Comparing Legal Professions Cross-nationally: From a Professions-centered to a State-centered Approach

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Legal occupations vary dramatically from country to country—in scope of activity, education, organization, and institutional setting. This essay proposes to study legal occupations focusing on their relations to the state rather than on their character as "professions." It builds on the recent renaissance of state-centered approaches in the social sciences. A review of the diversity of law work and legal occupations in different countries leads to state-centered conceptualizations that identify institutionally comparable features of law work. A sketch of the European historical background of modern legal professions yields theoretical principles that can inform the proposed approach. Variations in the role of the state and in the relation of lawyers to the state apparatus are then shown to be related to differences between national legal professions. Even where the law is primarily seen as a profession, the character of law work is better understood when related to the state.

This essay seeks to analyze lawyers and their work from a state-centered perspective. Such a perspective may not appear to be novel. After all, social scientists frequently have defined law as that normative order which is set down and guaranteed by the state. Even scholars who prefer other definitions see the bulk of law work as state-related. Yet much of the discus-

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1. Donald Black, The Behavior of Law 2 (New York: Academic Press, 1976), speaks of law as "governmental social control." William J. Chamblass & Robert B. Seidman, Law, Order, and Power 3 (2d ed. Reading: Addison-Wesley, 1982), distinguishing particular laws from legal order, define the latter as "a set of social relations governed by rules set down by the state." Max Weber's definition, probably the most influential in the social sciences, turns on "the presence of a staff engaged in enforcement"; while this definition may cover at the margins normative orders supported by clan action or the leaders of a religious sect, the "staff" of enforcement is, under modern conditions, regularly part of the apparatus of the state. See Max Weber, Economy and Society, ed. G. Roth & C. Wittich (New York: Westminster Press, 1968; originally published in 1922). This close connection of law and state action is also not necessarily denied by the definition of those scholars who for philosophic reasons seek to avoid a narrow focus on the coercion used in law enforcement and who try to maintain a conceptual link between moral and legal norms. This is, of course, not the place for a serious overview of definitions of the law; for an introduction see Jack P. Gibbs, Definitions of Law and Empirical Questions, 2 Law & Soc'y Rev. 429 (1968); Leopold Pospisil, Anthropology of Law: A Comparative Theory (New Haven, Conn.: HRAF Press, 1971); Lawrence M. Friedman, The Legal System: A Social Science Perspective (New York: Russell Sage Foundation, 1975); Chamblass & Seidman, supra.
sion of law work and legal occupations has either been merely descriptive or has taken its analytic leads from the study of the professions. A state-centered perspective offers a promising theoretical framework for the comparative analysis of law work and legal occupations, and it counterbalances the neglect of the state that is common in studies that take off from theoretical conceptions of "profession."

When pure description crosses international boundaries, it is quickly led astray by the diversity of institutional arrangements. Or, to put it more accurately, cross-national comparison reveals that pure description is an impossible undertaking. No study can be purely descriptive; any study—however "merely descriptive" in aim—needs some guidance as to what to look for. This need for an analytic underpinning becomes even more obvious in comparative work. Typically, studies that lay claim to the modest goal of "merely describing" either look at very different national patterns ethnocentrically, taking their clue from the understanding of law work that prevails at home, or they seek to avoid getting lost in the variety of legal work and legal institutions (evident even in historically closely connected countries) by holding on to a few questions about the formal regulation of education, licensing, legal ethics, and lawyers' associations.2

It is possible that the institutional diversity found in any cross-national comparison of legal occupations conceals a greater underlying unity and that the different forms of law work respond to at least a core of universal problems found in all complex societies. Reflective lawyers who have practiced law in more than one country tell of drastic contrasts in particulars and of similarities of purpose and deeper structure that underlie what is initially experienced as strange and alien. This idea of a homogeneous foundation supporting a variety of forms gives comparative work a sharper focus and raises important theoretical questions for research. We may go further and formulate what has come to be known as the "convergence hypothesis": Countries become more similar—in the problems they encounter and in the institutional solutions they devise to solve those problems—as they grow more complex and especially as they move from an agrarian to an industrial economic base.

I believe that a search for patterns of comparable "functions" discernible beneath the surface diversity of national institutional arrangements is promising. Yet I would insist on two qualifications, both of which point to the importance of state structures and state policies. If we look for such functional similarities, the level of socioeconomic "modernization" alone is unlikely to be sufficient to determine the relevant factors. At similar levels of socioeconomic modernization and development, a different role performed by the state in the economy and society will make for important differences

in the structure of institutions. This qualification is virtually obvious where
the law is concerned. To point to the most persuasive contrast, often in-
voked as evidence against simplistic "convergence" theories of a more gen-
eral nature, state socialist countries will have legal occupations and legal
institutions of a very different character than capitalist societies because of
the very different part played by the state apparatus. The mix of adminis-
trative-political and market allocation of resources is radically different in
the two systems.

It appears more generally—and this is the second, closely related qualifi-
cation—that for reasons to be discussed below, the historicity of state struc-
tures entails a variability of legal institutions and practices that cannot be
fully understood in terms of current power constellations and current inten-
tions of public policy. The persistent legacies of past historical develop-
ments make for quite different state structures and state-society relations,
even in countries with quite similar economic patterns. Anything as closely
interrelated with the state as law and legal work is likely to differ across
countries just because of this historicity.

Recently, the major theoretical impulses for understanding lawyers and
their work have come not from such considerations of the fundamental
structures of the economy and the state but rather from the study of a sub-
set of occupations called the "professions." In this approach, the work of
lawyers is deemed to be similar in important ways to that of doctors,
priests, and such modern knowledge-bearing occupations as engineers and
accountants. The details of work recede into the background. What moves
into the foreground are certain characteristics of work and organization
that the professions share with each other in greater or lesser degree and the
explanation of these characteristics, which set them apart from other
occupations.

This line of analysis has focused on an historically important phenome-
on, the unprecedented growth of the utilization of knowledge in modern
societies, and it has yielded important results. Yet here, too, a state-cen-
tered perspective has a critical part to play. This is so because past studies
of the professions have focused on Britain and the United States, where the
professions were largely autonomous vis-à-vis the state and where the old
professions, especially law and medicine, reorganized themselves in re-
sponse to expanding market opportunities and an entrepreneurially led pat-
tern of industrialization and urbanization. What has been neglected are
contrasting early forms of state-sponsored professionalization. In addition,
the model of professional autonomy seems to be of limited utility when we
want to understand the role of expert occupations in advanced capitalist
economies, in all of which state action plays a much larger role than it ever
did before.

I will begin my discussion with a closer look at the concrete diversity of
law work and legal occupations in different countries. The question of how
one might best define law work and legal occupations will be used to highlight this institutional variability; at the same time, a state-centered definition will constitute a first step in the search for an underlying order. I will then develop from a brief sketch of the European historical background of modern legal professions some theoretical principles that can inform the proposed state-centered approach. Direct relations between law work and state structures are the focus of the next section; variations in the role of the state and in the place of lawyers within the state apparatus seem clearly related to differences between national legal occupations. Finally, I will return to the perspective that looks at law as a profession and will explore what can be learned even within this approach by paying systematic attention to variations in the role of the state.

I. CROSS-NATIONAL VARIATION AND PROBLEMS OF CONCEPTUALIZATION

The largest legal profession in the world—in absolute numbers as well as in proportion to the population—is the bar of the United States. In 1983, there were 622,000 lawyers in the United States. Taking population size into account, there were more than twice as many lawyers per capita in the United States than there were Rechtsanwälte in West Germany, or barristers and solicitors in England. Surprisingly, perhaps, the proportionate number of members of the Brazilian Bar Association stands midway between the figures for the United States and for England or West Germany. Among industrial countries, Japan represents the extreme opposite of the American case: There is only one bengoshi for every 10,000 inhabitants, while in the United States there are nearly 27 lawyers for every 10,000 people.

Many analysts take figures like these at face value and proceed to explain the differences in terms of (1) level of economic development, (2) the nature of the legal system, (3) the role of nonlegal patterns of dispute prevention and dispute settlement, and (4) the scope of work characteristic of different legal professions.

In countries with a capitalist market economy, the level of economic activity seems clearly related to the volume of law work and thus to the number of lawyers. If around 1960 there were fewer than 50 lawyers per million

5. There is a surprising continuity in the factors that are considered relevant. In 1832, Mittermaier analyzed German and other statistics on civil litigation and listed the following factors as determinants: liveliness of economic exchange, level of education, national character, the viability of family and community traditions conducive to peaceable conflict settlement, and the ease of suing. He also expected to find that modern civil legislation would reduce the complexity and variety of the old law and would result in fewer suits. Christian Wollschläger, Zivilprozessstatistik und Wirtschaftswachstum in Rheinland von 1822 bis 1915, in K. Luig & D. Liebs, eds., Das Profil des Juristen in der europäischen Tradition (Ebelshach: R. Gremer, 1980).
population in Sierra Leone, Kenya, and Nigeria, while all the old—and highly developed—common law countries (the United Kingdom, Australia, Canada, New Zealand, and the United States) had more than ten times as many lawyers,\(^6\) differences in the level of economic development are bound to play a central role in the explanation. This is also suggested by longitudinal studies in a given country or jurisdiction, which presumably hold many other factors constant that vary across countries and that might be responsible for changes in the volume of law work.\(^7\) However, differences in the level of economic development hardly throw much light on why the lawyer/population ratio varies as it does between the United States, West Germany, England, Brazil, and Japan.

The nature and complexity of the law has been held responsible for large differences in the amount of law work. This argument often contrasts common law and civil law countries. Thus Cohn, a practitioner with long experience in Germany and England, estimates that deciding the same legal question takes a Continental lawyer only a fraction of the time needed by his common law colleague.\(^8\)

The role of nonlegal means of dispute prevention and dispute settlement may be related to the level of development and modernization; yet “legalization” is not a simple correlate of “modernization.” Many observers who comment on lawyers and their work in Britain and especially in Japan have invoked these factors as limiting the scope and the importance of law work.\(^9\) Nonlegal forms of dispute containment have an impact quite independent of the level of economic development. In the sweeping formulation of Donald Black, “Law varies inversely with other social control. . . .”\(^10\)

Such arguments seem quite plausible, but a superficial inspection of the role of the last factor—the nature and scope of work done by lawyers in different countries—suggests that as explanations of the varying numbers of lawyers, these arguments are at least premature. Vast differences in the kind of work done by lawyers raise troublesome questions of definition. What do we actually mean by “lawyer”? And do even formally similar occupational profiles, defined by educational certificate or by license for certain professional activities, indicate that similar work is actually done? After all it is the latter—the similarity in actual work or “functional”


7. Wollschläger, supra note 5, found, e.g., that in the Rhineland from 1822 to 1878 the number of civil suits per thousand of population had a high correlation with the growth in domestic product per capita \(r = .78\). See \(\Rightarrow\) B. Peter Pashigian, The Market for Lawyers: The Determinants of the Demand for and the Supply of Lawyers, 20 J. L. & Econ. 53 (1977).


contribution—that underlies the reasoning of all the explanations briefly alluded to in the preceding paragraphs.

The work of English barristers and solicitors has long focused on litigation and conveyancing. While the recent rapid increase in their numbers led to efforts to create demand beyond court and real estate work, this relatively narrow scope of work of solicitors and barristers (and the declining importance of litigation in court) led Abel-Smith and Stevens to conclude that “most of the really important issues of modern society are not getting into solicitors’ offices and barristers’ chambers.” The work of Japanese bengoshi is even more narrowly circumscribed. Largely confined to court work, they serve mainly small and medium-sized business firms and well-to-do individuals. Rokumoto concludes that “they have so far not succeeded in penetrating deep into the everyday life of ordinary citizens or that of the business world and in helping institutionalize the specifically legal ways of ordering human affairs at that level.” By contrast, the work that lawyers do in the United States has a wider scope than is found in any other country, ranging from representation in courts and administrative agencies to drafting, counseling, negotiating, and lobbying. Furthermore, especially in the private business sector, lawyers activities often do not have sharp boundaries separating their work from the work of other counseling occupations and from the conduct of business itself.

Rokumoto’s concluding sentence suggests an interpretation of these differences in terms of “legalization,” of “institutionalizing specifically legal ways of ordering human affairs” in ever wider spheres of social life. Yet a closer look at his own description of law work in Japan suggests another explanation that is powerful indeed, even if it may not fully displace all arguments about the relative importance of law and nonlegal social control. There are different kinds of law professionals in Japan besides the bengoshi, who as officers of the court most closely parallel American lawyers or German Rechtsanwälte. The existence of these other law professions goes a long way toward explaining why the Japanese political economy can make do with so few recognized “lawyers.”

As of 1981, there were 11,466 registered practicing attorneys (bengoshi) in Japan, who now appear as a mere minority, albeit one that is more stringently selected and more thoroughly trained than the other law professionals, who comprise about 2,500 patent lawyers, 14,500 “judicial scriveners,” 65,000 “administrative scriveners,” and 40,000 tax consultants. In addition to these secondary legal and quasi-legal professions, each with its own licensing system, there are very large number of people who have studied law for two years at the university but did not enter the subsequent two-year training course for bengoshi. Such legal studies, integrated in a broad

11. Abel-Smith & Stevens, supra note 9, at 3.
social science curriculum, constitute the training base for successful careers in government, business, and politics. In addition, "many law students enter large business corporations and become the so-called 'law-men' in the firm." In fact, even if they work without certification as lawyers, they constitute yet another emergent law profession, that of house counsel.

One is tempted to conclude, then, that it is not so much the use of law as the work of the official bar in private practice that is narrowly circumscribed in Japan. The legal work required for the functioning of a capitalist political economy gets done in Japan as it does in the United States and in Western Europe; yet this is accomplished by different kinds of occupations and professions.

It is equally important, however, to keep in clear view the fact that the legal work required for the functioning of a capitalist political economy differs in character and volume from one country to another. The institutional structure determines the very nature and the incidence of issues to which the law responds. Whether law is used at all in a given situation and whether it is a private legal claim or public legal intervention that is the most appropriate and the most effective response depends on a large number of factors that vary across countries and are often shaped by past history: the role of the market and of (public or private) administrative decision making in the allocation of economic resources; the structure of the state apparatus; the differentiation of the judicial system from administration and policy making; and the legal rights inherent in citizenship. Therefore, it would be foolish to expect that if only one could find the right information on what different specialists in law work actually do and then could redraw the professional boundaries so as to make them comparable, one would discover that roughly the same kinds and amounts of professional effort make the wheels of economy and government go around in Japan, in North America, in Western Europe, and in the more advanced sections of countries like Brazil.

A closer comparison of the legal profession in the United States and in Germany is suggestive in both directions: different occupations slice the pie of legal work in different ways, and different institutional structures create different demands for legal work. While the United States has more than four times as many lawyers per capita than there are Rechtsanwälte in West Germany, the difference is reduced to a size advantage of the American bar of only about 30% if we compare American lawyers to fully qualified Juristen in Germany who finished law school and an apprenticeship of several years and who passed a state examination at the end of both periods of training. What is radically different is not so much the number of lawyers per capita as the distribution of this legal personnel into the different major

13. Id. at 12.
branches of practice. In Germany, lawyers in private practice (all Rechtsanwälte except those privately employed) account for about a quarter of all fully qualified Juristen. Nearly half of the Juristen work in government service (including the very sizable judiciary), and more than a quarter are in private employment.\textsuperscript{15} In the United States, the vast majority of lawyers—more than seven of every ten—work in private practice, while private employment and government service (excluding the smaller judiciary) account for just over 10\% each.\textsuperscript{16}

Nearly three quarters of all German lawyers are in private or public employment, but nearly three quarters of all lawyers in the United States work in private practice. This contrast remains impressive even though both percentages are in a long-term decline. If in the United States the work of employed lawyers, and especially the work of government lawyers, is fairly clearly confined to legal issues, while lawyers in private practice often venture into more or less closely related nonlegal matters, the pattern is reversed in Germany: Rechtsanwälte in private practice largely confine themselves to court work and legal advice quite narrowly conceived, while employed lawyers (excepting judges and prosecutors) and especially lawyers in the ministerial bureaucracy often have a scope of work that reaches far beyond any specifically legal tasks. In fact, often in Germany lawyers still largely make up the core of administrative higher civil servants. This informal, though longstanding, "lawyers' monopoly" in government administration is at least as effective as are regulations against legal advice by nonlawyers in the private sector. Another indication of the contrasting institutional patterns is the fact that in Germany judicial career appointments and also the better jobs in the civil service go to the law graduates with the best grades, but the top law students in the United States typically find employment in the leading private law firms.

If the German Juristen quite closely approximate American lawyers in their proportionate numbers, one might ask whether a definition of law professionals in terms of their education would not give us a concept that might, in most cases at least, capture the overall functional contribution of legal specialists better than the various indigenous definitions of lawyers in private practice. The elementary contours of the Japanese case have already prepared us for a skeptical answer. In most countries there are more graduates of legal training than there are professionals working in legal practice, however defined. But the proportion of law graduates who do not practice law varies considerably from country to country, and it is not at all clear that this variation corresponds to an underlying pattern of demand for law work of one kind or another.

\textsuperscript{15} Id.; Erhard Blankenburg, in collaboration with Ulrike Schultz, The Legal Profession in Germany (paper prepared for Working Group for Comparative Study of Legal Professions, 1985).

\textsuperscript{16} Rueschemeyer, supra note 14; Richard Abel, American Lawyers (paper prepared for Working Group for Comparative Study of Legal Professions, 1982).
While in the United States in 1960 there were about one third more law graduates than legal practitioners,\textsuperscript{17} in many (but not all) Latin American countries the number of law graduates who do not practice law is much higher. In Brazil in 1980, for example, there were 221,321 "bachareis," persons with a law degree (18 to 19 for every 10,000 inhabitants), but only 168,245, or a little more than 70\%, were registered with the Brazilian Bar Association, and only 93,846, or just above 40\% had law work as their main occupational activity.\textsuperscript{18} Such differences may be explained in part by differences in the character of legal studies, which vary from a practically oriented and sharply defined professional education to a broad program that encompasses most of the social sciences while focusing on the law. But even with a rather diffuse and academic legal education, graduates bring a certain legal knowledge and understanding to their work that is difficult to quantify but hardly irrelevant to an overall assessment of the uses of legal expertise in the political economy. Furthermore, in certain cases such a diffuse and academic education may actually be the steppingstone to some of the most desirable legal positions, as is the case with some elite law schools in the United States, or the "law men" in Japanese corporations.

Comparing the number of law graduates over time rather than cross-sectionally across countries reinforces doubts that a conceptualization in terms of education better reveals an underlying pattern of functional equivalencies among countries. Since about 1960, the number of law graduates has increased tremendously in a wide variety of countries around the globe.\textsuperscript{19} It is very doubtful that this sudden increase can be explained in functional terms as a response to an equally sudden increase in demand, especially since these developments occurred in a very diverse assortment of countries that also enjoyed quite different levels of economic development. A much more plausible explanation begins with an expansion of higher education, which was induced in many cases by internal developments but was also internationally coordinated by organizations such as the Organization for Economic Cooperation and Development (OECD) and by independent imitation. This expansion often led to a decrease in the opportunity value of educational certificates and in turn was often fueled by the desire of people to undertake further study to compensate for the devaluation of credentials. Expansion of law school enrollments can be accomplished fairly easily, at least in comparison to such fields as medicine, chemistry, or engineering. At the same time, law studies typically are prestigious, and appeal to a wide spectrum of potential recruits. Thus law school enrollments

\textsuperscript{17} Rueschemeyer, supra note 14, at 32–33.

\textsuperscript{18} Falcão, supra note 4, at 17. In Colombia less than a third of all law degree holders practice law, but in Chile the proportion of those never practicing is negligible; see S. Loewenstein, Lawyers, Legal Education, and Development: An Examination of the Process of Reform in Chile 30-32 (New York: International Legal Center, 1970).

\textsuperscript{19} Abel, supra note 3.
tended to expand relatively independently of any existing demand for legal services.

What was the effect of this expansion on the system of legal occupations? While no easy generalizations are possible, it appears that on the one hand, the proportion of law graduates who do not do specifically legal work increased. On the other hand, it seems that of the major branches of law work, the bar in private practice is most able to expand. This may be obscured in particular cases by other developments that occur at the same time, such as a structural shift toward private and public employment. But there is ample evidence that the self-employed section of the profession is, when pushed, the most flexible in its capacity to absorb additional practitioners and to expand the areas of work. In New Zealand, for instance, the bar doubled in size between 1961 and 1981, even though it lost a major field of work as New Zealand introduced in 1973 “the first truly comprehensive no-fault accident compensation system in the world, which completely abolished legal action at tort for personal injury and workers compensation insurance arrangements.” The doubling of the size of the legal profession in the United States from 1967 to 1983 or of the German Rechtsanwaltschaft occurred without such drastic reductions in traditional mainstays of legal practice; but these developments, too, can hardly be explained without assuming a specific flexibility in the scope of private legal practice. This flexibility apparently exists even for professions that are traditionally quite restrained in their approach to new fields of activity. The German Rechtsanwaltschaft certainly is such a profession, and yet its massive expansion has not led to a deterioration of income levels, even though the bar lost to medicine and dentistry the highest income rank among professions. Blankenburg and Schultz juxtapose this remarkable fact with the continuing guild-like restraints of the German Rechtsanwaltschaft and conclude that “times for a truly entrepreneurial advocacy in Germany are yet to come, but with the pressures of an incoming generation of lawyers looking for new markets for legal services, their chances have never been better than now.”

Where do these observations on contrasts and developments in a handful of countries leave our search for a definition of lawyers and law work? Beginning with indigenous, institutionally anchored definitions of lawyers in different countries and asking skeptical questions about their comparability did yield results. It gave us at least a glimpse of the variety of forms in which law work is organized in different countries, even in countries with a quite similar socioeconomic order. For many purposes this may be sufficient. It is clearly quite sufficient if we are primarily interested in demon-

20. See, e.g., Falcão, supra note 4, table 1.
strating and describing differences between countries. Yet the differences in numbers, in areas of work, and in the boundaries between those occupations recognized as legal professions and others raise difficult questions ranging from the elementary interpretation of sheer numbers to fundamental issues common to any theoretical and comparative investigation that goes beyond contrasting description. If we are attempting to derive theoretical generalizations and explanations, we need concepts that analytically transcend local and historical variability. What we have to face is more than a mere definitional, "semantic" issue that can be solved eventually by cutting the Gordian knot one way or the other. The conceptual determination of what we mean by law work and lawyers has to make theoretical sense: It must identify important underlying similarities; it has to correspond to reasoned hunches about causal conditions and patterns of outcome; and, at the same time, we must be able to translate it back, at least roughly, into variable local idioms, definitions, and institutional arrangements.

One common solution is to adopt a functional approach that takes off from the question: What are the problems in any society—or in any society at a given level of institutional complexity—to which law work can be considered the response? A common proposal is to focus on the containment and regulation of conflicts and disputes that go beyond the informal peace-making capacity of kinship and neighborhood relations. Occupational work that deals with such disputes and conflicts—directly or indirectly, in a preventive or in a responsive way—would then be considered law work in widest sense. This focus is rather too broad; the approach is also premature, because our understanding of conflict generation in different societies is very limited. Finally, the functional approach all too often implies that societies on a similar level of development and differentiation have a similar conflict potential and similar conflict regulation problems.

I propose instead an institutional approach that focuses on the state and its actions and interventions in civil society. The state is defined here as a set of organizations that successfully claim the right to make binding collective decisions, which are imposed on a territory and guaranteed by the organizations' monopoly over the use of coercion. 24 Within this state-centered perspective I will identify a narrow and a wide definition of law work and lawyers and then ask how they relate to each other and to cognate subcategories. The result is a grid of interrelated definitions, a conceptual framework, from at least some points of which bridges can be built to the different national and historical definitions of law work and lawyers.

The proposed narrow circumscription of "lawyers" is: the trained specialists in state-sponsored adjudication of disputes—judges or judicial advisors and advocates for both sides, including those representing the state, provided that specialized knowledge and skills are required for all these roles. This is not an unambiguous and homogeneous category of occupa-

24. 1 Weber, supra note 1, at 54–56.
tions in functional terms; but it does have a clear-cut institutional reference, however variable the different institutional arrangements may be in different countries. The disputes that come before state-sponsored institutions of adjudication—the "courts"—are not of the same character in all societies. The existence and role of nonstate arrangements of conflict regulation and of nonlegal forms of social control represent only some of the factors that make for substantial variation. Conflicts may also simply be left unregulated. The claims for which one can invoke the coercion machinery of the state vary a great deal historically and across countries. The roles of those involved in state-sponsored adjudication also may vary a great deal; of special historical importance are the right of advocates to represent and act for the parties, the separation of adjudication from other tasks (in particular from administration), and the autonomy of adjudication. Closely related to the issue of the separation and differentiation of adjudication from other concerns is the question whether the specialists are involved full time or pursue other business as well, for instance, as administrative officials, religious professionals, semi-autonomous small-scale rulers, or owners of private fortunes.

In spite of this variability, however, the proposed definition is fairly clear-cut in institutional terms, especially if the investigation is limited to those societies in which the state apparatus has in principle achieved a monopoly of coercion. Virtually all states provide institutions for the adjudication of disputes. If the substance of these disputes varies from country to country, the fact that the state offers the coercive power of its monopoly as a means of settlement of certain kinds of disputes is in itself a noteworthy social phenomenon. And virtually all states also seek to exercise some control over the specialists involved in adjudication, be it through the administrative apparatus or through the organization of the courts. This tends to set "officers of the court" apart from other occupations. The legal specialists' entitlement to represent parties in the major state-sponsored institutions of adjudication forms the core of many indigenous definitions of the bar—of the Prussian Justizkommissar and the later German Rechtsanwalt, of the Japanese bengoshi, and of the English barrister, as well as, initially, the American lawyer.

Yet this core definition based on adjudication is clearly insufficient to comprehend law work in most, if not all, modern societies. As a corresponding broader concept of law work, I propose a definition that refers also to the state; it, too, varies in substance with the structure of a state and its involvement in civil society; and consequently it is also strongly institutional rather than exclusively functional in character. This definition calls law work all specialized work that requires knowledge of the "language of the state," as John Austin called the law.25 This broader occupational cate-

gory is often less sharply etched institutionally. The interests served by such knowledge of the law are quite variegated, and its uses appear in very different socioeconomic contexts. Often the state's capacity (as well as its inclination) to regulate this work is not as strong as in the case of the core definition that is related to adjudication. Access to such work, as well as the level of performance, may be subject to different mixtures of public and private control, the latter exercised by congeries of law professionals, by formal associations, by powerful clients, or possibly by client associations. But this control, whether public or private, may not be at all comprehensive and may apply only to subgroups of law professionals, to special fields of activities, or to particular sets of clients.

It is important to realize that this broad concept covers a wider range of activities and occupations than what most conventional and indigenous uses mean by the words "lawyer" and "law work." A knowledge of the "language of the state" is required for a great variety of professional work. Not only do Japan's judicial and administrative "scribifiers" fall into this category, but so do most countries' tax advisors, accountants and business consultants, as well as architects and social workers, and on occasion, union officials.

We can narrow this definition in various ways. Such narrower concepts of law work and the lawyer may be useful—and indeed necessary—for specific purposes; but they will not eliminate mismatches between the general concept and idiomatic institutional arrangements. One can rule out all work that requires only a very specialized and partial legal knowledge—and eliminate social workers, but also immigration lawyers, and other narrow legal specialists. Or one can stipulate in the definition of a legal occupation that legal knowledge be necessary for all or most of the practitioners' work—and thus eliminate most occupations not normally considered law occupations, as well as an unknown but substantial part of the U.S. bar and those other legal professions that do not require their members to engage full time in law work.

A concept closely akin to the proposed broad definition is one that focuses on professional training: Legal occupations are those for which a certain education in the law is formally required. In fact, this definition is probably the best substitute, in terms of practical application, for our broad theoretical concept.

A definition based on education is not free of problems. It does not quite fit arrangements where law work is learned through decentralized apprenticeship, as was the case in the United States until a hundred years ago. We have also seen that one cannot simply take all law graduates to be members of legal occupations, because a proportion that varies from country to country is engaged in work that is more or less unrelated to law. However, a definition in terms of education establishes welcome links to the institutional structure of each society. Prescribed education and the certification
of graduates as competent law practitioners are common techniques of institutional control for certain types of work. Often the education is provided under state sponsorship, or state agencies at least control the certification procedure. Furthermore, a shared education often is an important criterion for indigenous group definitions. With its peculiar patterns of exclusiveness, privileged association, common outlook, and esprit de corps based on a shared "social honor" a shared education is one of the major foundations of "status group" formation, in the sense of Max Weber.26 The character of a shared legal education thus is a critical factor determining whether a legal profession functions as a cohesive social group.

Two definitions, then, seem capable of containing and ordering the complex variability of law work in different countries. One focuses on state-sponsored adjudication. The other includes all uses of the law, and often approximates a definition in terms of legal education. Various subcategories may be useful to relate this dual conceptualization more closely to the manifold concrete institutions of law and law work in different countries. Concluding this section, I want to underline once more that both proposed definitions of legal work and legal occupations (as well as several of the intermediate distinctions) not only seek to make sense of the institutional variety encountered in different countries but are hinged on the state, its structure and its activities. This is theoretically important. Since under modern conditions law is created by the state, law work and its social organization differ in substance with variations in state structure and state action across countries and time periods. Bringing the conceptual definitions in line with this perspective is only a first, but a significant step.

II. A STATE-CENTERED VIEW OF THE EUROPEAN HISTORICAL BACKGROUND

The state has been subject to relative neglect for a long time in both liberal and Marxist social thought. States loomed large in Herbert Spencer's view of the old agrarian, "militant" societies, but he saw them and their violence as being on the way out as the new "industrial" society emerged.27 Karl Marx incorporated similar ideas in to his vision of the future society: The state would "wither away" as capitalism, the last system of exploitation, came to an end. In these traditions of thought, state structures and state actions were typically conceived as the outcome of societal forces. The state was seen to have little or no autonomy from civil society, much less an independent impact on the development of society. In Marxist terms, the state was part of the superstructure whose shape and development were determined by the basic processes of history—by changes in the forces of production and their social organization. Even where a mechanical substructure-superstructure model was rejected, the analysis often re-

tained a society-centered perspective. In functionalist theories of the 1950s and 1960s,\textsuperscript{28} for example, the state—reconceptualized as the core of a functional subsystem of society, the "polity"—was not radically subordinated to such other "functional subsystems" as the economy. It was, however, largely stripped of its special character, which rests first on the monopoly of coercion, but also derives from its place at the intersection of geopolitical and economic relations between states and countries. Both the state's monopoly of coercion and its insertion into a system of states give the state a special position vis-à-vis the organized social and economic interests within its jurisdiction.

Views of the state have changed radically since the 1960s. Several developments account for this, only some of which can be mentioned here. First, there has been a veritable renaissance of comparative historical studies in which states and their formation and transformation, as well as their impact on other institutions and arrangements, have figured as major topics of investigation.\textsuperscript{29} Older European perspectives, which responded to different historical realities and were themselves rooted in the ideologies of the continental states, had always given greater weight to the state as a phenomenon that must be understood on its own terms and cannot be reduced to an expression of the forces of civil society. Such views and analyses, especially those of Hintze\textsuperscript{30} and Weber,\textsuperscript{31} attracted renewed attention (and gained paradigmatic standing for some) with the resurgence of comparative historical research in the social sciences.\textsuperscript{32}

The most important theoretical impulses in recent discussions of the state came from Marxist scholars, who engaged in an extended and complex debate on the nature and the role of the state in capitalist society. One central issue in this discussion was Poulantzas's thesis of the "relative autonomy" of the state from even the most powerful interests in society.\textsuperscript{33} Poulantzas argued that such autonomy was necessary for the functioning of the capitalist order and that at the same time it was limited to serving such functional requirements: he thus moved—in form, though not in substance—close to the mode of reasoning characteristic of structure-functionalism. Questions of the autonomy of the state have also attracted the attention of liberal


\textsuperscript{29} For an overview, see Theda Skocpol, Bringing the State Back In: Strategies of Analysis in Current Research, in P. Evans, D. Rueschemeyer, & T. Skocpol, eds., Bringing the State Back In (New York: Cambridge University Press, 1985).


\textsuperscript{31} Weber, supra note 1.

\textsuperscript{32} Actually, this tradition was never completely displaced. For instance, Bendix et al. insisted in a Weberian vein on a more state-centered perspective in the very heyday of society-centered functionalism in political science and sociology. Reinhard Bendix, et al., eds., State and Society: A Reader (Boston: Little Brown & Co., 1968).

scholars. It is fair to say that across a wide range of theoretical and ideological positions, the state is again seen as a social phenomenon sui generis that constitutes in all societies a significant element in the overall structure of power, that enjoys some autonomy from other forces and even from the most powerful interests, and that has in turn a major impact of its own on macrosocial change. Even though it is against this background that I propose to analyze legal occupations in a state-centered perspective, there is little need to develop the foregoing into a sketch of some depth, since good overviews are readily available. Instead I will look at certain aspects of the origins of legal professions in Europe, in order to gain some historical perspective and perhaps to distill some guidelines for a state-centered analysis of lawyers and their work.

Legal professionals flourished with two broad developments of Western history: the rise of capitalism, and the formation of the modern state system. The importance of the market is commonly emphasized, but the two developments were intertwined in complex and historically variable ways. The formation of modern states not only preceded the development of capitalism, but is intrinsically at least as important as the needs of the market. Weber’s thesis is well known: Market exchange creates powerful demands for reliable guarantees of contractual claims, which become “consciously and rationally adapted to the expected reaction of the judiciary,” provided there is a state and a justice apparatus able and willing to offer such guarantees. Capitalism also created demand for law work in other, related ways. Disputes about property multiplied, and demands for its protection increased. Lawyers were also involved in seeking government protection for various economic undertakings as well as in fighting unwanted regulation.

Yet the rise of lawyers to a prominence peculiar to western Europe antedates the rise of capitalism proper. Thus William Bouwsma can write that

36. Wilfrid Prest, who edited an important collection of essays on early modern legal professions, Lawyers in Early Modern Europe and America (New York: Holmes & Meier, 1981), wrote in the introduction: “Lawyers seem to be a peculiarly Western phenomenon. Outside Western Europe and her colonial offshoots, specialist secular legal advisers and representatives were unknown until very recent times. Indeed Weber held lawyers decisively responsible for those two institutions—capitalism and the ‘legal-rational’ state—which have most strikingly differentiated Western Europe from the rest of the world between the Renaissance and the present day.”
38. It may be useful to note that while the first part of the argument is functionalist in character (modern law, and in Weber’s view a particular version of it, is the perfect answer to the needs of capitalist market exchange), the second is not. Modern law does not come about because it answers the needs of capitalism; the story of its genesis is rather a complex causal account in which states and state interests play a central role.
“the culture of Renaissance humanism, especially in its early stages, was largely a creation of lawyers and notaries.”39 This prominence goes back to the emergence of a knowledgeable service class in the “urban societies of Medieval and Renaissance Europe.” Carlo Cipolla, one of the historians on whom I rely for this judgment, comments on developments in northern Italy: “The great social and economic change which took place between the tenth and the thirteenth centuries was not only connected with the growth of trade and manufactures, but also with a remarkable development of the service sector.”40 Notaries and other lawyers were particularly favored by the growth of public institutions. “This new class of men,” says Joseph Strayer of lawyers in France and England, “produced by the increased activity of twelfth century governments, set the tone for the thirteenth century even more than the new class produced by increased business activity.”41

Harold Berman, in his broad interpretive work, “The Formation of the Western Legal Tradition,” has identified the revolutionary differentiation of secular and religious authority in the eleventh and twelfth centuries, the development of the church as a quasi-state apparatus following the “papal revolution,” and the legal responses of royal, feudal, and city authorities as the constellation of forces in which the legal tradition of the West, as well as its legal occupations, had their origin.42 The law espoused by independent cities and the new territorial states was instigated and shaped by the “rebirth” of Roman law in the wake of the revolutionary self-transformation of the church into a hierarchical proto-bureaucratic apparatus. This meant that a variety of legal jurisdictions and competing legal systems all utilized the body of Roman law rediscovered and systematically interpreted as the corpus juris Romani by twelfth- and thirteenth-century scholars. Among the lasting consequences of this initial constellation of events was that legal scholarship and legal training became the institutional basis of legal thought transcending the positive law espoused by any one state apparatus. “The law contains within itself,” as Berman describes this characteristic of the Western legal tradition “a legal science, a meta-law, by which it can be both analyzed and evaluated.”43

Legal studies and legal training acquired the status of a general preparation for public authority and action. It did not always lead directly into legal practice; it was an aristocratic pursuit,44 equally important in the management of the church, the organization of the new states, the interrelations

43. id. at 9.
44. Bouwsma, supra note 39; Filippo Ranieri, Vom Stand zum Beruf: Die Professionalisierung des Juristenstandes als Forschungsaufgabe der europäischen Rechtsgeschichte der Neuzeit (Inaugural Lecture, Johann-Wolfgang-Goethe Universität Frankfurt, 1985).
between the different sovereignties and systems of authority, and the defense of feudal and early bourgeois privilege. Against this background we can begin to understand why lawyers and law-trained public leaders achieved special significance in the aftermath of the Reformation and the early generations of the modern world. William Bouwsma has painted a vivid picture of the character and role of lawyers in the hundred years from the middle of the sixteenth to the middle of the seventeenth century. The law became an antidote to the "Crisis of Europe," a response to the unsettling of social order and cultural tradition, to religious wars and intense conflicts between states, to economic difficulties and social tensions.  

It is only an apparent paradox that the number of law-trained people, as well as the close association between aristocratic status and learned profession, declined with the advent of the bureaucratic state of the Enlightenment in the eighteenth century. These state apparatuses of continental Europe routinized some tasks so that lawyers were no longer needed to perform them. They increasingly hired on the basis of merit rather than rank at birth, and they sought to control adjudication and access to the role of advocacy. Fewer people studied law, but it seems that a greater proportion of them actually practiced it; and the legal profession became less deeply embedded in the status order of society. These conclusions, drawn from rather incomplete historical findings, fit well with the result of S. N. Eisenstadt's comparative study of premodern and early modern bureaucratic systems of rule. Eisenstadt summarizes his findings about the legal policies characteristically pursued by bureaucratizing rulers: "Broadly speaking, the rulers' general objectives in the legal field were to minimize the legal autonomy of traditional groups and strata (for example, the aristocracy and the urban patriciate) and to advance the development of more complex and differentiated legal institutions and activities. At the same time, however, the rulers wished to maintain control of these institutions and to keep them, as far as possible, from autonomous growth."  

The foregoing sketch of some aspects of the early history of law as a profession in Europe perhaps gives a glimpse of the complex relationships between the transformation of authority structures, the rise of the modern legal tradition, and the emergence and transformation of legal professions in Europe. These developments in the political organization of Europe prepared the necessary institutions, personnel, and cultural resources for the role the law came to play in the rise of capitalism.  

A first principle that emerges from this review, which I want to highlight and incorporate into the proposed state-centered perspective, is that states and their forerunners—in particular, the rationalized apparatus of church government after the investiture conflicts—had a major impact on the de-

45. This expressed itself also in numbers: "The sixteenth century saw in all of Europe a massive, nearly explosive increase in the number of persons trained in the law." Ranieri, supra note 44, at 6.  
46. Cipolla, supra note 40, at 51–52; Ranieri, supra note 44, at 13.  
development of legal occupations. States not only determine their own structures through routine operations and consciously designed policies, but they also can influence the status order and the class structure of the wider society, the place of the emergent professions in that order of status and privilege, and most specifically, the organization of law work in relation to the administration of justice. It is important to keep in mind that there was and is considerable variation in this transformative capacity of states.

A second principle is equally important, and it limits the first. In the developing Western legal tradition, the law always constituted a reference point beyond the regulations and enactments of a particular political authority. If we can label the first idea as the principle of the (variable) transformative capacity of states, the second idea may be called the principle of the (variable) autonomy of law from state authority.

Two other principles that are suggested by the early history of European legal professions accord closely with recent arguments advanced in the discussion of states and social structures. The much debated autonomy of the state vis-à-vis dominant classes and social interests—however contingent on variable conditions—is a major factor in attempting to explain the great variety of organizational forms assumed by the state and the variety of policies adopted. Together with the principle of the state's transformative capacity, state autonomy accounts for major differences in the institutional structures of otherwise similar societies. Where the conditions for state autonomy and the efficacy of state policies are propitious, we should expect to find significantly divergent developments in the institutional arrangements for the administration of justice and for the work of lawyers, even in the widest sense of law work.

Of equal significance for the analysis of states and for the understanding of the social organization of law work is a closely related phenomenon—the persistence of social structures, and especially state structures, beyond the conditions of their origin, even in the face of changes that might be expected to force realignments. This historicity of state structures and related institutional arrangements and cultural traditions constitutes an insurmountable obstacle to any presentist functional analysis of states as well as of law and law work. If we want to understand lawyers and their work, it will therefore always be necessary to enter into a comparative historical analysis. It may be useful to give more substance to this principle by elaborating it briefly.

The currently most developed countries differ fundamentally in state-society relations and in the role of lawyers and law work. Broad contrasts between England, the United States, Canada, Australia, and New Zealand on the one hand, and France, Prussia/Germany, Russia, Japan, and other countries, on the other hand, are conventionally treated in terms of the special features that set the common law tradition apart from other legal traditions. While even this conventional view implies the stability of cultural
tradition once it is crystalized (and takes it for granted without much analytical ado), if one looks at the historical background, it is possible to go further and be more specific. In England, where early attempts at centralization and a certain rationalization of rule had resulted in early compromises, and even more so in North America, the major thrust of modernizing transformations came from capitalist entrepreneurial activities to which the state and its administration of justice responded with some delay. In France and Prussia/Germany, as well as later in Russia and Japan, the major transformations began with a more far-reaching bureaucratic rationalization of rule. This relative timing of bureaucratization of authority and the capitalist transformation of exchange and production had lasting consequences that can be detected even today. Thus Huntington has described and analyzed in these terms fundamental differences in the political institutions of the United States and of continental Europe and my own comparative analysis of the legal profession in Germany and in the United States builds its explanatory account on this contrast.

The relative timing of other macrosocial changes is likely to have similarly momentous consequences that endure across generations and even centuries. The succession of indigenous rule, colonization, and decolonization and the relative timing of different strands of socioeconomic development are critical for state-society relations in many developing countries and set the stage for the crystallization of patterns of legal work and later realignments. The early introduction of liberal constitutionalism in Latin America under conditions of limited economic development shaped its complex fate later; the effects on law work and its social organization remain largely unexplored.

To recognize the importance of historical continuities is not to deny change. In fact, an insistence on the role of continuity and persistence is theoretically unsatisfactory until we begin to understand the conditions under which long-lasting patterns form, are realigned, break down, and are replaced by new structural constellations. Even within a long-lasting pat-

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tern, significant changes take place—changes that may very well stand in tension with major features of the past.52

A related caveat points to a last guideline for a state-centered analysis of law and lawyers. The sources of change may not be found primarily within the social structure of a given country, as some paradigms of social analysis might lead us to expect. External impulses for change are of particular importance for state structures, due to the intrinsic salience of their position in the relations among states—despite the often fiercely inward-looking ideologies of state elites. The early history of law and lawyers in Europe contains many instances of the diffusion of law and organizational forms for law work. In fact, the tension between a more comprehensive legal tradition and the laws of a particular jurisdiction is one of the most important features of European legal history, as is the dialectic between borrowing and imposition, resistance and absorption. Recent social theory has emphasized international dependence and domination as major determinants of the developments within countries, especially less developed countries. Dependency theorists have not paid sufficient attention to cultural dependence and interdependence, though such attention could significantly complement the other concerns of dependency theory. These ideas might also prove very fruitful in the study of law and legal institutions, and could lead far beyond more traditional concerns with the transplantation and reception of foreign legal patterns. In all such transactions that transcend a country’s borders, the state will clearly have a major role, even as it is also affected and perhaps transformed by them.

In conclusion, then, we have arrived at five interrelated theoretical principles that should inform a state-centered analysis of law and law work. (1) States have a significant, if variable, impact on law work—through their very organization and routine operation as well as through explicit policies. (2) In the Western legal tradition, the law retains an autonomy vis-à-vis the state and its policies that is variable across countries and time periods; this supports in varying degree an organizational autonomy of legal professions. (3) The state has a certain autonomy vis-à-vis the dominant interests in civil society. Though this autonomy also is variable and contingent on specific conditions, it is a fundamental premise of any state-centered analysis. (4) State structures share with certain other cultural and social patterns a specific “historicity.” Their features often persist beyond the constellation of events in which they arose, even in the face of unfavorable conditions. (5) Finally, states are critically important gatekeepers that modify the impact of external forces for change in law and law work. Together, these principles form a theoretical framework within which more specific analysis can proceed.

III. CONTRASTING STATE STRUCTURES AND PATTERNS OF LAW WORK

The salience of the state in society, its institutional structure, its autonomy from social forces, and the efficacy of its actions vary a great deal from country to country. This was not only the case in the long formative period of the European state systems; dramatic contrasts also exist among the different modern countries of the West. We just saw that such differences follow from the principles of (variable) state autonomy and the historicity of state structures.

In the pattern of these contrasts, the United States occupies a rather extreme position. Katznelson and Prewitt sketch an interesting picture of the American state from a comparative viewpoint.53 While "the 'stateness' of the United States in the international arena is at least as great as that of any other nation-state" and while "the growth in the size and the capacity of government is also not in doubt," they argue that, "understood comparatively, the state—the autonomously organized sector of society that authoritatively taxes, preserves order, potentially conscripts, makes foreign policy—is less tangible, more diffuse, and more interpenetrated by nonstate actors than virtually anywhere in Western Europe." This is grounded in the very constitutional design of the United States: "The Constitution does not establish a state that in turn manages the affairs of society toward some clear conception of the public welfare; rather, it establishes a political economy in which the public welfare is the aggregate of private preferences."54 This conception of state and politics, modified but by no means overturned by developments since the New Deal and World War II, creates very special conditions and vast opportunities for legal work. From the very beginning, citizenship entitles one, in principle, to claim rights through litigation, and litigation has a special salience: "constitutional principles legitimate claims for a fair share of 'the American way of life,' and constitutional interpretations and reinterpretations are the means of forcing reallocations. . . . Stated more generally, the United States is a government of legislation and litigation."55

Even though this conception of the state and state-society relations is set off sharply from the premises of other legal and political systems (including, in important respects, those of England), the case of the United States has nonetheless disproportionately informed the social sciences around the globe. This is a natural consequence of the leading role played by American social scientists and of their preoccupation with conditions in their own

54. Id. at 32.
55. Id. at 32, 33.
country. "The relative 'statelessness' of American social science coincides with the relative statelessness of the United States."\textsuperscript{56}

In both England and the United States, the law has retained a strong autonomy vis-à-vis the rest of the state apparatus. Capitalist development in the private sector combined with lagging bureaucratic rationalization of rule and, in America, with judicial adjustments of the law to accommodate changing demands,\textsuperscript{57} to create the most favorable conditions in the modern world for a high degree of autonomy of the law. This is reflected in the character and organization of the legal professions in America and in England. None of these legal professions became as integrated into the modern state apparatus as did many on the Continent; more autonomously organized, they remained oriented primarily toward private legal practice.

Quite different developments took place on the European continent. Here the rationalized state of the Enlightenment dominated the transformation of post-medieval estate society and shaped the system of legal professions according to its needs. "In Europe," J. P. Nettl notes:

[T]he tradition of law is essentially an emanation of the state—or rather, it became incorporated into the state when the latter institution "took over" the sovereign powers of individual rulers. Thus the law on the Continent has traditionally been the profession of the state par excellence. To a greater or lesser extent, judges, prosecutors, and others connected with the administration of justice regard themselves as state servants; the law they enforce is a distinct and, on the whole, narrowly defined as well as carefully codified system intimately connected with the judicial function of the state. The relationship is pointed up and idealized by the German concept of Rechtsstaat. Law as such has little autonomy of its own.\textsuperscript{58}

It is worth stressing that on both sides of the English Channel state structures and state-society relations illuminate the developing role of the law. We encounter different state structures, not strong states on the one side and "statelessness" in any literal sense on the other. And on both sides, too, the contrasting relationships between law and the state are reflected in different organizational forms of law work. Furthermore, comparing common law countries and continental civil law countries serves only as a first rough illustration of the impact of state structures and state operations on law and lawyers. More detailed differences also can be interpreted in the same state-centered framework. Thus the American bar was radically transformed in the aftermath of the American Revolution and also changed significantly after the Civil War and then the New Deal, while in England the prerevolutionary guild-like professional structures were strong enough to resist transformation until much later.\textsuperscript{59}

\textsuperscript{56} J. P. Nettl, The State as a Conceptual Variable, 20 World Pol. 559, 561 (1968).
\textsuperscript{58} Nettl, supra note 56, at 384.
\textsuperscript{59} Michael Burrage, Revolution as a Starting Point for the Comparative Analysis of the Legal Profession (paper prepared for Working Group for Comparative Study of Legal Professions, 1984).
The extreme consequence of the Continental conception of law as "the profession of the state" would be the staffing of the core civil service positions with lawyers. That is not characteristic of all Continental states, but it was—and still is, to a significant extent—the case in Germany and Scandinavia. This contrasts with other countries where only specifically legal work in the state apparatus is handled by lawyers. For instance, in the United States lawyers often do not pursue a career within the state apparatus, but move in and out. Such differences between frequent lateral mobility and long-term career opportunities and career commitments within the state apparatus are important because it is the latter situation that induces a specific loyalty to the state. Nevertheless, one may well be tempted to treat the German and Scandinavian lawyer-administrators as virtually irrelevant to an analysis of the legal profession as it is commonly understood. After all, these civil servants do work that for the most part is not specifically legal, and they could well have had another education in common; many have pointed to the functionally similar role of public school education in England. However, such a dominant role for lawyers in the central apparatus of the state has far-reaching consequences for the position and outlook of lawyers in the political economy at large. It strengthens a civil service orientation throughout the legal profession, even as it tends to be associated with a differentiation of law work into separate professional groups—publicly employed administrative lawyers, judges and prosecutors, attorneys in private practice, and privately employed lawyers.

The early modern state had a limited core of classic concerns: Next to war making and the extraction of fiscal resources, the administration of justice and internal policing were central preoccupations. With increasing bureaucratic rationalization, states sought to impose strict regulations on legal practitioners. These regulations were often applicable only to those practitioners who had a right to appear in court, both because this was deemed especially important and because activities outside the immediate institutions of the state were difficult to bring under such close control. This historical difference between lawyers representing clients and pleading in court and other legal advisors often led to a professional separation of the different kinds of law work similar to that between English barristers and solicitors (whose more autonomous self-regulation responded to analogous concerns and had analogous outcomes). In France it was not until 1971 that these distinctions were overcome, while in Germany and Scandinavia


61. Ralf Dahrendorf, Society and Democracy in Germany 236 (Garden City, N.Y.: Doubleday, 1967); Aubert, supra note 53.

a unified bar was instituted by successive reforms culminating in the second half of the nineteenth century, as both opportunities to control and interest in controlling changed with changes in the role of law in the political economy. Both in Norway and in Germany, advocates in private practice were until the later nineteenth century quasi-civil servants, which is symptomatic of a strong state interest in the control of advocates.

The change in the American bar between the Revolution and the Civil War provides the opposite example. On the eve of the Revolution, American lawyers had been tightly organized and regulated by courts and autonomous local organization. This organization and the attendant entrance requirements were nearly completely leveled in the decades after the Revolution, especially in the Jacksonian period. When professional organization and regulation were at their weakest in the first half of the nineteenth century, the autonomy and independent power of the American legal elite reached its highest point: The state apparatus was relatively small and not prone to intervene in civil society, few private clients were powerful enough to dominate the elite of the legal profession, and the civil law of early capitalism was fashioned primarily through litigation. The pattern continued in similar fashion after the Civil War, although private corporate influence became stronger and a renewed interest in professional organization began to be apparent.

Tight court-related regulation of the bar is likely to limit the tendency of legal practitioners to pick up new areas of work as opportunities present themselves. This is so partly because other occupations may have been granted “jurisdiction” in these fields already, partly because certain new involvements are viewed as undermining devotion to tasks that are given priority, or simply because clearly delimited fields of operation make regulation easier. Any of these rationales may come to coalesce with views of what is “appropriate” work for members of a professional status group with strongly held conceptions of “honor.” At the same time, the interests of the profession’s elite may reinforce or stand in tension with such a group ethos, and this, too, will shape further developments. Still, it is noteworthy that the legal profession with the widest and the most open-ended definition of law work, the bar of the United States, is also the profession that in its historical period of greatest glory was the least regulated, the most autonomously powerful, and the most entrepreneurial group of lawyers.

The court-related core of early law work expanded in all advanced industrial societies to include new tasks of mediation between expanded state

63. Rueschemeyer, supra note 14; Johnsen, supra note 60.
activities and various interested parties, many (and the most lucrative) of which involved legal counseling rather than trial work. In all countries, lawyers "lost" some of these activities to new professions. Yet the differences across countries are enormous, ranging from a virtual confinement to court-related work to a restructuring of the legal profession in which trial work becomes one among several specialties—and not the most prestigious one at that. In terms of the contrasts pursued here, it is interesting that private lawyers in the United States have been most successful in expanding their activities in tandem with changing conditions, while in Germany law-trained public officials were able to extend much of their "lawyers' monopoly" into the new bureaucrats and to maintain it in the expanded old ones.

What is the role of lawyers in giving direction to the state's policies? One part of the answer turns on whether the courts have acquired a de facto legislative function, as they did in the United States (and to an extent also in West Germany after the Second World War) but not in the United Kingdom. Two other components of the lawyers' share in the apex of power are the participation of lawyers in politics proper and their role in the exercise of private corporate power and its articulation with state policy. I will comment briefly on these latter two themes.

Lawyers often engage in politics. Yet the extent of this participation—the proportion of lawyers who are active in politics and the proportion of politicians who are lawyers by profession—varies greatly across countries; with few exceptions it seems to have declined in the Western industrial democracies since the nineteenth century.65 One likely determinant of the level of lawyers' participation in politics is found in the different conceptions and structures of state and political life, as briefly sketched above. Not surprisingly, the high proportion of lawyers among members of the legislative bodies in the United States has its counterpart in the high proportion of civil servants in the German parliaments.

Among the explanations commonly advanced for the high rate of political participation among lawyers are the assertions that lawyers can relatively easily free themselves from the obligations of their profession, that their work has a special affinity to politics, and that they gain professionally from engaging in political work. In the United States, the country with the highest proportion of lawyers among elected politicians, the last two points are of special importance. It is not only that state structure, the organization of the administration of justice, and a legally oriented political culture generally make for a particularly close link between law work and political participation; popular election and political appointment as modes of filling judicial and prosecutorial offices represent a very concrete incentive for lawyers to get involved in politics.66

65. See, e.g., Boigeol, supra note 62, on France.
Given the fact that most law work serves the interests of the privileged and well-to-do, a strong role of lawyers in politics is favored where, as in the United States, the expression of class interests in politics is muted by ethnic identification and regionalism as well as by party structure and electoral arrangements (single-member districts vs. proportional representation). A strong expression of working-class interests in the political process will diminish the role of lawyers in politics. A comparison of the four major English-speaking democracies (the United States, Canada, Australia, and the United Kingdom) that took into account the character of the major "left" party, the importance of voting by class, and the strength of elitist values supported this view.\(^67\) This hypothesis may also contribute to an explanation of the secular decline in lawyers' participation in the politics of many countries. The rise of working-class parties and of class-based voting seems at least as important a factor in this development as the rise of competing educated professions.

A variant of the same hypothesis is also relevant if one is to understand the role of lawyers in newly independent Third World countries. Members of the bar often were leaders in the movements to gain independence from colonial rule. Among the factors accounting for this were probably their high and rare educational status and their professional position that was related to but independent of the colonial government. In addition, however, strong nationalist sentiments were likely to override class divisions in the period of decolonization. Later, the rise of an indigenous state apparatus and the politics of mass mobilization were factors less favorable to a prominent political role for lawyers, especially lawyers in private practice.

Strong participation by lawyers in politics does not mean that the interests of the legal profession are politically powerful. It is lawyers as representatives of social and political forces that we meet in the political arena, not lawyers working for an abstraction called "the law" or for the interests of their professional group. Nevertheless, it is likely that a strong representation of lawyers among political leaders does affect the mind-set and the mode of operations of legislators and appointed politicians. Certain attitudes of client care-taking among American politicians, for example, or a civil service outlook among their German counterparts, can be understood in this way.

Finally, there is the issue of shaping public policy through participation in corporate power. In most capitalist countries, a significant part of the bar—typically the most prestigious, best trained, and most affluent segment—serves the legal interests of dominant private actors, of corporations and of very wealthy individuals and families. This is perhaps of limited consequence if such service consists of occasional representation in court, the drafting of wills, and other narrowly technical activities. However, it takes on a different character if legal and economic advice are closely inter-

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related and if both also involve strategic initiatives and responses vis-à-vis state policies. Where the latter pattern obtains, the elite law firms play an important role in articulating the interests of dominant economic actors in relation to each other and the state apparatus. It is among these lawyers, as well as major bankers and politically interested chief executive officers of corporations, that the common interests of the dominant class are discussed, identified, and acted upon. Marx and Engels's characterization of the state as merely a committee that manages the common interests of the bourgeoisie has never had much more than rhetorical value and was rather misleading even at that. Their formulation may, however, quite interestingly serve to describe this elite determination and defense of the interests of the dominant class, in which top corporate lawyers play an important part.

These issues must, again, be examined in a comparative light, and here I will confine myself to raising a few questions rather than advancing hypotheses or offering sketchy analyses of limited comparisons. How general is this pattern of a close concatenation between a legal elite and dominant class interests? Under what conditions does it prevail, and what conditions inhibit it? Are there other elites in the profession—law teachers, for instance, or leading administrative lawyers—and what is their relation to the corporate bar, to the state elites, and to other social interests? How are the relations between the state and the major organized interests in society structured, and what are the interrelations between different patterns of these relations—antagonistic or corporalist, for example—and the role of lawyers in the representation of dominant class interests? To what extent does the integration of the bar into one profession, if it exists, serve to legitimate the claims and political activities of any one segment of the bar, including the corporate legal elite? Finally, how is the unity of the bar affected by the political and parapolitical pursuits of its different segments?

IV. THE STATE-CENTERED APPROACH AND THE PROFESSION FRAMEWORK FOR STUDYING LAWYERS AND THEIR WORK

Lawyers and law work are usually studied in a framework of analytic ideas about the professions. This corresponds, at least in the common law countries, to important features of the self-understanding of lawyers. "The law is a profession" has been both a key idea in the image that lawyers have of themselves, and a call to critique and renewal.

In the professions themselves, the bar included, the concept of "profession" has often had an idealizing character, whether it was used to state occupational ideals in capsule fashion or whether it became the centerpiece of a rosy self-presentation to the public. In either case, it has meant that members of a profession are (or should be) specially devoted to the welfare of their clients; that they also bear a special responsibility for the community at large; that they form a body of people who as a group ensure (or should ensure) competence, as well as devoted and responsible action; and
that in turn they are entitled to freedom from lay interference, to a special kind of respect and honor, and to a commensurate level of income.

In the social sciences, two views of the professions have competed and occasionally clashed with each other. The first view, which grew out of structure-functionalist theories and was built fairly directly on certain elements of the professions' self-understanding, focuses on the knowledge gap between client and expert and on the values that are at stake in the transactions between them. The solution to the question of how both the client's interests and the community's values are protected against abuse by the knowledgeable experts is found in the collective organization of the professions and their pledge to self-control.68 The second is a more critical view. It focuses on the advantages that accrue to the professions from their collective organization and from society's recognition of their autonomy. In this view, the professions appear as rather more self-interested, using their organization to control competition and to limit access to their protected market.69

A common premise of both views is that the profession derive a particular power from their knowledge, even though proponents of the first view rarely stress this power, which accounts for the specific "dangerousness" of the professions,70 and proponents of the second view tend to emphasize other, organizational bases of power and underline the contingent character of the knowledge superiority of professional experts. Yet without this common premise, the first school would find it difficult to explain why there is a control problem in the first place, while the second would run into difficulties in accounting for the similarities in the professions' position and privileges in very different political economies.

Both schools of thought suffer from a certain Anglo-American parochialism that is directly relevant to our concern with a state-centered analysis. Both have long failed to ask whether there are other institutional arrangements that provide for the increased use of knowledge that is characteristic of all modern societies.71 In continental Europe, as we have already seen for the legal professions, the modern state established the institutional forms for this development in that it provided professional education, as well as

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70 Goode, Theoretical Limits, supra note 68.

oversight and regulation, for virtually all professional work from religion, law, and medicine to the more recently established professional fields. If we can understand the transformation of professional work in nineteenth-century England and America largely as an attempt of the different groups to make the most of the expanding market opportunities by standardizing education and gaining collective market privileges, we can see that exactly analogous transformations were initiated in France, Prussia, and Scandinavia by the state. Only after the initial state-led modernization of professional training and work was accomplished did the professional groups press for some reduction of state regulation and for more market-oriented autonomy.

Lest this last observation be taken as an indication of the ultimate primacy of the "professional project" to secure competitive advantages in the market through autonomous organization,72 it must be pointed out that even in the United States success in this professional project always involved the state as a very important third actor beyond the agents of demand and supply. It was the state that granted protection against "lay" competition; it was the state that sanctioned educational arrangements and educational entrance requirements; and it was the state that required and granted professional licenses. This role of the state, however much shot through with de facto and de jure patterns of delegation and deference to professional authorities, has been emphasized most recently by Eliot Freidson.73 Without it the models of professional autonomy—be they of the structure-functionalist or of the more critical variety—remain seriously incomplete. Even the most autonomous professional institutions in the United States do not rest simply on private organization (whether self-interested or client- and community-oriented), but ultimately on recognition and guarantees by the state. In fact, one might argue that the coexistence of idealizing self-presentation and the pursuit of collective self-interest, which gave rise to ambivalent public images and to contrasting scholarly views of the professions, has its roots in this need to acquire and to justify state recognition and state guarantees.

Legal work has a special character that sets it apart in important ways from other professional work—for instance, from medicine.74 On the one hand, it requires knowledge not of immutable features of nature but of socially created norms, rules, and practices; furthermore, it requires many skills—in negotiation and representation and in the factual analysis of a client’s situation—that are not grounded in legal scholarship but are quite diffuse in character. In many of these different dimensions of knowledge and skill, clients are often as capable as their lawyers. Thus the knowledge

72. Larson, supra note 69.
73. Freidson, Professional Powers, supra note 69.
gap, so critical to the analytic understanding of professional work, may be quite small, and the leverage of lawyers correspondingly reduced.

On the other hand, law work—especially law work that is court-related—has a basis of independence that is grounded in the requirements of conflict regulation. As officers of the court, lawyers must have a minimum of loyalty to the administration of justice, to the norms and to the institutions provided by the state. At the same time, they cannot fulfill their mediating, translating, and advising roles without the trust of the clients. This is the structural reason why attempts made in eighteenth-century Prussia to absorb advocates completely into the civil service of the administration of justice failed and why in the Soviet Union attorneys work as self-employed professionals in cooperative colleges—however much supervised by state and party.75 In the nineteenth century the German bar, which with its quasi-civil service status enjoyed a very profitable state-protected market niche, agitated for—and finally achieved in 1878—a freie Rechtsanwaltschaft, with open admission of all educationally qualified candidates and more autonomous professional discipline (a move that can hardly be accounted for in terms of the pursuit of collective professional self-interest). The advance of capitalism had emphasized the importance of that independence of the bar which derives from mediating between state and private-sector interests.

The bar, then, can partially be understood as a professional group like many others. But its special character derives from its specific relations to the state, in particular to the administration of justice, and to the private interests that are served by the legal order. Closer relations to one or the other of these poles have profound consequences for the profession.

Close relations with clients, approaching in the extreme identification with the latter's interests, subject the cohesion of the bar to great strains. This is intertwined with other, closely related factors. The wider the scope of the bar's professional activities, the greater the variety of different types of work and of different types of clientele. The importance of the lawyer-client relationship is reflected in the fact that most specialization in the law is in the last analysis as much specialization by clientele as it is by special knowledge and skill. This means also that client influence on lawyers' actions and outlook is likely to be strong, leading different parts of the bar in different directions. As a consequence, the ability of a heterogeneous bar to both provide guidance and oversight to its members and to act as an effective professional interest group can be significantly impaired. It will be most impaired where identification with client interests is strong and the heterogeneity of the bar is great.

State regulation and traditions of professionalism may constitute a counterweight to client orientation and heterogeneity of outlook—directly by counterbalancing client influence and control and indirectly by more narrowly delimiting appropriate kinds of law work. That some degree of state control and professional tradition may work hand in hand rather than be at odds with each other is contrary to what one might expect from much theorizing (of either school) about professional autonomy and professional projects. For lawyers in particular one can go further and point to a general strengthening of state intervention in capitalist economies as an important factor that supports professional autonomy and responsibility. J. W. Hurst’s comment about the American legal profession at midcentury is revealing: “[I]f the bar was to be taken out of absorption in sheer technique or partisanship—whether these be regarded as naive or calculated attitudes—it would be mainly because of the simple pressure of government intervention in the economy.”

On the other hand, unbalanced state control can be oppressive and can destroy much of professional responsibility, even where a minimal autonomy, required by the logic of conflict regulation, is granted. Even if judges and lawyers involved in litigation enjoy such autonomy, other branches of law work may be little affected by it. Furthermore, the tendency especially in many “statist” legal systems, to differentiate the various branches of law work into separate professional groups with little overarching solidarity may make the other groups of lawyers particularly vulnerable to outside control, unless other conditions strengthen their independence. This is illustrated by the histories of lawyers in the Soviet Union and in Germany in the twentieth century.

These brief comments relating the state-centered framework for studying law work and lawyers to the more common approach based on the concept of profession have shown that the two approaches can be used in complementary fashion. Focusing on the role of the state can help liberate the profession-centered framework from its confinement to the historical conditions of England and North America. Further, it can illuminate the role of the state even in the “professional projects” of occupations in the North American political economy, and it is of special importance in studying lawyers, whose profession cannot be understood at all if their relation to the state—its structure, its operation, and its history—is ignored.

76. Hurst, The Growth of American Law, supra note 64, at 375.