CREATIVE LAWYERING AND THE DYNAMICS OF BUSINESS REGULATION

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1. Lawyers and Lawyering, from Structure to Process.

The recent spate of work on the practice of business lawyering has begun belatedly to make up for the surprising neglect of the topic by sociologists of law, or social theorists generally. An important reason for the neglect of the consideration of lawyering as a process has been the predominance of structuralist perspectives in the sociological study of the legal profession. Furthermore, both theoretical perspectives and practical factors have led those sociologists who have attempted to analyse lawyer-client relations to concentrate on encounters with individual clients rather than the work of lawyers for business. The image of the lawyer as dealing essentially with the private problems of individual clients has become harder to maintain with the increased prominence, first in the US and then in many other countries, of the large, bureaucratized law firm specialising in commercial and business law (Galanter 1983; Galanter and Palay 1991), and the sharpening of the division between lawyers who serve corporate clients and those with a practice predominantly of individuals (Heinz and Laumann 1982).

1.1 Theories of the Professions.

The predominance of structuralism is noticeable, despite the continual flux of theoretical perspectives in this field over the past 20 years. The focus of sociologists, stemming from the study of the social role of professions and professionalism generally, has been on the control of specialized expertise. Initially the dominant viewpoint was functionalist, assuming the utility of specialized knowledge and of the ‘bargain’ by which society was said to grant professional groups self-regulatory autonomy. From the 1970s this came to be criticized as ignoring questions of power and the role of the state (M. Larson, 1977; P. Lewis in Abel and Lewis, 1989; Rueschemeyer 1983). Professionals such as lawyers were seen as trying to achieve status, prestige or power, on the basis of claims to specialized knowledge resulting from the mobilization of resources. A more complex picture was then further developed, which included the importance of other factors such as access to state power, and the need to consider the historically-specific conditions of development of particular societies (Luckham 1981). However, studies in the field became dominated by discussion of the thesis originated by Magali Larson and most forcefully put forward by Richard Abel which, in brief, argued that the legal profession has generally aimed to secure monopolistic markets for its specialized services by controlling the production both of and by the producers, or by seeking to create demand for these services (Abel, in Abel and Lewis 1989, vol. 3, ch.3). This argument was in turn criticized by studies showing that professionals often have little control over their markets or their clients (e.g. Paterson, in Abel, 1989 vol. 1)). While undoubtedly the profession tries to establish and maintain market control, such measures are often reactive, and it is not clear that market control is the source of the power or privilege of lawyers.

What is clear is that most of these discussions have tended to leave out any examination of the nature and process of lawyering itself. ¹ This lack was stressed in relation to the study of

¹. This was belatedly recognized by the inclusion in the massive 3-volume comparative study edited by Abel and Lewis of a final chapter called ‘Bringing the Law Back In’, which sketched some considerations for the study of lawyers’ work. However, this project did not include any actual studies or analyses of lawyering.
professions more generally by an important new work by Andrew Abbott, who pointed out that existing studies had talked "less about what professions do than about how they are organized to do it" (Abbott, 1988, p.1). For Abbott, the main difficulty with the prior concept of professionalization was its "focus on structure rather than work" (ibid. p.19). He defines professions loosely as "exclusive occupational groups applying somewhat abstract knowledge to particular cases" (ibid. p.8), and emphasizes that it is the control of the abstractions which generate the practical techniques that distinguishes professions from other occupational groups such as crafts, since "only a knowledge system governed by abstractions can redefine its problems and tasks, defend them from interlopers, and seize new problems" (p.9). Abbott provides an interesting analysis of professional work, organized around "the sequence of diagnosis, inference, and treatment [which] embodies the essential cultural logic of professional practice" (p.40); and he explores the relationship between professional practice and the academic knowledge which formalizes these skills and gives professionals cultural legitimacy by the essentially symbolic power with which it links those professional skills to major cultural values, usually those of rationality, logic and science (pp. 52-4). By starting from the characteristics of professional work, Abbott's approach redirects attention from the structural concerns of organization to the interaction between the competitive system of professions and their environment. However, he himself perhaps overemphasizes the structural character of the "system of professions", which he sees as essentially reacting to external forces which cause a competitive struggle over the reshaping of professional tasks (p.33), leaving little space for the dynamic role of professionals in helping to construct the social world.

1.2 Studies of Lawyering.

Despite the limitations of the general theories of professionalization, a handful of pioneering sociological studies have been made of the actual process of lawyering. In addition, others have put forward various analyses of the process, calling upon diverse types of evidence, including contemporary accounts both of the major exploits of big business lawyers and direct experience of its more routine aspects, as well as historians' reports of the role of lawyers in the creation of corporate capitalism based on studies of the archives of major law firms and memoirs of leading practitioners.

The issue that is posed by shifting the concern from structure to process is the nature of the 'transformation' that takes place in lawyer-client interaction (Felstiner, Abel, and Sarat 1980-1). Studies of lawyering generally agree that the lawyer's task is to convert the requirements

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2. The confidentiality of lawyer-client relations has been a serious barrier to access for a researcher, since an observation study requires initial cooperation from the lawyer and then permission from each client, entailing practical problems which may prevent a study taking place (Danet, 1979-80), as well as meaning that the interviews observed are likely to be a highly selective sample. Nevertheless, some observation studies have been carried out (Cain, 1979), Sarat (1986)). Research based on participant-observation has focussed less on the process of lawyer-client interactions and more generally on lawyers' strategies (Mann, 1985), Flood, 1991). An interesting study by K. Mann concerned a relatively small group of white-collar criminal defence attorneys in the Southern District of New York, and began with in-depth open-ended interviews, but was supplemented by participant observation, the researcher taking employment as an associate with one of the lawyers being studied (Mann 1985). Others have used their personal experience of law practice, focussing on a specific type of transaction for which documentation is available, e.g. Gilson's analysis of the role of lawyers in mergers and acquisitions focussing on the drafting of a corporate acquisition agreement: (Gilson, 1984).
of the client into legal solutions, and emphasize that this is by no means limited to litigation or dispute-settlement. But once the lawyer is recognized as 'gatekeeper to legal institutions and facilitator of a wide range of personal and economic transactions' (ibid. p.645), many issues arise as to the nature of the conversion or transformation that takes place between the client's concerns and the lawyer's solutions.

Some studies still see the lawyer-client relationship simply as a structured power relation, in which the extent to which the client can obtain the lawyer's specialized knowledge or skills depends on the client's wealth and other related factors, such as the likelihood of repeat business or other connections through this client, perhaps weighed against the lawyer's loyalties and ties to other actors (other clients, the opposing lawyer, etc). In this perspective, the lawyer as 'gatekeeper' to the legal realm is motivated mainly by financial reasons, but also social and cultural ties such as loyalty, in deciding whether and with what degree of assiduity to venture on behalf of the client into that realm to bring back the desired legal outcomes. Thus, Abraham Blumberg argued that important procedural rules laid down by courts as a protection for criminal defendants are in practice rendered nugatory because defence lawyers do not act as adversarial representatives on behalf of (mainly indigent) clients, but are 'bound in an organized system of complicity in which covert, informal breaches and evasions of due process are institutionalized, but denied to exist' (Blumberg, 1966-7 22); the strong ties of criminal defence lawyers to court personnel and their involvement in the unwritten rules and routines of the system mean that what they do is not really private practice but bureaucratic practice (Blumberg, 1966-7 31). Similarly, Stewart Macaulay argued that consumer protection legislation was ineffective, because he found that lawyers were generally reluctant to utilize legal provisions and procedures in a serious way, preferring conciliatory negotiation, since they regard consumer cases as unimportant as well as unlikely to generate lucrative repeat business (Macaulay, 1979). Although these studies focussed on the characteristics of lawyering in practice, they adopted a rather simple model of lawyer-client interaction, and reinforced the view of the lawyer as possessor of privileged knowledge.

A radically new approach was put forward by Maureen Cain, who rejected the perspective of social control by the lawyer of the client based on their positions in the social structure, emphasising instead the need to study lawyering as a specific practice, centering on lawyers' role as 'conceptive ideologists, who think, and therefore constitute the form of, the emergent relations of capitalist society' (Cain 1979, p.335). This was based on two central points. First, that lawyers act typically as agents for the bourgeoisie (in its various forms), and far from controlling their clients, they are often highly dependent on them, or at least must compete to offer services for which clients are willing to pay. Second, Cain focussed on the specific practice of lawyering as translation:

'Clients bring many issues to the solicitor, expressed and constituted in terms of a variety of everyday discourses. The lawyer translates these, and reconstitutes the issues in terms of a legal discourse which has trans-situational applicability. In this sense law is a meta-language. Its material significance, however, derives from the fact that it is also the workaday language for certain state authorized adjudicators.'

The combination of these two points provided an important new perspective, supported by the detailed accounts resulting from her pilot observational study.3 Cain's argument integrates

3 Regrettably, the importance of this study was not recognized, and funding for a full-length study was not forthcoming.
some elements emphasized in previous studies to help explain the relative dependencies in the lawyer-client relation, such as whether a client represents an important source of repeat business. However, an important new dimension was introduced by refocussing on the specific practice of lawyering as an ideological mediation and translation between the needs of the client, expressed in everyday discourse, and the specialized discourse of the law, which the lawyer also helps to create.

This perspective introduces a more differentiated approach to the analysis of lawyer-client interaction. First, it recognises that the conversion of the client's problem into legal terminology and the search for a legal solution which can be reconverted into an acceptable one in the client's world, is a common concern of both parties. Although the lawyer's professional expertise may entail some socio-psychological advantages in the immediate relationship (some lawyers may be able to browbeat some clients), this is not structurally determinative, for the lawyer must compete with others in the provision of this service. The question is, rather, the nature of the interaction between the realm of the law and that of 'everyday' social relations in which it is primarily the client who initially defines the problem.

Certainly, this entails a 'legal construction of the client', and the lawyer may take the lead in 'educating' the client as to the law's requirements. Sarat and Felstiner have provided a detailed micro-study illustrating how a client conference involves the 'construction of a legal picture of the client, a picture through which a self acceptable to the legal process is negotiated and validated' (Sarat and Felstiner 1986, 1980-1 p.116). They provide a valuable account of the way legal professionals behave as if it were natural to separate out those aspects of human behaviour with which the law is willing to deal, thus implicitly legitimating parts of human experience and contributing to the 'reification' characteristic of law (Gabel 1978). However, this begs the question of legitimation of the law itself. If the client has a readymade, practical, socially functioning self, whence comes the need for its legal reconstruction? If this need is considered to be externally imposed, as part of a social power-structure involving the state, how is it validated or legitimated, if it involves distortion of a previously-whole self?

It seems necessary to accept that the client's social self is constructed by intersecting social processes, of which legal discourse is one. After all, if a person has become a client it is by some sort of prior recognition that there is a legal dimension to the social circumstances in which the problem arises to which a solution is sought. Further, and this involves the second important aspect of Cain's argument, the lawyer carries out not only the translation of the client's problem into legal terms, but also (once a legal solution has been found) a retranslation back into the client's everyday discourse. Hence, the solution found in the legal realm must in turn be validated by successful interaction with the other social processes contributing to the social construction or reproduction of the client's self.

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4 Robert Gordon, in his important essay on the effects of the turn to corporate law practice on New York lawyers after 1870 argues that law itself entails a legitimizing ideology, by offering 'an artificial utopia of social harmony' (Gordon 1984, p.53); he argues that this universal vision was embodied in an Ideal of law practice, rooted in liberal individualism, which was undermined by the fragmentation of that order, a process to which lawyers contributed considerably, especially through their service of corporate power. This created a disjuncture between the old Ideal of the law and the practical tasks lawyers were called upon to perform on behalf of clients, which was only partly remedied by the attempt to reconstitute a new Progressive vision of the corporate lawyer, since the new synthesis was too liberal-reformist to be acceptable to clients and the courts.
1.3 Business Lawyering.

This point is more clearly brought out through consideration of business lawyering, for several reasons. First, it focusses on the client as an organization rather than an individual, thus de-emphasising the socio-psychological aspects of lawyer-client interaction. This brings more sharply into focus the point that both the skill of the lawyer, and the legitimation of the legal process generally, depend on the extent to which they make an effective contribution to the ensemble of processes interacting on the business enterprise. This has been very effectively analysed from an economic perspective, in particular by Ronald Gilson (Gilson 1984). From this point of view, it is clear that business enterprises will not resort to lawyers, nor request them to seek legal solutions, unless lawyering `adds value' to the business transaction in question. Gilson shows in detail, through an analysis of the drafting of the complex acquisition agreements common in (US) corporate mergers and acquisitions (M&A) practice, that the lawyer acts as a `transaction cost engineer', assisting the parties in pricing the transaction at the lowest cost. In other words, from the internal perspective of economics, the lawyer adds value to the transaction as a whole if transaction costs can be reduced or eliminated, for example by maximising the availability of relevant information to parties and guaranteeing its veracity, to assist the establishment of homogeneous expectations and thus a successful economic exchange. However, other professions (notably accountants and investment bankers) also perform broadly similar functions, so an economic analysis cannot explain the existence of a specifically legal function, although it may provide criteria for testing its efficiency. Interestingly, Gilson is driven to accept that the existence of such a specifically legal function in economic transacting cannot be shown by economic analysis, but depends on the existence and character of state regulation of such transactions (ibid. 296-8).

Gilson characterizes the role of `transaction cost engineer' as not a specifically or traditionally legal one, even when it entails the drafting of immensely lengthy and complex contracts, since 'when lawyers play this role well, the courts and formal law generally, shrink dramatically in importance' (p.294). However, one of the important points which results from the study of lawyering is that lawyers in practice engage in a wide variety of activities broadly concerned with the facilitation of transactions, and are not exclusively or even primarily concerned with litigation. In the UK for example, the bedrock of the market for solicitors' services even for individual clients has long been, and despite many changes still remains, house conveyancing and wills-and-probate; even the Bar, which defends its monopoly of rights of audience in the higher courts, relies for most of its work on drafting documents and opinions. Disputes and litigation are in any case better understood as the pathology of a regulatory system. This makes it all the more important to try to develop an analysis to help us understand whether there is any specifically or inherently legal function in facilitating economic and social transactions.

Hence, it is necessary to consider the characteristics of the private ordering which lawyers carry out for clients, and its relationship both to formal law and to the economic or social aspects of the client's transactions. Returning to Gilson's analysis of a corporate acquisition agreement, it seems clear that the need for a lengthy contract embodying a very detailed specification of the business being acquired results from low-trust factors in the relationship of the transacting parties: a corporate acquisition is usually a one-shot operation, and the potential gains from opportunism or cheating outweigh any long-term disadvantages, hence the need to juridify the
relationship. Of course, in a different social setting there might be far less need for detailed contracting. Indeed, the increased research into business lawyering in the US results partly from concern about the loss of competitiveness of US business especially in relation to Japan, and the accusation that the US system overinvests in nonproductive professional activity (particularly lawyering) while Japan concentrates on professions such as engineering, which make a positive contribution to production. Hence, it is said, not only does Japan have many fewer lawyers, but a typical business contract will not be thick and detailed, but rely essentially on a general good faith provision leaving any disagreements which may subsequently arise to be worked out by the parties. This comparison raises manifold considerations: perhaps Japan is a more homogeneous society where even business relations are less prone to opportunism; or perhaps the opportunism is constrained by other factors, notably a more stable (or even rigid) managerial system together with other factors (such as the role of the zaibatsu and keiretsu) which cement longer-term relationships between firms and the senior managers representing them, but which may also carry their own costs such as loss of entrepreneurial spirit (Gilson, 1984 pp. 307-312).

However, our concern in this paper is rather with the relationship of business lawyering to the forms and institutions of formal law. In particular, we want to explore the interaction between lawyering and the development of the regulatory forms in and through which corporate capitalism develops. This entails consideration of the extent to and ways in which lawyers themselves contribute to the creation and development of the legal forms regulating business.

2. The Indeterminacy of Legal Rules and Lawyering as a Social Practice.

The lawyer's specialized knowledge is of the more or less abstract and formalized rules which are the object and product of legal discourse; and it is the practising lawyer who acts as the mediator between this field of formal rules and the arena of economic and social relations inhabited by the client. The characterization of the legal sphere or field and of its relation to economic relations and social life more generally is a central concern of social theories of law. In this section we consider in what ways the study of lawyering as a social process can illuminate this central question.

We focus on the characterization of legal rules as unclear or indeterminate, and the role of lawyering in relation to that indeterminacy. One result of the increasing global competition in the field of professional legal services is a concern that lawyers may excessively exploit the loopholes and ambiguities of the law on behalf of clients, and that as a result 'creative compliance' with regulatory requirements may undermine the efficacity of regulation. This has been the subject of academic analysis (e.g. McBarnet, 1988; McBarnet and Whelan, 1991; Power, 1993), as well as broader political concern. Thus, in 1992 the Legal Risk Review Committee set up by the Bank of England proposed a number of measures to deal with difficulties that may be caused for London's financial markets by legal uncertainty. This was

5. Gilson additionally points out that the major law and accountancy firms involved also act as reputational intermediaries since, unlike the primary parties, they will expect future mutual dealings.

6. This was forcefully expressed in the Report of Derek Bok (himself formerly a business law teacher) as President to the Board of Harvard University, cited both in Gilson (1984) and by several of the contributors to the symposium on corporate law firms published in (1984) 34 Stanford Law Review.

due to concern caused by the losses to financial institutions following appeals court decisions holding that local authorities were acting outside their powers in engaging in `swap' transactions; although the Committee identified other problems of uncertainty in the regulation of dynamic and constantly changing markets (Bank of England, 1992a; 1992b). More broadly, however, there is concern that the globalization of financial markets means that traditional practices based on understandings among closed City networks are inevitably being replaced by a more juridified approach, and City of London regulators have shown themselves to be, at the least, unaccustomed to dealing with this environment, as evidenced by a string of `regulatory failures', such as the Guinness, BCCI, and Maxwell affairs.

However, the question of `compliance' with rules and `creativity' in relation to them involves some fundamental philosophical concerns. Thus, we must first consider the various ways in which this indeterminacy has been characterized in jurisprudence and in social theories of law.

2.1 The Indeterminacy Critique.

While there is considerable debate and controversy regarding the indeterminancy thesis, even some positivist theories accept that rules are not altogether certain. Indeed, it is central in the work of H.L.A. Hart that rules have a core and a penumbra. However, for Hart this indeterminancy is merely linguistic: his theory is based on a distinction between the core and penumbra meaning of words. There is a settled area, the core, in which the meaning of words (and therefore of rules) is uncontroversial, and a realm of uncertainty which is characterized as penumbra where there can be disagreement due to the vagueness of terms and the open-textured quality of language. In Hart's view, these disagreements can be resolved by reference to the settled core of meaning which limits the boundaries of all disputes over the meaning of a word or term.

The issue of the indeterminacy of law has been put most strongly by critical (CLS) and post-modernist legal scholars, although the origins of this perspective lie in Realist legal theory. These theorists argue that legal doctrine is internally contradictory, and as a result the legitimacy of legal decisions is suspect and the rule of law undermined. The antinomies, inconsistencies or contradictions of legal doctrine and legal reasoning mean, for some, that

8. In his exchange with Fuller, Hart argued that words have a settled core meaning, but that in cases where there is no core meaning the law is `incurably incomplete' and interpreters by discretion decide penumbral cases. Thus, he states, `If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbra cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do' (Hart 1958: 607-08). Thus, Hart's argument was that borderlines must be drawn, whereas Fuller argued that meaning is always tightly connected to the aim of the legal rule. Recently, Dennis Patterson has tried to reconcile the Hart/Fuller divide, arguing that while Hart is correct to draw hard lines in the law, Fuller is also correct in claiming that the line should be drawn based on the `settled context of use'. Hence, for Patterson, what counts is the formal element of the rule which makes the rule intelligible to an interpreter (Patterson 1990: 961-3). However, Patterson's perspective remains within linguistic philosophy, although emphasising a Wittgensteinian view of context.

9. The Realists attempted to show that formalism is an impossible project. For the most part, the Realists claimed that law is deeply subjective and contradictory and therefore a purely formal system is implausible to justify since it is rooted in the values and assumptions which it purports to exclude, viz., politics, morality etc. Several authors have pointed to the continuities between the Realists and CLS: see e.g. Brigham and Harrington 1989.
judges, by engaging in legislative decision-making, impermissibly usurp the role of the legislature and the efficacy of consent. For the most part, critical legal theorists, in their analysis of the indeterminacy of legal doctrine, attempt to demonstrate that the law is incoherent and contradictory and that there is no meta-principle or norm which is capable of reconstructing the unstable and highly contingent 'patchwork quilt' that comprises legal doctrine (Altman, 1986; for a critique of Altman see Balkin 1991: 1145-53). As a result, liberal-law is contradictory and there are no foundations for legal determinancy.

Thus, for CLS scholars, the indeterminacy critique is central to their attack on liberal-legalism and formalism. Formalism is based on the idea that law is a closed system which contains all the resources necessary to justify its actions. It is predicated on the claim that there is an internal principle of unity that structures and controls the legal system; thus, Kelsen (1967 p. 299) considers that the law regulates its own creation. Formalism has tended to support law's claims to objectivity, neutrality and consistency, because it implies that the mechanical application of legal rules provides a basis for constraining interpreters and justifying the values purportedly embodied in the rules. The radical critique aimed, by exposing the indeterminacy of rules, to show that the process of adjudication reflects and embodies deeper differences at the level of society. Thus, Duncan Kennedy, in his celebrated analysis of the difference between rules and standards in the context of contract and tort law, aimed to deconstruct the form of law and to show that rules tend to serve individualism while standards are consistent with altruist viewpoints (Kennedy, 1976).

By showing the struggle between two competing and opposed conceptions of doctrine, Kennedy attempted to show that there are both individualist and altruist arguments that might be employed by a judge in every legal decisions. Thus, for him, adjudication involves a choice between two competing political visions: self-reliance, as reflected in rule-like forms, and altruism, reflected in the resort to standard-like forms. The implication of Kennedy's analysis is that deep structures of cultural meaning ensure that individualist or altruist arguments will support their respective positions. Hence, his argument appears to depend on the view that there is a deep system of structures, in which the elements are defined in terms of difference, and that each vision is dependent upon the other and, at the same time denies its existence. The thrust of the indeterminancy critique is that it is impossible to generate principled, coherent doctrine.

From a different perspective, Unger offers a sociologically-informed critique of liberal-legalism which stresses the importance of the indeterminacy of both legal doctrine and social context.

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10 Ken Kress (1989) examines the work of Altman, Singer and Kennedy, to show that, like liberals, CLS theorists think that legal determinacy is necessary to ground consent: Kress argues there are other grounds to uphold just institutions.

11 Recently, Richard Posner has stated that formalism has three features: (1) a scientistic element which defines law in terms of a set of principles and a form of legal reasoning which produces certain outcomes; (2) a formalist element which is static and treats legal principles as if they were timeless and have no chronological ordering; and (3) a conceptual vision which separates life from law. While there are both natural law and positivist versions of formalism, Posner argues that the common thread is the view that one's conclusions follow from one's premises (Posner 1990: 15-16). For a critique see Fish 1990: 1458-59.

Unlike the indeterminacy critique advanced by Duncan Kennedy, which posits an irreducible conflict between world-views, expressed in the divergence between rules and standards, Unger's theory rejects structuralism; he opens up the possibility of social-structural change, accepting that there is no constant human nature. For Unger the law is contradictory and indeterminate because the liberal forms cannot be maintained as a result of the transformation of the state into a modern regulatory state. Unger argues that the breakdown of the 19th century liberal legal order, and the transition to the regulatory law of the welfare state, leaves the law caught in a contradictory logic: on the one hand, the political requirements of the welfare state have been absorbed into the law in terms of goals and purposes which are realized through administrative discretion; and, on the other hand, the classical private rights complex functions with different techniques to penetrate the community to accommodate the institutional framework of society. The introduction of social welfare law subverts the formal qualities of classical law (symmetry, certainty, generality, etc.). This combination produces an inability to balance the political demands for results with the classical formalist requirements of the rule of law model. For Unger, paradoxically, the private rights complex originally represented one side of an earlier institutional compromise, one which involved the state granting the elite more control over land, labour and wealth in exchange for allowing the state to develop an administrative system based on taxation and war. Unger's hypothesis is that the origin of the private rights complex is based on a different vision of society from the principles and aspirations embodied in the present system.

The indeterminacy thesis advanced by Unger suggests that an alternative vision of society can be worked out from the implications of indeterminacy, which he defines in terms of conventions and context being indeterminate and the dislocation of objectivity from representation in language. Locating the transformative potential in the notion of `negative capability', Unger maintains that it is our capacity to break through a specific context of action which presents the possibility for us to reappropriate the alienated political and economic spheres and, at the same time, guarantees the possibility of personal transformation and freedom. Unger insists that the formative institutional context can be transformed through an exercise in deviationist doctrine which involves drawing out the alternative legal vision of the private rights complex in order to demonstrate that certain elements were embedded in deviant forms in past legal arrangements and that these counter-forms avoided instability and, as a result, form the basis of a transformed social institution. However, Unger's deviationist doctrine, and the subversive potential in exploiting contradictions that might shatter the liberal legal order, is limited by the fact that it relies upon the existing norms and ideals in society as the basis for social-structural change.  

The concern of all these theorists focuses on how indeterminacy affects the authoritative decision-maker, usually the judge. There is little or no consideration of the way in which the characteristics of legal rules affect the social behaviour of legal subjects, nor for how this is mediated by lawyers, whose prime role it is to adapt and develop the forms of legal rules and concepts to the social transactions of their clients. We argue that it is important to integrate some of these considerations regarding the indeterminacy of rules with the recent sociological

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13 For the most part, Unger's deviationist doctrine is perceived as the least threatening, and hence most attractive, version of indeterminacy critique, since it provides a foundation for the legitimacy of law within certain aspects of the present normative order (Collins 1987). For a view that Unger is actually a deconstructionist, see Jack Balkin (1990: 1688 n. 55, 1689 & n. 57).
perspectives which emphasize the social structures and function of competitive professions in exploiting paradoxes and inconsistencies in law.

2.2 The Reality Paradox and Systems Theory.

Indeed this point has been advanced, albeit from a different perspective, by Teubner, who argues that the problem with the radical critique offered by critical legal studies scholars is that it "is not radical enough" (Teubner, 1990 p. 404). The general doctrine of indeterminism, as developed by critical legal studies scholars, focuses only on superstructural phenomena, such as legal norms, doctrine, institutions and decision-making, and, as a result, fails to expose the deeper point that law itself is based on a fundamental paradox. The paradox of legality is that, in order for law to be determinate, it must be grounded in some super-norm. The problem for the rule of law is not to locate a ground (or foundation) of law, since there is no grounding, but rather to suppress the fact that we can generate paradoxical situations, and can accept contradictory opinions as being both right and wrong, which unmasks the disturbing reality that we must invent excuses in order to give authoritative answers. For Teubner, the work of law is to accept paradox, and that reality is paradoxical. The intuition here is that we are always-already embedded in a paradoxical world and it would be itself deeply paradoxical to attempt to locate or construct a de-paradoxical reality. Thus, the best way to avoid the perversion of paradox is to suppress the fact that law is founded on originary violence or power.

For Teubner, legal decisions are not based on any super-norm of justice; the system merely sorts claims on the basis of a simple binary code, legal-illegal. The simple process of differentiating legal from illegal acts necessarily involves the suppression of the paradox of self-reference. That is, the judge must suppress the truth that there is no right or wrong, in order to follow the dictate of the binary code that a wrong be constructed. The proper role for the interpreter is to avoid the problem of locating a transcendental ground for law. The fact that the legal system is able to process these demands routinely, and without creating legitimation problems in every instance, is what makes it function.

Teubner argues that the function of contemporary theory is not to offer a general account of legal contradiction or paradox. No such theory is possible since there are no practical solutions to the fundamental indeterminacy of law. For Teubner, the proper task for the radical indeterminacy critique is to extend it to understand that there are classes of legal indeterminacy which arise from other sources than the paradox of the legal system. Teubner understands the emergence of the new indeterminacy as being instantiated in balancing tests, the increased propensity to employ general clauses in contracts, and the emergence of sociological and economic-based jurisprudence (Teubner, 1990 p. 410). For Teubner, the relevant theoretical perspective for extending the indeterminacy critique is autopoietic theory, since the problem of indeterminacy is important at the level of system's own communicative

\[14\] Teubner, following Luhmann, argues that the legal system has no foundation and that paradox, self-reference, indeterminacy etc., are part and parcel of the operation of the legal system (Teubner 1990: 408-09). Hence, paradox can be grasped by a theory which contends that reality has a circular structure and there is no insight gained from attempting to seek solutions by avoiding paradox.

\[15\] Interestingly, Luhmann and Derrida both refer to Walter Benjamin's classic essay, 'Zur Kritik der Gewalt' to support their claim that 'there is no such right above right and wrong, no such superright' (Luhmann 1988b, p. 154; Derrida 1990).
contexts. In this regard, Teubner, unlike critical legal studies theorists, attempts to ground the indeterminacy analysis at the level of real operations within society. For Teubner, indeterminacy is created when a communication subsystem adapts to another system's self-description. Indeterminacy is a function of the interaction of autonomous but overlapping communicative contexts; while the internal codes which ensure self-reproduction remain intact, the interference that results creates conflict between the system and operation of its environment, and the influence of the environment within the system.

Teubner views the legal system not as a coherent whole, but a series of self-enclosed sub-systems reflecting the functional differentiation of society; thus, conceptual and normative conflicts between the sub-systems are unavoidable. It is the very indeterminacy of legal principles, such as general clauses in contracts, that provides the mechanism for reconciling the conflictual logics of sub-systems. The high degree of flexibility manifested in these clauses, for example `good faith' clauses, provides an efficient mechanism for reconciling the legal disputes between the various sub-systems (Teubner, 1990). Diverse social demands and conflicts, resulting also in state intervention, produce the materialization in private law of general clauses, which provide the legal means for coordinating contradictory social demands. Unlike critical legal scholars, Teubner concludes that legal indeterminacy is a functional mechanism which ameliorates the disabling effects of the paradox that there is no foundation for law. That is, the legal system is capable of creating internal mechanisms which stabilise the intersystemic conflicts, through the recursive self-generation of `eigenvalues' which creates the potential of social regulation through law (Teubner, 1990 pp. 408-409, 420-425; see also Teubner, 1992).

However, the systems theory approach concerning indeterminacy is problematic in several respects. While indeterminacy is clearly a prominent feature of regulatory systems, this does not mean that reality itself is inherently paradoxical. Zolo argues that `[a]ttributing to "reality" a circular structure not dependent on (the circularity of) knowledge amounts to violating the premise of the circular and "closed" nature of the cognitive process' (Zolo, 1991 p. 77). As regards the claim that law is a closed system - closed off from external sources and capable of reproducing its own operations through its own structures - the basic question is whether autopoietic systems are indeed self-regulating. To suppose that reflexive autopoietic structuring can obtain stability suggests, as Frankenberg has argued, the emergence of an invisible hand which operates to produce stability and order from chaos (Frankenberg, 1989 p. 382). According to Frankenberg, systems theory, by employing the concepts of structural coupling and interference, creates the possibility of reforming self-contained systems. The problem is that Luhmann and Teubner, on the one hand wish to enclose the legal system, but on the other hand insist that it be sufficiently open to different operating principles in order to create the conditions for internal reconstruction. Nevertheless, despite the limitations of systems theory, the attempt to locate indeterminacy within the material realm constitutes in some ways an advance over critical legal studies' formulations.


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16. Teubner acknowledges that the recursivity of the legal system creates a problem for societal regulation. Briefly, the problem is that external intervention within the legal system creates a regulatory trilemma: i.e., regulation creates disintegration (institutional death); is irrelevant; or corrodes the social sphere (see Teubner 1987, p. 21).
A sophisticated post-structuralist sociological approach is provided by the work of Pierre Bourdieu. For Bourdieu the autonomy of law results from the competitive struggle of lawyers to assert their influence in the social system by asserting the right to declare or state the law. Thus, lawyers generate the abstract and formal principles characteristic of legal norms and doctrines, and their special knowledge of these principles, and skill in operating the distinctive linguistic processes of the law, guarantee both the autonomy of the legal field and the monopoly of lawyers’ access to it.

The body of legal doctrine is, for Bourdieu, a symbolic order which at any particular moment delimits what is possible; although legal doctrine appears, due to its autonomy and its abstract and formal nature, to be a closed and coherent system which generates outcomes from its own internal logic, it does not, according to him, possess the principles of its own dynamic. Both this dynamic, and the conditions of existence of legal reasoning, derive from the operation of the objective relations between agents and of the institutions of the legal field. Thus, the legal text is the focus of struggles because its interpretation is a means of appropriating and influencing the symbolic power which it contains; however, this is not a closed hermeneutics, since the interpretation of legal texts must have a practical effect. Although jurists can put forward competing interpretations, they must operate within the hierarchy both of institutions and norm-sources which defines the authority of legal decisions.17 At the same time, the competition between interpreters in putting forward their versions and developments of legal doctrine is limited by the necessity of presenting them as rational interpretations of recognized texts. Bourdieu describes the ways in which the two major effects of neutralization and universalization are produced by the characteristic linguistic procedures of law, such as the use of passive constructions and impersonal phrases; far from being a simple ideological mask, this rhetoric is the result of the continual process of rationalization which has over centuries constituted the universalising posture which is the spirit of law.

While Bourdieu provides a very strong explanation of how the legal sphere is constructed, he is much less clear on why abstract formal rules play such an important part in the reproduction of social relations. He presents a very Weberian view that legal rationality offers predictability and calculability (Bourdieu, 1987 p. 833). Yet Bourdieu himself accepts the Legal Realist critique that rules can never be merely applied to new cases, and that texts ‘can go so far as complete indeterminacy or ambiguity’ (ibid. p. 827). For him, it is this indeterminacy which gives not only judges, but more importantly the various groups of competing legal professionals, the power to explore and exploit it by using their resources and techniques to generate alternative rules which they can wield as symbolic weapons. If the promise of consistency and predictability offered by the formal-rational nature of the legal universe is illusory, whence comes its legitimacy?

For Bourdieu the power of law seems to derive from the effectiveness of legal symbols in giving the ‘seal of universality’ to social practices (ibid. p. 845). Legitimacy is imposed in the social order through symbolic domination. In explaining how the promise of predictability is

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17. Also, the juridical field has its own rules and conventions which must be accepted by all participants. Its fundamental principle is that all conflicts must be resolved juridically; beyond this, the three main requirements, Bourdieu says, are (1) that decisions are binary (e.g. guilty/not guilty), (2) claims must be couched in the procedural terms which have become historically accepted, and (3) precedents are authoritative (Bourdieu 1987: 832).
fulfilled, Bourdieu again emphasizes the social practices of professionals. Here he introduces his key concept of the `habitus':

`the juridical field tends to operate like an "apparatus" to the extent that the cohesion of the freely orchestrated habitus of legal interpreters is strengthened by the discipline of a hierarchized body of professionals who employ a set of established procedures' (ibid pp. 818-9).

The habitus is defined as `the system of dispositions to a certain practice ... an objective basis for the regulation of behaviour, and thus for the regularity of modes of practice, and if practices can be predicted ... this is because the effect of the habitus is that agents who are equipped with it will behave in a certain way in certain circumstances' (Bourdieu, 1990 p. 77). Note that the habitus, which is constituted by second-order objective structures, is the repository for the strategies of distinction which various actors employ in their struggles with and against other actors within the autonomous field.18 Serving as the mediation between external structures and action, the habitus `est creator, inventif, mais dans les limites de ses structures' (Wacquant, in Bourdieu, 1992 p. 26).

Thus, the repertoire of behaviour is structured and limited by the habitus, although it permits a range of creative invention which obeys a practical logic. Bourdieu argues that the notions of the field and of habitus must be understood as interactive concepts in order to avoid the twin charges of determinism and functionalism (e.g. Bourdieu, 1992 pp. 102-115). Thus, he states that the habitus becomes active only in relation to the field and that the habitus may generate a different trajectory of strategies depending on the state of the field (Bourdieu, 1990 pp. 116-119). However, it has been argued that Bourdieu presents an `unrealistically unified and totalized concept of habitus, which he conceptualizes as a vast series of strictly homologous structures encompassing all of social experience' (Sewell 1992: 16). The habitus, which is responsible for the social dispositions of agents and for framing the range of possible actions has a strong conservative bias. This rather static concept is unable to explain how change occurs internally to itself. Thus, Sewell argues `Bourdieu's habitus retains precisely the agent-proof quality that the concept of the duality of structure is supposed to overcome' (Sewell 1992, p. 15). Bourdieu's requirement that these structures are all homologous is far too demanding, because society is not so cohesive and there is a range of competing and overlapping structures. Hence, a more dynamic account of change would loosen the strict requirement for homology between the symbolic struggles within the juridical field and the political and economic transformations occurring outside it.19

18 Bourdieu states: `Between the system of objective regularities and the system of directly observable conducts a mediation always intervenes which is nothing else but the habitus, geometrical locus of determinisms and of individual determinations, of calculable probabilities and of lived-through hopes, of objective future and subjective plans. Thus, the habitus of class as a system of organic and mental dispositions, of unconscious schemes of thought, perception and action is what allows the generations, with the well-founded illusion of the creation of unforeseeable novelty or of free improvization, of all thoughts, all perceptions and actions in conformity with objective realities, because it has itself been generated within and by conditions objectively defined by these regularities' (Bourdieu 1968, p. 706).

19 To take a contemporary example, Dezalay argues that the internationalization of capital and the deregulation of financial markets in the 1980s have stimulated a response by the most powerful players in the legal field (Dezalay 1992). The new technological developments, and the movement of firms across jurisdictions, is linked to the relative position of each group of lawyers in the juridical field, and their ability
Within the juridical field, Bourdieu argues that it is the legal scholars and theorists who generate the formal abstractions whose universalising tendency is the source of the symbolic power of law. Judicial interpretation adapts these general rules to particular cases. But above all, Bourdieu emphasizes the role of competing groups of practising lawyers and other professionals, who mediate the application and development of formal rules to social practices and reality, by marshalling varying degrees of technical skill and social influence.

For Bourdieu the indeterminate nature of legal rules is central, since it is the source of the power of professionals as mediators between the realm of formal law and the economic and social practices of their clients. Bourdieu's focus on the practices of competing professional groups, with varying degrees of skill and symbolic capital, provides a very different perspective from that of critical legal scholars. As Coombe has argued, Bourdieu's position avoids the problem of essentialism which besets the structuralist theory offered by Kennedy, and by interpreting the legal field in terms of conflicting struggles among competing legal actors, Bourdieu achieves a dynamic notion of legal practice; one that is defined in terms of the social dispositions and norms of the competitors which are shaped and structured by struggle (Coombe 1989, pp. 103-111). Bourdieu's theory of the juridical field constitutes an advance on the views advanced by critical legal studies because he examines the practices and dispositions of habitus and explains them in terms of the objective elements of social life. Bourdieu clearly understands that the juridical field shapes and structures the dispositions of legal actors and that legal rules are predictable largely as a result of the homogeneity of the habitus. Thus, the law is determinate to the extent that diverse groups within the juridical field accept the legal conventions. In this respect, Bourdieu offers a theory of legal constraint based on the cultural practices that shape the legal habitus (cf Balkin 1991, pp. 1149-53).

Bourdieu acknowledges that Luhmann's notion of self-reproduction of a sub-system is superficially similar to his own concept of the autonomy of fields (Bourdieu 1992, p. 79), in that differentiation and autonomization are central to the respective approaches. However, he parts company with systems theory by rejecting its functionalism and organicism. Bourdieu considers that Luhmann makes a simple category mistake by confusing the symbolic domain with the social field in which it is reproduced. Bourdieu's claim is that the juridical field is only potentially autonomous since on the one hand it is structured and shaped by its own norms and practices, but on the other hand it is influenced by social, cultural and economic forces outside it. In this regard, Bourdieu's account, unlike systems theory, is capable of explaining how legal actors are affected by extra-legal forces and how struggles outside the juridical field are refracted into the field. While we have seen that Luhmann and Teubner see law as a closed system which is in contact with the external environments, but only learns and re-structures to obtain sufficient resources to create new devices for exploitation by their clients. This appears to function as a structural explanation, without sufficient regard either for the improvisational activities of lawyers, which help to mediate the social conflicts, or for the structurally complex role of states.

20. In certain respects, Bourdieu is influenced by Wittgenstein's work on rules, although he often says that the reality of practices is a richer source for understanding the social fields (e.g. Bourdieu 1990, pp. 59-75). We believe that Bourdieu's notion of indeterminacy is broadly consistent with the community consensus reading of Wittgenstein since it looks to the social-cultural features of rule-following over the internal, grammatical aspects (Bourdieu 1986, p. 826).

21. Elster has argued that Bourdieu's symbolic theory also has functional explanation at its core (Elster 1983, p. 105- 6); but see Bourdieu 1990, p. 106-119.
from perturbations produced within the system, Bourdieu's notion of the autonomous field requires a social process of intermediation in the confrontation of texts and procedures with the social realities that they are supposed to express or regulate (Bourdieu 1987).

Bourdieu's theory of the legal field offers an important approach for understanding indeterminacy since it accounts for regularity and predictability in legal doctrine largely in relation to the social structures which constrain and structure legal rules and their application. Bourdieu's approach avoids the structuralism of certain critical legal studies approaches while at the same time it does not reify the legal system or suppress the importance of possible external sources of critique.

2.4 Beyond Bourdieu

Bourdieu provides a powerful account both of the characteristics of legal reasoning and of the conditions and processes of its production, which goes a long way towards an explanation avoiding the dilemma between idealism and economism. However, we would like to indicate what we consider to be weak points in the argument, and develop the analysis in the context of the study of business lawyering. The central problem is with Bourdieu's account of juridification and of the relation of the lay person and of social `reality' to the legal field. His claim is that this relationship is structural, in that the process which he identifies as the main dynamic of autonomization of the legal sphere is the `spontaneous logic of competition' between agents asserting specific competences. We argue that Bourdieu over-stresses the role of the professional in the autonomization of the legal field, and under-emphasizes the social need for law and the contribution that law makes in the reproduction of social reality.

In Bourdieu's account, the world-view of order offered by law is powerful yet illusory. The social power of legal professionals derives from their ability to create a demand for their services by offering a world-view of an order based on universal norms and the neutralization of particularisms, and in transforming irreconcilable conflicts of interest into an appearance of exchanges between equal subjects regulated by rational argument between independent professionals before a neutral arbiter. But the offer is a spurious one. First, the capacity to perceive an incident as an injustice, which is the source of the demand for law, is not `natural', but the result of a construction of social reality mainly by professionals generating the feeling of entitlement, the revelation of rights (Bourdieu 1987, p. 833). Secondly, the elasticity and ambiguity of legal texts means that judicial decisions involve an element of choice which is either arbitrary or derives its content externally, from the social or economic preferences of the judge. The conformity of decisions with the system of abstract rules is essentially an ideological matter, reinforcing the symbolic power of the legal sphere, which is exerted by the social acceptance of the decision as legitimate despite its arbitrariness. The practical efficacy of a legal decision, for Bourdieu, rests in its applicability in the everyday realm where the matter originated. This double function of law produces two poles around which the types of lawyer coalesce: on the one hand, the theoreticians, whose role is the elaboration of pure doctrine, and on the other the practitioners,  who take care of the necessary adjustment of pure principles to social reality and for whom the interpretation of law must be evaluated by its applicability to the particular case.

To begin with, an empirical objection can be made, that this distinction in roles appears based on the continental European tradition, in which judges or magistrates tend to decide on the basis of the practicalities of the situation, while academic lawyers are the guardians of the purity of doctrine. In contrast, in the common law tradition, particularly in English law, it is
the judiciary which tends to emphasize legal autonomy, especially from politics, and the importance of basing decisions on doctrinal exegesis, whereas academics often criticize their judgments for failing to take into account social ‘reality’ or practical implications. However, the existence of two ‘poles’, of pure and practical law, is a structural requirement according to this theory, hence it is not of major concern which particular group carries out either function.

A more fundamental difficulty is that, in identifying power with the control of access to legal resources, Bourdieu treats control as concerned exclusively with the ability of certain social agents to appropriate conflict. In contrast, an examination of situations in which social actors actually do invest resources to improve their access to the legal sphere shows that by doing so they do not challenge the autonomy of law, although they may increase their control over lawyers. Though members of the dominated classes generally have low access to law, they can in some circumstances become specialized in aspects of concern to them: for example, in the case of ‘jailhouse lawyers’ who develop specific skills in the filing of appeal petitions and other procedures (Milovanovic 1988). More central to our concern with business lawyering is the growth of in-house corporate law departments, which permit a large firm to internalize routine legal aspects of its transactions and create a better basis for it to evaluate and control its external legal contracts (Chayes and Chayes 1984). To be sure, it can be said from a Bourdieuan perspective that this ‘competition’ from the periphery of the legal field merely pressurizes independent lawyers to invest further in legal autonomy and rationality. Our point however is that such investment must show an economic return and cannot be based on a merely ideological power. Large corporations, especially when they have their own in-house counsel and are dealing with others similarly situated, do not resort to outside lawyers only due to acceptance of the ideology of professional autonomy. The in-house counsel movement has certainly had a strong disciplinary effect on the legal profession in the US, and probably does so also in other countries, e.g. Germany where bank lawyers play an important part in business lawyering (Hartmann, 1991). In the US the evidence is that internalization of legal services was part of the general trend of pressures on corporate management from capital markets to reduce costs, with the end of the era of uninterrupted corporate growth. Internalization reduced the costs of much routine work and capped expenditure on some outside work, notably litigation, but stimulated new areas of work for the independent firm, in specialized transactions, regulatory work and the breakdown of business relationships (Chayes and Chayes 1984). This has led to the emergence of new ‘boutique’ firms and undermined the old general-purpose commercial law practice, creating new tensions between the professional ideal and the increasingly bureaucratic organization of the elite law firm (Nelson 1988).

Both the example of the jailhouse lawyer and the corporate in-house counsel show that the client is not structurally excluded from the legal field, but can develop independent legal

22. These differences caused similar difficulties for Weber’s theory of legal formalism, the famous ‘England problem’. Bourdieu himself argues that the French and German ‘Professorenrecht’ is based on the primacy of doctrine over procedure, whereas the Anglo-Saxon case-law system emphasizes procedural fairness and aims for a solution to the particular case without much concern for its basis in a moral or scientific rationality; this distinction he sees as rooted in the greater importance of practice both in legal training and in the recruitment of judges (Bourdieu 1977, p. 822). The argument is further developed by Dezalay ([Dezalay, 1986]), who argues that the theoreticians of pure law have a stranglehold over the reproduction of law, which they codify and rationalize on the pretext of drawing out general and abstract rules by purifying them of ordinary language, dispossessing and downgrading practitioners, a picture which does not easily fit the common-law world.
expertise, either where it is economic to do so, or where there may be another gain, for example in social prestige (e.g. in the jail). Bourdieu's account offers a distorted characterization of the power of the juridical field to exclude lay persons. In our view it is necessary to accept that, since social relations are reproduced partly through law, social actors are always-already (partly) within the juridical field; but they possess varying degrees of skills, time, resources and inclination to monitor the legal professional.

For Bourdieu, the main effect and purpose of creation of the legal space is to secure a monopoly for lawyers, who have invested in the acquisition and the generation of the specialized knowledge and techniques, and to exclude the lay person, whose everyday, commonsense understanding is confronted by a sharply different mental universe. Largely a by-product of this alchemy is the neutralization effect, in which irreconcilable conflicts of interest are transformed into regulated and rational arguments between equal subjects or parties. This embodies a vision of social order, backed by state powers and sanctions, which by its symbolic force consecrates and helps to create the social world. Its force is symbolic, in that it can only be effective if it is accepted even by those whom it dispossesses. In Bourdieu's account there is a dual basis for this effectiveness. On the one hand it is is essentially ideological, in that the vision of order projected by law, which is a universalist one transcending particularisms, is merely a deception since its pure principles must be adjusted to reality by arbitrary or political judgments. On the other hand, he accepts that there is a social reality to the symbolic efficacity of 'formal rational' law, and that it does provide predictability and calculability, as argued by Weber. However, these features of the formal rigour of law are only available to those who can gain access to the specialized realm of pure law.

Hence, the powerful reinforce their positions through law in two ways. First, because the judges and others with legal competence come from the same social strata and share their ethical and political dispositions, their interests are more likely to be reflected in the process of adjustment of pure law to social reality. But second, to the extent that pure law can offer a realm of formal rationality, access to these advantages is the privilege of those who can purchase legal advice. Although a shift in the balance of social forces in favour of dominated groups can produce a differentiation in the legal sphere, by the introduction of consumer law, labour law, and social law more generally (with an emphasis on public law and the creation of special tribunals as against the general civil courts), this is essentially integrative. For Bourdieu, law is essentially conservative; although he says law creates the social world, it does so on the basis of existing structures, since its effectiveness depends mainly on its being adjusted to those existing structures. A creative or prophetic vision is possible, especially in periods of revolutionary crisis, but generally even a creative vision of law can only consecrate a process which is under way. Hence a critique of law, and the generation of a basis for social change, must be sought outside it. So for Bourdieu, as for many other sociologists of law, law is internally coherent and in its own terms rational; the problem lies with restricted access. His position is on the radical wing, in that the implications of his position are not that access should be improved but that law should be abolished.

We argue that Bourdieu's picture of the realm of law can be brought into a different focus, with different implications, by accepting that the legal sphere plays its part in the reproduction of social reality by interactions with other equally fetishized spheres, notably the economic realm, which is mediated by money. To the extent that the legal sphere contributes to the reproduction of social relations it has a functional and not merely illusory role; however, there are deep structural contradictions in this role, a distorted reflection of the broader social
contradictions. The process of abstraction by which legal reasoning produces and elaborates formal legal rules results in norms which purport to regulate social conduct; as Bourdieu correctly points out, their abstract nature entails indeterminacy, since they can only receive substantive content by interaction with other social spheres. Nevertheless, this indeterminacy is functional, in that it provides the flexibility and adaptability which permits law to contribute to the dynamic of social change. We do not say that this is necessarily a positive or ameliorative dynamic; simply that social change is generated partly through law, and hence that lawyers can play a creative or contributory role in such change.

4. The Regulatory Process and the Dynamic of Business Lawyering

In this section we pull together some of the points made until now, and sketch out a framework for the analysis of business regulation and lawyering, which will be applied in the final section to the specific example of the regulation of financial market transactions and the prohibition of insider trading.

Markets cannot exist without rules, and the regulation of market transactions takes place through layers of rules, formal and informal. Rules emerge through the need to mediate economic transactions by reference to a framework of generally understood and articulated expectations about behaviour and conduct. Regulation is essential to the operation of any system of social organization; but the generalization of social relations mediated by commodity circulation resulted in the autonomization of the state, which legitimizes the definition and allocation of property rights, and ultimately guarantees the enforcement of those rights and their circulation. It is the combination of economic relations mediated by markets, and political processes dominated by the state, through which social relations are reproduced. That combination is mediated primarily by money and by law.

This is not an automatic process, nor one that flows logically from the development of economic and social relations. Hence, it is important to understand the ways in which the forms taken by social and economic activities have developed historically, and the role that regulation has played in that development. There is no space here to give more than a brief indication of the main phases of development of the regulatory frameworks which have helped mould the institutional and transactional patterns of corporate capitalism. The key formative period of 1865-1914, between the American Civil War and the first Great War, was marked by the great depression of the late 1870s and early 1880s, which stimulated the concentration of capital and the establishment of the first large-scale major companies. During this period, the leading capitalist countries established the basic legal framework for the institutionalization of corporate capital, through the liberalization of the right to incorporation and of the main institutions of property ownership and transfer, including industrial and intellectual property rights. Although there was significant international discussion and debate, and cross-jurisdictional transplantation and emulation, there were significant national divergences. Notably, while the US, during the `progressive era' evolved a liberal `regulated corporatism' (see e.g. Sklar 1988), elsewhere the state played a more direct role: in Germany, within a formalized framework, which included state-supervised cartels, whereas in the UK the longer history of the centralized state and greater homogeneity of its ruling groups permitted much more informal supervision of business and industry. These patterns were generally further consolidated during the 1930s, following the crash of 1929, notably with a significant revamping of the US regulatory arrangements during successive Roosevelt administrations, especially the establishment of the Securities and Exchange Commission in 1933-4, and the
revitalization of antitrust law enforcement after 1937. After 1945, American influence led to some regulatory transplantation, especially of antitrust laws (e.g. to Japan and Germany), but as the postwar boom gathered momentum after the end of the Korean War, the regulation of the institutions, structures, practices, and transactions of business was of relatively small concern. The period since the mid-1960s has seen a trend towards formalization or juridification of business regulation in many fields. It has also been marked by international conflicts of regulation, resulting from the application of national regulation to increasingly internationalized business (Picciotto 1983). Finally, during the 1980s, although there has been a significant process of national deregulation, it has been accompanied by equally important patterns of and attempts at re-regulation, to establish internationally-coordinated controls over global business.

From this brief outline it should be clear that the development of regulation takes place in response to both political and economic processes. While major events, such as war or depression, have broad political repercussions and often lead to radical changes in regulatory forms, the continual operation of economic and political processes also produces changes, generally at the micro-level. A key feature of legal regulation within capitalist market economies generally is that they aim to produce and maintain equalization of the conditions of competition: hence their basic ideal or feature is equal treatment or rule-fairness in relation to similarly-situated economic actors. However, competition is not a static state but a process. Furthermore, economic actors are quite different in their factor endowments, market power and sunk investments, so rules affect them differently. Moreover, the very operation of a regulatory system produces inequalities resulting from competitive advantage. Hence, an important function of the process of interpretation, application and enforcement of rules is to resolve the persistent antinomies resulting from rule-structured market transactions. For that reason, a regulatory system by nature is not a static but a continually evolving and dynamic process. The interpretation involved in the application of rules to specific transactions generates modification, supplementation and amendment.

A key role in this process is played by the private lawyer whose job is to structure a client’s business strategies and transactions to optimal advantage in relation to the regulatory framework. This often involves routine ‘compliance’ work, ensuring that transactions conform to the bureaucratic formalities of the regulatory arrangements, or are kept within the accepted understandings of the regular players. Not infrequently however, often in small and sometimes in major ways, the lawyer may play a ‘creative’ role. This may entail, for example, achieving an economic objective desired by the client, which is impeded by a regulatory obstacle, by devising a new legal means; or the lawyer may find significant cost-savings for a client by new ways of structuring a transaction, by creating new legal forms or adapting existing ones to new ends. Such creativity can lead to the development of major new legal and institutional forms (e.g the holding company), as devices become generalized through competitive legal practice. However, legal ‘creativity’ raises constant ethical, political and economic (as well as legal) issues, as it probes the limits of the existing regulatory patterns.

The problem of regulatory compliance is the chief concern for state officials. As we have seen, legal theorists and economists have addressed the problem of rule avoidance and compliance in terms of the conflict between rules and their interpretation. Until recently, regulatory theorists assumed that legal rules were common knowledge and that there were static incentives for compliance. The static rule framework was based on the view that legal rules were fixed and assertable and that parties self-select, given their preferences, to follow
the rule. As we have noted above, modern legal theory has pointed out that legal rules are moderately indeterminate, and that the uncertainty in legal rules results from the competitive struggle to define the rule and the fact that interpreters can, within certain boundaries, select an interpretation. In this perspective, legal rules are the result of interpretations of regulators and judges who justify their decisions with the aid of rhetorical practices (Fish 1993). This contingency of law leads some CLS theorists to infer that law must therefore be politics and hence illegitimate; whereas it delights pragmatists, like Fish, who argue that it reflects the inherently contingent and historical quality of interpretation generally. The implication for regulatory theory is that indeterminacy permeates the regulatory domain and there is always movement in the juridical field to assert new interpretations in order to modify the impact of legal rules.23

5. The Regulation of Insider Trading

Against this background, we now turn to discuss the role played by business lawyers in mediating some of the changes in the financial services sector, focusing especially on the major scandals in the US during the 1980s and the debates about the interpretation and enforcement of the `insider trading' rules.

5.1 Risk, Trust, and Property in Information.

As in any area of economic regulation, the role of legal rules in mediating financial transactions is expected to be to ensure a `level playing-field'. The demands for fairness, in this context, result from expectations underpinning the functioning of financial markets (Giddens 1990: 24-27) and their accompanying regulatory institutions. Financial market transactions, like all exchanges, require a basis of trust between the parties; this is especially important since such trading is particularly impersonal, taking place between parties who may not even know each other's identities, and particularly abstract, since it concerns subject-matter with little content other than price. In such circumstances, trust is only possible if risk is kept within acceptable limits (Luhmann 1988a, p. 36-46).

Perhaps the most important force driving financial markets is information. It is not surprising, therefore, that rules governing the disclosure of information should be central to the stabilization of expectations about risk, and thus to the maintenance of the basis of trust necessary for the functioning of such markets. However, the issue of information disclosure involves a central contradiction. Profitable trading results from capturing the value of private information, which would be negated by disclosure; hence, an obligation to disclose removes the economic incentive to acquire information, and would impede the flow of active trading (Fischel and Ross 1991, p.509) by participants who believe they have advantageous knowledge or superior analysis. On the other hand, many investors would be repelled from markets if they perceive them to be `rigged' by privileged knowledgeable insiders.

Hence, it is in the characteristics of financial market transactions themselves that can be found both the need for rules, as a means of reconciling expectations and creating trust, as well as the reasons for their instability. The market requires a regulatory framework, inter alia to

23 Even law-and-economics scholars have tried to integrate some of the insights of the post-realist jurisprudence; thus, Jason Scott Johnston has examined the problem of legal uncertainty, and argues that legal form oscillates `from precision to generality, between rules and balancing' (Johnston 1991, p.365).
define the legitimate limits of property in knowledge. The abstract and formal nature of the rules helps to legitimize the terms of trading, while their relative indeterminacy provides the flexibility which can accommodate divergent expectations between the parties. The particular skills of legal professionals lies in acting as intermediaries between the realm of abstract-formal legal rules, where the general interests of market participants is debated and reconciled, and the practical realm of specific transactions, where the professional can and must exercise the creativity permitted by the ambiguities and indeterminacy of the rules to facilitate a deal or resolve a conflict caused by a failed transaction. As this creativity is also used on behalf of clients in the competition between market participants for competitive advantages, it can contribute to the destabilization of the regulatory system which results from the dynamic of the markets.

5.2 The Origins and Basis of the Prohibition of Insider Trading.

Historically, trading in financial securities was regulated only under the general law of contract and fraud. The emergence of a more specific regulatory regime took place in the US, following the general loss of confidence due to the collapse of the stock market in 1929, and the resultant widespread lack of trust and generalized belief that dishonesty permeated the financial markets. The need for regulation to restore confidence was argued by eminent lawyers who were also public figures, notably Brandeis, who published a critique of Wall Street (Other People's Money) in 1933. Congress enacted legislation in 1933 and 1934 which regulates the issuing and registration of securities (Securities Act of 1933), and the purchase and sale of securities (Securities Exchange Act of 1934). The 1934 Act also established the Securities and Exchange Commission, a regulatory body of a fairly classical corporatist type: the Commissioners are eminent professionals who direct the policy, while the official staff are charged with its implementation.

The main target of the legislation was market `manipulation'. However, this is a far from precise concept, and defining its scope involves significant economic and political issues, as well as affecting numerous vested interests. The legislation of 1933-4 included several specific provisions outlawing particular practices. Thus, s.16(a) of the 1934 Act required corporate executives to register their holdings of the company's stock, while s.16(b) introduced the `insider's short-swing profit rule' requiring such insiders to disgorge to the company any profits from trading in its securities within a period of 6 months. The 16(b) rule was very narrow and easily avoided, since it did not cover trading in the shares of related companies, nor tipping, nor `stringing out' trades beyond the 6-month limit. In addition to such relatively specific rules, the 1934 Act also included a sweeping provision (s. 10(b)) making it unlawful in connection with any sale or purchase of securities to `use any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe'.

Whether and to what extent trading with privileged or inside information might amount to or should be treated as fraud was unclear, and had been the subject of some academic and judicial debate. Common law fraud generally required a deliberate and explicit misrepresentation. Hence, mere silence or the failure to disclose was not actionable, unless there was a basis for an obligation to speak, such as a confidential or a fiduciary relationship. Although the Supreme Court in Strong v. Repide (1909) had found that the concealment of his identity by a manager purchasing from a minority shareholder did amount to fraud, this seemed based on the special circumstances of a close relationship rather than the mere manager-shareholder
link, which made the concealment fraudulent. Some argued that company executives were in a fiduciary position by virtue of which any trading by them in the firm's securities should be regarded as tainted; however, it seemed too extreme to prohibit all trading by executives, and other theorists preferred to point to the need for disclosure by any person (not only managers or employees) trading on privileged information, which could also make avoidance more difficult by limiting the passing on of the information (Manne 1966, ch.1).

In the face of the inadequacies of narrow anti-fraud rules such as 16(b) and 17(a), the SEC in 1942 approved regulations under the broad powers of s.10(b), including Rule 10(b)-5, which much later became a key and hotly-contested provision. Within the framework of a still very general rule against fraud, rule 5 made it unlawful:

'To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading'.

Initially, this provision was very little used. Overall, the rules and their enforcement merely routinized and normalized the disclosure of holdings by executives, as well as others purchasing large blocks of shares; this favoured larger issuers of securities (Easterbrook and Fischel 1991, pp. 277-9). The 1930s New Deal reforms, which involved the delegation of regulation to self-regulatory bodies, including the stock exchanges and dealer organizations, served to eliminate competition and restore political legitimacy to the markets (Moran 1991, p. 30-1).

It was only in the 1960s, and based on private actions by shareholders and purchasers, that the issue of concealment of privileged information was brought to the fore. By 1965 there had been an appreciable increase in the number of private actions citing s.10(b)-5: in 1962-4 the number of cases citing 10b-5 were over 50% more than those for the two prior decades 1942-62 (Manne 1966). From the 1950s to the early 1970s the SEC contributed very little in the way of control of insider trading, even though it was clear from the empirical studies that there was significant non-disclosed trading on insider information; particularly in the context of unannounced merger plans.

5.3 The Uncertainty of the Disclosure Rule and the Conflict over the Misappropriation Theory.

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25. Early studies showed a strong relationship between insider trading and large price movements (see e.g. Lorie and Niederhofer 1968: 50-52; Pratt and De Vere 1972; Jaffe 1974a). For recent discussions of the statistical evidence see, e.g., King and Roell 1988: 173-177; Suter 1989: 912. Susan Shapiro's study of the SEC analysed data on securities violation prosecuted by the agency from the late 1940s to the early 1970s, and showed that the vast majority were apparently technical misrepresentation and registration violations; however, while most of the common types of violation were remarkably stable, some offences, such as professional technical violations and self-dealing, increased. Shapiro concluded that '[t]hese trends reflect some mixture of the effect of changing economic conditions, growing sophistication among wayward capitalists, shifting SEC priorities, and the ubiquity of certain generic modi operandi of securities fraud and cover-up' (Shapiro 1984, p.27 & n.4).
The activation of the obligation to disclose by means of civil actions brought by the SEC, as well as major criminal prosecutions by the Department of Justice, began in the late 1970s, resulting from major changes in financial markets. In particular, the opening up of trading in share futures substantially increased the potential value of privileged information, since very little capital outlay was needed to take a position on the possibility of a price movement. At the same time, the financial boom, creating much greater market competition, led to major institutional changes and the arrival of large numbers of newcomers both as employees and major traders. These changes destabilized the previous regulatory regime based on understandings among the WASP leaders of the major financial institutions and professional firms.

While the vast bulk of cases initiated were resolved by out-of-court settlement (as is usual in white-collar infringement actions), some key actions were litigated to conclusion, exploring the ambiguities and limits of the legal rules. The basis for more active enforcement had been laid in the early 1960s, when William Cary, as Chairman of the SEC, supported the deployment of the fiduciary duty concept to establish an obligation on corporate insiders to ‘disclose or abstain’ from trading. The SEC's reasoning was that there was a duty to disclose material information obtained by company executives, employees, and others, since such information is obtained in the course of their work which should be to the benefit of shareholders. This still left very open the extent of the prohibition on the exploitation of such an informational advantage. While the more specific rules governing disclosure of share ownership and trading by executives might be too narrow and easily avoidable, a broader rule dealing with privileged information could strike to the heart of the quest for informational advantages which provides an important dynamic for the markets.

Despite considerable doctrinal debate and some major litigation during the 1980s, including several landmark Supreme Court cases, there remains a lack of clarity both in the formulation of and in the rationale behind the insider dealing rule. In Chiarella v. United States (1980), the Supreme Court accepted that parity of information between trading parties could not be the aim, stating that ‘not every instance of financial unfairness constitutes fraudulent activity under S10(b)’. The Court noted that the legislative intent of S10(b) did not support the parity of information rule and that ‘the problems caused by misuse of market information had been

26. The Commission brought fewer than 50 actions in the two decades 1949-1977, but 77 cases between 1982 and 1985, equivalent to all the cases brought in the previous 47 years (information from the SEC: see also testimony of its Chair, John Shad, to the Subcommittee on Telecommunications, Consumer Protection, and Finance, of the Committee on Energy and Commerce of the House of Representatives, Hearings on Insider Trading, June-July 1986; Naylor, 1989). The first criminal prosecution was brought in 1980, after which about 40% of cases were criminal in nature (Naylor, 1989 p.88).

27. Of the 22 Department of Justice prosecutions between 1981-84, 21 were guilty pleas; however, of the 55 cases brought in the Southern District of New York up to 1987, 16 defendants pleaded guilty: Naylor, 1989 p.88. See also Flynn, 1992 p. 109 & n.8.


addressed by detailed and sophisticated regulation that recognizes when use of market
information may not harm operation of the securities market' (ibid. p. 233). The SEC had
secured convictions against Chiarella, a ‘markup man’ employed by a well-known Wall Street
financial printer, who by virtue of handling confidential documents for a takeover bid, was able
to discern the names of the target companies from information contained in the documents.
Acting on these deductions, and without disclosing his knowledge, Chiarella immediately
purchased shares in the target companies and thereafter sold them after the takeover attempts
were made public. The Supreme Court overturned the lower courts' decisions, stating that
since he was not in a relationship of trust to the shareholders he was under no duty to disclose.

The Chiarella decision sparked a heated theoretical debate, and obliged the authorities to shift
to a broader-based theory that the duty to disclose was based on ‘misappropriation’ of
information. Chief Justice Burger, in a strong dissenting judgment in Chiarella, had argued
that in the context of rule 10(b)-5 what matters is whether a party obtains information through
fair means or simply misappropriates it unlawfully for personal gain, since such a party should
not profit from ‘his ill- gotten informational advantage by purchasing securities in the market’
(1980 445 U.S. at 245). This appeared to provide a better grounding for a duty to disclose
than the existence of a fiduciary relation, which covered only a limited circle of direct
employees.

The major test of the misappropriation theory occurred in the litigation following the admission
by a Wall Street Journal reporter, R. Foster Winans, that he had shared pre-publication
information of the details of his column ‘Heard on the Street’, with a broker in a major Wall
Street firm, in exchange for payments to himself and his room-mate, David Carpenter. Winans
argued that although he knew that his actions were a violation of journalistic ethics, they were
not illegal (Winans 1987, p.260). The information essentially concerned the contents of
forthcoming columns, hence the decisive moment in the pre-trial tactical manoeuvres was the
production by the Journal's officers of a 3 1/2-page document stating the paper's policy
relating to confidential information; despite Winans' denial that this policy had ever been made
known to him, this was the basis on which he and all those who benefited from the information
he disclosed were convicted. Although the convictions were upheld by the Supreme Court, on
the grounds that the Journal had been defrauded of confidential use of its business information,
the Court was divided 4-4 on whether the misappropriation theory was a valid approach
(Carpenter v. United States, 484 U.S. 19 (1987)).

5.4 The Enforcement Process and Restabilization of the Regulatory Regime.

Within the framework of the loose and developing doctrinal rules, the regulators conducted a
process combining guerilla war and strategic bargaining with the major Wall Street houses,
mediated by the various groups of lawyers involved. By the mid 1980s Wall Street was in the
middle of an unprecedented merger wave and a raging bull market. The premium fees that
investment banking houses were charging for their services in control contests created further
competition and much public debate. There existed considerable public pressure on SEC
Commissioners to step up their enforcement against insider trading, especially after the well-
publicized Winans case and the persistent rumours circulating in the financial press that
insiders were trading on confidential information in most of the hostile takeovers, which were
occurring in greater frequency (Grunfest et al 1988, pp. 311-332). Increasingly, critics of Wall
Street's freewheeling approach had begun to link insider trading with hostile takeovers.
Congressional democrats were making soundings to step up regulation against takeovers.
A new consensus gradually emerged that financial institutions, in order to promote further competitive gains, required an environment which was free from scandal and based on investor trust. This change in attitude resulted from the recomposition of the investment banking sector which occurred in the 1970s and early 1980s. Stimulated by the competition which resulted after the 1975 SEC decision to deregulate the fixed-rate commissions on stock transactions, investment bankers, affected by the loss of secure profits, struggled to create new markets (Moran 1991, pp. 36-53). As a result, the established investment bankers joined in with the newer investment bankers, like Drexel Burnham, to compete for other firms' clients and to move into the financing of hostile takeovers. These changes upset many of the traditional social and professional relations on Wall Street; but at the same time, the changed commercial environment was threatened by allegations of unfairness which the practice of insider trading promoted in the minds of the public and legislators.

The story of the chain of investigations leading from Dennis Levine through Ivan Boesky to Michael Milken and others, involving a series of major prosecutions, has been widely recounted (see notably Frantz 1988, Stewart 1991, as well as Oliver Stone's film 'Wall Street'). Although the underlying issue in these cases concerned inside information, many of the prosecutions were on other charges, such as stock parking or even registration failures. Virtually all the cases were settled out-of-court on the basis of plea bargains, the negotiation of which is the speciality of the white-collar defence attorneys, who are generally former prosecutors. The outcome of these, and many other less-publicized cases, has generally been to punish prominent scapegoats, mostly Wall Street newcomers. Nevertheless, this was clearly a traumatic process, not only for the individuals who fell from positions of great financial power and immense wealth to imprisonment and obloquy, but also for their firms, which included some of the leading names of Wall Street.

That said, it is clear that the outcome has been the restabilization of a new regulatory regime based on greater bureaucratization and juridification: the 'increasing codification of rules, a more prominent role for formally constituted organizations, both public and private; and growing penetration of law into the regulatory system' (M. Moran 1991, p. 13). Thus, into the gaps left by the indeterminacy of the general legal rules have been inserted detailed codes of practice, patrolled by corporate Compliance Officers, who cultivate a close relationship with the official regulators. Naturally, their prime task is to ensure that no harm comes to the institutions, and to minimize the number of individuals who may have to be sacrificed. The major financial institutions and market professionals in general terms have an interest in safeguarding their investments in more regularized processes of access to unique information,

30. K. Mann 1985. In these cases a key part was played by Harvey Pitt, a former SEC attorney, who defended Bank Leu in the Levine investigation (in the process helping to identify Levine as the scapegoat), and negotiated the plea-bargain for Ivan Boesky which was denounced as a 'sweetheart deal' (Stewart 1991, p.296).

31. Prior to the massive publicity given to the high-profile insider trading prosecutions, Congress had been satisfied with an enforcement programme consisting of obey-the-law injunctions and administrative remedies imposed by the SEC. However, the 1984 Insider Trading Sanctions Act provided for fines up to three times the profit gained or loss avoided. Even more significantly, the 1988 Insider Trading and Fraud Enforcement Act provided for civil penalties for organizations which fail to take affirmative measures to prevent insider trading by their employees. These powers have produced record sums in terms of disgorgements obtained from defendants. See McLucas, Walsh and Fountain 1992, pp. 88-9.
and in discrediting the more unorthodox and informal channels used by the likes of Levine and Milken.

It is important to stress, however, both that the transition has not been smooth or predictable, and also that the new regulatory regime is far from a being model of formal rationality. In both these respects, therefore, we consider that it is necessary to go beyond a neo-corporatist theory such as that of Michael Moran, who locates the cause of juridification in the institutional structures of meso-corporations and argues that the regulatory struggles of the 1970s and 1980s reflects the response to the ascendancy of multinational financial services firms, which operate increasingly in all major world markets. In Moran's view, the regulatory changes, orchestrated by decisive state interventions, is shaped by the alliance with large market players (Moran 1991, pp. 124-135). While it is no doubt the case that the shifting alliance of private actors and the state is responsible for the changes in regulatory form, we find that Moran's thesis places undue emphasis on almost deterministic changes in state structures, which fails to capture the dynamic and contingent nature of the processes of change. We argue that a key focus must be the interactions of government and private sector lawyers. Hence, juridification is the result of the strategic competition amongst different players within the juridical field. On this account, the shape of the formal legal rules and the constitution of the juridical field depends, in part, on the specific power of the legal professionals to manipulate power for their interests. It is however the competitive interaction between the state and the professionals around the definition of the legal regime which creates juridification. The power of these professionals lies in the specific skills which they control, of mediating the processes of legitimization entailed in relating the realm of abstract rules of law to the specific practices of economic actors. It is however the indeterminacy of the abstract rules that leaves the space for creativity, which enables the reshaping of the regulatory regime.

Bibliography


Altman, Andrew (1986) 'Legal Realism, Critical Legal Studies, and Dworkin', Phil. & Public Aff. 15, 205


Kennedy, Duncan (1976) ´Form and Substance in Private Law Adjudication', Harv. L. Rev. 89, 1685


Examines the ongoing efforts of lawyers and allied professionals to construct, police and redefine their boundaries. Focusing on the newly emerging large multinationals, it explores the relationship between professions, the economy and the state. Table of contents.

Chapter 22: Introduction: Professional competition and the social construction of transnational markets. By Pierre Bourdieu Yves Dezalay. View abstract. With Facebook Dynamic Creative ads, set multiple creative assets to get a combination of Facebook ads automatically created. Find the best performing creative for your ad. Dynamic creative helps advertisers automatically deliver high-performing combinations of their creative assets to their audiences. Dynamic creative accepts the basic components of a Facebook ad (image, video, title, description, etc) and automatically generates optimized ad combinations based on these components. These ads are then served across placements to explore the performance of each creative element within the given audience. Dynamic creative ads can be applied to Conversion, Traffic, Video Views, Reach, Brand Awareness, and App Install campaigns. Indeed, the increased research into business lawyering in the US results partly from concern about the loss of competitiveness of US business especially in relation to Japan, and the accusation that the US system overinvests in nonproductive professional activity (particularly lawyering) while Japan concentrates on professions such as engineering, which make a positive contribution to production. Hence, it is said, not only. However, our concern in this paper is rather with the relationship of business lawyering to the forms and institutions of formal law. In particular, we want to explore the interaction between lawyering and the development of the regulatory forms in and through which corporate capitalism develops.