevant to the general interest. Second, many arrangements (labour contracts, mergers, possible trusts, certain forms of trade and communication, and the like) are directly monitored by state agencies. Third, the state intervenes as a direct partner in innumerable contractual agreements with the private sector. More importantly, lawyers represent a sort of "shadow state" in private agreements between the large units of the private sector (or between them and the state) precisely because they see it as their function to keep these agreements and their clients' actions within the law of the state. Finally, these structural arrangements that can and do have enormous impact on the lives and welfare of many people remain largely free from public supervision and regulation. The privatization and depoliticization of the lawyers' state-constituent functions is determined by the nature of the state in which they operate and by the intensity of political demands for public control.

In conclusion, the classic functions of the lawyers marked them as the most inherently political of all specialized workers. The political content of their functions changes with the historical transformation of the economic, social, and political matrix in which jurists work. Not the least important of the changes in the meaning of lawyers' work is the tendency for the legitimizing ideology of legalism to be displaced. This substitution also participates in the general process of depoliticization which is understood as one that minimizes human practice and conceals it within the objectified language of a scientistic ideology. The depoliticization and repoliticizing content of lawyers' functions in particular historical contexts can be objectively determined. It cannot and should not be true of all professions. Abbott, supra, note 53.

Note: All notes are from the original source.
not situate a whole occupational category but should instead allow one to connect its functional divisions and its internal stratification with reasoned hypotheses about the political potential and the political consequences of specific practices.