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Volume I

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Volume I
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Series Preface

The International Library of Essays in Law and Society is designed to provide a broad overview of this important field of interdisciplinary inquiry. Titles in the series will provide access to the best existing scholarship on a wide variety of subjects integral to the understanding of how legal institutions work in and through social arrangements. They collect and synthesize research published in the leading journals of the law and society field. Taken together, these volumes show the richness and complexity of inquiry into law's social life.

Each volume is edited by a recognized expert who has selected a range of scholarship designed to illustrate the most important questions, theoretical approaches, and methods in her/his area of expertise. Each has written an introductory essay which both outlines those questions, approaches, and methods and provides a distinctive analysis of the scholarship presented in the book. Each was asked to identify approximately 20 pieces of work for inclusion in their volume. This has necessitated hard choices since law and society inquiry is vibrant and flourishing.

The International Library of Essays in Law and Society brings together scholars representing different disciplinary traditions and working in different cultural contexts. Since law and society is itself an international field of inquiry it is appropriate that the editors of the volumes in this series come from many different nations and academic contexts. The work of the editors both charts a tradition and opens up new questions. It is my hope that this work will provide a valuable resource for longtime practitioners of law and society scholarship and newcomers to the field.

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Introduction

Sociolegal Research: An Overview

The last 40 years have witnessed an explosion of sociolegal research on lawyers and the legal professions. Studies in this area exhibit enormous diversity in the questions they pursue, the methodologies they adopt and the spheres of professional activity they investigate. They are all, however, animated by an underlying – if often unstated – preoccupation with the problem of professional power. During the last several decades, sociolegal scholarship on the legal profession has focused on the varied sites of organized and daily professional activity to investigate how power is produced, legitimated and deployed by lawyers, and contested by competitors, clients, state actors and third parties. This volume *Collective Projects, Professional Hierarchies, and the Construction of Transnational Regimes*, and its companion, *Elite Practices, Personal Legal Services, and Political Causes*, collect the ground-breaking studies in this area.

Up until the 1970s functionalist approaches had dominated sociological studies of the legal profession (Durkheim, 1957 [1893]; Parsons, 1951, Carr-Saunders and Wilson, 1933). Under these approaches, professions were viewed as social phenomena that emerged organically to mediate between individuals and the large institutions of modern society. Because professions were treated as a necessary feature of the modern social landscape, the question of how they came on the scene did not arise. Functionalist accounts took the legitimacy of professional authority for granted. The logic of functionalism obscured the problem of professional power.

In the later part of the twentieth century the sociology of the professions underwent a paradigm shift that brought professional power to the fore as a subject of empirical inquiry. Rejecting functionalism, new approaches to the study of the professions, rooted in the Chicago School of Sociology, proposed a fundamental reorientation of the field. The new sociology represented a shift from theories of structure to theories of action (Macdonald, 1995). Discarding the assumption that professions were an inevitable feature of modern society, sociologists set out to investigate how people 'make or accomplish' professions by their actions (Freidson, 1983, p. 27). The fundamental insight underlying this new orientation was the recognition that professional projects represented collective efforts to develop, control and deploy expertise to obtain political power, material rewards and social status. In recognizing professions as products of collective and individual agency, this approach put the problem of power front and centre (Freidson, 1970, 1986; Larson, 1977; Johnson, 1972; Abbott, 1988).

The term 'profession,' as Eliot Freidson (1970) has emphasized, has two meanings: It is a type of work; it is also an affirmation (see also Freidson, 1986, pp. 20–26). An important characteristic that distinguishes professions from other occupations is their normative claim that their members will use their expertise in the interests of the individuals they serve as well as for the good of society. Traditional professions invoke their specialized knowledge and adherence to a public-minded ideology to justify a unique relationship to the state and the

market. Professions receive benefits from the state, including the authority to determine their own standards of competence and ethical behaviour. Hand-in-hand with the power to regulate themselves, professions enjoy the power to prohibit competitors from providing services in the spheres over which they claim jurisdiction. Through these delegated powers, professions are able to control the market for their services (Freidson, 1970).

Using the logic of professionalism as a roadmap, sociologists have explored the various avenues through which professionals assert and exercise power. In particular, they have sought to investigate the claims of authority made by professions for their services in the private market and in the public sphere. Under this approach, the traditional hallmarks of professionalism, including independence from clients and from the state and the right to determine the conditions of one's work, do not represent necessary characteristics of a profession. Rather, they mark sites at which professions typically assert and exercise power (Freidson, 1970; Abbott, 1988; see also Bourdieu, 1977 and 1987) Sociologists have also investigated how professionals use their professional power to obtain social and economic power. As Larson emphasizes, '[p]rofessionalization is ... an attempt to translate one order of scarce resources – special knowledge and skills – into another – social and economic rewards' (Larson, 1977, p. xvii).

Pursuing the problem of power, sociologists have investigated different aspects of the professional project. In his early, ground-breaking study of medicine, Freidson (1970) demonstrated how professional privileges were better explained by the power wielded by professionals than by the functions they purportedly furthered. As he further showed, the medical profession achieved social and political dominance by transforming ethical and moral questions into issues of professional technique. In later studies, Freidson turned to the question of what kind of power professional expertise itself had. In this research he investigated the role that professional institutions play in transforming formal knowledge into the capacity to affect the social world (Freidson, 1986). In her work Magali Larson described the historical rise of different professions as collective mobility projects that standardized and limited access to professional know-how to achieve control over the market for certain services (Larson, 1977). In a similar vein, Johnson (1972) considered how professionalization furthered class interests. Pursing a different approach, Abbott (1988) argued that related professions were joined in a system in which they competed for jurisdiction over various types of human problems.

Taking up these themes, law and society scholars have explored the different dimensions of professional power as reflected in legal practice and the organization of the legal profession. Sociolegal investigations have focused variously on the interactions among lawyers' market activities, their deployment of expert knowledge in their work and the different, often conflicting, ideologies they invoke to justify their protected status in the market, the value of their services to their clients and their contribution to society at large. Researchers have documented how lawyers seek to gain and maintain control over the markets for their services (Abel, 1989, 2003; Auerbach, 1976; Dezalay and Garth, 1996; Dezalay and Sugarman, 1995); how the organization of their work permits them to succeed in different markets for legal services (Galanter and Palay, 1991; Hobson, 1986, Van Hoy, 1997; Seron, 1996); and how they assert jurisdiction over social and political issues (Halliday, 1987; Auerbach, 1976; Dezalay and Garth, 2002; Carruthers and Halliday, 1998). Scholars have further explored under what circumstances lawyers assert authority vis-à-vis their clients (Heinz *et al.*, 2005; Nelson, 1988; Rosenthal, 1974; Sarat and Felstiner, 1995; Landon, 1990; Mann, 1985) and

the circumstances under which they have autonomy to determine the conditions of their work (Nelson, 1988; Spangler, 1986; Van Hoy, 1997; Landon, 1990). Researchers have also documented the hierarchies of status and income within the bar (Heinz and Laumann, 1982; Heinz *et al.*, 2005).

A second important source of research ideas were the constitutive theories of law that were being investigated more broadly within sociolegal scholarship. Drawing on European social theory, critical legal studies and other traditions, in the 1980s sociolegal scholars turned to the question of how law, despite its failure to deliver on its promises of equality and justice, maintained its power in society (Sarat and Silbey, 1988; Ewick and Silbey, 1998; Sarat and Kearns, 1993; Silbey, 1998; Ewick, 2004; Silbey, 2005) Researchers working in this vein investigated the social meanings and uses of law to explain how legal institutions, processes and structures sustained their legitimacy in everyday life (Sarat, 1990; Ewick and Silbey, 1998; Haltom and McCann, 2004; Engel and Munger, 2003; Nielsen, 2004). As this work showed, legal ideology has played an important role in undergirding law's legitimacy in American society. In research on lawyers and the legal profession, legal ideology has proven to be a valuable conceptual tool. This research has investigated how lawyers, both in their formal pronouncements and routine interactions with clients, invoke different features of legal ideology, including the central place of the legal profession in furthering legal values to enhance its power vis-à-vis clients, the public and the state (Sarat and Felstiner, 1995; Gordon, 1983, 1988, 1990; Nelson and Trubek, 1992; Mather, McEwen and Maiman, 2001, Shamir, 1995; Dezalay and Garth, 1996, 2002; Dezalay and Sugarman, 1995; see also Constable, 1998).

The Professional Project in Historical and Sociological Perspective

Part I of this volume considers the professional project in historical and sociological perspective. In Chapter 1 Richard Abel, drawing on Larson, argues that, between the late nineteenth century and the 1960s, the American legal profession rose to power by creating and protecting a market for legal services. According to Abel, the American legal profession's ascent depended on obtaining a monopoly over the market for legal services. In the early years, the organized bar gained control over the supply and training of new lawyers by introducing and formalizing educational requirements and bar standards, excluding immigrants and their sons, and reinforcing barriers against women and minorities already in place. Having achieved control over the 'production' of lawyers, the bar turned to restricting competition from outsiders by enlisting the state to enact and enforce prohibitions against the unauthorized practice of law. The bar also sought to dampen competition from within by enacting prohibitions on advertising, mandatory fee schedules and other measures. As Abel observes, since the 1960s market forces have overwhelmed the bar's attempts to control the supply of lawyers, as new aspirants have sought to join the profession in large numbers and the bar has no longer been able to justify exclusions based on ascriptive characteristics, such as race and gender.

Research on the legal professions in other common-law countries lends support to the market control thesis (Abel and Lewis, 1988a). In Chapter 2 Dietrich Rueschemeyer suggests, however, that it is myopic to generalize from the common-law experience. As he points out, in the United States, many more lawyers are in private practice as compared to other developed countries such as West Germany or Japan. He argues that market control fails to explain

the diverse types of law work found across the globe. Rueschemeyer favours a state-centred approach that focuses on the varying roles that states have historically played in economy and civil society. Reviewing the development of legal professions in Western Europe, he notes that their appearance pre-dates the rise of capitalism and was deeply intertwined with the emergence of the Church as a quasi-state bureaucracy as well as with competing secular legal systems. Subsequent modernizing transformations varied from country to country. In some states – such as France, Prussia/Germany and, later, Russia and Japan – major transformations were prompted by the expansion of state bureaucracy. In others, such as England and the United States, modernization was driven at the outset by market forces. These differences produced varying patterns of law work, which continue into the twenty-first century. Studies of other civil-law countries confirm the central role of the state in the creation of law-related professions (Abel and Lewis, 1988b, 1989).

Abel's and Rueschemeyer's chapters suggest that the power of legal professions might be situated along a market–state continuum: At one end, lawyers' power can be gauged according to their collective capacity to develop and control a market for legal services. In this account, the state, which must be enlisted to further the market-driven goals of the private bar, is passive rather than absent. At the other end, the power of the legal profession is reflected in the absorption of law-trained professionals into state bureaucratic structures and the state's autonomy from dominant interests in civil society. Lucien Karpik's study of French *avocats* (Chapter 3) adds a second dimension. During the nineteenth century *avocats* came to prominence in France by aligning themselves in various arenas with the public interest and against state authoritarianism. At critical moments of state repression, the bar took up the cause of legal liberal values in the political arena. The bar was also very active in defending the interests of the press – a frequent target of authoritarian regimes – in court. In France the bar achieved independence by creating a clear separation between lawyers and civil servants, and by embracing a political agenda organized around the public values of liberal democracy.

Rueschemeyer's and Karpik's essays illustrate the limits of market control as a mechanism to explain the different historical trajectories of legal professions around the world (Abel and Lewis, 1988b, 1989; Rueschemeyer, 1973; Halliday, 1987; Halliday and Karpik, 1997; Carruthers and Halliday, 1998). Two in-depth historical studies of American lawyers provide evidence for the limitations of the thesis, even in the United States. This scholarship suggests the importance of ideological commitments, particularly those tied to claims of expertise, in driving professional activity. Robert Gordon's study (Chapter 4) focuses on the law reform activities of elite corporate lawyers at the turn of the twentieth century. As he shows, reformers sought to deploy an ideal of legal science to address a breakdown of legal processes and institutions – a breakdown in which they were implicated by virtue of their representation of powerful corporate interests. According to Gordon, lawyers embraced a scientific legal order in order to 'bridge the gulf between the ideal and the actual, the lawyers' high-minded and public-regarding selves, and their activities on behalf of clients' (p. 129).

In Chapter 5 Ronen Shamir considers the conflicted roles of American lawyers in the New Deal. While the lower stratum of the bar sought to monopolize practice before administrative agencies, elite lawyers resisted it. Leaders of the bar, moreover, opposed the expansion of administrative processes generally as a threat to the centrality of federal courts in the legal system. Under the ideology to which elite lawyers subscribed, courts were the principal producers of legal knowledge. To the extent that administrative procedures displaced the

federal judiciary, they threatened the distinctive expertise claimed by the elite bar and the power, prestige and influence that flowed from it.

Terence Halliday's essay (Chapter 6) turns to the collective influence of professions at a macro-level and serves as an appropriate bookend to Part I. Halliday rejects the idea that market control and increased status are the sole measures of professional power. Instead, he proposes that an important dimension of professional authority is the capacity to exert public influence. Comparing law, medicine, the clergy, engineering, the military and academia, Halliday suggests that their variable success in shaping the public agenda is linked to differences in their knowledge mandates and in the institutions through which these mandates are mediated. Law is a normative profession whose epistemological foundations are grounded in value-claims about the appropriate ordering of society. The scope of law's influence across different public spheres is accordingly broad. The intensity of its influence, however, depends on organizational factors, such as the existence of large integrated professional associations, the profession's capacity to mobilize individual practitioners and the extent to which lawyers are embedded in larger individual and organizational networks.

Stratification and Exclusion: Dispelling the Myth of an Integrated Bar

The success of lawyers' collective attempts to attain market control, achieve independence from state institutions, or influence the public sphere largely turns on the extent to which the bar is integrated – that is, the extent to which its members share core interests, values and goals. Part II focuses on studies documenting divisions within the American legal profession. On one level, such divisions have strategic implications as they undermine the bar's power to act as a group to further shared purposes. On a deeper level, the stratification of the bar reflects the differential distribution of power among lawyers. Depending on their status, race or gender, lawyers face different material, institutional and ideological impediments to their efforts to exercise professional authority (Chambliss, 2004; Rhode, 2001; Hensler and Resnik, 2000, Wilkins and Gulati, 1996; Heinz and Laumann, 1982; Heinz *et al.*, 2005).

Investigating the Chicago bar during the 1970s, Edward Laumann and John Heinz found a differential allocation of prestige to different areas of specialization. Their findings are described in Chapter 7. Business law specializations, such as securities law and tax, received the highest prestige scores, whereas legal work done for individuals, such as family practice, divorce, personal injury, consumer and criminal law, received the lowest rankings. Considering various variables that might account for these differences, the authors conclude that there is a strong relationship between the prestige accorded to a specialization and the type of client served. Surprisingly, *pro bono* – the extent to which a specialization was pursued for altruistic reasons – correlated negatively with prestige. Turning to the characteristics of the practitioners, Heinz and Laumann found that practice specializations with high prestige were associated with a greater presence of Republicans and fewer Jews. The authors conclude that the sphere of legal practice can be divided into two hemispheres, one consisting of commercially oriented specializations serving corporate clients and the other specialities serving individual clients. The client stratification within the bar translates into a differential in lawyer's professional and political power. In Chapter 8 John Heinz, Robert Nelson, Edward Laumann and Ethan Michelson revisit the Chicago bar 20 years later. They find that the bar is divided even more sharply into two hemispheres, with few lawyers crossing the boundary between the two. A

lawyer's status correlates more directly with the type of client – corporate or individual – represented by that lawyer. The authors observe that the comparative size of hemispheres has changed, with the corporate sector consuming more than twice the amount of lawyers' time devoted to representing individuals or small businesses. They also find a substantial increase in specialization, especially in corporate practice: If lawyers in 1975 practised in a cluster of specialities for one type of client, in the late twentieth century they devote many more hours to one area of specialization.

The next two essays turn to the ways that ascriptive characteristics of lawyers create impediments to amassing professional power. In Chapter 9 David Wilkins considers the paucity of black partners at corporate law firms and their concentration as non-equity members at the bottom of the partnership hierarchy. Wilkins excludes discrimination as a complete explanation for the departure of black partners from law firms, but focuses on structural factors. As he notes, in the late twentieth century not all partners in a corporate law firm are created equal. A few command more prestige and resources within the firm. Wilkins argues that black partners face barriers in the three interrelated markets that determine power and rewards at corporate firms: the market for new business, the market for work from a firm's existing clients and the internal market for support from associates. In the realm of rain-making, black partners are not only less likely to have the type of social network that facilitates bringing in new business, but are also less likely to have the internal connections within a firm that would lead to referral from other partners of existing clients. As a result of their difficulties in obtaining an adequate 'book of business', they are at a disadvantage in competing for the services of associates, particularly senior associates whose experience is most valued.

In Chapter 10, Carroll Seron and Kerry Ferris offer a parallel account of the interactions between structural aspects of practice and social status in the context of small-firm practice. They observe that law practice, like other professions, is organized around access to time. In their study of solo and small-firm practitioners in the New York area they found that although these lawyers enjoyed substantial latitude in structuring their work, the requirements of maintaining a practice imposed significant time demands. Whereas most of the married male lawyers with children were released from time-consuming family obligations, their female counterparts bore primary responsibility for child-care and household tasks. Of the lawyers who worked reduced hours, almost all were women who had organized their practices to fit the demands of child-care. As Seron and Ferris demonstrate, social capital – in the form of freedom from obligations in the private sphere – plays an institutional role in sustaining professional autonomy, a precondition for success in small-firm practice.

The Creation of Transnational Legal Regimes and Markets

Part III turns to lawyers' involvement in the development of transnational legal regimes. As the essays in Part I suggest, until recently the production of law has been almost exclusively a national project. As a consequence, most sociolegal work has focused on how legal professions have assumed certain organizational forms and functions in relation to particular economic, political and legal conditions within nation-states. American lawyers, for example, seized on particular opportunities that emerged from specific legal, political and economic developments in the United States, while lawyers in other countries pursued different goals and strategies tied to varying national circumstances. In the late twentieth century new transnational law-making

institutions emerged and older ones began to exert greater influence. The last two decades have also seen the rise of huge multinational corporations, whose production and marketing activities span the globe. With globalization, lawyers have been at the forefront of creating new transnational legal institutions, adapting local legal norms, stratagems and manoeuvres to meet the demands of expanding global markets and increasingly robust international regimes. The final chapters of this volume represent pioneering studies of how lawyers vie to amass and deploy power in transnational arenas.

In Chapter 11 Yves Dezalay and Bryant Garth document the transformation of international arbitration since the 1980s. Drawing on Bourdieu's concept of a field, they describe the contests between the 'grand old men' who had long dominated the field of international commercial arbitration and a new generation of technocrats over the shape of the substantive and procedural framework within which arbitration is conducted. Contrasting their specialization and competence to their elders' charisma and idealism, the new arrivals have argued for the rationalization and routinization of arbitration. In so doing, they have sought to legitimate an approach to arbitration rooted in Anglo-American rules of procedure and evidence. Recognizing that disputes among transnational companies have created a huge market for international arbitration, the International Chamber of Commerce, the pre-eminent institution of arbitration, has modernized its procedures to meet the demands of corporate business and its lawyers. The result has been a formalization of the arbitration process privileging American-style adversarialism and emphasizing extensive fact-finding and detailed decision-making. Dezalay and Garth emphasize, however, that despite these transformations, arbitration still relies on the personal relations among the old guard – and the social capital derived from their academic standing – to secure its legitimacy in the field of commercial dispute resolution.

In Chapter 12 John Hagan and Ron Levi turn to the International Criminal Tribunal for the former Yugoslavia (ICTY) to illustrate how legal actors successfully mobilize liberal legal values to empower public institutions. When Louise Arbour was appointed as chief prosecutor in 1996, the ICTY had limited resources and had launched few prosecutions. Three years later, UN contributions to the ICTY had nearly tripled, the tribunal's detention centre was filled with arrestees, and the court had indicted Slobodan Milosovic, then a sitting head of state. At the time she joined the tribunal, Arbour saw her challenge as translating those aspects of criminal law and procedure that rendered it legitimate at a local level to the international arena. To succeed, she had to overcome an international culture that emphasized state and sovereign immunity and privileged diplomatic measures over the use of legitimate force (as exemplified in arrests of suspected war criminals). She also had to counter the tendency to view war crime prosecutions as dealing with events in 'historical' time, on the model of the Nuremberg trials, as opposed to contemporaneously or in 'real time'. By adroitly enlisting the cooperation of various national and international institutions and mobilizing public opinion through the media, she succeeded in legitimating the indictment, arrest and prosecution of dozens of suspected war crime participants including many working at the highest levels of the state.

A Note on Volume II

The problem of professional power is revisited in Volume II of this series on lawyers and the legal profession. The work collected in *Elite Practices, Personal Legal Services, and Political*

Causes is organized around the corporate and the personal legal services sphere – the two hemispheres of private practice in the United States. As the studies in Volume II show, lawyers in these different markets deploy varying legitimating strategies to gain authority and obtain clients. This second volume also collects important research on cause-lawyering, a genre of lawyering which rejects the market rationale that dominates private practice in favour of furthering political and social ideals and commitments

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