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LAWYERS

Lawyers exist in every modern society and perform essential work within each legal system. Nevertheless, the fundamental variation around the world in how the legal occupation is defined, organized, and regulated, along with the sheer variety of legal tasks performed within any particular system, makes generalizations in this field difficult and potentially misleading. Even the concept of the *legal profession* defies any unitary notion, despite the nomenclature sometimes shared among various systems. There is no single conception of *the* profession that applies worldwide, nor is there a single list of functions that can be attributed to the term *lawyer*.

Legal Profession in the United States

In the United States, the legal profession encompasses lawyers practicing in the private sector, individually or in small to large firms; lawyers employed by the government, corporations, organizations, and legal aid societies; law professors; and judges and related judicial or administrative actors also employed by the government. Most lawyers have a private practice, and many practice individually. Individual states license lawyers, either by membership in a nominally private bar association with powers delegated by the government, or licensed more directly by the courts themselves. In either situation, the state grants an exclusive right to practice law to lawyers (and criminalizes unauthorized law practice). It often defines the practice of law broadly, including many tasks beyond representing clients in courts that could be shared with other occupations, but for which lawyers continue to hold a monopoly.

Entry and Mobility

Entry into the profession, by license or bar membership, usually requires passing both a bar-administered examination, which varies in part by state law, and a process of character screening. The bar association can disqualify applicants with certain criminal records or deficits relevant to law practice as defined by the bar, subject to review by the courts. Successful candidates affirm the ideals of legal practice and allegiance to the rule of law and the United States Constitution. Eligibility to take the bar examination requires, in nearly all states, three or more years of postgraduate education in law at an accredited law school. No apprenticeship is required, unlike in many countries. (A few states, such as Wisconsin, license graduates from designated schools without examination.) A career in law requires a substantial commitment and cost just to earn the right to be considered a lawyer, much less to succeed.

The law monopoly, and the onerous formal barriers to entry, are somewhat muted by the widespread availability of legal education; in 2006, 194 U.S. law schools satisfy the typical American Bar Association (ABA) licensing requirements. Furthermore, there is now increased availability of loans and financial aid (or subsidized tuition in state schools), and high pass rates for most states' bar examinations (much higher than in many modern countries). There is relatively little attrition from the ultimate goal of a professional license once a person enters law school.

Geographic mobility among the various American states is made surprisingly difficult by many state bars, including important ones such as that in California. There is no national licensing authority allowing a lawyer to practice freely across state borders, and even a license to practice before a federal court requires admission to one state bar,

sometimes that of a specified state. Appearing before a state court temporarily under a process of admission *pro hac vice* (meaning "for this turn") also requires valid bar membership in one state, and offers no regularized solution to the problem of interstate practice. About thirty states do allow a lawyer admitted elsewhere to join the state bar without examination ("admission on motion"). This, still, is an imperfect aid to mobility, because many of the states that offer such waiver grant it only from a jurisdiction that itself allows admission on motion (requiring "reciprocity"), or grant it only for those with substantial experience or even, in some states, a local office.

Once a person is admitted to practice law in a jurisdiction, there are relatively few restrictions on horizontal or vertical mobility within the profession, especially as compared with most other countries. The bar permits entry into and exit from various sectors. Private lawyers may join the government and later return to private practice. Lawyers may leave a large firm to open a solo practice and criminal practitioners may also do civil litigation. Litigators may also be business lawyers and advisers. Judges, either elected or appointed, are drawn from the ranks of experienced practitioners, often from private firms. American lawyers are nominally generalists, entitled to practice in all areas of law (including most subject matters and erstwhile specializations) or engage in various forms of client representation (in court or otherwise, unlike in some countries, where representation in certain courts is restricted to certain types of lawyers, such as the solicitor in England). Even the states that "certify" particular specialties (for example, tax practice or family law) allow others to practice in the area, merely prohibiting them from advertising themselves as certified.

Specialization and Self-Regulation

Many lawyers do effectively specialize, either as a matter of choice or economic or practical feasibility rather than as an official certification. *De facto* specialization, and the growth of large law firms, is an important trend both in the United States and increasingly worldwide, perhaps ushering in an Americanization of their professions. Apart from the geographic restrictions remaining in many states, American lawyers benefit from a monopoly on the provision of legal services (unlike in many countries) and enjoy lateral mobility and relatively fluid internal competition.

Some scholars cast the legal monopoly, or at least the effort to obtain and maintain it, as the hallmark of a profession, in contrast to other occupations or businesses. The traditional sociological approach to professions, drawing from the organizational foundation introduced by Max Weber (1864-1920), himself a commercial lawyer, and the occupational studies of Émile Durkheim (1858-1917), is a "functional" one that looks for certain characteristics in an occupation and declares it to be a profession if it shares them. Talcott Parsons (1902-1979), notably, developed such an approach to the sociology of the professions and applied it to lawyers. In addition to the monopolistic mission, the other core attributes of a profession include a specialized and formal body of knowledge, gatekeeping (often through formal education), self-regulation, promotion of client or patient goals rather than only personal gain, and a proclaimed dedication to the public good. Because lawyers encompass these attributes, their group is unquestionably on the short list of professions; in turn, the bar receives the fruits of this status, particularly protection from competition and the privilege of self- regulation that is relatively unfettered by legislation or outside pressures.

In the United States, self-regulation remains a hallmark of the legal profession. Lawyers control most issues of membership (including disbarment and other bar discipline processes) and pass the rules of professional conduct that they enforce by their processes. Although the American Bar Association has promulgated ethical codes and restrictions, such as the most recent and dominant Model Rules of Professional Conduct (2002), these govern lawyers only when a particular state bar adopts them (as all have done, for some version of the ABA's guidelines) and when its bar apparatus or courts enforce them. Pressures from external interests have caused state bars increasingly to expand their investigation and prosecution of client complaints, and led some to include lay members in hearings of bar discipline matters or to make discipline a function of courts rather than the private bar. Yet the regulation of lawyers remains an essentially independent task, with relatively few accepted inroads by legislators, interest groups, or even consumer law. To some extent, beyond bar ethical discipline, lawyers are increasingly regulated not by the threat of loss of bar license but indirectly though malpractice suits for acts of incompetence or through judicial sanctions for filing improper pleadings. Of course, courts and judges, who see themselves as part of the profession itself, control these systems.

Reforms and redirected mechanisms of enforcement have not obviated the reality of essential self-governance by the profession, broadly defined. There has not been a serious dent put into traditional restrictions on external competition, although judicial decisions on advertising and fees over the past quarter century have expanded internal competition. Some from a liberal economic perspective have criticized the professional

mission as an elaborate form of market restraint, such that certification (as with accountants) or mere registration would be a preferable model in a capitalist market.

Sociological Issues

Other critics, most openly from the left or critical legal studies movement, have denied the legitimacy and descriptive power of the traditional sociological construct of the legal profession. They believe it is circular, espousing attributes in such general terms that no one can deny them and then justifying social control and hierarchy (themselves some of the attributes) because a profession is "special." Such critics argue that the sociological tradition is unhelpful and even dangerous, rationalizing social hierarchy and advantage without social policy to justify it. Even so, it seems relatively accepted that at least some of the traditional characteristics of a profession are descriptively accurate, if not naturally inevitable or sufficient justification for the social and economic perquisites professions maintain. No one disputes that lawyers wield enormous power and carry social status in American society. Critics may not accept every platitude pronounced by bar associations, but they seem to recognize that the bar is an important and unique institution.

One can divide the U.S. legal profession, with all its mobility and diversity of work, into certain segments. The most obvious groupings break down lawyers in their current situation by their immediate employer, such as self-employed, firm practice, corporation, or government. This is informative, as far as it goes; for example, most lawyers practice privately (with a third of the total in solo practice). Some describe the legal profession by status and salary and therefore break down the nominally "unitary" bar. John Heinz and Edward Laumann group lawyers by the type of clients they

represent, especially corporations and institutions with repeat business, as opposed to individuals whom attorneys usually represent once. These lawyers must attract business, often by advertising.

Others have studied the racial and gender structure of the legal profession in the United States and in other modern systems, and note that the U.S. bar has increased its percentage of female members but has not substantially expanded its racial and ethnic diversity since the first wave of the antisegregation movement occurred a generation ago. David Clark wrote that minority representation is "much bleaker" in most other countries as well. The entry of women into the professions has grown "dramatically" around the world, though the distribution is uneven among practice sectors; in some countries, such as Japan and many developing nations, women have had less success.

The reality that there is no universal conception of the legal profession has often led to confusion when scholars attempt comparisons among systems and their forms of legal occupations. There is simply no agreement on what constitutes a lawyer, nor is there one language describing or analyzing the lawyer's role. Even the concept of "legal profession" may be a culturally driven construct, particularly when used by American and European scholars drawing on the sociology of Durkheim and Parsons. In other countries, the concept may not be a unified or coherent one shared by workers in their own systems who have different roles in law, but no overarching identity.

This "Babel effect" has had its biggest impact on attempts, over the years, to count and compare the lawyers in specific countries. The question of how many lawyers is a basic one. However, the headcount is not particularly useful for comparative purposes if lawyer means something different in various systems or if membership in a

"legal profession" is fluid and ill-defined. Ironically, the difficulty of such comparisons has not deterred political critics of legal systems, particularly in the United States, from pronouncing that there are too many lawyers compared with economies presented as more successful and efficient. Lawyer counting, over the years, became the mantra of critics ranging from President Jimmy Carter to Vice President Dan Quayle. It was the essential evidence that Harvard University President Derek Bok famously used to decry the U.S. economy in contrast to Japan's unlawyered engine. It still serves as a common if often erroneous basis of comparison between the U.S. and other nations. More generalized lawyer bashing continued to be a theme in the 2004 U.S. presidential elections.

Comparative Survey of Legal Professions

In the United States, counting lawyers is straightforward because the legal profession is broadly but formally defined to include anyone holding a valid bar membership or license. Because that official attribute is legally required to practice law in each U.S. jurisdiction, and because most law graduates do practice law, lawyers are easy to count. A common estimate is that in 1991, the United States had nearly 600,000 lawyers in private practice, more than seven out of ten lawyers nationally. (This is in contrast to civil law systems, in which lawyers tend to work for the state or for companies.) In 2006, well over one million lawyers practice in all areas of law. An important shift is in the decrease in the number of lawyers who practice solo, currently one third of lawyers (though still a larger percentage than in most countries). Until the 1950s, the majority of lawyers had a solo practice. Much of the recent growth in the size of the profession exists in expanded opportunities for ethnic minorities and, to a greater

extent, women. Clark wrote that in the 1990s the relative ratio of private lawyers per 100,000 population was a high of 233 in the United States, with Israel close behind at 196—far higher than in the typical civil law bar (for example, in the low nineties for Germany, Switzerland, and Ecuador), a difference explained by various structural, cultural, and measurement reasons.

In England and Wales, lawyers are officially recognized by the government, though generally after they receive an undergraduate education in law (plus a specialized apprenticeship) rather than a separate graduate legal education. The private profession is formally divided into *barristers,* who represent clients in courts (particularly the higher courts, where they maintain the exclusive right of audience), and *solicitors,* who meet with clients, advise them, give opinions, draft documents, and convey title. There is no lateral mobility between these two careers. (The rigid distinction continues in some Australian states and in South Africa, but other former British colonies have generally abandoned it, in practice if not in name.) In England and Wales, in 1995, there were 71,500 private lawyers (not counting nearly 11,000 corporate employees). Solicitors made up by far the numerical majority (63,000) if not the most readily perceived example of the bar to the public, which tends to see practicing law in terms of appearing in court. The relative number is 138 per 100,000, still substantially above that found in civil law countries.

Other countries may employ similar official labeling of lawyers and a broad definition of the legal profession. In these countries, lawyers are relatively recognizable. In France and many other civil law systems following a Romanist tradition (as much of Europe and Latin America does), the recent trend is toward unifying the lawyers' role, at

least for the private lawyers who serve as analogs to American lawyers, even if occasional titular distinctions remain. France, for example, has merged most functions into the *avocat* (followed by many former socialist systems such as Romania), and Venezuela and Costa Rica have recently abandoned the *procurador* in favor of the general category of *abogados.* Germany, by contrast, has long unified the lawyer function into *Rechtsanwälte;* similar unification has occurred in Greece, Switzerland, and Sweden, though like Germany they tend to have tighter restrictions by geography and court practice.

The growing reality of a unitary "bar" should not obscure the fact that most lawyers in civil systems, including Germanic ones, are not private in the same sense as United States practitioners. Civil law systems tend to locate a majority of their lawyers, defined broadly, within the government (including the judiciary), corporations, and legal aid societies. Mobility between careers and specialties, within the larger profession, is limited or nonexistent. The unitary trend in civil law systems is also at odds with the office of *notary,* which survives in many countries as a powerful and profitable public or regulated office. The notary typically verifies facts, maintains registries, and drafts authentic documents; it is a legal specialization not necessarily perceived as in the same broader legal profession.

Civil law systems tend to place a more central importance to developing law on academic lawyers than do common law countries. Nonetheless, law schools or universities have less control over entry into the profession. Most countries have experiential or apprenticeship requirements, as well as state-administered examinations (sometimes multiple, as in Germany), before they grant full admission to practice law.

Indeed, law is an undergraduate curriculum in nearly all countries except the United States and Canada, where law is taught in postgraduate professional schools. Civil law systems (like all common law systems outside North America) treat law more like a college major and find that its undergraduate education, with other formal requirements, suffices to prepare one for legal work. Aspiring lawyers tend to choose a career path (for example, judiciary, administrative agency, private practice, or teaching) and remain there for life, enjoying predictable horizontal advancement but only within the specialization (though Spain and the Netherlands allow some mobility into judging from practice). This stands in contrast to the more fluid and comprehensive license that American lawyers hold.

Such specialization and state control is in part a function of the larger role of the state and the inquisitorial model of dispute processing that is typical of civil law systems. Where more of the decision making and inquiry is done by the judiciary and government agencies, it is inevitable that more lawyers will work in these institutions. In turn, the profession itself appears less independent from the state, in various important ways, than is traditionally true for common law jurisdictions, though of course the least independence is found in socialist or authoritarian systems.

Many other countries simply do not share any broad and unifying conception of the legal profession or do not have a clear and formal definition of legal practice as does the United States. Entry into *de facto* legal practice, and in some cases into the nominal profession itself, is relatively fluid. In such settings, counting lawyers is guesswork, either because there are no comprehensive records of official "lawyers" or because much

legal work, described in other countries as the practice of law, is done by those who are not formally labeled as lawyers.

The most important example of this disconnect, skewed by an American definition of "lawyer," is Japan. Its importance lies partly in how often Japan's numbers are compared to those of the United States, with credit given for Japanese economic or even cultural superiority, and partly in how inaccurate those numbers actually are, depending on the methodology applied and definition used. Japan, some say, has only a tiny fraction of the lawyers that America has, even though Japan's population is half the size. "Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 *every year*" (Bok 1983: 574).

Such counts assume, however, that the only practicing lawyer in Japan is the *bengoshi,* who represents clients as a private practitioner and holds the license only after rigorous sifting through additional testing and a specialized education in one single academy with excruciating entry requirements. They ignore the fact that most law graduates in Japan do not become *bengoshi* and yet have the basic college education in law that is required of lawyers in most other countries. Comparisons focus entirely on court practice as a false American analog, at odds with most other systems as well, in which the private lawyer does not dominate. If the estimate for Japan included all who perform lawyerly functions in other countries, the ratio would be similar to that in modern European countries (nearly 1,200 people to 1 lawyer). Indeed, Japan's law schools—eighty of them—graduate approximately 37,000 students per year. This is comparable to the output of U.S. law schools. Furthermore, under reforms effective in 2006, Japan's formal count of licensed lawyers should rise substantially in coming years.

Studying the Roles and Functions of Lawyers Comparatively

To make meaningful comparisons, scholars must use a broad and functional definition of lawyer. It should include all persons who, after devoting several years to formal legal education, enter a career using law and legal argument. This encompasses judges, judicial clerks and scriveners, prosecutors, advocates, corporate lawyers and legal advisers, law professors, many legislators, many administrative agents and clerks, many tax and patent representatives, and even civil notaries and procurators. By that measure, the numbers and ratios in many nations, including many such as Sweden that are often used as polemical examples, are closer to the American reality than most critics present.

Despite such conceptual drawbacks, scholars in the past quarter century have offered notable advancement in the study of lawyers across societies and cultures. The most ambitious and comprehensive project, if somewhat limited by its increasing age and the admitted lack of examples from Asian, African, and communist systems, remains Richard Abel's and Philip Lewis's *Lawyers in Society* (1988-1989). The editors helpfully structured appropriate questions in this field of study, and collated, from various contributors, informative chapters on the legal occupation in specific countries in the civil law and common law traditions. They then offered a synthesis and critique of the legal profession as a whole and its uneven mission of "professionalization," including issues cutting across borders, such as the role of women and minorities. This broader comparative theme was followed in a collection edited by John Barceló and Roger Cramton. Along with renewed attention by scholars who focused on specific examples and contexts, the field seems promising for further study, in part owing to the structure Abel and Lewis provided. To be sure, any such cross-cultural examination will continue

to have a definitional deficit, but observers are now in a better position to face that challenge and account for it as they expand the study of lawyers in society and across societies.

In this endeavor, scholars can learn much by studying what lawyers *do*. Recognizing that modern political and economic systems (as well as less formal social and cultural structures) differ greatly in their need for lawyers and the use they make of them, Abel and Lewis usefully catalogued the "repertoire of lawyer functions." They reduced the list to eight:

1. Lawyers provide knowledge about law to clients.

2. Lawyers provide clients with information about and contacts with influential people.

3. Lawyers speak for their clients and may in the process seek to restrain client speech and behavior.

4. Lawyers listen to clients with a sympathetic, realistic, or redirective ear.

5. Lawyers perform formulaic acts that trigger routine but essential or official legal results.

6. Lawyers construct narratives and shape what others believe or remember.

7. Lawyers transform client objectives and strategies.

8. Lawyers may intensify or moderate legal conflict and encourage compliance with or even evasion of law.

This overall functionalist strategy, Abel and Lewis noted, owed much to such American legal realists as Karl Llewellyn (1893-1962) and Willard Hurst (1910-1997), but remained an area for systematic inquiry. At bottom, they concluded, lawyers

essentially amplify or reduce inequality. In turn, the lawyer-client relationship shapes lawyer behavior and perceptions of reality and objectives.

Scholars over the past half century have exposed some of the particularized roles and functions lawyers take on, including influential studies of law in action which explored lawyering itself in important contexts. Austin Sarat and William Felstiner studied how lawyers in divorce cases control clients, negotiate with clients to redefine reality and shift power, and often mystify the law to promote objectives they believe to be realistic or even right. Lawyer autonomy in the divorce and custody context seems confirmed by observing the intricate attorney-client waltz in other systems, such as the Dutch practice of discouraging forms of visitation that lawyers believe, right or wrong, to promote animosity.

In the context of plaintiffs' personal injury representation in the United States, Douglas Rosenthal examined the common practice of lowering, or "cooling out," client expectations. This promotes faster settlement of cases in an ongoing law practice in which time is money for the lawyer, but presents a conflict of interest when the client would ultimately benefit from patience and going to trial. Any study of lawyer-client relationships and their attendant power negotiations necessarily draws on Abraham Blumberg's ground-breaking observation that much of daily law practice lies not in doing what a client commands but in discreetly controlling clients.

The overall inquiry is one offshoot of the more general trend toward studying law in action. It focuses on the specific contribution of the legal profession to shaping law and society. In white-collar criminal defense work, for example, the lawyer shapes the narrative in an attempt to control client speech and behavior, ultimately to prevent

prosecution, often by repeat players. In more general criminal defense cases in the United States, the lawyer may paternalistically prepare the client to plead guilty. In contrast, evidence suggests that in other systems, such as the Netherlands, defense lawyers may be more confident of the outcome and therefore more willing to roll the dice.

Similarly, landmark studies of law and society, rightly recognized for what they uncover generally about law in action, are often secondarily revealing for what they also specify about the lawyers' many roles, or about the way lawyers transform the real law in an area and are themselves transformed by law. For example, Stewart Macaulay famously demonstrated that the true law of contractual relations is less what contract law declares and more what businesspeople do on a daily basis. He later studied how lawyers in commercial matters may be impatient with client goals, attempt to lower client expectations, and have faith in the market and law not shared by consumers. Marc Galanter showed how the lawyer role is one part of the explanation why the "haves" stay ahead of the game, and David Luban showed how the attorney's role may be an "adversarial excuse" meant to rationalize unjust outcomes in the name of zealous representation of client interests.

Such scholarship, along with similar observations from other systems, has begun the important mission of studying the profession in action and emphasizing the "law" within the legal profession. The inquiry is a promising one, despite the inherent difficulties of cross-cultural comparison and the definitional disagreements that abound for the role of "lawyer." Future challenges include keeping up with the rapid changes in the professions worldwide, including the incursion of nonprofessional actors, as well as more study of less-known legal systems and their professionals, such as African and

Middle Eastern lawyers. Furthermore, scholars will increasingly study the development of legal practice and conceptualizations across borders, including the idea of a transnational lawyer able to work within and between systems without offending competing professional associations or vested notions of what constitutes law practice.

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