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GLOBAL RESTRUCTURING AND THE LAW: STUDIES OF THE INTERNATIONALIZATION OF LEGAL FIELDS AND THE CREATION OF TRANSNATIONAL ARENAS*

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Abstract

Law and lawyers are being remade by processes of global restructuring, even as they actively participate in and shape these processes. New transnational and global economic

* This paper is based on studies conducted by research groups at the Global Studies Research Program (GSRP) at the University of Wisconsin-Madison and the Centre de Recherches Interdisciplinaires de Vaucresson (CRIV). The authors have been assisted by numerous colleagues at both institutions, in particular by Alain Bancaud (CRIV) and David Delaney (GSRP), and have benefitted from contacts with Boaventura de Sousa Santos of the University of Coimbra and the encouragement and support of Bryant Garth of the American Bar Foundation.

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processes and political trends create opportunities for law and lawyers and change the logic of legal practices. As the participants in various national legal fields react to new opportunities, they change the nature of the field. Actors with international linkages and expertise become more important, while those whose practices are tied exclusively to national law lose ground. National legal fields become more "internationalized," and transnational legal regimes become more important and begin to penetrate previously closed national fields. Lawyers participate in the construction of transnational and supranational regimes and these actions affect the power and legitimacy of national states and their legal fields. These processes can be seen most clearly in Europe, which has undergone a major transformation of its legal fields and in some of the developing countries most affected by global restructuring. They can be glimpsed at work in North America as the US, Canada and Mexico move toward a North American Free Trade Area.

I. INTRODUCTION -

THIS Paper asks what role "international forces" play in legal systems and professions, and what role law and lawyers play in the global economic and political restructuring currently underway. These questions are intimately related. "International forces" are not some mystical emanation, but are the concrete practices of multiple agents, including lawyers, in a multitude of national "systems". There is no bright line between the international and the national in law and other fields. Moreover, the forces and processes that are contributing to global economic restructuring and political change have their origins in national systems, including the practices of lawyers. Thus the "global" and the "national" are interpenetrated and interrelated, and must be studied as a whole.

A. *Background: Globalization and Economic Restructuring*

In the background of this Paper are a series of interacting processes and changes occurring on the world scene.¹ These are generally

1. For a general overview of these trends, see PETER DICKEN, *GLOBAL SHIFT: INDUSTRIAL CHANGE IN A TURBULENT WORLD* (1986).

familiar, and we will not devote much space to their delineation. Among the most important are:

► **Changing Production Patterns:** New systems of flexible specialization and the “global factory” have made it easier to site production and other economic activities in many parts of the world, facilitating the dislocation of economic activity from one country to another and contributing to the emergence of a new international division of labor.

► **Linking of Financial Markets:** The creation of globally linked capital markets facilitate the free flow of investment across borders.

► **Increasing Importance of Multinational Firms:** Because large multinational firms are now able to spread production and other operations around the world, and move plants from one country to another, their bargaining power has been strengthened and their importance in the world economy enhanced.

► **Increasing Importance of Trade and Growth of Regional Trading Blocs:** International trade has increased as a proportion of GNP in most countries. Trade barriers in general have been lowered; this process has accelerated in certain regions through regional free trade areas and common markets. Trade regimes are being extended to cover services and intellectual property. International rules promoting free trade in goods and services have direct and indirect effects on many aspects of national regulation.

► **Structural Adjustment and Privatization:** All of the former Soviet bloc and much of the developing world are influenced by pressures for greater macro-economic stability and reduction of direct involvement of the state in the economy. Great emphasis is placed on developing market institutions, including legal structures, to facilitate economic interaction.

► **Hegemony of Neo-liberal Concepts of Economic Relations:** The “Washington consensus” (named after the international financial institutions based in the American capital) places strong emphasis on private markets, deregulation of economic activity, reduced role for government, and free international trade. This vision influenced policy in the United States and England under the Reagan and Thatcher administrations, and has begun to affect Continental Eu-

rope. Under the aegis of the International Monetary Fund (IMF) and the International Bank for Reconstruction and Development (IBRD or "World Bank"), as well as regional banks and the General Agreement on Trade and Tariffs (GATT), the neo-liberal vision has spread throughout the developing world, is influencing Eastern Europe and the former Soviet Union, and is having an effect in China.

►A Worldwide Trend Toward Democratization, Protection of Human Rights, and Renewed Interest in "The Rule of Law"· Along with pressures for economic change, international attention has also been focused on the creation of liberal polities, control of arbitrary government, protection of individual rights, and strengthening the judiciary.

►The Emergence of Supranational and Transnational Actors Promoting Human Rights and Democracy· New actors, such as the human rights movement and transnational advocacy non-governmental organizations (TANGOs) which promote democratization, protection of environmental and social interests, and advocacy for the disadvantaged have entered the world stage and have begun to influence developments in national legal fields.

B. Focus on Legal Practices and National Legal Fields

These broad trends form the background of our study. But our purpose is to look at law and legal practice to see how the legal field itself is becoming more internationalized and how transnational arenas for legal practice are being created. Such a study, we think, will contribute to the understanding of global processes by uncovering in one field the microprocesses and concrete practices that, taken as a whole, are creating global change. Forces and logics that can be observed in the economy, the state, and the international order are at work within the legal field as well, so that the logic of the legal field constitutes a "homologous microcosm" of larger social phenomena.² To understand the particular logic of the legal field is to know something meaningful about the constitution of the society of which it is a part.

2. Cf. PIERRE BOURDIEU & LOÏC J. D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY, 105-06 (1992) (noting that "we can observe a whole range of structural and functional *homologies* between the field of philosophy, the political field, the literary field, etc., and the structure of social space").

The national "legal field" is the primary unit of analysis in this study. Not only do we focus on legal practice as a route to understanding global forces; we also pay primary attention to the *national* legal fields in several parts of the world. By "legal field," we mean the ensemble of institutions and practices through which law is produced, interpreted, and incorporated into social decision-making. Thus, the field includes legal professionals, judges, and the legal academy. Our method is to trace the effects of global and transnational forces by looking first at their impact on national fields.

It may seem strange that a study of law and global restructuring takes the national legal field as its focus and point of departure. Some might argue that as the nation-state loses its primacy in the regulation and structuring of economic relations and the protection of individuals and community, the focus should shift to transnational and supranational arenas and the legal fields that might exist or could emerge at such levels. While we agree that transnational analysis is important, we think the national field is a necessary point of departure for such studies. In the first place, the logic of practice still plays itself out primarily on a national plane. To focus only on transnational arenas and lawyers, we believe, would be to lose sight of the vast range of legal actors and practices who are being influenced by and who influence global processes. Yet it is these embedded practices of lawyers, judges and academics which constitute the legal field as we understand it, whose logics are being transformed directly, and indirectly, by transnational interactions. And in a circular fashion, it is the transformed logic of practices in multiple national legal fields that is, in no small way, contributing to the increasing integration of economies and the parallel transformation of systems of governance in many parts of the world. *As lawyers are remade by the emerging global order, they are actively trying to remake it.*

A second reason for keeping a national focus is that transnational and supranational arenas involve competition between national fields seeking dominance and fledgling "extra-national" regimes (both public and private) with varying degrees of authority and effectiveness. The process of transnational construction is both partial and hierarchically ordered. The relative degree of "internationalization" of different national fields is a major subject of inquiry. Moreover, the struggle among national fields, and the process by which the normative orders and modes of production of some become dominant, are among the most important issues for a

study of this nature.³

C. Case Studies

To study phenomena so complex and far-reaching, we have chosen to employ a series of "case studies." The most extensive is a study of the internationalization of national legal fields in Europe, as they are influenced by the gradual emergence of a "transnational" legal space within the European Community (EC) and by the opening of borders among the Member States of the EC. We take the European experience as the focus of our Paper for two reasons. In the first place, we had access to many studies of this phenomena already carried out by Dezalay and his collaborators.⁴ Second, recent developments in Europe have been substantial and dramatic: European legal practice has been radically transformed and national legal fields remade in the past 20 years. Thus, the European story highlights the questions with which we are most concerned: The remaking of legal fields through their interrelation with extra-national processes.

To the detailed study of Europe we add two additional case studies. The first is a preliminary study of efforts by public interest lawyers in North America to react to the emergence of the North American Free Trade Agreement (NAFTA), a free trade area among the United States, Canada and Mexico. Because this set of phenomena parallels developments observed in Europe, the NAFTA story helps us see how the European case might provide insights for North America. But because our information on NAFTA is

3. For a discussion of the manner in which specific national fields become "globalized," i.e., achieve global dominance over aspects of other nations and cultures, see Boaventura de Sousa Santos, *Law in the World System: From Legal Diaspora to Legal Ecumene* 2-19 (Nov. 8, 1991) (unpublished manuscript, on file with the *Case Western Law Review*). Sousa Santos identifies two kinds of globalism: "Global localism" is "the process by which a given local phenomenon is successfully globalized" to gain acceptance throughout the world. *Id.* at 16. Examples include the English language and U.S. software copyright laws, both of which have come to be widely used and accepted in many different and diverse nations. "Local globalism," on the other hand, "consists of the specific impact of transnational practices and imperatives on local conditions by means of which the later are restructured, in order to respond to transnational imperatives" *Id.*

4. See, e.g., *PROFESSIONAL COMPETITION AND THE SOCIAL CONSTRUCTION OF MARKETS* (Yves Dezalay & David Sugarman eds., 1993) [hereinafter, *PROFESSIONAL COMPETITION*]; *BATAILLES TERRITORIALES ET RIVALITES DE COUSINAGE: JURISTES ET COMPTABLES SUR LE MARCHE EUROPEEN DU CONSEIL AUX ENTREPRISES* (Yves Dezalay ed., 1993) [hereinafter, *BATAILLES TERRITORIALES*]; YVES DEZALAY, *MARCHANDS DE DROIT: LA RESTRUCTURATION DE L'ORDRE JURIDIQUE INTERNATIONAL PAR LES MULTINATIONALES DU DROIT* (1992).

limited, the situation is highly fluid, and the focus of our study is narrow, the North American case yields only provisional hypotheses about the internationalization of the North American legal fields. The third case study deals with the transformation of legal fields in the developing world, with primary attention to Indonesia. This study highlights the differences between advanced capitalist "core" countries and poorer nations on the periphery, while also showing that some forces are at work that are similar to those that have affected national fields in Europe.

Our studies place primary emphasis on economic matters, or what might be called "business law." But we also pay attention to social issues, and the relationship between developments in business law and such issues as the nature of the judiciary, the role of the academy, and the representation and protection of the disadvantaged. Our view of legal fields leads us to try to keep all these dimensions in view at once: While we recognize the possibility of separating the role law plays in the regulation of economic activity from its roles in the protection of social interests and the preservation of individual rights, we believe that these aspects of the legal field are indissoluble. While our studies look primarily at business law, some of the studies seek to illuminate the interaction of economic regulation with social and individual protection and protection in national fields as both are transformed by, and transform, international forces.

II. EXCURSUS ON THE FRAMEWORK OF INQUIRY: LEGAL FIELDS AND MODES OF PRODUCTION OF LAW

In this Paper we use two terms that are not widely employed in North American legal studies: "legal field" and the "mode of production of law."⁵ They are the core of the conceptual framework employed in the preparation of the case studies on Europe,

5. The concept of social fields, and its application to law, is derived from the work of Pierre Bourdieu. For Bourdieu's own effort along these lines, see Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Judicial Field*, 38 HASTINGS L.J. 814, 816 (Richard Terdiman trans., 1987) (arguing that "social practices of the law are the product of the functioning of a 'field'" governed by "the specific power relations which give it its structure" and the "internal logic of judicial functioning"). Several scholars have used the notion of the mode of production of law. See, e.g., Boaventura de Sousa Santos, *On Modes of Production of Law and Social Power*, 13 INT'L J. SOC. L. 299, 300 (1985) (positing that "capitalist societies are legal formations or configurations which are constituted by four basic modes of production of law"). While we have benefitted from these formulations, we have not tried to follow them in all regards.

public interest lawyers and NAFTA, and the developing world. This section sets out this framework and thus provides a key to the logic of our research. Readers who want a fuller understanding of the framework may wish to read this section. However, the case studies can be read without reference to the detailed exposition of the framework, and some readers may wish to skip over this section and turn directly to the discussion of the contrast between American and "old European" modes of production of law, which introduces the case studies.

A. *Social Fields*

Pierre Bourdieu has conceptualized society as a series of inter-related yet semi-autonomous "fields," each of which has a distinct structure.⁶ Social fields are made up of actors with different positions who struggle for the stakes the field offers: The stakes may be monetary, but they may also be status and power. A field is an open system whose boundaries are always in question (and constitute one of the issues over which struggle occurs). "Players" in the game of the field deploy various forms of capital (economic, social, or cultural) in their struggles with other players. Conflict within the field gives it its dynamism, but also maintains it as a field: The contending players challenge each other, but not the field itself, so the struggle reaffirms and even strengthens the field. All the players in a field have a shared set of dispositions which orient their action. These dispositions have been constructed through the struggles of the field with other social fields, and internal conflict: Bourdieu calls this the "*habitus*" of a field. The *habitus* is not arbitrary or accidental; rather these dispositions reflect objective forces that have shaped the field and thus encode basic structural constraints. However, structures are never fully controlling; dispositions change over time as the field encounters new challenges and opportunities, and actors with different *habitus* may begin to play new or more important roles, thus transforming the "structural" logic.

B. *Legal Fields*

The legal field is one of many social fields. To prepare the case studies that form the core of this Paper, we have developed a

6. For a good discussion of Bourdieu's logic of fields, see BOURDIEU & WACQUANT, *supra* note 2, at 94-115.

tentative "model" of the operation of legal fields.

1. Once More into the Breach

Much of legal sociology from Max Weber to the present has operated on the assumption that in some way the legal institutions of a nation operate as a "system" whose parts are interrelated and whose practices, in relationship to other aspects of society, somehow reflect a common endeavor. To say that, however, is to say very little. There is little agreement on the nature and sources of legal "systematicity," the degree to which legal institutions are integrated or fragmented, and so on.⁷ Interest in systems theory as a tool for the explanation of legal phenomena waxes and wanes, but suffice it to say that no theory has achieved universal assent or even dominance.

To introduce the idea of the "legal field" as a master concept for understanding legal institutions is to set sail again on the unruly waters of holistic theorizing in search of the holy grail of "systematicity." We take this step with trepidation, but are drawn to it by a sense of necessity that arises out of the nature of our project and the results of our preliminary inquiries. We are trying to answer three related questions:

- (i) What are the forces that are set in motion within any nation's legal institutions when preexisting patterns are challenged by new markets and new influences that are stimulated or created by extra-national (regional or global) economic and political opportunities and forces?
- (ii) How do the new logics created by international influences and opportunities affect the operation of national legal fields, and how do the characteristics of the field affect the nature and degree of the "internationalization" that results?
- (iii) What do lawyers take with them, and what strategies do they employ, when they move beyond "national" arenas into global relationships and transnational regimes?

To answer these questions, we have to look first at embedded practices:⁸ The actual behaviors of lawyers and others within a

7. See David M. Trubek, *Back to the Future: The Short Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 1, 31-33 (1990) (discussing the changes in scholarly thought regarding systematicity over the last few decades).

8. Here, "practice" is being used in a different, and much broader, sense than the

dynamic set of relationships. The concept of the field helps us understand these dynamics, and permits comparisons among national legal orders and between national fields and transnational legal arenas.⁹

2. What is a Legal Field?

A field has positions, stakes, capitals, and a *habitus*, or shared predispositions. All practices are within this field and subject to its force and influence.

(i) *Positions*. The legal field is the ensemble of all actors who make, interpret and apply the law; transmit legal knowledge; and socialize players in the game of the field. These actors occupy positions which can be ordered in terms of internal hierarchies accepted within (and to a degree without) the field. At the risk of gross oversimplification, one can identify the following strategic positions:

(A) Practitioners: In this position are all the people who provide services to individuals and institutions who must orient their behavior toward the law, providing information about the likely outcome of relationships, deals and conflicts that are legally regulated.

(B) Law Appliers: These are the positions officially consecrated for making authoritative interpretations of legal norms in concrete situations. It includes not only judges but also arbitrators and administrative officials, among others.

(C) Guardians of Doctrine: Every mature legal system has some form of more or less systematic doctrine which contains authoritative answers to legal questions. The location of this function varies: it may be performed by notables (Weber's *honoratiors*),¹⁰ by academics (the Continental

typical meaning of "legal practice" as used in the United States.

9. For an extended discussion on the nature of field analysis, and the difference between "systems" and "field" approaches in sociology, see BOURDIEU & WACQUANT, *supra* note 2, at 94-115. For Bourdieu, the field approach is superior to systems theory because it can deal simultaneously with the autonomy and dependence of social realms like law, religion, art etc.; it stresses the porosity of the boundaries that separate these realms; and it places emphasis on struggles and changes within fields and thus on historicity. *Id.*

10. Max Weber defined notables (*honoratiors*) as "persons (1) whose economic position permits them to hold continuous policy-making and administrative positions in an organization without (more than nominal) remuneration; (2) who enjoy social prestige of whatever derivation in such a manner that they are likely to hold office by virtue of the

tradition), or by judges (the U.S. model).

(D) Educators: Someone has to socialize entrants and create the habitus that binds the field together and encodes its structural constraints. While primary socialization is the responsibility of the schools in almost all legal fields, socialization is a continuing process and workplace influences are often as important as educational ones.¹¹

(E) Moral Regulators: Legal professions all have systems that police behavior and ensure conformity of actors: These include formal mechanisms like accrediting bodies, disciplinary boards, promulgators of legal ethics; as well as workplace influences, informal social networks and the like.

(ii) *Stakes*. What are the stakes in the legal field? The most important are markets (financial success) and status or a place in the hierarchy of the field. The nature of the stakes differ within sub-fields.

(iii) *Capitals*. The players in the legal field deploy various forms of capital. These include economic capital, cultural or informational capital (educational credentials, technical knowledge) and social capital (status acquired both outside and inside the field).

3. "Regulation," Protection, and Legitimation

Within the legal field, one will observe struggles over stakes and the deployment of various capitals in this game. But what is the "output" of the game? While there is always a risk of lapsing into naive functionalism when one tries to specify outputs, some specification of social effect is needed to understand tensions within the field and variation between fields.

At the most simplified level, legal fields "produce" *regulation*, *protection*, and *legitimation*.¹² "Regulation" as we use it refers to

member's confidence, which at first is freely given and then traditionally accorded." 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 290 (Guenther Roth & Claus Wittich eds., 1968).

11. For a discussion of the workplace as a site of socialization, see Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 177, 198-213 (Robert L. Nelson et al. eds., 1992) [hereinafter *LAWYERS' IDEALS*].

12. See Yves Dezalay, *From Mediation to Pure Law: Practice and Scholarly Prepresentation Within the Legal Sphere*, 14 *INT'L J. SOC. L.* 89, 102-04 (1986) (discussing legal legitimation and competing social interests); Boaventura de Sousa Santos, *The Postmodern Transition: Law and Politics*, in *THE FATE OF LAW* 79, 81-98 (Austin Sarat & Thomas R. Kearns eds., 1991) (discussing regulation as a pillar of the paradigm of

the structuring of economic relations: Law provides rules for the interaction of economic actors and protects economic interests, whether the origins of these rules are public or private. Regulation is the way legal fields foster markets and encourage accumulation. Law also provides protection for individuals and various social groups and interests. This is the social or emancipatory dimension of law. Legal fields temper accumulative drives, protect individual integrity and preserve community. Finally, law provides legitimation for a social order; in this way law is part of the "field" of power. The relationships between these "outputs" of legal fields are complex and contradictory. There are tensions between regulation and protection, and the balance struck between these may affect the nature and degree of legitimation.¹³

4. The Legal Field and the National State

The legal field, as we use the term, has its center or "hub" in the national state and the normative order originating from state law. But legal fields are more complex and multi-layered, and will become more so over time if processes of "globalization" continue.¹⁴ National legal fields have, to some degree or another, always been "penetrated" by extra-national influences, and sub-national structures of private and public order introduce complex forms of legal pluralism that must be incorporated into any full definition of the field. A complete study of the internationalization of legal fields would have to deal with legal pluralism in all its aspects. However, since the primary goal of this Paper is to analyze changes in the centrality of the normative order of nation-state law and nationally-oriented legal practices under the influence of transnational, supranational, and international legal regimes and orders, we concentrate here on the relationship between state law and state-law oriented practice on the one hand, and forces and processes from

modernity in advanced capitalist society); David M. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y 529, 555-61 (1977) [hereinafter, Trubek, *Complexity and Contradiction*] (discussing the legitimization function of the legal order in a modern society); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 597-604 (1984) (discussing differences in the way Legal Realists and Critical Legal Scholars utilize the concept of legitimation). See generally ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY (1976) (discussing the law of bureaucratic regulation and social order); WEBER, *supra* note 10.

13. See Trubek, *Complexity and Contradiction*, *supra* note 12, at 560-61.

14. For a rich analysis of the impact of global forces on legal fields at all levels, see Santos, *supra* note 5.

outside national borders on the other, looking at how this relationship affects the construction and reconstruction of legal fields.

C. *Modes of Production of Law*

To one degree or another, one can find a "legal field" in every "liberal" society¹⁵ But the way fields operate varies from country to country, and changes over time. A major part of the European story that forms the centerpiece of this Paper is a dramatic change in the methods by which the legal fields in Europe produce "law" in the broadest sense. To understand this and other changes, we have introduced the notion of the "mode of production of law." By this, we mean the political economy of regulation, protection, and legitimation in a given national space at a particular moment in time. A legal mode of production includes:

- the way the legal profession and the delivery of its services is organized;
- the allocation of roles among the various positions in the legal field (practitioners, law appliers, academics, etc.);
- the way the field produces the *habitus*, including variations in education and the importance of social capital (personal background and relationships) in recruitment into the field;
- the modalities for the articulation of authoritative doctrine, and the ways these are related to relationships between players and positions;
- the role lawyers linked to global actors and transnational regimes play in a given legal field;
- the relationships between regulation and protection; and
- the dominant mode of legitimation.

Variations in modes of production of law will affect the relationships between the production of regulation, protection, and legitimation; the degree to which transnational forces influence national fields and are influenced by them; as well as the capability of one national field to achieve hegemony over others.¹⁶

15. For a definition of "liberal" societies and their relationship with legal fields, see *infra* part III.A.

16. In the case studies, for instance, we explore the growing worldwide importance of the American legal field under conditions of globalization, showing how American legal actors have had an important effect on the transformation of legal fields in Europe and the developing world.

III. THE INTERNATIONALIZATION OF LEGAL FIELDS: THE OLD EUROPEAN AND THE AMERICAN MODES OF PRODUCTION OF LAW

Our study of the internationalization of legal fields and the emergence of transnational arenas is also the story of the growing dominance of a particular mode of production of law which began in the United States. This approach to the role of the lawyer in society, the delivery of legal services, the organization of legal practices, and the location of legal authority, has now spread to Europe and is increasing as an influence throughout the world. The intrusion of the "American mode of production of law" into legal fields in Europe and elsewhere is both the result, and the cause, of the growth of transnational legal arenas and the related internationalization of legal fields. The European story is, in no small part, the account of the clash between an old legal tradition or mode of production of law, and new forms heavily influenced by transatlantic forces and models. Moreover, since the "Old European mode of production of law" influenced many other parts of the world, through colonial domination and cultural influence, the conflict between "European" and "American" modes of legal production is being repeated elsewhere as well. Thus, to fully understand that story, as well as to gain insights into internationalization elsewhere in the world, it is important to understand the difference between these two modes. In this section, we set out to sketch the contrasting approaches to the production of law¹⁷

A. *Law in Liberal Society: The Social Construction of Legitimacy*

Our models of differing modes of production of law focus on differences in the nature of the legitimation claims made by legal fields, and the way these claims are reflected in practices and institutions. They represent different ways that legal fields secure and maintain legitimacy in those societies in which law has become an autonomous field. We call these the "liberal" societies.¹⁸ The very idea of a legal field, which asserts the autonomy of the law, only makes sense in a certain type of society and can only

17. These ideal-typical models are tentative and oversimplified. They try to move beyond Weber's effort at macro-social theorizing about law, and are influenced by Unger's restatement of the Weberian model. See generally UNGER, *supra* note 12.

18. See *id.* Unger defines liberal society as the relationship among groups where no group occupies a permanently dominant position or has an inherent right to govern. *Id.* at 66.

take hold under certain social conditions. For this idea to emerge, ascend, and become reflected in institutions and practices, the society must be divided and the divisions must be unstable and not fully legitimate. The idea of a "rule of law," which asserts the existence of a normative order independent of social hierarchy, makes no sense either in the absence of major divisions or in circumstances where these divisions are stable and accepted by all. "Liberal" societies are made up of differentiated and stratified social groups and classes, but these divisions and hierarchical orderings cannot be fully justified by any shared social vision or widely accepted ideology. In such circumstances, the idea of a neutral sphere of law provides legitimation for what would otherwise be seen as the unjustifiable exercise of power by dominant groups in society¹⁹

Legal orders in "liberal" societies achieve legitimacy in different ways. Legal fields thus differ in their scope, positions, and characteristic struggles. They will also produce different forms of shared understandings and dispositions, or *habitus*. All, however, face a common dilemma: In their practices, they must assert the unity and autonomy of the legal field, while accommodating the diversity of social organization. Moreover, since legal fields are tied closely to hierarchically-ordered social, economic, and political "fields," they are influenced by, and their structures reflect, the very hierarchies of power and status which they are constituted to escape. *Thus all in the legal field must at once deny hierarchy, and serve it.* This dualism leads to what many see as the characteristic hypocrisy of law and lawyers.

B. The "Old European" Model

Historically, the legal systems of Continental Europe rested their legitimacy on the authority of legal science. Legal authority derived from codes which were "scientifically" constructed, and was embodied in authoritative doctrine maintained by those at the top of the academic pyramid. Legal fields were organized along strictly hierarchical lines, with leading academics and high court judges at the apex of the hierarchy. Fields were also segmented, so that each area of practice was separated from the others. The division of labor and status between those who practiced the law, and those who made and interpreted it, was clearly defined. Practitio-

19. *Id.* at 177-79.

ners, who had day-to-day contact with the realities of everyday life, were seen as inferior to the leading academics. The higher academics, or "guardians of the temple," presented themselves as working in a realm of "pure law," aloof from social life and distant from its divisions and struggles.

At the same time, the European legal fields were linked to, and affected by, hierarchies of power in other social fields. Those at the apex of the legal pyramid were drawn from the social and economic elite, and maintained close personal ties with their social and economic peers. Only a very limited number of notables or legal *honoratiros* (mostly professors) were authorized to "speak the law." Although formally they were independent of clients and distant from commerce, these oracles of the law were amply compensated by affluent clients who could afford to pay the high costs of the authoritative legal opinions they provided and which carried great weight with courts and regulatory bodies. The hierarchy and division of labor in the legal field meant that the higher sources of the law could maintain the appearance of distance from practice, social division, and commercial activity. The scarcity of legal authority meant that those who could speak the law were all tightly linked to *status quo* powers outside the legal field. The system gained its legitimacy from the aura of neutral science and the prestige of the oracles of the law.

Lawyers operated as solo practitioners or in small firms that specialized in specific areas of the law. Legal practice was oriented around litigation, and lawyers played relatively restricted roles in the general affairs of business firms. The idea of the lawyer as a general business advisor, or the law firm as a conglomerate of specialties, was slow to develop. Continental European legal education was closely tied to the academy, rather than the profession, and oriented toward mastery of rules and doctrine rather than development of generalized analytic skills. On the other hand, law schools have not served as the primary gateway for entrance into the profession or to its higher ranks. These processes have been controlled as much by personal networks and relations as by academic performance in the schools.

The Old European system produced legitimacy primarily by the boundedness of the field, the apparent autonomy of the producers of law, and the scarcity of authoritative interpretation. (This was buttressed by close relationships between the legal field and the state, itself a source of legitimacy.) The European legal fields maintained their connection to other social fields, and thus their

commitment to existing hierarchies of power and wealth, by informal and largely invisible means. In contrast to the American model, they did not place much stress on what Americans call "pro-bono" activities, or public interest law. Nor did these fields accord much prestige to those lawyers who championed popular causes or represented the disadvantaged.

C. *The American Model: "Cravathism"*

Political economists sometimes refer to the basic structure of capitalist economic regulation in the post-World War II period as "Fordism," a term which refers to a set of social, political, and economic relationships organized around production of consumer durables in large-scale factories of the type pioneered by Henry Ford.²⁰ Borrowing from this usage, we refer to the American mode of production of law as "Cravathism": it is a system at whose core is the large, nationally oriented, multi-purpose, commercially-oriented law firm of the type pioneered by Paul Cravath in the late 19th century.

1. Organization of Practice

The clearest contrast between the "Cravathist," or "American mode of production of law" and that of Europe lies in the organization of the delivery of legal services to business. But the "Cravath" system of organizing corporate legal services both reflects unique but general features of American legal culture and has an impact beyond the realm of business law. *Thus, the large law firm is both the emblem and the engine of the entire American legal field.*

The large law firm concentrates legal expertise in many fields, offers advisory services that extend well beyond narrow legal advice, litigation, and preparation of documents, and operates on a regional or national scale. The legal services it provides include the preparation of legislation and administrative regulations, as well as lobbying and other forms of non-judicial advocacy. In the American scene, because of the variations in state laws, the large law firms have developed the capacity to analyze and compare different and competing legal orders, and develop strategies through which their clients can benefit from the legal diversity and complexity

20. Fordism is a term used by the French "Regulation school" of economists. See, e.g., DAVID HARVEY, *THE CONDITION OF POST MODERNITY* 125-40 (1980).

inherent in a federal system of law.

2. Impact on Legal Culture

Large law firms exercise substantial influence on legal culture. Except for some judges of the highest courts, the corporate lawyer is at the peak of the hierarchy of the legal field in the United States. American "corporate lawyering" emphasizes strategic planning and advice to clients, has the capability to mobilize almost unlimited resources and all types of expertise, and operates in many legal and semi-legal arenas. This model of lawyering has influenced other sectors of the legal field: It has been adopted by government offices and corporate house counsel, and copied (to the extent resources permit) by public interest lawyers and advocates for the disadvantaged.

The influence of the corporate law sector on the legal academy is direct and substantial. The corporate lawyers, who form the elite of the American legal field, are recruited from the most prestigious law schools. American law schools serve as the gateway to the profession, and help construct its hierarchies. While social class and symbolic capital play a role in recruitment to the upper reaches of the legal profession in the U.S. as in Europe, meritocratic criteria and academic performance in law school are much more important in the Cravathist mode of production of law than in the old European system. The schools gain status in no small part from the high salaries their students secure on graduation, and they compete vigorously for the well-publicized national rankings that signal to students that entry into a given school will ensure lucrative career opportunities. The competition for high rankings and thus, for top students, coupled with the orientation of the students who enter the elite schools, influence the schools' approach to hiring faculty and defining curricula. And because of the status of the elite schools and the generalized competition for entry into the charmed circle of elite schools, these effects radiate down the well-defined hierarchy of American legal education. The financial impact of the corporate law sector on American legal education is also very important. Most law schools, especially the most prestigious, are directly dependent on financial support from alumni. Given salaries of American lawyers, most of the money given to the schools will be from corporate lawyers.²¹ These alumni exer-

21. Most elite law schools are private and financially independent from the universities

cise subtle (and not so subtle) influence on the schools, affecting choice of leadership, orientation of curricula, and even the appointment of faculty.

3. Mode of Legitimation

The American mode of production of law gains legitimation in ways quite different from the European system. To the extent that the corporate law firm is a central agent in the production of law in the American system, the relationship between social hierarchy and the legal field is more direct and open in America than it has been traditionally in Continental Europe. The top corporate lawyers charge over \$500 per hour and some may earn upwards of one million dollars per year. This hardly makes them look autonomous from social and economic hierarchies, although the more meritocratic methods of recruitment may off-set this delegitimation effect to some degree. Moreover, while the European legal notables cultivate aloofness from commerce and client interests, the American corporate firms are organized as profit-making entities and are identified with their affluent clients.

Other mechanisms, however, preserve the aura of objectivity, autonomy, and distance in the American legal field. The entrepreneurial nature of the American legal profession, its early adoption of business methods and practices, its tradition of zealous advocacy on behalf of clients, and the lack of a strong tradition of autonomous legal science made European methods of legitimation unavailable in the New World. Instead, the American system relies on a cult of service to the law and the construction of countervailing power to support the legal field's need for apparent autonomy from the hierarchies of the social and economic fields. Much emphasis is placed on the obligation of the profession to ensure that the legal system operates on behalf of all, either through neutral "reforms" or through the creation (and subsidy) of countervailing legal powers. Wall Street lawyers have always been proud of their commitment to public service, even if that has largely involved filling the

in which they are housed. These schools obtain their revenues primarily from student tuition, along with gifts from alumni and other supporters. Over a third of the annual revenue of many elite schools derives from annual gifts or endowments with most of this money having been donated by lawyers or firms in the corporate sector. Of course, the few state-assisted schools in the rank of elite schools (e.g., Michigan, and the University of California at Berkeley) receive additional assistance from state revenues. However, alumni donations are crucial in allowing them to compete with private schools like Harvard, Yale and Stanford.

very gaps in the legal system in the afternoon that they were exploiting on behalf of their corporate clients in the mornings. In addition to the "pro-bono" tradition of the "gentleman lawyers" of Wall Street, the U.S. legal profession, more than any other, has fostered the idea of countervailing legal power, supporting legal services for the poor, imposing a generalized obligation of pro-bono service, and fostering the uniquely American "public interest law firm." These forms of legitimation through neutral reform and countervailing power stand in strong contrast to the traditional European approach.²²

IV THE INTERNATIONALIZATION OF LEGAL FIELDS: EURO-LAW AND THE TRANSFORMATION OF NATIONAL FIELDS

In this part, we trace recent developments in Europe, showing how two interrelated processes—the emergence of a market for what we call "Euro-law" and the adaptation of American-style business lawyering methods—are transforming Europe's national legal fields and revolutionizing the old European mode of production of law.²³

A. *Introduction and Summary*

The old legal orders of Europe are going through a massive set of changes. As a result of the creation of the EC, the opening of European borders, the restructuring of European economies, and the growing number of business firms that operate simultaneously in several countries within Europe, a new market for legal services to business has emerged. This "Euro-law" market exercises a powerful force on the national legal fields of Member States of the EC. The old business law structures of the European legal fields have proved incapable of meeting the new demands generated by the Euro-law market. American corporate firms, however, had exactly

22. This mode of legitimation introduces new forces into the legal field whose influence is felt to some degree. The issue of whether the service rendered through neutral reform largely benefits corporate clients, and whether countervailing powers like public interest law firms are really strong enough to be effective against the battalions of corporate layers they often face, is hotly debated and beyond the scope of this Paper. For a discussion on this topic, see generally Trubek, *Complexity and Competition*, *supra* note 12.

23. This section is based on extensive research by the Research team on Legal Professions at the CRIV, and their European collaborators. For more detailed analysis and specific data and citations, see PROFESSIONAL COMPETITION, *supra* note 4; BATAILLES TERRITORIALES, *supra* note 4; DEZALAY, *supra* note 4.

the kind of organization, knowledge, and technology needed to respond to this demand. Several had established a beachhead in Europe even before the creation of the EC. As demand for Euro-law expanded, they were able to gain a major share of the emerging market. The American pioneers were followed by "late-comers" from across the Atlantic, and the role of U.S. firms grew and the range of services they provided expanded. The big American corporate firms were joined by the "Big Six" accounting firms, which began to offer legal as well as accounting and management consulting services.

Challenged by the transatlantic invasion of Wall Street lawyers on the one side, and the expansion of accounting firms into the legal services market on the other, lawyers in some European countries, notably the UK and the Netherlands, began to reorganize themselves into multinational, pluri-disciplinary business service enterprises. In the creation of the new European firm, elements were adopted from both the American "invaders" and the accountancy "intruders," and merged with some "Old European" features. From the Wall Street firms, the new Europeans borrowed the tradition of full-service and aggressive "mega-lawyering."²⁴ From the accountants they took the idea of close integration of legal, accountancy, and economics skills ("pluri-disciplinary") and a tradition of entrepreneurship even stronger than that of the U.S. law firms. With this they merged elements drawn from the old European model, including close contacts with high status academics or legal notables, and recruitment of cosmopolitan lawyers from socially elite backgrounds. This development has led to the creation of a new "Euro-hybrid" type of corporate law firm which in some ways may be even better adapted to the Euro-law market than either the American-based corporate law firms or the accountants. The Euro-hybrids are now challenging both the accountants and the Americans for dominance of the Euro-law market, and may pose a future challenge to them in other markets on the capitalist periphery.

This set of developments has had a profound impact on the national legal fields in Europe. The challenge presented by all three "transnational" actors (American firms, accountants, and "Euro-hybrids") is affecting the entire mode of production of law in Europe. New sub-fields are being developed, and others which were

24. For a description of mega-lawyering, see Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, in *THE SOCIOLOGY OF THE PROFESSIONS* 152 (Robert Dingwall & Philip Lewis eds., 1983).

on the periphery of the legal field are becoming more central. The transnational challenge is affecting the relationship between the old academic and judicial elites (what the French call the *noblesse de robe*) and practitioners, as the status of the former recedes and that of the latter grows. Changes are occurring in the regulation of the legal profession, the organization of the academy and its relation to practice, and the role of the judiciary.

B. *The Euro-law Market*

There are two basic dimensions to the Euro-law market. The first, or vertical dimension, is the most familiar: The EC creates a new center of lawmaking and rule application that either supersedes or strongly influences the national laws of the Member States. But the second, or "horizontal" dimension of the market, is equally important. That is, the Euro-law market also includes legal services oriented toward giving business advice on the different and sometimes conflicting laws of the several Member States, as well as on ways to use these rules and Community law for various tactical purposes.

1. Vertical: A New Source of Law

The vertical market is created by the huge corpus of new legal rules that emanate from Brussels and the new regulatory and judicial fora created under the Treaty of Rome. This body of EC law changes the laws of all the Member States, and creates demands for new types of lawyering.

It was to be expected that the creation of the EC would affect the legal orders of the Member States and the practice of law within and among them. But the volume, density, and importance of EC law has been even greater than observers might have predicted when the Community-building process first got underway. The Member States have relied very heavily on law as a modality for community-building. The reasons for the "juridification" of the EC are complex: most important, perhaps, is that it has proven easier to create the Community through law than politics. It has often been hard for Member State governments to develop consensus within their countries on measures necessary for the construction of Europe. In such a situation it has been tempting to allow Brussels to issue directives which can be presented as emanating from a higher level, and then present them to national parliaments

as necessary costs of integration.²⁵ Also, when Member States have not been able to agree, the European Court has sometimes acted aggressively on its own by interpreting the Treaty of Rome and subsequent accords, thus generating a body of quasi-constitutional law at the European level.

The impact of EC law on national legal fields is most visible in those areas where Community law has "direct effect"; that is, where the Treaty of Rome and Community legislation and adjudication are directly binding within the entire space of the Community. Community law in such areas as antitrust and trade has direct effect, superseding national law. But EC law also includes harmonization directives, through which the Community seeks to create a "level legal playing field" by requiring all Member-States to adopt similar rules and procedures for a given substantive area. Moreover, European law not only includes positive regulations, it also embraces negative prohibitions, i.e., restrictions on legislation at the national level on topics where the Community has asserted exclusive jurisdiction. The emergence of Brussels as a new source of law, the centralization of the regulation of such areas as mergers and international trade relationships, the growing role of the European Court, and the proliferation of harmonization directives in every field from product liability to food additives, all combine to add a new and dynamic sector to the legal field of each of the Member States. Business requires advice on this expanding and rapidly changing corpus of law. To provide service in these areas, lawyers must gain familiarity with entirely new regulatory schemes, and have access to decision-makers in Brussels.

2. Horizontal: Pilots to Navigate Among Different Legal Systems

But the "Euro-law market" has another aspect that is equally important. The opening of borders and the development of new

25. This is an example of what has been called a "two-level bargaining game" in international relations theory. For a description and case studies, see Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-level Games*, 42 INT'L ORG. 427 (1988). Aspects of international relations are compared to a two-level game. At one level the game is played on domestic turf, on the other, an international field:

Each national political leader appears at both games boards. Across the international table sit his foreign counterparts, and at his elbows sit diplomats and other international advisors. Around the domestic table behind him sit party and other parliamentary figures, spokespersons for domestic agencies, representatives of key interest groups, and the leader's own political advisors.

Id. at 434.

methods of production, financing, marketing, and sales means that more and more business in Europe is conducted in many national jurisdictions at once. A company may manufacture in plants in several countries, raise its capital in others, and sell its products throughout the Community and abroad. Firms engaged in multinational business operations come into contact with several bodies of national law

It might be thought that the development of the Community, and the gradual harmonization of law, might reduce these national differences and thus diminish the size of the "horizontal" Euro-law market. But this is not necessarily the case. In the first place, Member States have shown very different attitudes toward the enforcement of EC law, most of which is contained in directives which must be implemented by national bodies. Even when a directive has been passed, national variation will continue. Moreover, recent developments in EC law may actually encourage competition among national legal orders, thus giving explicit Community sanction to continued diversity among national legal fields.²⁶

To navigate through these legal thickets, and take maximum advantage of the opportunities they present for avoiding taxes, reducing the cost of compliance with protective laws, and raising funds at low cost, firms need advisors with very special skills. To be successful pilots in these waters, legal advisors must be able to integrate legal knowledge and business strategy; be aware simultaneously of different areas of law (e.g., taxation, securities, product liability, labor, environmental) and how they interrelate; be familiar with the laws of many countries; and understand the relative impact of EC law in different national legal orders.²⁷

26. See, e.g., Norbert Reich, *Competition Between Legal Orders: A New Paradigm of EC Law*, 29 COMMON MKT. L. REV. 861, 861 (1992) (asserting that "[c]ompetition between legal orders instead of centralized regulation seem[s] to be the 'new approach' of the EC harmonization process").

27. See Bill Armitage, *From Club to Global Firm: Forging International Links*, INT'L FIN. L. REV., May 1990, at 22, 23, for a discussion of the demands of the "horizontal" Euro-law market. Armitage notes that:

[Businesses trading within the EC] must beware of three legal environments: that of their home country, that of any other EC member state in which they operate, and the legal environment established by EC law. A company cannot avoid the legal consequences of European integration. Even if it choses [sic] to trade within its own national boundaries, EC law will apply.

Id.

*C. The Old European Mode of Production of Law
Could Not Meet New Needs*

The Euro-law market created demands that could not be met by the old European mode of production of law. This system relied on strict hierarchy and seniority, rigid divisions between academics who could "speak the law" and practitioners who understood business needs and practices, and segmentation of legal subfields (e.g., taxation, commercial law, and litigation). Moreover, the legal elites, who cultivated an image of restraint and aloofness from commercial activities, were a very restricted group: Entry was limited to lawyers who combined academic excellence with social capital, and who had spent long years as disciples to senior notables. The system could not grow quickly in response to a major spurt in demand, since a fundamental feature of the old European approach was to limit legitimate legal expertise to a small group of learned elders. It could not produce advice based on the integration of business and legal factors, since the members of this "old priests club" had cultivated distance from business practices and needs. It was hampered in its ability to integrate knowledge from several legal areas because expertise was strictly segmented into separate subject matters. The "old European" lawyers could not provide the lobbying skills needed to influence legislation at the European (or national) levels because the cult of aloofness meant that the notables of the bar maintained as much distance from politics as they did from the market. Since the lawyers who had been raised in the old European tradition eschewed any kind of entrepreneurial behavior, they were unwilling to enter into the scramble that the new market opened. Finally, the old European model was intimately tied to national structures and traditions, and old European lawyers were ill-equipped to deal with the highly technocratic regulatory jumble emerging from Brussels, or to cope with the traditions of other European legal systems.

D. Newcomers Enter the European Legal Fields

Because of the restrictions created by the old European mode of production of law, new-comers from outside the traditional European legal professions and structures were able to exploit the growing Euro-law market. These new entrants into the European legal fields have played a major role in the construction of the new European legal order, lending support to the development of EC law through the EC institutions in Brussels and pressing for the

"modernization" and "Europeanization" of the domestic laws of the Member States. At the same time, these new actors on the European stage have led the way in the development of new approaches to lawyering and the organization of legal services for business, thus creating a challenge to the old European mode of production of law. In this section, we focus on four different actors: (i) U.S.-based law firms which developed European practices; (ii) the Big Six accounting firms which transformed themselves into multinational consulting conglomerates providing legal as well as financial and audit services; (iii) house counsel of European corporations who have emerged from the backrooms of business to play a more assertive role within their firms; and (iv) the new European multinational law firms which have been created in the past ten years or so along lines pioneered by the U.S.-based firms.

1. U.S. Law Firms

A few American law firms had established a beachhead in Europe even before the Second World War. But the real growth of these firms in Europe began after the war. The Marshall Plan and the reconstruction of Europe brought a few American lawyers to the European capitals, where they participated in the administration of Marshall Plan funds and the initial creation of the European Coal and Steel Community, the precursor of the EC. As Europe recovered from the war, and its economy began to expand, U.S.-based multinational corporations began to expand their European operations, thus creating further business for the law firms that accompanied them to Europe. A number of U.S. law firms expanded their small European offices, and some (like Cleary Gottlieb and Coudert Brothers) practiced simultaneously in Brussels and several other national capitals, like Paris and London. This trend was further accelerated by the emergence of the "Euro-dollar" and petrodollar markets, which became major sources of financing for the global operations of U.S.-based multinational firms. Therefore, there were a number of well-established U.S. firms on the European scene by the end of the 1970s. These firms were well positioned to take advantage of the Euro-law market which accelerated in the 1980s as a result of the move toward the single European Market, the trend toward privatization of European state enterprises, the "big bang" in the UK and other financial markets, and the concomitant merger and takeover wave that swept Europe in the late 1980s.

The American firms brought to Europe methods of organization

and styles of lawyering that gave them a real advantage as the Euro-law market grew. They were used to providing "full" legal services, bringing together specialists in all areas of law relevant to business operations. They were better prepared to develop the contractual regimes needed for the governance of economic relations under conditions of rapid legal change and uncertainty. And they were used to operating in multiple jurisdictions at once, having learned in the U.S. how to exploit the potential of a fifty-state, two-level federal system for the benefit of their corporate clients at home. They were thus quick to grasp the opportunities created by the development of EC law and the competition among national legal orders. The American firms had also learned how to manage large scale legal services organizations operating in many jurisdictions at once, combine legal and financial skills, and use the law aggressively and tactically for the benefit of their clients. This put them in a strong position, which they exploited fully, expanding the range of their services to U.S.-based clients and adding European clients who needed guidance in the new legal world that took shape in Europe as the Common Market became a reality.

As the American firms expanded, they became more and more "Europeanized." The U.S.-based law firms had started by rotating partners from their U.S. home offices, but from the beginning they had hired younger European lawyers (often with LL.M.s from major U.S. law schools) as associates. And some of the leading partners had put down roots in Europe (e.g., marrying European wives) and had become permanent legal expatriates. As the market expanded, the U.S. firms increased the participation of European lawyers, both at the junior and the senior levels. They attracted outstanding younger Europeans who were familiar with American lawyering techniques and comfortable with big firm practice, but also able to operate effectively in the national legal systems of several European countries and thus able to accompany the deepening of the Euro-law practice as it moved from a core of EC regulation and financial transactions to the restructuring of manufacturing firms and the reorganization of the internal division of economic labor within Europe.

Not only were the American firms increasingly "Europeanized," they also contributed directly to the "Americanization" of the European legal fields. The U.S. firms became virtual "finishing schools" in American legal methods for a generation of younger European lawyers. Because many younger European lawyers rotated through the large U.S. firms, both in Europe and in the home offices, but

only a few became partners, the American firms helped create a pool of "alumni" who had been well trained in the "Cravathist" mode of production of law and who carried these new skills and dispositions with them when they joined European firms or helped create new European-controlled legal organizations that would be better suited to meet the demands of the Euro-law market.

2. The "Big Six" Accounting Firms

The second set of "newcomers" to the European legal scene were the "Big Six" accounting firms. These firms developed legal subsidiaries which, in some countries, have come to play a major role in the market for corporate legal services. In France, for example, the legal subsidiaries of the Big Six constitute six of the country's largest corporate law firms.

Accountants in Europe have always played a role on the margins of the legal fields, and many accountants have legal training. But the elite lawyers tended to look down on these "poor cousins," who were seen as more business-men than true "professionals" of the old European type. The growth of the Euro-law market, and the increased prestige it brought to lawyers who also had business analysis skills, offered to the lawyer-accountants an opportunity for professional mobility. As the legal fields changed, in part as a result of their own efforts, the accountants transformed themselves from marginal players into central actors.

The accounting firms had always been an important source of tax advice for business, a field which old European legal professionals largely stayed away from. The Big Six firms were able to use their expertise in tax as a base for the expansion of their claims to legal expertise, in part because the lawyers had not fully occupied this sub-field in Europe. As the market grew, the accountants strengthened their capacity to do tax work by recruiting employees of the government tax offices.

As international restructuring and the corporate merger and acquisition (M&A) wave began to hit Europe, the accountants were well positioned to gain a major share of the market. They could offer business global coverage (they were already global conglomerates) and full service on all aspects of business planning and strategy. Thus the accounting firms recruited higher profile lawyers, and expanded from taxation to complete legal/financial/economic consulting. They were thus able to compete with the large American law firms and the European multinational law firms that adopted American law firm methods and organizational structures. They

offered an even fuller range of services, and were even more international in their operations. Moreover, the accounting firms offered more standardized service packages, and, as a result, were better able to compete on price, since they offered their services at a cost somewhat below those of the higher-priced legal multinationals. Thus when they moved into the market for full-service legal and financial "engineering" services, the Big Six were able to capture a significant portion of the market, especially in the lower segment where price was more important and in southern Europe where the "business lawyer" was less well known.

3. House Counsel in European Corporations

In the United States, the role of corporate house counsel has expanded in recent years. The "in-house" lawyers of large corporations have taken over the role of general counseling previously handled by senior partners of the large law firms, and house counsel offices have assumed more of the burden of routine legal work and the management of the work of outside law firms. These trends can also be seen in Europe, where the role of house counsel is also becoming more important. However, the European development has a special feature which has had an important impact on the transformation of the legal fields. The expansion of the role of house counsel in Europe occurred at a time when there were numerous European "alumni" of American law schools and law firms seeking permanent positions in Europe, and these "Americanized" Europeans are disproportionately represented in the top positions of legal offices in European-based corporations. These "alumni" understand American methods of legal practice and the organization of legal services, and have not only introduced these methods into their own shops, but also demanded these types of services from the outside firms they retain. Thus they have created additional demands for a new approach to the practice of business law, and the organization of legal practices.

4. The New European Multinational Law Firms

Perhaps the most dramatic development on the European scene is the rapid development of large-scale, multinational European law firms. To take advantage of the Euro-law market, and meet the competition from the American firms and the accountants, law firms in several European countries, particularly the UK and the Netherlands, have grown in size and expanded throughout Europe and the world. Thus, between 1985 and 1990, the total numbers of

employees (lawyers and support staff) of the 20 largest UK law firms *doubled*. The largest UK firm, Clifford Chance, now has over eleven hundred lawyers, making it the second largest law firm (after Baker & McKenzie) in the world. Many of these UK firms have opened offices throughout Europe, equalling or rivalling the pan-European coverage of the large American firms and the Big Six. Similar trends, although on a smaller scale, can be seen in the Netherlands. Through mergers and expansion, Dutch firms are also expanding in size, the range of services offered, and geographic reach. All the large Dutch law firms have opened offices in Brussels, and several also operate in Paris, London and New York. German firms are beginning to move in a similar direction, and there is no reason to think that this process of expansion and "multinationalization" will abate. The new European multinationals have some advantages in the Euro-law market that may see them taking an increasing share over time. They are able to incorporate leading lawyers in various European capitals more easily than the American firms, and they will be able to benefit from Community regulations that will reduce the barriers to practice by European nationals across Member State borders.

As a result of the growth of the American presence, the development of legal services within accounting firms, the expanding role of house counsel in European-based firms operating in several European countries, and the emergence of European-based multinational firms, by the end of the 1980s the European scene included many large-scale, full-service business law organizations which were able to operate simultaneously in Brussels and across Europe and were organized along lines totally unfamiliar to lawyers used to the old European system.

E. Transnational Shock and the Restructuring of National Fields

In this section, we report two specific studies that explore the impact of internationalization and the growth of the Euro-law market on the old European mode of production of law. The first examines the impact of M&A practice on the European legal fields. The second explores changes occurring in teaching and research on business law in France. They show how new markets and new actors are transforming the nature of practice, the organization of services, the role of the judiciary, and the law schools. While the case studies focus on specific areas of law and highlight developments in the UK and France, they reflect broader trends that can be seen throughout the Community

1. Mergers and Acquisition Practices Transform the Legal Fields

If one had to single out any specific area of legal practice as a cause of the transformation of the old European mode of legal production, one would pick M&A work as the prime candidate. The prospects of the Single European Market led to a wave of mergers and takeover bids, including many that crossed one or more European borders, as European business firms sought to position themselves for Community-wide competition. The growing number of cross-border mergers and takeover bids created a demand for new regulatory schemes at both the European and the national levels, and offered new opportunities to the multinational legal services organizations. They saw an opportunity both to shape the new legal environment for business in Europe, and exploit the resulting market for Euro-law services. As the M&A market grew, the multinational firms expanded. And as they grew in size and scope, their capacity to shape law at the Community and national levels increased as well. The multinational organizations played an active role in the formation of the EC's Merger Control Regulation, and participated in efforts to reshape rules governing takeovers at the EC level and in several Member States. These changes in law and practice had far-reaching effects on national legal fields, affecting the nature of practice, the position of business lawyers, the structure of the academy, and the role of the judiciary.

The area of M&A law and practice illustrates many of the themes which we want to highlight. The legal arena which has emerged in Europe includes both EC law and national regimes which have been reshaped by the internationalization of markets and legal fields. The opening of borders, and the drive to create new business firms that operate across these borders, has created the need for legal advice both on EC law and the varying regimes of the Member States. Cross-border mergers and acquisitions involve competition law and takeover rules: The former determine whether the new business organization created by a merger or an acquisition will threaten competition; while the latter establish protections for shareholders, management and labor affected by both hostile and friendly takeovers. Competition law is governed both by an EC regulation that has direct effect in all Member States but is limited in scope to very large transactions with Community-wide impact and by national laws for cases falling outside the scope of the EC's exclusive jurisdiction. Although there was an effort to develop an EC directive on takeovers, no agreement could

be reached on its provisions. Therefore, these matters remain exclusively within the competence of national law, which have been modified and strengthened in several countries to adapt to the needs of international business.

The resulting legal "order" governing M&A in Europe is highly complex, and increasingly "juridified." It requires sophisticated analyses that demand the integration of economic, financial and legal matters. It provides substantial opportunities for tactical use of litigation in the pursuit of business objectives and other "mega-lawyering" techniques pioneered in the U.S. The new European system of M&A regulation provides vast opportunities for the multinational law firms. *It is a world that they feel comfortable with because, to no small degree, it is a world they have made.* And the M&A practice is one which lawyers whose institutions and *habitus* were formed in the old European mode of production find unfamiliar and frightening: The old Europeans were unprepared for, and unwilling to, enter into this new arena created by internationalization. Thus the growth of this market provided an opportunity for the multinational firms to expand their practices and thus affect the nature of the legal fields in Europe.

To sketch these developments, we will concentrate on three aspects of the construction and exploitation of the European M&A market and its effect on the national fields: the creation of the EC Merger Regulation; the effort to develop an EC Takeover Directive and the transformation of takeover rules and procedures in several European countries; and brief case studies of the impact of these changes on the role of the judiciary in France and the transformation of corporate legal practice in Germany.

a. Creating a Community Merger Regulation

In 1990, after a long process of debate and negotiation, the EC established its Merger Control Regulation. This provision, adopted by the EC Council of Ministers, gives the Commission exclusive jurisdiction over large-scale mergers that affect the Community, leaving smaller combinations to be regulated at the national level. The creation of this Regulation demonstrates the impact of American legal concepts in Europe, the conflict among European approaches to the control of economic activity, and the role of multinational legal organizations in the construction of the new European legal order.

The Treaty of Rome contains two provisions (Articles 85 and 86) governing competition. Modelled on U.S. antitrust law, these

sections reflected the impact of U.S. legal ideas on Community law at the very birth of the EC. But until the 1980s, these provisions had been used sparingly. Moreover, their application to mergers, as such, was uncertain and there was no provision for prior approval of such consolidations by the Commission.

While the Commission proposed EC legislation on competition in the 1970s, initially the Member States resisted Commission pressures for any expansion of European-level competition law beyond the rules already enshrined in the Treaty. France, for example, was wedded to its version of industrial policy, which might be threatened by the establishment of a free market-oriented competition law at the Community level. However, skillful advocacy by the Commission, aided by the efforts of the multinational firms and the European Court, overcame this resistance. The multinational law firms brought several cases in the Court which established the principle that the Commission could regulate mergers under the Treaty, although the text of Articles 85 and 86 are silent on this point. Armed with these powers, the Commission threatened to begin exercising controls without benefit of any specific regulation that would set limits to its powers or fix the rules governing mergers in advance. These threats helped weaken resistance to an EC regulation, and as Europe approached 1992 and the creation of the Single Market, it became clear to many that some new form of European legislation governing competition would be needed.

There were, however, no common set of principles or procedures available to guide the preparation of this new body of EC law. Few of the Member States had well-developed policies limiting anti-competitive practices. To the extent that there were controls, in most places the regulation was carried out informally through government ministries or even through private structures. Two European states, however, had relatively well established systems to control mergers that would diminish competition in their markets: the UK and the Federal Republic of Germany. These systems, however, operated in very different ways, and the debate over an EC competition policy involved a struggle between these two contrasting modes of control.

The German system for controlling anti-competitive behavior had its origins in the antitrust legislation enacted by West Germany after World War II under the pressure of the U.S. Occupation. The German system, like the competition articles of the EC Treaty, drew its inspiration from the Sherman and Clayton Acts. However, under the guidance of the *Bundeskartellsamt* (BKA), the German

system evolved along very different lines than its U.S. forebears. The BKA became a highly autonomous agency, staffed by an elite body of lawyers and economists who were wedded to a vision of a pure competitive market operating under clear general rules. With this vision, and aided by a first-rate staff of lawyers and economists, the BKA developed and enforced a highly rationalized system. Cloistered in Berlin and thus far from the political pressure in Bonn or the economic pressures of large financial and economic interests, these "competition ayatollahs" (as one critic has dubbed them), built a strong regulatory system and elaborated a clear set of rules incorporating free-market economic principles. The BKA took advantage of a political environment that encouraged the growth of a technical and autonomous mode of market governance, at least for the German *Mittelstand* of small and medium-sized businesses.

The British approach to competition policy was very different. British anti-competition regulations were vague, and their administration fragmented. While the Germans were willing to grant substantial authority and autonomy to their competition authority (the BKA), the British were not. Neither the London business community (the "City"), which prided itself on informal and private modes of governance, nor the state, dominated for a long period by Labor governments wedded to "industrial policy," wanted to create a strong anti-monopoly unit or encourage any "competition ayatollahs" who might try to gain ascendancy in the UK scene.

When the EC began to consider a Community level merger regulation, it was subject to various influences. There seemed to have been general agreement that the substantive law would be based on the well-developed and rule-oriented principles of German law. On the other hand, there was a dispute concerning the process for application of these rules. The Germans favored their own model, which stressed "inquisitorial" techniques in which the enforcement agency developed facts and analyses, and engaged in "preventive" negotiations to avoid negative decisions on proposed combinations. The British, with strong support from the City Barristers who had developed a lively competition practice, preferred a system more like the common law, in which the parties would develop the case, and the courts could be used to review administrative determinations. The result was a hybrid system, which incorporates the well-developed legal/economic principles forged by the BKA, but allowed much more room for lawyering than the German system. Not surprisingly, this model, with its stress on

legal rules and economic analysis and the room it gives for litigation, also appealed to the American firms (and some of the Euro-hybrids also operating in Brussels), since they were familiar with such a system and knew how to make it work on behalf of their clients.

The results have been gratifying to the Americans and the "new European" firms. The EC Merger Control Regulation, and other aspects of the EC Competition policy, have in effect introduced antitrust law for the first time in most of Europe, thus opening up a new market for those firms with the expertise to exploit it. Not only is there now a need to deal with the EC Regulation, but also the developments at the Community level have had an indirect effect on many Member States, which have beefed up their own competition control mechanisms to deal with consolidations, typically smaller, that fall outside the Commission's exclusive jurisdiction. Competition law thus has become a major part of both the vertical and the horizontal Euro-law market, providing a significant portion of the revenues of the major law firms operating in Europe. Because antitrust law is a new market, in which the traditional European practitioners had not already staked a claim, it was particularly attractive to the American firms and other "newcomers." The resources derived from this lucrative practice has fueled the expansion of firms and financed their efforts to reconstruct the entire system of M&A law, including takeover regulation.

b. Takeovers

The M&A euphoria in Europe in the late 1980s led to a wave of takeovers of various kinds. Between 1985 and 1988, the number of takeovers in Europe doubled and the value of takeovers involving transnational or cross-border acquisitions increased ten-fold. These takeover battles created an arena for "mega-lawyering" and led to further transformations in the legal fields. Needless to say, the European takeover market attracted the American firms, which had honed their skills in the great Wall Street takeover battles of the 1980s. As the American M&A market began to dry up, many of the practitioners who had led the "barbarians" of Wall Street to the "gates" of American capitalism moved across the Atlantic first to create and then to exploit new territory.

The emphasis should be on the *creation*, or better, the *recreation* of the market. The transplanted Americans and others who followed their lead in Europe did not invent mergers, acquisitions or takeovers: Europeans had been doing all that for a long

time. But this corporate restructuring had gone on behind closed doors and largely outside the legal field. Traditionally, European corporate restructuring had been the privileged domain of a small elite largely made up of bankers and government officials. In these closed settings, a small number of highly respected "business notables" served as mediators, ensuring that informal rules of the game were followed. No one thought of bringing lawyers into these informal transactions (which operated on the basis of long-standing networks of trust and influence) until after the deal was struck when lawyers were called in to regularize and record arrangements made by the insider notables.

The sudden expansion of the scale and geographic scope of European M&A work placed great strains on this system of informal governance, while creating opportunities for the transatlantic M&A practitioners and the Europeans who followed their lead. To continue following "old European" approaches to "regulation," the network of notables would have had to be significantly expanded to deal with the new market created by the opening of borders. It would have been difficult, however, to expand the supply of "notables," or establish informal and personal ties across so many national borders. Moreover, the national "old-boy" networks that regulated corporate acquisitions were based on shared interests and operated as closed systems. The same commonalities of interest do not exist in the larger European economic space opened up by the Single European market. Moreover, the wider market gives "outsiders" in any given national space, who had been constrained by local pressures and customs, an opportunity to break out of closed systems which may have been based on the power of some, not the mutual interest of all. It is no surprise that the pioneers of the new European M&A business, in law as well as finance, were often outsiders to the cozy world of the old European game.

In the late 1980s, the imminence of the Single Market led to an increase in M&A activity in Europe, including a number of hostile takeovers. While this has declined in recent years, market observers predict that takeover business will accelerate again as the Single Market evolves and firms seek to reposition themselves to survive and exploit Community-wide competition. Takeover business has already brought about changes in the role of lawyers in Europe and has had other effects on the legal fields. It has created new opportunities for tactical use of regulation, led to the emergence of a new breed of super-star takeover lawyers in the UK, generated business opportunities for the American firms, and is

affecting national approaches to regulation.

M&A activity has been greatest in the UK, which has the most hospitable environment for takeovers. While the rest of Europe is just beginning to join the M&A wave, London has been the site of active takeover efforts for several decades. By European standards, British law and custom is relatively favorable to takeovers. Although takeovers must satisfy competition policy, there are few other legal barriers. The main form of "regulation" is through the private Takeover Panel (TOP) which was set up by the City in 1968. Part of the elaborate system of self-regulation of the London financial markets, the TOP administers a private code of conduct primarily designed to protect the shareholders of companies involved in takeover bids. The TOP was initially a very informal system, providing immediate advice on the applicability of the panel's rules, which tended to be quite open-ended and flexible. Until the decision in *Regina v. The Panel on Takeovers and Mergers, ex parte Datafin*,²⁸ the TOP's actions were not subject to judicial review, which has been infrequent in any event.

The system that evolved in Britain through the 1980s had two cardinal features: it encouraged takeovers as long as minority shareholder interests were protected, and it discouraged the kind of litigation that is such a familiar part of the U.S. takeover scene. The situation regarding takeovers in the rest of Europe stood in stark contrast. On the Continent, a series of legally sanctioned devices made it extremely difficult to carry out hostile takeovers. Management and owners of large blocks of stock could take advantage of numerous techniques to frustrate financial and industrial interests seeking to acquire firms through public purchase of their shares. And when such purchases did occur, there were scant protections for minority shareholders, since nothing required the purchaser to acquire all the shares.

Believing that takeovers would facilitate restructuring of European industry and create pressures for more efficient management, the European Commission sought to promulgate a Community Takeover Directive that would reduce the barriers erected in many countries. Needless to say, the British government, with the active support of the City, initially supported this move. British merchant

28. 1987 Q.B. 815 (Eng. C.A. 1986). Although the Court of Appeals recognized its power to review decisions of the TOP, the Court declined to do so in the present case because there was no justification from the particular facts to interfere with the TOP's decision. *Id.* at 815.

bankers saw an opportunity to expand a lucrative business onto the Continent, an effort that would be aided if the new Community rules were based on those that had already been developed by the TOP which, to a large degree, the banks themselves controlled.

The British, however, proved less than enthusiastic about the draft directive that emerged. While the Commission draft would have lowered the barriers to takeovers in the rest of Europe, it also would have opened the door to aggressive use of litigation in takeover battles, thus potentially unleashing the kind of legal wars in which Americans engage in these situations. Once they realized that the coast of the British takeover market would be laid open to aggressive lawyering, the leaders of the City establishment lost their enthusiasm for a European scheme to open the markets of Continental Europe to their takeover efforts.

Not so the City Solicitors, who had begun to develop a lucrative takeover-related practice despite the limited potential for direct litigation under the TOP scheme. Along with some American law firms, they had already developed sophisticated techniques and active practices in the M&A field. Because M&A involves the complex interaction of competition, tax, and company law, and because M&A battles often involve several jurisdictions, including the EC's competition competence and even (in a few cases) U.S. law and U.S. courts, the "Euro-law" M&A practice had been a boon to many City Solicitors and has supported the rapid growth of many of these firms. Some of these UK lawyers, were far from enthusiastic about the informal methods favored by the City bankers and the TOP, and very supportive of the approach to takeovers adopted by the EC directive.

The debate over takeover law is complex and ongoing. As we have seen, arguments occur at two levels. The first is whether takeovers should be encouraged, and barriers to takeovers dismantled. On this issue, the British and the Commission seem to be in agreement, but other countries have been resistant. The second debate is among those who favor a "free market" in takeovers, but disagree on whether the regulation of this process should be handled informally by the financial community, or formally through legal rules and with recourse to the courts for judicial review of administrative determinations. On the latter issue, the City lawyers, American law firms and probably other "Euro-law" firms line up with the European Commission on the side of legalization, with the financial community in London hoping to hold onto the informal methods it controls and prefers.

There is some reason to believe that the lawyers and the Eurocrats will win in the end. On the one hand, some of the countries that have resisted liberalization of takeovers may be changing their tune. These changes in attitude toward takeovers are being impelled by the competition among European financial centers. Takeover business provides a major stimulus to stock market activity and has a significant effect on stock prices. As competition heats up among financial capitals, national authorities are beginning to see that the cozy protections they have provided for firm management may hamper the international competitiveness of their financial markets. As these changes occur, the substantive rules promoted by the Commission may seem less objectionable. At the same time, the City may come to see that its effort to preserve its informal system is a rear-guard action that should be abandoned. Already, the TOP is making changes that will render its decisions more transparent and reduce the dominance that the banks can exercise in its informal process, so that the City may eventually yield to Brussels' desire to further legalize takeover regulation. Moreover, as a truly European-wide takeover market develops, the "club-like" informalism that might operate effectively within the City of London will prove ineffective for a market that involves twelve countries with as many cultures, banking traditions, and legal systems. For that reason, it is reasonable to predict that a more "juridified" system will come to be acceptable to all. If that comes about, it will be in no small measure the result of the efforts of the multinational law firms, who have championed legalization, assisted the EC to develop its own approach, and demonstrated the utility of mega-lawyering to new and old clients. These firms have lobbied in Brussels and the national capitals, organized European colloquia on M&A, published articles on the new legal technologies used in this practice, brought high-profile cases, and encouraged journalistic accounts of their exploits and the substantial rewards garnered from them.

c. Other impacts on the old European mode of production of law

We have already seen that the growth of the European M&A market has facilitated the transformation of the City Solicitors into U.S.-style large-scale law firms engaged in mega-lawyering and is placing severe pressures on the informal system of takeover regulation practiced in Britain as well as generating changes in national takeover and competition regulation elsewhere in Europe. In order to further trace the impact of this growing market and the new

forms of lawyering and legal organization it generates on the old European mode of production of law, we take a brief look at two recent developments: the creation of a specialized and elite branch of the judiciary in France to handle major economic cases, and the emergence of U.S.-style corporate law firms in Germany. Both, directly or indirectly, in part or in whole, are the result of the transformations set in motion by the M&A boom.

1. France creates an elite chamber for economic disputes

In recent years, as part of its effort to strengthen the Paris capital markets, the French government has tightened up its regulation of many aspects of stock exchange transactions, increased protection for shareholders of takeover targets, and beefed up the power of the competition authority. The COB (France's SEC) and the French anti-monopoly board are subject to judicial review and more and more major economic issues are being referred to the first chamber of the Paris Court of Appeals, which has jurisdiction over these major economic disputes. One observer noted that ever since the new laws on takeovers were promulgated in France, every takeover bid has eventually come before the Court of Appeals.

These new cases present issues with which the French civil courts were ill-equipped to deal. Until recently, major economic transactions of this nature were handled within the administrative structure of the French state. But with the liberalization of markets and the need to create a more neutral legal framework that would provide "rules of the game" for economic actors independent of *ad hoc* government policy determinations, the civil courts have had to take on a set of economic issues unlike any they had seen before.

This task was at odds with the traditions or *habitus* of the French judges who had cultivated their distance from, and ignorance of, big business. In the old European tradition, the judiciary, like the bar itself, achieved autonomy by appearing to renounce the world of commerce. Moreover, they cultivated a tradition of strict adherence to the law, making clear that it was no business of theirs to shape new rules or develop innovative solutions to new problems. But faced with the responsibility to resolve major business disputes under new legal rules which have not been elaborated into complex codes and for which no body of authoritative doctrine had been created, the French judges found that they were expected to master the complexities of major financial transactions and make law in hitherto uncharted areas.

The result has been a major debate among the elite judges of the Court of Appeals. For some, the new jurisdiction is an opportunity to develop and exercise a new legal-financial expertise, and to fill in the gaps in new regulatory schemes. Others want to keep to the old traditions and the cult of pure law²⁹ Needless to say, the multinational firms lend their support to the first group, who are encouraged to mix with the business elite, understand developments in the markets, and integrate the growing corpus of EC law into their decisions. For many judges, especially those with prior background in economic affairs, this creates an opportunity to change the role of the judiciary within the legal field, and its relationship to the state. Judges who step boldly into the new world of financial regulation and Euro-law may gain prestige their peers have failed to secure, even at the price of a loss of distance from a world of commerce whose status itself may be on the rise in France.

ii. Germany creates large corporate law firms

In recent years German corporate law firms have grown in size, secured permission to operate multi-city practices, opened offices throughout Europe, begun to employ mega-lawyering techniques, and developed a capacity to provide "multi-disciplinary" services by either hiring lawyers with training as tax consultants or auditors or developing relationships with other professional groups. A major impetus to the growth and restructuring of the corporate bar in Germany has been the Euro-law market, and Euro-M&A in particular. M&A work requires a major investment, as firms must attract specialists in the several subject matters involved in this area of practice and develop the kind of "excess" capacity needed both to field teams of specialists on short notice and deter potential opponents. One observer of the German scene reports that the larger German firms secure 20-30% of their revenue from M&A, and that firms unable to gear up for this market have suffered. In addition to the stimulus of M&A work, the development of the large corporate law firm in Germany has been spurred by the prospect of competition from the large British, Dutch, and American firms on the Euro-law market and to a lesser degree at home. Once again, we see how the Euro-law market is impelling major

29. See generally Dezalay, *supra* note 12, at 90-91 (defining pure law as the scholarly representation of legal practice by those possessing the authority to engage in the legitimate interpretation of law).

changes in the organization of practice and the nature of business lawyering in Europe.

2. Structural Changes in Academic Business Law in France:
From Grand Priests of the Law to the Market
for Legal Expertise

The internationalization of the law, and the juridification of economic relations that has accompanied the construction of the EC, has had a significant impact on the production of scholarly knowledge about the law, particularly in civil law jurisdictions like France. In place of the traditional model, dominated by a small corps of professors who were firmly rooted in the academy and who stayed aloof from practice, there is emerging a new system, inspired by Anglo-Saxon models. This new system is characterized by much greater professional mobility and accords higher status to practitioners.

In France, the legal multinationals which have come to dominate the Euro-law market have begun to invest heavily in legal education and the production of doctrine. They have hired professors, supported conferences, funded university chairs, and influenced the selection of people to occupy these positions. These developments, which have had an impact on the traditional autonomy of the universities, have allowed the large law firms to occupy a central position in the academic field as they bring into their sphere of influence a new breed of practice-oriented academics who are able to assert the traditional professorial privilege to "speak the law." They presage a major structural change in the mode of production of law in France, and probably in many European countries. The "old priests club," through which doctrine was produced by a small group of senior professors, operated on an "economy of scarcity" in which authoritative legal opinions and advice were the prerogative of a small group more interested in producing legal coherence and legitimacy than in meeting business needs for legal innovation. Under the banner of the "return to the law," a new breed of academics are creating new approaches to the production of authority and expertise, better adapted to the rapidly growing Euro-law market. This new breed, which has emerged from actors heretofore on the periphery of the national legal field, has challenged traditional hierarchies and the old European division of labor in which practitioners were excluded from the arena of doctrinal production in the interest of preserving "the purity of the law."

a. Changes in the academic field

In France, the process of structural change began in the 1970s, thus, preceding the period of rapid growth of the Euro-law market which really took off about 1985. Two factors impelled the initial changes. The first was the rapid growth of law faculties and thus of the number of professors. Legal education in France, as in much of Europe, underwent rapid growth in the 1970s. The number of students soared, new law schools were created, and others expanded. The ranks of the professoriate increased rapidly. In Paris alone, once dominated almost exclusively by the Faculty of Law of Paris (the Sorbonne), *eleven* new law faculties were created.

At the same time, a new approach to legal education was being forged, originally in provincial law schools. Under the leadership of the "Rennes School" of commercial law, a group of relatively marginal academics began to champion what was for the time and place a truly radical approach to legal education for business lawyers. In contrast to the traditions of French legal education, which were oriented toward academic theory and pure doctrine, this "School" argued that business law, like surgery, had to be learned in practice and through close contact with practitioners. They recruited practitioners to serve as "Adjunct Professors" and created a new, quasi-academic degree called the DACE, or the "Certificate for Business Lawyers."

Initially, this effort did not have a great effect on the traditional hierarchies and structures of the French legal field. The "grand priests" of the law, and the elite of the international firms in Paris, tended to look down on these provincial upstarts, who (in their view) lacked the social credentials, cultural distinction, and seniority needed to effectively play the role of "broker" among factions of the French business elite that had been the preserve of the "old priest's club." But the new French "business lawyers" were successful in attracting clients and expanding into new areas of practice, especially those that were opened up by internationalization. In effect, they expanded the boundaries of the French legal field, thus, unsettling traditional hierarchies and *habitus*, even if they did not initially overturn them.

At first, "business law" seemed just a supplement to the legal field, but it proved to be a dangerous supplement indeed. By arguing that business law principles had to be derived from, and learned through practice, the "School of Rennes" and other academics who led and accompanied this development introduced a

radically new concept of legitimate legal knowledge onto the French scene. The French (and generally the civil law) tradition had been based on the *isolation* of legal knowledge from practice. The production of authoritative doctrine was carried out by individual scholars. These notables were the authors of the great treatises that set out the doctrine in a magisterial and systematic form. Produced through long and lonely labor, these treatises created both a body of knowledge and a source of authority. When consulted on specific matters, the priests need merely refer to a few sources available in their personal libraries, draw on the reservoir of knowledge accumulated through scholarship, and produce an authoritative judgement.

The resulting isolation from practice and affairs provided a guarantee of the independence of the guardians of juridical orthodoxy, whose authority rested, in no small measure, on their apparent distance from vulgar aspects of legal practice which they neither knew anything about, nor wanted to know about. Not incidentally, it also meant that the authoritative spokesmen for the law had to come from wealthy families, who could afford to finance the long and often unremunerative apprenticeship it entailed. But if, as the "business law" movement asserted, legitimate knowledge had to be derived from practice rather than mere study, this whole system was put into question.

b. Aspirant academics turn to practice and the large firms

This revolution in ideas about the source of academic legal expertise led some younger academics to chart a new approach to university careers and scholarly production. Acting on the assumption that the only way to learn about business law was from practice, and aware that they could not get access to such knowledge solely through academic studies, these aspirant professors of business law sought employment in the large multinational law and accounting firms that were entering the French market for legal services. The younger business law academics (and those who aspired to become academics) recognized not only that they had to join the firms to learn from practice; they also saw that the mode of production of legal knowledge that was being created by the multinational law firms was superior to the old artisanal techniques normally employed in the French academy. The firms, as we have seen, had created the structures and the technologies necessary to cope with both the vertical and horizontal aspects of the Euro-law market. They had assembled large numbers of lawyers with differ-

ent specialties, and created networks of people expert in the laws of the several European countries. Indeed, it might be argued that the large firms had "overinvested" in expertise partly as a technique of marketing and partly as a tactic to increase their economic power and thus their market share. The multinational firms had the capital to create information retrieval and communication systems that would allow them to keep abreast of rapidly changing laws and regulations in many jurisdictions at once. They stressed the importance of integrating business law and management ideas, and deployed multi-disciplinary teams to analyze new developments and complex issues. They prided themselves on keeping ahead of the law, and creating new legal rules and strategies to benefit their clients and enhance their own competitive position in the Euro-law market. *Thus the firms were veritable laboratories for the study of Euro-law as well as well-oiled machines for its practice.*

Since, as part of their tactic of over-investment, the firms were on the lookout for people with talent and were prepared to pay them handsomely, the large law firms began to attract the "best and the brightest" of French lawyers, including many with academic positions or aspirations. Younger professors in Paris and elsewhere joined the firms or worked for them on a contractual basis, and young lawyers went to work in the multinational offices in the hope of increasing their chances to get an academic post later.

c. The breakup of the club

It used to be that the Faculty of Law of Paris dominated the field of doctrinal production, and its professors formed the core or inner circle of the "old priests club." The "club" stood aloof from law practice and business, although its members were closely tied to the world of affairs through complex but largely invisible mechanisms. These guardians of the temple of pure law stood at the apex of the academic pyramid, and controlled the production of legal doctrine. In the past decade, as a result of the explosion in legal education, the impact of internationalization, and the growth and success of the "business law" movement, this club has started to break up.

The breakup of the club can be directly traced to the impact of the French business law market, and particularly its rapidly growing Euro-law component. The demands of Euro-law in particular have changed what business wants from legal academics, reducing the market value of the "products" of those who operate in the old European mode. At the same time, changes in the supply side

brought about by the growth of legal education, the increase in the size of the professoriate, and the entry of newcomers into the academic field have further contributed to the weakening of the hold of the priests on the market and their importance in the legal field.

The old European mode of production of legal authority was not completely divorced from the market, but the typical "product" and the way it was financed allowed the "priests" to appear distant from commerce. In the old market, the typical product was the legal opinion or consultation: a learned statement of the law in an area that could be cited in court or relied on in negotiations or planning. These opinions were solicited by practitioners who sought the authority of the "priests of pure law" on debated issues. After discussion with the practitioners who explained the problem and requested the opinion, the professor would retreat to his study and produce a learned document grounded on the authority of the scholarly tomes which he had previously published. These opinions were issued *ex cathedra*, as it were, and had the style and authority of major American law review articles if not of judicial opinions from important judges.³⁰

In the new era ushered in by the growth of business law in general, and Euro-law in particular, business clients still need the services of academics, but the clients and the practitioners who represent them have begun to demand a different kind of service, and look for a different academic product. Rather than asking for one-shot grand opinions based on learned mastery of some specific field of law, business now looks to the academics to provide highly specialized information on a regular basis to integrate into daily decision-making. This kind of service requires regular contacts with the practicing lawyers and their clients. To render such service effectively, academics must not only know the law, they also have to grasp business needs and have the ability to work with multi-disciplinary teams assembled by the law firms.

The professors dedicated to the cult of pure law could not meet these new demands. They lacked the required expertise, eschewed the close relationships with law firms which was necessary to keep abreast of rapid changes, and operated at a slow and stately pace wholly inappropriate for the rapidly changing Euro-law market and

30. There is some similarity between the system of consultation among practitioners and opinion-writing by professors in France, and the Barrister-Solicitor relationship in the UK.

the aggressive practice of American-style mega-lawyering which must operate in the "real time" of court filing dates and "drop-dead" deadlines for deals. Demand for their services declined, and the market for classic consultations and learned opinions began to dry up.

As demands for academic services have changed, so has the supply of such services. Now that there are twelve law faculties in Paris alone, the number of academics available to serve business needs has grown, and the competition among them has increased. The growth of the law faculties has undermined the monopoly of legal authority once exercised by a small number of Parisian-based legal *savants* safe in their comfortable monopolistic niches issuing learned opinions designed to last forever. In their place has emerged a much larger group of more competitive newcomers who are prepared on demand to offer instant interpretations and analyses aimed at a specific problem or designed to aid one of the parties in an individual law suit or negotiation. While some from the old school have looked with disdain on these new products, referring to them as "throwaway law," this is often just what the clients want. Moreover, the academic newcomers have developed close ties to the multinational law firms, sometimes working in "of counsel" type roles. These contacts have given them both expertise and income unavailable to those of their university colleagues who have chosen to remain within the temple of pure law.

d. The brain drain threatens the efficacy of doctrine
and the legitimacy of the law

The development of close and open alliances between the multinational law firms and the new "practitioner-professors" of the business law type threatens to upset the delicate play of distance from, and involvement with, the world of affairs that created and maintained the legitimacy of the old European mode of production of law in France. The production of "pure" doctrine, based on the apparent aloofness of the priests from commerce, and grounded on what was presented as a scientific body of learning, created the image of the law as an autonomous body of coherent authority. At the same time, the class-based method of recruitment into the priest's club and the subtle relationships between the priests and the affluent practicing lawyers who solicited their magisterial and scholarly opinions, ensured that the doctrine was adapted to the interests of the world of affairs, and provided the priests, albeit behind the veil of formal consultations, with access to the real

world of business and its needs.

As the club breaks up under the pressures of Euro-business law and the multinational firms, this system may not survive. With the growing co-option of the academy by the large law firms, the new "practitioner-professors" are pulled more and more into the world of affairs, and the firms are more and more interested in investing in academic law (of a particular type) in ways which will give them advantages on the Euro-law market. At the same time, the greater practical knowledge the newcomers gain from their contacts with the firms, and the access these contacts give them to information only available in the libraries, data bases, and networks of the large firms, gives these newcomers increasing prestige among law students and within the law schools. The growing prestige of the newcomers devalues the credentials of the "pure" academics still wedded to the old European mode of production, and cuts them off from former sources of income and information.

The breakup of the club has fragmented the old academic mode of production of law in France without necessarily producing a satisfactory substitute. To be sure, the large law firms continue to demand academic services, and the newcomers are cheerfully producing for this market. While they also maintain their academic credentials by publishing scholarly books and articles in learned journals, this work is much more "applied" and more oriented to short-term needs than the type of research that was the hall-mark of the old European mode of production of academic knowledge. There is something to the gibe that the new system encourages the production of throw-away law. As the newcomers shift to more applied work, the academics who have remained aloof from the new system and continued their commitment to the cult of "pure law," are finding it harder to maintain the quality of their work and their influence in the field. As the market for old European-style legal opinions declines, the priests lose the close and intimate contact with the world of affairs that helped ensure that the products of the old European mode were more or less attuned to the needs of the French business class. In effect, the old system of consultations and opinions both financed "basic research" on the law and ensured that the producers of this research had access to the information needed to produce legal doctrine attuned to business needs. With the change in the kind of academic services demanded by the market, financial support for "basic research" of the old type has eroded, without something new taking its place.

e. International legal education and training accelerate the process

The process of structural change we have sketched in this section is both the result and the cause of internationalization. While the "business law" movement in the French academy was not solely, or perhaps even primarily, initiated by international factors and the growth of the Euro-law market, its success has been enhanced by these transnational phenomena and the concomitant emergence of the American mode of legal production in France. Moreover, these international factors accelerate the process and have led to a new development which will carry it forward even faster and further. We refer here to the growing importance of foreign, primarily U.S., legal education and internships for careers in French practice and academic work. As French lawyers increased their contact with the American mode of production, they began to see the value of an American legal education and, even more importantly, a period of training in a major U.S. corporate firm on the other side of the Atlantic. The number of top graduates of French law schools studying for LL.M.s or M.C.L.s in the U.S. and working as trainees or junior associates in American law firms has grown substantially in the past ten years. Most of these "expatriates" return to France after a period of study and work across the Atlantic eager to capitalize on their new skills and knowledge.

The Americanization of the best and brightest from the French law schools further undermines the old European mode of production of academic law. This system had depended on a cadre of assistants or disciples who would work directly or indirectly under the shadow of the "grand priests" whose own prestige was enhanced by the high academic and social status of the people they could recruit into the academic networks they commanded. As the top students begin to look to the United States for inspiration, and to business law for careers, they are pulled out of the orbit of the grand priests and into the sphere of influence of the large multinational law firms. Thus, this process of transatlantic education and training further lowers the prestige and weakens the capabilities of the old European priests and the networks of intellectual production they depend on.

f. The German academic field: A contrast

To highlight the detailed case study of the French academic scene, and suggest the complexity of the processes set in motion in national fields by internationalization, it is useful to take a brief

look at what is happening to the legal academic sub-field in Germany. It appears that, in contrast to France, the German legal professoriate has apparently maintained substantial prestige, autonomy, and financial status despite the impact of the Euro-law market and increasing contacts with the American mode of production of law. What explains the apparent differences in the impact of internationalization on the French and German legal academies?

In the absence of detailed research, we can only speculate on the factors that might be at play here. In the first place, German law schools have more contact with the state, and thus more prestige than their French counterparts, because they do not have to compete, as the French do, with the *Grandes Ecoles*. Second, at least until recently, the multinational law firms have had less impact on the German market than in France, so that the pull of Euro-law practice may be weaker. Third, German academics seemed to have been better able to integrate American legal ideas into their tradition and doctrines than the French. Fourth, the German universities have exercised more control over those who go abroad to study the law, and thus have been better able to reintegrate the best and brightest back into the academy and the networks that sustain professorial production on their return. Fifth, the German government, through the Max Planck Institutes and otherwise, provides much more financial support for basic research on the law than is available in France. Therefore, the German academics may not be as dependent on financing from the Euro-law market as their French counterparts.

F Conclusion: Europe and the World Beyond

The European story is a rich one, and introduces many of the basic concepts we have developed and forces we will explore in the other case studies. It demonstrates the reciprocal relationships between legal changes, the creation of new markets for services, and the restructuring of practices. It demonstrates that these changes can have a fundamental effect on national legal fields, and the modes of producing "law" within them. On a smaller scale, the changes in Europe mirror larger changes going on throughout the world, as barriers to economic integration fall, systems to produce goods and provide services become globalized, and nation-states and legal fields contribute and react to the new logics that are set in motion.

V. THE INTERNATIONALIZATION OF LEGAL FIELDS:
NORTH AMERICA, NAFTA, AND ACCESS
TO TRANSNATIONAL JUSTICE

In this part, we extend the analysis to North America. Our focus is on the North American Free Trade Agreement (NAFTA), and the concerns of public interest lawyers that NAFTA will impede their ability to represent certain groups and interests. This brief look at the ongoing NAFTA debate allows us to trace the logics of practice that are influencing and being influenced by global economic and political forces. It illustrates how transnational regimes create new legitimacy issues and generate new demands for access to justice.

This discussion provides some preliminary observations regarding the role of both public interest lawyers and the trade bar in the ongoing struggle over the terms of NAFTA. It suggests that recent shifts in the internal dynamic of the North American legal field caused by increasing internationalization have led to a re-emergence of the question of legitimation. Public interest lawyers, who play an important role in the preservation of a widespread belief in the essential fairness of legal institutions, have found themselves in a particularly difficult Catch-22 regarding NAFTA. While the agreement threatens to preempt much of the work of advocates based in national and subnational arenas, it also represents a significant opportunity for public interest lawyers to influence the nature of the agreement, particularly in the area of environmental and labor protections. This double-edged position has led to important splits within the public interest community with regard to strategies, with some groups opposing the agreement absolutely and others attempting to work to improve it.

While the structural forces at play in the NAFTA debates, and some of the strategies currently being deployed, are sketched out below, we do not presume to be able to present a comprehensive picture at this stage. The legal and political debates over NAFTA are ongoing at the time of writing, and a substantial amount of research remains once the debates have played themselves out. However, this study shows how the analysis developed in this Paper can be used to map some of the changes in the North American legal field and understand the way social protection and related practices change as they become subject to the forces created by new transnational arenas. It also helps us see some of the differences between Europe and North America, and thus better un-

derstand the distinct logic of the North American legal field.

A. *Legislation, Protection and Duality in the
(North) American Legal Field*³¹

While all legal fields involve struggle over certain "stakes," the stakes and struggles vary from field to field. While all fields involve regulation, protection, and legitimation, practices and modes of production of law will vary from country to country. As we have already noted, one of the distinctive features of the American legal field has been the way that protection and legitimation have been related. This has led to the idea of "countervailing legal power" and the creation of a "public interest" bar committed to the representation of social interests. Our case study of lawyers and NAFTA highlights efforts by the public interest bar in the United States to deal with the challenge both to their clients and their own practices created by this new transnational regime and the legal arenas associated with its construction and eventual operation.

1. The Duality of Professionalism

Legal fields produce legitimation in part by maintaining and reproducing their own legitimacy. Thus the concept of what is an appropriate and legitimate "professional" role is one of the "stakes" internal to the legal field. It is the site of repeated and ongoing debate in North America.³² Professionalism is frequently deployed in the determination of boundaries between lawyers and other service providers, fundamental to the maintenance of tension in the North American legal field between the law's regulatory and protective functions, and essential for the reproduction of the law's legitimacy in the social field.

In North America, there is a competing and complimentary duality in the definition of the lawyer's professional role. The ideal

31. Although we refer to the North American legal field and the American legal field interchangeably, our study is based primarily on the experience of American, and to a lesser extent, Canadian, lawyers and law firms. Transformations in Mexican legal circles have likely undergone a different and unique trajectory which is outside the scope of this discussion.

32. See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988) (discussing the meaning of "professional independence" and the varying ideals lawyers may follow); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (examining a lawyer's conflict between common morality and "role morality" in the adversary system); Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, in *LAWYERS' IDEALS*, *supra* note 11, at 1 (discussing the current "crisis in professionalism").

model of the lawyer includes both the roles of the "zealous advocate" and "guardian of the public interest." The successful model of the American corporate lawyer exemplifies the first of these competing visions, that of the zealous advocate who is expected to use every lawful resource to advance the client's interest, while remaining aloof from the morality of the client's position.³³ At the institutional level, this idea supports the flexible specialization of the large law firm, capable of "gearing up" to produce complex legal opinions or massive litigation strategies as the circumstances or the clients demand.³⁴

The public interest lawyer exemplifies the second of these competing role formulations. These lawyers seek out what Louis Brandeis described as "opportunities in the law" to use their skills on behalf of the larger social good. While in theory all lawyers are expected to contribute to the "public interest," in fact this universal obligation conflicts with the ideal of the zealous advocate and is inconsistent with the "do everything for the client at all costs" mentality of the corporate firms. As a result, we have seen in the American legal field the creation of "public interest" advocates who specialize in representing the unrepresented, and thus discharge the profession's moral obligation for all. Public interest advocates function as a necessary "corrective" in an adversarial system where not all interests are organized or represented.³⁵ Consequently, public interest lawyering has been an acknowledged and respected career path within the profession that brings a certain amount of prestige, if not substantial remuneration.

2. The Importance of an Ideal of Equal "Access to Justice"

The duality of the ideal notion of professionalism reflects a larger duality within the North American legal field. We have suggested that the relationship of the "regulatory" and "protective"

33. See Gordon, *supra* note 32, at 3-4.

34. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 16-18* (1991) (discussing the emergence and success of the large firm).

35. See David M. Trubek, *Public Advocacy: A New Approach to Administrative Reform*, in 3 *ACCESS TO JUSTICE* 447, 470-74 (Mauro Cappelletti & Bryant Garth eds., 1979) (stressing the importance of public advocacy for low visibility and diffuse groups). That is not to say that the public interest bar ever had the capacity effectively to counterbalance the corporate bar, given the vast disparity in resources between these groups. Moreover, the resources available for "countervailing legal power" have declined in recent years, both relatively and absolutely.

functions of the field, and the struggles between the actors associated with each, is one of the basic dynamics for the production of legitimacy. Corporate lawyers in the U.S. are more explicitly linked to social hierarchies outside of the legal field than their European counterparts. Law firms are increasingly characterized and managed as business enterprises, and their top level partners visibly maintain standards of living not unlike those of the corporate executives for whom they work. While the appearance of neutrality and aloofness was crucial to the maintenance of the legitimacy and autonomy of the legal field in the old European model, these characteristics have played a much less significant role in the production of legal legitimacy in North America.

More fundamental to North American legal legitimacy has been the ideal of equal "access to justice," which underpins the notion of countervailing legal power. In order to be legitimate, the legal system must be seen as working on behalf of all segments of the society. As the large corporate law firm became increasingly identified with its powerful clients, a need emerged for mechanisms and institutions to ensure justice for those who could not afford the elite, specialized and costly services offered by such firms. This led first to the idea that legal arenas should be open to all, and then to the corollary that specialized institutions were needed to provide equal access to justice in these arenas for groups who could not buy legal services in the marketplace. Without such countervailing institutions, it would be impossible for Americans to believe that social justice and protection could be achieved through the legal system.³⁶ The uniquely American institution of the public interest law firm, therefore, is a response to the growing size, power, and client identification of the corporate mega-law firm, as well as the embodiment of a belief in social change through law. The War on Poverty and the civil rights, women's rights, and environmental movements in the United States were all influenced by the belief that the law can be used as an instrument of social change and the lawyer can serve as an advocate for the public welfare. As a result, public interest law flourished in the 1960s and 1970s.

36. Another (earlier) example of legitimation can be found in the process of law reform. Under this view, laws are written in a manner which requires equitable application to all the parties involved in the dispute. However, as Americans learned the limits of this idea, the need for countervailing institutions became more apparent.

*B. Internationalization and Public Interest Practice:
NAFTA as an Instrument of Legal Destruction*

Internationalization is posing a serious challenge to the structure of countervailing legal power in the United States. The U.S. public interest law movement was organized on the assumption that state and federal courts, agencies and legislatures were both necessary and sufficient arenas for the exercise of countervailing legal power. Public interest lawyers needed to have an influence on all these arenas and were able to win significant victories for "unrepresented" interests in all of them. These victories, however, were always partial and often temporary. In the last decade, as a result of political and legal changes, victories have become harder, setbacks have occurred, and the prestige attached to public interest practice has declined.³⁷ The process of "internationalization" has contributed to this lessening of public interest lawyers' effectiveness. The expansion of transnational regimes like GATT, and the proposed creation of a new regime through NAFTA, have affected their ability to defend unrepresented interests and threaten to undermine gains previously won at the local, state, and national levels. In the eyes of some public interest practitioners, this is the result of a conscious strategy, not of "impersonal" forces. Thus, in an article that sets forth this point of view, Walter Russell Mead has argued that the Bush administration used international trade negotiations to complete the deregulatory agenda of the Reagan administration.³⁸ In his view, these secretive negotiations provided a low visibility arena for doing what could not be successfully carried out in the United States Congress. Thus, American negotiators pressed for provisions both in the GATT Uruguay Round and in NAFTA that would preempt local and state laws and limit federal authority to legislate in a number of areas deemed trade-related. In this manner, they sought to restrict the capability of states and provinces, and to a degree federal governments, to maintain existing protective laws.

37. The declining status of public interest practice is one of the sources of what some have called the "crisis of lawyer professionalism," which has spawned numerous attempts at reconstruction. Cf. Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS' IDEALS*, *supra* note 11, at 152-53 (examining five crisis periods that contributed to the decline of public interest work and increased the perception of the lawyer as a businessman).

38. Walter Russell Mead, *Bushism Found*, *HARPER'S*, Sept. 1992, at 37.

1. The Impact of International Trade Agreements on Protection

Whether or not these developments were part of an intentional deregulatory strategy, it is clear that they might easily have that effect. Trade agreements can significantly limit a nation's ability to provide social protection in three ways: they can legally preempt national and sub-national law, create disincentives for new regulation, and change the relative bargaining power of capital and labor. The enactment of trade agreements, like the construction of the EC, creates "regulatory gaps" that make the task of public interest lawyers much more difficult and forces them to deal with new legal matters and seek access to new arenas.

a. Preemption

The first, and most obvious, way in which international trade agreements can act to limit the regulatory choices available to governments is the potential for explicit preemption of federal and state jurisdiction in areas like health, safety, and the environment. Once approved by Congress through the passage of a package of implementing legislation, international trade agreements have the legal status of federal law, and thus preempt state and local laws. While their priority within the federal landscape is not always so clear, they do constitute law which federal agencies must consider and courts may consider. There will also be a great deal of political and economic pressure within the federal realm for lawmakers to bring the legal regime into alignment with such agreements, given the permitted retaliatory trade measures for their breach.³⁹

Both GATT and NAFTA have the potential to preempt national and sub-national protective laws. GATT has already ruled that its provisions can preempt national law.⁴⁰ NAFTA adopts much of

39. See Patti Goldman, *The Legal Effect of Trade Agreements on Domestic Health and Environmental Regulation*, 7 J. ENVTL. L. & LITIG. 11, 26 (1992) (discussing the effect of international trade agreements on federal, state and local law).

40. An example worth examining in some detail is the recent GATT challenge to the U.S. Marine Mammal Protection Act (MMPA). 16 U.S.C.A. §§ 1361-1421 (West Supp. 1993) (amending 16 U.S.C. §§ 1361-1407 (1988)). The MMPA prohibits the importation of tuna caught using methods (usually purse seine fishing nets), which kill numbers of dolphins beyond the levels specified in the Act. *Id.* at 16 U.S.C.A. § 1371(a)(2). Mexico successfully challenged the Act before a GATT panel. The GATT panel ruled that the Act violated GATT's prohibition on import bans and was not saved by any of the exceptions contained in the agreement. First, the ban was based, not on a characteristic of the product itself (the tuna), but on the process by which it was caught. Second, the ban was an attempt to protect a species (dolphins) beyond U.S. borders. Finally, the U.S. could not show that "less trade restrictive measures," including a negotiated international agreement,

the language contained in the Dunkel Draft of the Uruguay Round of GATT and can be expected to give rise to similar concerns with respect to the maintenance of standards. With respect to local and state or provincial laws, however, NAFTA actually beefs up the language contained in the parallel GATT provisions to provide that the signatory governments must "ensure that all necessary measures are taken in order to give effect to the [Agreement's] provisions, . . . including their observance by state and provincial governments."⁴¹ Such language virtually ensures that NAFTA provisions will prevail over conflicting state or local legislation, which have been the traditional sites for the enactment of measures to protect the safety and health of individuals and communities.

b. Disincentives for regulation

The second way in which international trade agreements can function to limit the regulatory choices available to governments is by providing remedies for corporate entities who can establish that government policy decisions will have an adverse effect on their future business income. The dispute resolution sections of NAFTA give standing to private corporate entities who seek damages from governments for loss of future profits which might be caused by the initiation of a new social program or set of regulations if it is determined to be an impermissible barrier to trade under the Agreement. The potential that this type of claim might be brought creates a serious disincentive for governments considering new regulatory programs due to the risk of these large additional costs. For example, in 1989, under the parallel provisions of the Canada-US Free Trade Agreement, the provincial government in Ontario had to back away from a campaign pledge to establish a new publicly regulated regime of no-fault automobile insurance because of the potential cost of damages for lost profits that American insurance companies would have been entitled to claim under the

were not available to address the same legislative goals. Goldman, *supra* note 39, at 36-38. In the U.S., the tuna/dolphin decision was an important public illustration of the potential of international trade agreements to limit the scope and effectiveness of domestic legislative efforts to target environmentally unsound production practices, extend protections to the "global commons" or enact health and safety measures that do not have clear (scientific) support in the international community.

41. North American Free Trade Agreement between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States: Preliminary Text, pt. 1, ch. 1, art. 105, Free Trade L. Rep. (CCH), Spec. Rep. No. 36 (1992).

Agreement.⁴² No parallel opportunity exists (except where requested by the panel) for citizen or public interest groups to make submissions regarding public costs or benefits resulting from actions taken by governments or corporations. In this way, international trade agreements may provide a powerful disincentive for the development of new government programs and regulatory schemes of all types through the mere risk of large external costs.

c. Changing bargaining conditions

Finally, international trade agreements, by facilitating capital flows between countries through liberalized investment and tax regimes, but without reciprocal provisions concerning the flow of labor, can undermine existing bargaining regimes between labor and management. The threat of shops relocating to nearby low wage areas such as Mexico takes on a much greater credibility in the context of the proposed NAFTA regime. It has been argued that this threat can and will be used by businesses to successfully "ladder down" wages and benefits in the United States. In this way, the legal regime designed to protect labor interests in this country (or at least to strike a balance between the competing interests of labor and capital) could be rendered ineffective and obsolete.

d. NAFTA and the creation of regulatory gaps

The creation of NAFTA has the potential for creating regulatory "gaps." Students of the EC have noted that the EC may create situations in which areas once subject to legislative protection at the national level may be effectively deregulated.⁴³ The creation of the common market can affect national capacity to regulate in two ways. First, Community law may reserve a specific area to the exclusive competence of the Community, but then the Community may fail to provide legislation to replace the "preempted" national-level law. This situation creates a *de jure* gap. Second, the opening of borders may make it difficult for any one country to impose protective rules that increase the cost of doing business, even though Community law may permit national legislation. In such a

42. BRUCE CAMPBELL, CANADIAN CENTRE FOR POLICY ALTERNATIVES, CANADA UNDER SIEGE: THREE YEARS INTO THE FREE TRADE ERA 10 (1992).

43. *E.g.*, 3 THIERRY BOURGOIGNIE & DAVID TRUBEK, INTEGRATION THROUGH LAW: CONSUMER LAW, COMMON MARKETS AND FEDERALISM IN EUROPE AND THE UNITED STATES 172-89 (1987).

circumstance, with businesses free to move from a high cost to a low cost jurisdiction, countries may be fearful of imposing new requirements that will cause existing businesses to move to other jurisdictions and deter new investment by businesses free to choose among various sites for production or other activities. Such situations constitute *de facto* regulatory gaps.

The potential for both types of regulatory gaps are present in the final draft of the NAFTA agreement. While the Agreement states that governments are free to provide public services and establish appropriate levels of protection for the health and safety of workers, consumers and the environment,⁴⁴ NAFTA will restrict this freedom to legislate in areas that have a significant effect on trade. At the same time, the current agreement does not provide any mechanism that would replace preempted national rules with regulations at the Free Trade Area level. To the extent that NAFTA does preempt state or national regulation, therefore, it creates a *de jure* gap that could only be filled by amendments to the Agreement. Moreover, critics fear it will create *de facto* gaps as well, as states and provinces find their legislative choices constrained by fear of "runaway" shops and loss of new investment. Such a result would coincide with the needs of multinational corporations. It is no surprise that their relatively powerful advocates in the legal field have promoted rules that will have just such an impact. This situation forces the public interest advocates who oppose such effects to choose between competing strategies: They can seek either wholesale obstruction of NAFTA or promote efforts to reconstruct regulatory powers at the Free Trade Area level through modifications of the Agreement. The former choice puts them in conflict with powerful forces; while the latter requires them to shift to new advocacy arenas, develop new skills and expertise, and master a whole new geography of power. The distress caused by this Hobson's choice has probably contributed to the fervor of the public debates over NAFTA.

C. *The Crisis of Legitimacy and the Public Debates over NAFTA*

Realignments within the North American legal field, facilitated by processes of internationalization, have engendered a "crisis of

44. CANADIAN CENTRE FOR POLICY ALTERNATIVES, WHICH WAY FOR THE AMERICAS: ANALYSIS OF NAFTA PROPOSALS AND THE IMPACT ON CANADA 58 (1992).

legitimacy" whose effects can be seen in the unusually heated debates NAFTA engendered. Even though the economic integration of North America was already underway for some time,⁴⁵ the negotiations sparked a surprising amount of public debate in each country. This debate centered on NAFTA, even though most of the moves toward integration have occurred independently of the Free Trade Agreement. Even if the Agreement had not been ratified, there is reason to believe that these processes would not have slowed significantly.⁴⁶

However, the Agreement served both to focus and polarize public debates over the effects of economic internationalization. On the one hand, NAFTA was vigorously promoted by governments and business communities in Canada, the U.S. and Mexico. The Canadian government undertook a major publicity campaign to promote the Agreement,⁴⁷ and the business communities in the U.S. and Mexico have combined forces to address popular concerns about the effect of the Agreement on labor and environmental standards through a series of joint voluntary programs and initiatives.⁴⁸ The U.S. government worked closely with business in key sectors to ensure that the negotiated outcome would gain the support of these powerful actors, with a large measure of success.

45. The U.S. and Canada were each other's largest trading partners long before they negotiated the bilateral free trade agreement of 1987. The integration of Mexico has been proceeding rapidly since mid-1985, when the Mexican government, responding to increasing pressures from without and within, abandoned its import substitution policies in favor of an increasingly laissez-faire approach. Since that time, Mexico has privatized major government-owned businesses, lowered barriers to direct foreign investment, reformed its laws regarding the protection of intellectual property, reduced its tariffs to the relatively low average of 13%, and cut down dramatically its quantitative restrictions on imports. Barry P. Bosworth et al., *Introduction to NORTH AMERICAN FREE TRADE: ASSESSING THE IMPACT* 6, 7-8 (Nora Lustig et al. eds., 1992). Mexico has since become the United States' third largest and most rapidly growing market for exports. *Id.*

46. See Jorge G. Castañeda & Carlos Heredia, *Another NAFTA: What A Good Agreement Should Offer*, 9 *WORLD POL'Y J.* 673, 674 (1992).

47. The intent of the campaign (to "sell" NAFTA) became widely publicized in the fall of 1992 when Maclean's magazine published the transcript of a telephone conversation among a number of government leaders which contained a number of unflattering and pejorative references to the Agreement's opponents. *The NAFTA Tapes*, MACLEAN'S, Sept. 21, 1992, at 18. For a critique of the Tory advertising strategy, see BRUCE CAMPBELL, CANADIAN CENTRE FOR POLICY ALTERNATIVES, *A CRITIQUE OF "THE GLOBAL TRADE CHALLENGE" A TORY TRADE TABLOID* (1992).

48. See, e.g., Kristine L. Hall, Statement of the U.S. Council for International Business Cooperative Efforts of the U.S. and Mexican Communities to Address Labor and Environmental Issues in the NAFTA (Sept. 11, 1992), in *MATERIALS FROM THE ABA NATIONAL INSTITUTE ON THE NORTH AMERICAN FREE TRADE AGREEMENT* (Jan. 28, 1993).

Even industries who might be described as NAFTA "losers" ended up supporting the Agreement, in the hopes of obtaining additional gains down the road.⁴⁹ On the other side of the debate, a broad spectrum of labor unions, environmental, religious, family farm, consumer, women's, development and human rights groups banded together in opposition to NAFTA. They began working in the spring of 1991 in a number of loosely organized coalitions to raise public awareness and generate political pressure to influence the NAFTA process. The issues that they raise are very different from those that concern the large industries, corporate lawyers and trade negotiators who had the most influence in the process of drafting NAFTA. They are concerned about the Agreement's effect on the quality of life in North America, potential dislocation and disruption of jobs in the higher wage regions to low wage manufacturing regions in Mexico, enforcement of labor standards, the "transparency" of processes, pesticides in foods and, in Canada and Mexico, the "Americanization" of their cultures.⁵⁰ They predict that "harmonization" between countries will function to "ladder down" standards in the Northern countries rather than to "ladder up" standards in Mexico.

The real debate over NAFTA is not about "free trade" versus "protectionism," although it is often framed in those terms, but rather about the kind of market and society that will emerge from internationalization. Most of the participants in the debate appreciate the fact that increasing economic integration of North America is virtually inevitable. NAFTA represents a series of choices, not just about the nature of the trading relationship between sovereign states, but about the type of market economies the countries choose collectively to pursue. The very description of a "free" trade agree-

49. NAFTA supporters often justify their claims by referring to the principle of "comparative advantage," the notion that two countries trading with each other will each benefit the most if each exports what it produces best and imports what is difficult or costly for it to produce. These supporters argue that business will benefit in both the U.S. and Mexico because both will have improved access to the other's markets for the goods in which the other country specializes. Although some dislocations will occur, (U.S. textile producers and Mexican corn growers, for example) believers in the principle of comparative advantage claim that overall efficiency gains will more than offset these adjustment problems in the long run, producing increased growth and prosperity in both countries.

50. See George E. Brown, Jr. et al., *Making Trade Fair*, 9 WORLD POL'Y J. 309 (1992), for a good overview of this "alternative" agenda. See also Castañeda & Heredia, *supra* note 46, at 676-85 (arguing that a good trade agreement should include compensatory financing mechanisms, a worker mobility provision, an environmental and consumer protection charter, and dispute-resolution mechanisms).

ment, suggesting a market liberated to follow its own mysterious logic, conceals the extensive amount of regulation required for the construction of even a "deregulated" market economy. NAFTA's hefty two thousand pages would not be required if it were truly a "free" trade arrangement; a single page would do. The rules and regulations which are contained in the Agreement represent substantive choices about which interests ought to be encouraged and protected in each of the three countries. It is interesting to note, for example, that while NAFTA creates potential regulatory gaps, in contrast to the EC, no provision was made for replacing national law at the Free Trade Area level. This contrast provides support for the reading of NAFTA as a deregulation project.⁵¹

D. NAFTA and the Legal Field: The "Juridification" of Trade

We have noted that integration in Europe has relied heavily on law. This "juridification" has come about in part due to the inability of the Member States to secure domestic consensus on issues relating to integration and the fact that they often found it easier to allow Brussels or the European Court to issue directives or orders "from above" than to "voluntarily" enter into agreements bound to be unpopular with important domestic constituencies. An analogous, but not identical, process of "juridification" is taking place in the context of NAFTA. Law and the legal field is profoundly interwoven into this larger struggle over the nature and course of North American integration. This can be seen at two levels. First, because the legal field is already so strong in North America, it is no surprise that when trade issues have become salient, they are being approached by means of a highly complex legal document and process. Secondly, the addition of proposed "side agreements" on labor and environmental concerns are likely to extend the "law making" capacity of the NAFTA Agreement into areas not traditionally the subject of international trade agreements. The ways in which the "neutrality" of the law and legal language is being deployed to legitimate and justify the imposition of a specific regime at the first level, and the way the law's "public interest" arm may

51. Although NAFTA will preempt national and sub-national law, it does not provide machinery for social legislation at the transnational level. Thus, NAFTA is different than the emerging body of EC law which incorporates protections for labor, consumers and the environment. However, the negotiation of side-bar agreements by the Clinton administration, which may close some of the gaps created by the original Agreement, are the focus of intense lobbying at the time of writing.

provide still further legitimation at the second, illustrate the crucial intersection of the legal field in North America with the two-level game (domestic and international) played by the three national administrations engaged in this negotiation.

1. NAFTA as a Product of the Trade Bar

The trade bar, a relatively small sector of the corporate elite of the American legal profession, was most instrumental in the process of drafting NAFTA. Their level of involvement is justified by their expertise in matters of trade law and the needs of their multinational corporate clients. At the same time as individual trade lawyers contributed their know-how to the NAFTA negotiating team for the benefit of the administration and their clients, they greatly enhanced their own expertise. These same players will also be those who use and interpret NAFTA's myriad annexes and provisions. NAFTA is a "product" of the trade bar in a two-fold sense. First, the trade bar contributed to the production of NAFTA itself. In the process, they produced another product, expertise about NAFTA, which they can sell in the legal services marketplace to the highest bidder.

One of the primary features of NAFTA, in contrast with earlier agreements like the Canada-U.S. free trade agreement, is its high degree of specificity and the detail of its legal provisions. This increased juridification of trade relations benefits both the lawyers and their clients. From the client's point of view, specificity minimizes the risk that ambiguous provisions will be tested by adversely affected parties, and potentially decided against them. From the lawyer's point of view, this juridification of trade relations ensures that they will be needed to interpret the Agreement, and thus have a protected market for their services. In playing an active role in the process of North American economic and legal restructuring, these lawyers are also ensuring for themselves and their colleagues an even larger slice of the pie.

- a. Maintaining distinctions between "commercial relations" and "social issues"; between international "law" and domestic "politics"

The trade bar has an interest in maintaining a bright line between commercial relations and social issues, and insisting that

NAFTA be limited to the former.⁵² While NAFTA as written makes forays into a number of arenas not previously the subject of trade agreements, it does so firmly within a framework that keeps "economic" or commercial issues *IN* and "social" issues *OUT* of the Agreement. For example, this distinction was used by the United States as a reason to include a requirement in the Agreement that Mexico strengthen its intellectual property laws (they are "commercial") while resisting Mexico's request for changes in U.S. immigration law (it is "social"). While this is clearly a political choice, the maintenance of the commercial/social distinction helps obscure the value choices at stake and support efforts to keep NAFTA out of the public sphere.⁵³ This distinction also reinforces another dichotomy that is important in the NAFTA debate, namely the line between law and politics. It helps maintain the idea, defended by the trade bar, that NAFTA is law, not politics, and thus the exclusive preserve of lawyers. By casting NAFTA as merely a set of legal rules for the handling of international commercial transactions, vehicles for the facilitation of commercial relations between parties, and means for increasing the predictability and hence the efficiency of transactions, commercial lawyers can maintain their hegemony over the drafting, interpretation and manipulation of those rules. Moreover, because it stresses that NAFTA is not just law, but *international trade law*, this vision also justifies the closed and secretive nature of the drafting process, in which industry but not the public is consulted on various aspects of the Agreement. Thus, this vision helps justify moving questions from the open "civic culture" of national legislatures to the closed "trade culture" of international negotiation, and thus to an arena in which the advantages lie with those familiar with the trade culture.

b. Challenges to NAFTA may increase juridification

The critics of NAFTA have called attention to the obfuscation involved in the separation of the realms of commerce and law

52. See Castañeda & Heredia, *supra* note 46, at 675.

53. NAFTA critics argue that NAFTA threatens to set up a regime which will perpetuate the "anti-democratic" and "secretive" processes which surrounded its drafting. Such claims are direct challenges to the "insider" status of the many trade lawyers and corporate lobbyists in Washington who benefitted from those processes. For example, during the drafting of NAFTA, the Office of the U.S. Trade Representative engaged in extensive private consultations with industry representatives through a series of Industry Advisory Panels. These Panels allowed many corporate lawyer/lobbyists to further "territorialize" the business of providing input to the government in the formulation of trade policy.

from the domains of social protection and politics and have sought, in different ways, solutions to this dichotomy. The public interest lawyers are divided on this question. Some have sought to block the Agreement altogether; others have accepted the basic idea of an agreement while seeking to broaden its scope to embrace more social concerns, and open the process of negotiations and eventual dispute resolution. What is at stake here is the question of whether the public interest lawyers will choose to accept juridification of trade relations and the internationalization of social protection and seek to work for their clients within this framework. At first glance, this would seem to be a losing strategy for the lawyers. By challenging the dominant consensus on trade and NAFTA while seeking to work within the trade framework, the public interest lawyers seem to be waging in a bitterly fought battle on a completely skewed playing field. They have neither the numbers, the resources, nor the "insider status" (in Bourdieu's terms, the "symbolic capital") to mount a serious challenge to the ruling elite's consensus on free trade. Yet, they are doing so: The very fact that negotiations over side agreements on labor and environmental issues are taking place represents a virtual revolution in the agenda for international trade negotiation.

The apparent success of the public interest bar to date, and certainly the visibility of their struggle, is attributable to the particular structures of the North American legal field, and thus illustrates the specific logic of internationalization in North America.⁵⁴ The "high profile" of the legal field in North American society and politics has contributed to the "juridification" of NAFTA. While this has worked primarily for the benefit of the corporate bar and its clients, the "dualism" of the legal field may allow that process to cut both ways. Thus, the "symbolic capital" of the North American legal profession which allowed it to play such a significant role in the construction of NAFTA also may allow it to function as a powerful tool in the Agreement's reconstruction. The public interest lawyers who have decided to work within the Agreement's framework have gained legitimacy from the debate over NAFTA, and as long as they accept its basic premises, may be able to se-

54. Bourdieu has observed that "[t]he greater strength of the juridical field in the United States results in certain systematic differences . . . in the social role of the law and, more precisely, in the role attributed to legal recourse within the universe of possible actions, particularly in the case of campaigns to right particular wrongs." Bourdieu, *supra* note 5, at 823.

cure sidebar agreements that expand its scope and open its processes.⁵⁵

But this acceptance of juridification may be a two-edged sword. The public interest lawyers may be able to "leverage" the legal order's need for legitimation as it moves to a transnational level, build some protective functions into the new regime, as well as create new spaces for public interest advocacy. In that way, they may render the Agreement acceptable to Congress. While the gains achieved for workers and the environment from well-conceived and drafted side agreements may be real, one must not discount the contribution they will also make to the legitimation of the remainder of the Agreement in its present form and to the creation of new transnational arenas for the exercise of regulation and the limitation of protection. Ironically, therefore, the government/corporate consensus supporting the Agreement may benefit from the work of "public interest" advocates to the extent that they provide a way to enhance the political and legal legitimation of the Agreement, without having to address the underlying "democracy deficit" which juridification and internationalization represent.⁵⁶

*E. Conclusion: Internationalization and Restructuring
in the North American Legal Field*

The tension between the two hemispheres (corporate and public interest lawyers) of the North American legal field reveals itself on the terrain of the debates over NAFTA. Intricate webs of interest and power bind them together in complex and contradictory ways. Each of these players are redefining the other, even while being

55. Before his election to the Presidency, President Clinton (himself a lawyer) made a campaign speech in which he appealed to both of these powerful, but apparently contradictory aspects of the juridical field. He maintained that he would not renegotiate NAFTA. Yet, he also refused to submit NAFTA to Congress without having negotiated satisfactory "sidebar" agreements concerning environmental and labor issues. At the time of writing, negotiations just began among the three countries regarding the content of those "sidebar" agreements. Advocates for labor and environmental groups, who are encouraged by waning popular support for NAFTA, have worked to submit extensive proposals regarding the nature and content of these agreements. Without effective "sidebars" on labor and environmental issues, it is unlikely that NAFTA will muster congressional approval.

56. For a sustained explanation and argument concerning the notion of "democracy deficits," see generally Robert O'Brien, *Twin Democracy Deficits in NAFTA and the European Community*, (Mar. 28, 1993) (unpublished manuscript presented to the International Studies Association, Acapulco, Mexico, on file with the *Case Western Reserve Law Review*) (arguing that twin democratic deficits, in regional institutions and domestic political institutions, must be remedied for NAFTA to be successful).

transformed themselves. The "juridification" of NAFTA is both a reflection of the current state of the struggle between the hemispheres, as well as a site for the perpetuation of a struggle, that has the potential for transforming the current power balance among various sectors of the field. While NAFTA has been a boon to elite lawyers and could limit the effectiveness of laws and practices developed by the public interest sector, it has also generated a new set of high-visibility issues and created the need for transnational practices and access to transnational justice. Because NAFTA has juridified trade relations, the call for further juridification through side-bar agreements is more easily accepted, and the importance of the public interest lawyers reinforced. Mobilizing around NAFTA presents them with an opportunity to retool their advocacy to function in an increasingly integrated global economy. While pitting themselves against the elite bar, the lawyers for labor and environmental groups are also benefitting from "juridification." Since it provides them with an opportunity to argue for transnational rules regarding the protection of workers and the environment,⁵⁷ further expanding the scope and application of "legal norms" into areas of international society not previously subject to them and reconstituting their own arenas of professional hegemony in the transnational sphere.⁵⁸

Even before the original NAFTA Agreement was signed, the fortunes of various actors in the legal field (e.g., corporate elites,

57. For example, a labor lawyer who is able to find new ways to enforce a judgment against a multinational corporation which closes a plant in violation of worker rights in one country and then moves its assets to another, or an environmental lawyer who is instrumental in lobbying for the establishment of a North American Commission on the Environment (NACE) are both making substantive and constructive gains in their areas of concern while simultaneously contributing to the further "juridification" of the field of international trade.

58. The success of these practitioners in establishing themselves in a reconfigured North American legal field does not depend wholly on their manipulation of legal norms, nor on the political fortunes of the social movements which each represents, but rather on some combination of the two. That is, their fortunes are not determined either entirely within, nor entirely outside of the legal field, but are developed through the interpenetration of the legal field with the larger social or political field. On the one hand, the powerful and growing grassroots environmental movement provided the foundation for the inclusion, for the first time, of environmental issues on the agenda of an international trade negotiation. On the other hand, forums such as NAFTA provide new opportunities for creative lawyering in the labor movement, which has been thrown into a state of crisis by recent transformations in the global economy. The strategies taken by lawyers in each of these two different constituencies will be shaped by their positions in the hierarchies of the professional, as well as the political, fields.

union lawyers, environmental advocates) were being realigned. Whereas in the late 1980s it appeared that the Reagan/Bush deregulatory agenda had struck a serious blow to the "protective" pillar of the North American legal field, new representatives have emerged deploying more globally focussed strategies to mount a new challenge to the corporate elites of the bar. While the extent of their success cannot be predicted, it is apparent that this struggle within the legal field has significance for other fields as well. Those in the public interest bar that are struggling to limit NAFTA's impact on social protection are mounting a challenge to the neo-liberal consensus which seemed almost unassailable only a few years ago. They have helped unleash calls for the rethinking of democracy and democratic institutions,⁵⁹ and citizen group NGOs of all varieties have been extending their work and their networking into the transnational arena, formerly the undisputed territory of government institutions and multinational corporations. These NGOs and the lawyers who assist them are working for increased visibility, status and recognition by international institutions. It could be said that the public interest lawyers who have accepted the NAFTA framework are trying to redefine the idea of access to justice by including "access to transnational justice" as part of their demands; and that this is to the good, given the integration of the world economy and the inevitability of some form of trade regime that will affect national law. However, this tale is also a cautionary one, as it suggests the risk that these advocates might be co-opted by the elites which they endeavor to challenge. The "juridification" of trade and the internationalization of regulation and protection through NAFTA may be a double-edged sword. It represents the possibility for change, but also the potential for greater legitimization of current power structures.

VI. THE INTERNATIONALIZATION OF LEGAL FIELDS: TRANSFORMATION OF THE MODE OF PRODUCTION OF LAW IN THE "DEVELOPING WORLD"

Our preliminary review of the relationship between globalization and the law concludes with a brief look at developing countries, i.e., the nations on the periphery of the advanced capitalist world. New international conditions have led to radical changes in economic policy in much of the developing world.⁶⁰ Many de-

59. See O'Brien, *supra* note 56, at 22.

60. See generally Barbara Stallings, *The New International Context of Development*

veloping countries are shifting from state-directed, import-substitution approaches to "market-friendly" domestic policies and "export-oriented" growth strategies. In some cases, these changes are accompanied by new interest in democratization, human rights, and social protection. These changes affect the nature of law's regulatory and protective function, change the conditions for legitimation, and increase the involvement of global legal actors in national fields.

New economic conditions have generated global competition as capitalist nations of the core compete for markets and resources in the developing world, and developing countries compete for the capital and export opportunities necessary for accelerated growth. The legal fields of developing countries have become one of the stakes in this global competition. Legal reform is one way that developing nations compete for capital and investment; by reforming their legal systems and laws, developing nations seek to satisfy demands of donor agencies and attract private capital. At the same time, transnational corporations require more sophisticated knowledge about legal systems in the developing world as they seek to find the optimal location for production and other economic activities. This knowledge has become an asset in global competition, generating new interest in processes of legal reform and creating new markets for multinational law firms. These forces contribute to the internationalization of legal fields in the developing world, and to the transformation of the mode of production of law.

While the changes occurring in the legal fields of the developing world (including Eastern Europe and the former Soviet Union) are massive and far-reaching, and the actors involved in this process within and outside developing nations are numerous, little is known about the logic of the practices that are bringing about these changes. In this section, we sketch some of the basic forces that seem to be at work, and then illustrate some of the logics involved through a preliminary study of recent developments in Indonesia.⁶¹ As with the study of NAFTA and the North Ameri-

(1993) (unpublished manuscript, on file with the *Case Western Reserve Law Review*) (arguing that recent international changes, including the end of the Cold War, changing relations among capitalist powers, shifting patterns of trade, reduced availability of investment finance, and new ideological currents have had drastic effects on the economic development of third world nations).

61. Indonesia was selected for three reasons. First, one of the authors (Davis) has had substantial experience in Indonesia along with some knowledge of the Indonesian legal field. Second, the Indonesia case illustrates both the impact of global legal and economic

can field, this section is more a sketch of issues to be examined and research to be conducted than the conclusion of studies already undertaken.

A. Forces Affecting the Transformation of Legal Fields

In assessing the relationship between global restructuring and the legal fields of nations on the capitalist periphery, we need to take into account the history of the peripheral economies and their role in what has been called the "new international division of labour,"⁶² as well as their legal histories and the impact of global legal and economic forces. The actual trajectory of any legal field, and the struggles particular to it, will be the result of complex interactions among these factors.

1. New Factors Affecting Foreign Investment

Changes in technology, communications, and transportation costs have led to major shifts in the spatial organization of economic activities on a global scale. These shifts are affecting the nature of investment in the capitalist periphery and the role of some developing countries in the world economy. It has become easier for firms producing manufactured goods and some services for developed country markets to relocate activity, particularly labor-intensive production, into developing countries. It has become possible for portfolio investors to acquire and trade securities in developing country capital markets. This has led to changes in the competition among developing countries for foreign investment. Heretofore, much of the investment by core country firms in the developing world has been generated either by a need to secure raw materials (whose location is fixed by nature) or to service domestic markets (which had traditionally been sheltered behind high tariff barriers). But this new brand of investment is more "footloose," as direct investors have a wide range of choices for

forces, and resistances to those forces. Indonesia has not been completely open to foreign legal influences and pressures to "modernize," nor has the country been completely immune from such pressures. Finally, Indonesia plays two distinct roles in the world economy: On the one hand, it still has characteristics of traditional periphery economies (a large, partially closed domestic market primarily dependent upon its own natural resources); on the other hand, the country is moving toward a growth strategy based on open markets and the export of manufactured goods. The Indonesian legal field is thus subject to contradictory pressures.

62. See generally FOLKER FRÖBEL ET AL., *THE NEW INTERNATIONAL DIVISION OF LABOUR* (Pete Burgess trans., 1980).

the location of new plants and other facilities and portfolio investors have the whole world to choose from. This has led some developing countries to redirect policies in ways that will attract these new forms of investment. They have privatized state-owned firms, lowered tariff barriers, encouraged foreign private investment, created and regulated capital markets, and promoted export industries.

2. Legal Fields and the Competition for Investment

Legal fields have become important assets in the global competition for investment. Nations on the periphery have found it necessary or desirable to restructure their legal systems to make them more compatible with the operation of private markets, more transparent to private actors, and more open to international influences. They have sought to create "modern" laws, "efficient" courts, and "business-oriented" legal professions. In some cases, they have encouraged, or at least tolerated, the creation of "public interest" law groups. Some countries have eased restrictions on transnational legal practices. These changes, in part designed to convince investors and donors that the nation is committed to the "rule of law" and legal modernization,⁶³ have had an effect on legal education, the organization of law firms, and the nature of the local legal services market.

3. International Pressures for Legal Reform

National legal fields are not only feeling the "pull" of pressures to change from within; they are also subject to the "push" of external pressures to reform. In recent years the international financial institutions (IMF, IBRD, and regional banks) and bilateral agencies (e.g., the U.S. Agency for International Development (AID)) have included demands for "legal reforms" by their developing country clients.⁶⁴ These pressures are backed by substantial financial re-

63. For an interesting example of legal reform as a device to attract foreign investment, see the multi-page advertisement published by the Bolivian government in the *New York Times*. The Government brags of its "[h]ands-on approach to sweeping modernization of laws and constitution," promises a "judicial system that works," and a series of economic law reforms. *The Bolivia Report* (ADVERTISEMENT), *N.Y. TIMES*, July 19, 1993, at A5, A7.

64. See, e.g., INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, MANAGING DEVELOPMENT: THE GOVERNANCE DIMENSION 10-13 (1991) (stating that reforms proposed by the Bank "cannot be effective in the absence of a system which translates them into workable rules and makes sure they are complied with"); UNITED STATES INTERNATIONAL DEVELOPMENT COOPERATION AGENCY, DEVELOPMENT ISSUES 1991: U.S.

sources: International financial institutions, bilateral development agencies, and private foundations are investing hundreds of millions of dollars in legal reforms of various types in the developing world. These externally inspired and supported reforms create pressures to strengthen the legal infrastructure of markets and to reinforce democratic governance. They bring foreign experts to the developing countries, and spread Western legal ideas throughout the periphery

B. Possible Effects in Developing Countries

The results that are likely to flow from these forces and pressures are complex, and no simple scenario can be developed to predict the future of the legal fields of the periphery. However, there are some trends that may be expected. Among them are the following:

1. Resistance and Rapid Change

The legal fields are likely to resist change. Legal fields in the periphery, like those in the core, are conservative and semi-closed systems: Many within them will seek to preserve the autonomy of the field from external influence, and be very resistant to change from any source. Yet while the legal fields in the periphery may be slow to change, once they do change they may be more easily transformed than those of the core. These fields are often weakly institutionalized and narrow in scope. For example, the regulation of some peripheral economies is much less complete than in the core. The demand for change will be as much to extend the legal system to the rest of the economy as to transform it; "reforms" proposed by governments, private actors, or international bodies may involve expansion of the legal field into wholly new areas, rather than changing existing forms of regulation. Moreover, as in the core countries, changes in the legal field will not likely be smooth and continuous. Rather, stages of change will be observed corresponding to both changing influences from the core and changing locations of particular peripheral capitals in the hierarchy of production. Finally, because many national fields in the periphery retain connections with the fields of the former colonial powers, they may be subject to direct influences brought about by legal

change in the core.

2. Variation in Response

While all legal fields in the periphery will be subject to similar influences emanating from global institutions and transnational actors, the resulting forms of transformation will vary significantly. We have already noted the likelihood that some will resist change altogether. But even when change does occur, it is unlikely to follow any uniform trajectory. There are several cross-cutting and interrelated factors that will cause variation in the kinds of changes that may come about. Four principal axes of variation come to mind:

First, it is obvious that the structure of any national field will be influenced by its history, including prior relationships with different core legal traditions. Countries strongly rooted to the civil law tradition could take a different path than those whose roots are in the common law, even if the differences between the cultural motherlands of these "legal families" in the core are narrowing.

Second, while some variation may come about because of history and legal tradition, this may be offset by new cultural influences caused by shifts in global economic organization. The legal orders of regional hegemonies in various parts of the world may have a stronger influence than those of prior colonial rulers or cultural motherlands. To the extent that the world moves toward three major regional "blocs" centered around Japan, Europe, and the United States respectively, cultural influences from the regional core may lead to legal change and differentiation in the new peripheries. Thus, Latin America, whose legal fields have been heavily influenced by the civil law tradition and the old European mode of production of law, may see its future more in the United States and the North American legal tradition, while Asian nations may look toward Japan and its unique approach to legal order rather than to the former colonial powers in the West.

Third, while there is a general trend toward market economies and some form of "capitalism" (even in China), there is great variation in the way "capitalist" economies are organized and thus major differences in the structure and functions of their legal fields. For example, it has been suggested that "capitalism" as practiced by Chinese communities in Taiwan, Hong Kong and other parts of Asia is very different than capitalism as it has been known in the West. Specifically, scholars note that in "Chinese capitalism" economic organization is based more heavily on networks of personal

relationships and much less on arms-length transactions than has been the case in the West. This observation has led to a debate about the "Chinese mode of production of law," in which some scholars have argued that the emergence and expansion of capitalist market institutions in the People's Republic and other Chinese communities will not have the same role in fostering an autonomous legal order (or "rule of law") that capitalist development had in the West.⁶⁵ Thus, they argue that Western history provides few guidelines for anticipating the trajectory of legal developments in China and related communities, and suggest that predictions that the "rule of law" will follow in the wake of market-oriented changes in countries like China are mistaken.

Fourth, the nature of the state and its role in the economy and polity will affect the kinds of responses different nations will make to pressures for legal change. Some nations, like China, have relatively strong states with ancient histories, while others have weak systems inherited from colonial rule. In some countries, the tradition of state domination of both the economy and the polity are so strong that it seems unlikely that any degree of external pressure or influence will significantly change things, while others may adapt more readily to the neo-liberal order.

3. Competition for Reform and Knowledge

Pressures for reform will be accentuated by competition among developing countries as the existence of a supportive and "modern" legal system becomes one of the counters used to attract foreign investment as well as foster domestic capital. The developing world is likely to be the scene of increased competition among the economies of the advanced nations, and between firms from these nations. Just as knowledge of Euro-law has become a strategic tool for business operating in the EC, so knowledge of the legal fields of developing countries will be a strategic asset for multinational business. This expanding "developing world law" market will not simply encourage multinational firms to invest more heavily in knowledge about these legal systems, it will also be a spur for

65. Carol A.G. Jones, *The Globalization of Rule of Law? Some Questions from Asia* (May 1993) (unpublished manuscript, on file with the *Case Western Reserve Law Review*) (arguing that the economic success of the "Four Dragons"—Hong Kong, Singapore, South Korea, and Taiwan, as well as the current boom in southern China depend upon the stability and predictability provided by the traditional web of familial and business relationships and not upon any Western notion of a universal "rule of law").

them to play an active role in the reconstruction of these fields. Thus, we can expect that the multinational firms will accompany, or even lead, the development of reform efforts, and will seek to shape legal systems in ways that they find familiar and along lines that will enhance the value of their knowledge.

At the same time, firms in the developing world will see a need to master complex areas of "modern law," so that they can work more closely with counterparts from the core countries on projects that cross boundaries, and also serve as legal missionaries involved in the importation of new laws and the transplantation of institutions. There will be an increasing investment in "comparative law" in the developing world, especially in areas like telecommunications, environment, and securities. Newcomers in the legal fields of the periphery, often in alliance with foreign lawyers and multinational firms, will gain increased status within their fields, and encourage the transformation of modes of production of law.

C. Indonesia as a Case Study

To illustrate some of the general forces and explore their effects, we look at one large and important developing country, sketching recent developments and assessing trends. We have selected Indonesia as our focus; developments in its legal field will be used to illustrate the model response of a legal field in the periphery to global economic restructuring and world political changes. At the same time, the deviations of Indonesia's legal field from some general trends will be used to call attention to the ways in which the general model must be elaborated to deal with the particularities of individual nations.

Indonesia has been significantly affected by global economic restructuring. Due in large measure to increasing streams of Japanese investment, it has both expanded its natural resource exports and begun to develop various forms of export-oriented manufacturing, including the production of low-wage inputs for Japanese industry. As a result, in the past twenty years Indonesia has been able to take a higher place in the world hierarchy of production.

There are five major aspects of the impact of global restructuring on the Indonesian legal field that warrant consideration. First, because Indonesia has had a dual legal system, the process of "legal reform" requires not only changes within the modern sector, but a major expansion of its scope. Second, in Indonesia, as in other peripheral countries, there have been numerous formal efforts to reform the legal system to make it more like those in the core

countries. Such efforts have included technical assistance missions from the core countries and training overseas for law school faculty. Third, because offshore investment and finance has been crucial for the development of the Indonesian economy, a great deal of legal business affecting Indonesia has been done outside the country in places like Hong Kong and Singapore. Some of the most important influences that are contributing to the transformation of the legal field have come from offshore locations. Fourth, foreign law firms are expanding their operations in Indonesia, a sign that the climate is changing and the market expanding. Finally, the legal field is also being shaped by a hybrid of indigenous political forces who have joined with transnational NGOs. This development can chiefly be seen in the environmental area.

1. Economic and Legal Dualism

Indonesia's insertion into the world economy has been characteristic of a former colony on the periphery of the capitalist world system. Throughout the colonial period, the economy was divided between the traditional domestic sector and an advanced export enclave tied closely to the Dutch economy. This economic dualism was only slightly affected by the policies of import substitution pursued by the "Old Order" under Sukarno or the export orientation now being fostered by the "New Order" under Suharto.⁶⁶

A dualism similar to that in the economy can be observed in the practices of the legal profession. At independence, a small cadre of Indonesian and Dutch lawyers had received legal training in Holland and were recognized as advocates or notaries in all the courts of Indonesia. However, the law they practiced reflected the plural character of the law in the Indies. The Dutch Codes governed Europeans, Chinese on commercial subjects, and those few Indonesians assimilated to the European system. Chinese customary law was applied to Chinese in family, religious and other affairs, and adat law—sometimes in separate adat courts and in separate forms for different ethnic groups—was applied to most Indonesians. Islamic law, administered by Islamic courts, governed family, religion and inheritance for the majority Muslim Indonesians. Thus, the first question in any legal matter was always: What legal system applied?

66. The separation between the "Old Order" and the "New Order" is marked by the coup beginning in 1965 which resulted in Suharto replacing Sukarno as president.

These separate legal systems, and the legal practice founded on them, continued after independence. The small group of foreign-oriented lawyers continued functioning as intermediaries for American and other foreign companies such as Caltex and Standard Oil, applying Dutch commercial law in foreign commerce, which was dominated by the Dutch until Dutch holdings were nationalized in the mid-1950s. After the Suharto regime consolidated itself in the late 1960s, a small number of foreign lawyers began working in Jakarta representing foreign business interests. Few Indonesian lawyers were prepared to do so since they were oriented toward litigation rather than business advising. Nevertheless, there was an increase in demand for legal services at this time and some lawyers who had stopped practicing during the Guided Democracy period at the end of the Old Order began to practice again.⁶⁷ As in the Dutch system, there was a significant role for notaries in the preparation of legal agreements, such as contracts, and their functions were distinct from those of lawyers.

Until the late 1960s, there really were no organized law firms in Indonesia. Lawyers worked independently for the most part in small cramped offices with little staff support. Sometimes young lawyers would associate with a more experienced advocate; however there was no "partnership track" nor indeed any partners, since the law office was identified and dominated by the personality of its central figure. Probably the first Indonesian law firm on the American model was founded by Mochtar Kusumaatmaja in the late 1960s and is now called Mochtar, Karuwan & Komar (MKK). Mochtar Kusumaatmaja did his graduate study in law in the U.S., paying particular attention to the organization of American legal practice. The "innovations" he made in law practice in Indonesia includes an organization into partners and associates with a significant amount of specialization in different fields of law, use of a comfortable office with an organized filing system and a law library, and a conception of legal practice beyond litigation to include business counseling. A small number of other Indonesian firms developed on the same model as MKK. These firms, of course, were attractive to American and other foreign investors seeking representation in Indonesia and this attraction was enhanced by the fact that these firms came to have American lawyers work-

67. DANIEL S. LEV, *LEGAL AID IN INDONESIA* 26 (Centre of Southeast Asian Studies Working Paper No. 44, 1987).

ing in them as well as Indonesian lawyers who had studied in the U.S. or Europe. The number of firms that have developed on this model is still small—not more than twenty, involving no more than about 150 lawyers. The rest of the Indonesian legal profession continues to practice more or less in the old way, although some lawyers outside the Americanized firms have begun to offer more generalized business advice, albeit without the technology or the specialization of their more Americanized compatriots.

2. Direct Reform Efforts

Since the beginning of the New Order in 1965-66, there have been several major efforts at general legal reform, all of which have sought to move the Indonesian legal field in the direction of Western legal models and several of which have involved direct assistance from U.S. public and private entities. The first wave of reform came after the fall of Sukarno. Some civilians hoped that the Suharto regime would develop a liberal state. They set about to design an appropriate legal system, but these efforts had little impact. While the transition from the Old to the New Order was seen by some as an opportunity to extend the "rule of law," the Indonesian regime resisted these efforts.⁶⁸

Early in the 1970s two other types of legal reform efforts, inspired by American institutions and involving substantial American involvement, were initiated. The first involved the U.S. "Law and Development" movement of the late 1960s. The International Legal Center of New York (ILC) sent a number of young American lawyers to Indonesia to try to "modernize" legal education and documentation by bringing teachers of law to Indonesia and by exposing Indonesians to American law and legal practice. These legal missionaries worked principally at various university law faculties. Another project sent Americans to work with the

68. One reform commission recommended the adoption of devices such as judicial review of both legislative and executive decisions and the replacement of the inquisitorial criminal procedure with the accusatory one. But both the military and the Ministry of Justice opposed these reforms. The military had no political reason to accept any restrictions on its power, and the Ministry of Justice resisted any efforts to create an autonomous judiciary that might hamper the executive power and the supremacy of the People's Consultative Assembly. See Daniel S. Lev, *Judicial Authority and the Struggle for an Indonesian Rechtsstaat*, 13 LAW & SOC'Y REV. 37 (1979) (discussing legal reforms generally during the New Order). Ultimately, all of the important recommendations of the Commission were ignored and the legal system under the New Order continued to operate much as it had under the Old. See *id.* at 49-66 (discussing the ultimate rejection of the proposed legal reforms).

Legal Documentation Center of the University of Indonesia Faculty of Law and the National Legal Reform Center (PBHN or Pusat Pembinaan Hukum Nasional) of the Ministry of Justice. Their initial goal was to bring together, codify and make accessible both the statutes and regulations then in force and the (largely unpublished) decisions of the various courts. While the traces of these early reforms can still be seen, their impact was limited. They did, however, begin the creation of a cadre of American experts on Indonesian law: Several of the ILC fellows are now active in Indonesian-related corporate practice.⁶⁹

A second major legal reform effort has involved the drafting of new statutes and regulations in priority economic development areas. Harvard University began to play an important role in this process in the early 1970s, working on mining legislation,⁷⁰ business law, and taxation. Harvard's involvement continues to the present day, and has expanded into other fields as well.⁷¹ While many of these Harvard projects have resulted in new statutes and regulations, these efforts have not had a deep effect on the national legal field. The Harvard reforms started as technical assistance in economic management, and were not conceived of as part of a general legal system reform. What the Ministry of Finance, and later the Coordinating Ministry of the Economy (EKUIN), was interested in receiving from Harvard was technical economic rather than legal expertise. However, the economists that Harvard sent to Indonesia were often asked to help draft legislation. Starting in the early 1980s, they brought in lawyers to work on this drafting.⁷² But these expatriate legal experts had little contact either with the

69. Robert Hornick is a senior partner with Coudert Brothers. Greg Churchill works in a business law firm in Jakarta.

70. It is interesting to note that Mochtar Kusumaatmaja, the founder of MKK, also had some impact on the development of these mining regulations. This cooperation shows the interaction of foreign experts and internationally-oriented, locally-based corporate practitioners.

71. Harvard's involvement with Indonesia, begun by the Law and Kennedy Schools, is now organized chiefly by the Harvard Institute for International Development. Harvard's five large projects include: 1) the Customs and Economic Management (CEM) project for customs & tariff reform, tax reform (the most important components of which were income tax reform and the implementation of the value added tax in 1983-84), company law, merger & acquisition law, and antitrust law; 2) banking and financial reform; 3) regulation of pesticides; 4) urban poverty; and 5) development of the Center for Policy Implementation and Studies, a type of domestic consulting firm.

72. This represents an example of one type of symbolic capital, expertise in economics, being the basis for activity outside the realm in which symbolization is most effective, i.e., in the drafting of legal rules.

foreign lawyers working in Jakarta, or the local bar. The regulatory process was carried on directly with technocrats in the ministries, and outside lawyers were not regularly consulted. Thus, the legal drafting projects did not contribute materially to the development of new markets for legal expertise, nor (as yet) done much to stimulate the growth of the corporate bar as the EC regulatory process has done in Europe.

These reforms may have given some assurances to foreign investors that Indonesia was moving to create a legal environment favorable to global restructuring. But the general perception is that more needs to be done, and that the legal system is a barrier to capitalist development in the post-Cold War era.⁷³ The United States Government shares this perception, and has just funded a \$20 million project (called ELIPS) to promote legal reform in Indonesia. The U.S. Agency for International Development (AID)-funded ELIPS project, was, in part, inspired by a report prepared for AID by former ILC fellow Robert Hornick of Coudert Brothers. The project is premised on the belief that economic restructuring in Indonesia will require a more effective legal system in the field of "commercial law," a broad term covering much of business law. The authors of the ELIPS plan, which apparently originated with AID and the World Bank, reasoned that as Indonesia privatizes its state-dominated economy, relies more on markets and less on planning for economic coordination, and expands its manufacturing sector, it will require a legal system that can provide security of expectations and effective resolution of economic disputes.

ELIPS, which is just getting underway, involves the preparation of an entire new set of business and commercial laws, the reform of legal education to make it more "business-oriented," and the computerization of legal opinions. ELIPS may bring dozens of American legal experts to Indonesia, and probably send even more Indonesian lawyers and educators to the U.S. for training. The project may also explore some form of Alternative Dispute Resolution (ADR) for commercial matters, probably as an effort to create a commercial dispute processing system outside the regular court system which is ill-equipped to deal with commercial matters,

73. Thus, when the American Indonesian Chamber of Commerce, comprised of approximately 140 of the American corporations and law firms involved with Indonesia, was asked for ways to improve the environment for trade and foreign investment, it suggested promoting entrepreneurial development and reform of the legal system.

particularly those with international dimensions, and is believed to be highly resistant to change. The ELIPS plan continues some of the earlier U.S.-inspired reform efforts, but on a much larger scale and with much more substantial resources. Moreover, the ELIPS plan comes at a time when other forces are impelling change in the Indonesian legal field, and thus is more likely to lead to significant change than earlier efforts.

3. Indirect Influence of Offshore Legal Practice

"Offshore law," i.e., the creation of legal arrangements outside Indonesia but affecting business activities within its economic space, has had a significant effect on the national legal field.⁷⁴ These offshore practices have required a response from the Indonesian regulators and the rest of the legal profession concerned with the Indonesian economy.⁷⁵ Offshore law, therefore, contributes to the internationalization of the Indonesian legal field and the transformation of its mode of production.

The most significant development of offshore law has been in the financial area. This has stemmed in part from the growth of Eurodollar financing for Indonesian projects from lenders (and their lawyers) operating out of Singapore and Hong Kong. The defining characteristic of Eurodollar accounts is that they are subject to little or no supervision by the central banking authority of any nation. Foreign joint venture partners have been encouraged by the Indonesian Foreign Investment Board (BPKM) to have offshore or other non-Indonesian financing. These requirements have provided a major impetus to the development of this form of financing in Hong Kong and Singapore.

The process of lending has had a particular influence on the development of Indonesian legal practices. Offshore lenders in Singapore and Hong Kong and foreign joint venture partners were unwilling to sign loan agreements unless the documentation for the loans looked like documentation for similar loans in New York.

74. Foreign and local lawyers in Indonesia have not participated in making regulations and have not utilized their knowledge of these regulations in client representations to the same degree as lawyers in the EC and other parts of the developed and Third World have. Nonetheless, these lawyers have been important in creating local regimes outside the national field that have had significant effects on business in Indonesia.

75. This discussion of the changes and influences on the Indonesian legal field is based upon interviews with Indonesian and American lawyers and academics who specialize in Indonesian financial and environmental law. The names of these individuals will not be disclosed here.

(This insistence on New York-style documentation had happened earlier for local projects in Hong Kong and Singapore in the 1970s when these markets were first developing.) Some of this documentation reflects Indonesian law very specifically, although it was developed primarily by non-Indonesian lawyers. Today, much of this work has moved onshore, to the American-model firms in Jakarta. The lending has become routinized, and the documentation is still produced, as it had been offshore, in English and includes concepts such as "consideration" which are foreign to Indonesian law

In the effort to facilitate offshore finance, foreign lawyers operating offshore have made a number of specific legal innovations that are influencing national legal development. Two examples illustrate these processes. The first is the development of aircraft mortgages based on Indonesian law. When the state airline sought to finance aircraft acquisition by issuing mortgages, it discovered that Indonesian law does not provide for mortgages for other than real property. To deal with this, the foreign lawyers working with the airline developed an aircraft mortgage based on European models and through the influence of the MKK law firm secured legal recognition of such instruments and the establishment of an aircraft mortgage registry.⁷⁶ Another innovation involved mortgage financing for larger projects. In this case, offshore lawyers through an Indonesian firm were able to convince the government to have a statute approved by the Indonesian House of Representatives (DPR), which was necessary to provide the security needed by the larger projects.

These examples, of course, suggest the beginning of a more active role for legal practitioners in consulting on and producing governmental regulation. In recent years, the law bureaus of the various ministries where new statutes and regulations are actually drafted have been more open to receiving advice from lawyers. In part this is a result of the development of a broader view of what lawyers do and what legal practice involves. This might suggest that the Americanized firms, who have the technical capacity to provide such advice, will see an increased demand for their services as they both help create new law and then guide clients through the resulting regulations.

76. Robert N. Hornick, *Foreign Banking in Indonesia*, 6 NW. J. INT'L L. & BUS. 760, 798-99 (1984).

4. Multinational Law Firms Expand Their Indonesian Presence

Indonesian law creates significant barriers for practice by foreign lawyers and law firms. Nonetheless, in recent years, foreign firms have stepped up their investment in Indonesia and expanded their relationships with Indonesian firms. Several U.S., U.K., and Netherlands-based firms have joined the small group of foreign lawyers who have operated in Indonesia through a variety of devices, including relationships with Indonesian firms. Such large firms as Graham and James, Skadden Arps, Milbank Tweed, the Australian Legal Group, and Freehill, Hollingdale & Page have been developing practices, joining such old-timers as Coudert, White and Case, and Loeff Claey's. In addition to work connected to off-shore finance, these firms are working on such diverse matters as privatization, public offers, and overseas acquisitions by Indonesian groups. Some think that in the new economic climate, the American firms and the Americanized Indonesian firms will have an advantage, since a new generation of Indonesian business leaders, many educated in the United States, are receptive to American legal methods.⁷⁷ However, these developments are very new, and it is not yet clear how the technical knowledge of business practices that is part of the symbolic capital of the Americanized firms will fare in competition with the connections and the situational knowledge of other legal specialists. The multinational firms have created a beachhead in Indonesia, and have made tentative moves outside the "enclave" created by the need for advice on off-shore finance. It remains to be seen whether the market for business law will grow rapidly in Indonesia, as it did in Europe, or if the foreign-based multinational law firms or the global accounting firms will secure a major share of the legal services market.

5. Environmental Protection: Hybrid Local and Transnational Influence

Environmental law presents a contrasting picture of transnational influence on the Indonesian legal field, one in which foreign actors and Indonesian groups have worked closely together and international influence has been substantial. A brief analysis of the development of environmental law in Indonesia, and the role of international groups in this process, allows us to look at processes of

77. See James A. Altschul, *Foreign Lawyers Head for Indonesia*, INT'L FIN. L. REV., Jan. 1991, at 22.

"protection" and public interest law and underscores the complexity of the process of internationalization of legal fields in the developing world.

The New Order began with few environmental regulations and few, if any, enforcement activities. The Ministry of Population and the Environment was only created in 1978. In theory, suits claiming environmental damages as a form of nuisance were available under existing law and could lead to compensation, *ganti rugi*, but few of the persons affected by environmental degradation could afford the expense and low probability of success of such suits. Since the early 1970s, however, there has been a significant development of environmental law influenced by several factors, including: 1) the development of the Lembaga Bantuan Hukum (LBH) or Legal Aid Institute with the support of the Governor of Jakarta and foreign donors such as the Ford Foundation and the Dutch aid agency (NOVIB), and 2) the rise of environmental NGOs implementing a legal strategy, again supported by foreign donors and based on foreign models. While foreign influence, in the form of symbolic and financial capital from overseas, has been important, it has developed at the instigation of Indonesians, albeit Indonesians who themselves participate in transnational environmental organizations.⁷⁸

The establishment of the LBH in Jakarta in April, 1971, was one of the most significant developments for the later development of environmental NGOs and environmental regulation. The LBH has provided a model for NGO activity acceptable to the Indonesian government, which has generally discouraged political organization.⁷⁹ LBH developed a legal strategy for public interest work that was to be copied by the environmental groups, and has pro-

78. This group includes INGI, the International NGO Group on Indonesia. Although presently not significant, in the future there will likely be a process to develop practices that conform to the guidelines of international bodies such as the United Nations Conference on Environment and Development (UNCED). These guidelines will accommodate foreign investors' expressed concerns for predictability and transparency in the application of environmental regulation.

79. Indonesia has had since independence an active organizational life. Dwight Y. King, *Indonesia's New Order as a Bureaucratic Polity, A Neopatrimonial Regime or a Bureaucratic-Authoritarian Regime: What Difference Does it Make?*, in *INTERPRETING INDONESIAN POLITICS: THIRTEEN CONTRIBUTIONS TO THE DEBATE* 104, 112-13 (Benedict Anderson & Augrey Kahin eds., 1982). The New Order has succeeded in depoliticizing most of those. Many of the larger ones came to function as state corporatist institutions, coopted by the government. Other more political organizations were banned or incorporated in one of the three permitted political parties.

vided direct legal support for the environmental NGOs.⁸⁰ While LBH takes individual civil and criminal cases (including political crimes), it has also promoted a conception of legal aid as involving an ombudsman function, legal reform, and raising the consciousness of people concerning their rights.⁸¹

The second factor has been the development of environmental NGOs themselves. During the 1970s a small number of community organizations appeared, student and other groups of "nature-lovers" arose, and religious organizations such as Delsos in Irian Jaya became involved in the land and forest preservation issues that accompanied almost all corporate and development projects proposed for that province. Such groups, together with the LBH and the branches of LBH established in other cities, became the nucleus of Indonesia's environmental "movement." Working in the same organizations or in new ones, this nucleus grew and began to receive financial assistance from transnational groups such as the Ford Foundation, the World Wildlife Fund, and the Environmental Defense Fund.⁸² While many of the environmental organizations in Indonesia began as small local community organizations, they soon saw the need to form umbrella organizations. The largest of these is the Indonesian Environmental Forum (WALHI), a network of more than 500 environmental organizations with a staff and office in Jakarta. Several offshoots have been formed, such as the Indonesian Network for Forestry Conservation (SKEPHI). It is these organizations that have consciously adopted a strategy of focusing on the development of environmental regulation, and the enforcement of such regulation in the courts.

These groups have used some of the mega-lawyering techniques used by both corporate and public interest practitioners in the West, and have had some success. They promoted the requirement for Environmental Impact Assessments in advance of development projects and won the right to participate as community representatives.⁸³ They have obtained damages or other consider-

80. The current Director of the LBH is the Chairman of the Board of Directors of WALHI, the umbrella environmental organization.

81. See Oleh Erman R. & T. Mulya Lubis, *Bantuan Hukum: Arti & Peranannya*, 6 PRISMA 81, 85-86 (1973); LEV, *supra* note 67, at 22. In this vein, for example, it has conducted many training seminars for journalists, recognizing that the important role that journalists play in developing popular legal consciousness. *Id.*

82. The largest part of the funding for the Indonesian environmental NGOs has come from foreign donors.

83. Mas Achmad Santosa, *Environmental Law in Indonesia* (March, 1990) (unpublished

ation for persons affected by development projects. In the case of the World Bank-supported Kedung Ombo dam project which they opposed but failed to stop, the NGOs did obtain better relocation arrangements for a part of the population displaced by the project. They used a combination of litigation and lobbying, including work with transnational NGOs to pressure the World Bank. In another case, environmental groups attempted to use litigation to block the building of a textile factory that would affect water and forest resources.⁸⁴ While the case failed, it did create some useful precedents.

While foreign-linked NGO lawyers have used familiar mega-lawyering techniques to defend the environment, foreign corporate lawyers have been less active in this area. Despite the frequent involvement of U.S. corporations such as Scott Paper and Freeport Sulphur in projects that draw loud protests from environmental groups in Indonesia, only one American corporate law firm has tried to establish an "environmental practice" in the country, working in Jakarta through an Indonesian firm. While this firm has not established a major presence in environmental affairs, it may be a harbinger of changes to come.

Ironically, environmental law may become a major focus of the internationalization of the Indonesian legal field and transformation of its mode of production, bringing in foreign actors and using practices unfamiliar to the Indonesian bar. We tend to think that internationalization will be impelled first by trade and business law, with protective functions remaining more national. Yet there is

manuscript, on file with the *Case Western Reserve Law Review*) (stating that a 1989 Indonesian case held that WALHI, an Indonesian environmental group, had standing to bring suit on behalf of a community under the Indonesia Environmental Management Act and urging that environmental impact assessments be made at the feasibility stages of a project's development).

84. The environmentalists opposed the plan of P.T. Indorayon to construct a textile factory in North Sumatra that would have a significant effect on the quality of water and on the forest in the area. They obtained an important decision from the District Court of Jakarta according the environmentalists standing. This was the first case under Indonesian law where an organization that has not been directly injured itself has been recognized to have standing to represent others who have been injured. The case itself was lost in the district court on the basis of what would be called *laches* in American law and, because of the political sensitivity of the issue, LBH and WALHI decided not to appeal the case despite a legal basis to do so. Nevertheless, since this decision, there has been much discussion of the use of this precedent to develop a type of class action on the American model. However, due to the expense of that type of litigation, in the three years since the favorable decision on standing, none of the NGOs have been able to bring any significant case where that doctrine might be further developed.

some reason to think that the environmental field may be the opening wedge for a much deeper transformation of the Indonesian legal field in the business area, where international influences are still contained within a small trade and finance-related enclave. In the area of environmental law, the locus of decision making is predominantly within Indonesia. Although there are foreign influences in the form of joint venture partners, international public and private financial institutions, international environmental organizations and agreements, as well as environmental NGOs, their influence is more directly mediated by Indonesian actors than in the financial and trade areas and thus more likely to influence Indonesian practices in general. Moreover, environmental law is more accessible to Indonesian lawyers than international finance. Thus, American-style practices may be more likely to grow up in this domain than in the trade and financial field.

6. Unique Features of the Indonesian Case

While this brief sketch of Indonesia helps us understand how globalization may affect developing countries, it is important to understand the peculiarities of the Indonesian case. Many aspects of Indonesia's history, economy, and political structure differentiate it from other developing nations, and may make the Indonesian story the exception, not the rule.

The forces that have been most important in particularizing the transformation of Indonesian legal practice, economic law and the economy itself have been: 1) the characteristic forms of regulation, 2) the weakness in Indonesia of forces for democratization, 3) the relatively large size of the Indonesian economy in the global system, 4) the immobility of Indonesia's large resource extraction sector, and 5) the country's particular form of intra-elite and other political conflicts, particularly nationalism.

Indonesia remains a highly regulated society despite efforts at deregulation from the early 1980s to the present. The government's conception of its role requires it feel that it is in control of the economy and many aspects of social activity. Even as the government deregulates some areas, its capacity to control others increases.⁸⁵ The forces that in other societies have made neo-liberalism appear to be a diminution of the role of the state are weak in

85. See R. William Liddle, *The Relative Autonomy of the Third World Politician: Suharto and Indonesian Economic Development in Comparative Perspective*, 35 INT'L STUD. Q. 403, 422-23 (1991).

Indonesia. One only has to look at the limited competition of Indonesian elections, the restricted ability to form and run political organizations, and the prohibition of political parties below the district level to see the weakness of the forces for democratization, and the continued dominance of intra-elite competition. Even the surprising health of the NGO movement, especially in the environmental area, cannot (or not yet) be taken as the opening of a democratic space, given the extent to which the movement must abjure politics and allow itself to be co-opted so as not to be destroyed.⁸⁶ In this context then, it is not surprising that government regulation (and its deregulation project) has not become the object of an increased level of bargaining mediated by lawyers. Neither the pre-existing policymaking process nor any that might develop from the forces unleashed by neo-liberal ideology permit the access that would make such negotiated control possible.⁸⁷

It is not surprising that states such as Indonesia do not readily reduce control of their economic and political space without significant pressure being applied to them. What is most frequently identified as the source of this pressure is "delocalism"—the declining importance of geography in investment decisions and the resulting competition among potential sites of production through regulatory concessions.⁸⁸ But in some countries, and for some types of investment, developing nations have a degree of immunity from such pressures. Indonesia is one such country, because its

86. For example, WALHI decided not to appeal the district court's decision in its suit against P.T. Indorayon (discussed *supra* note 84) because it would be too political and appear to be confronting the government.

87. Two qualifications are in order here. First, Indonesia has long allowed big economic players access to the policy process through the payment of bribes. This practice continues in Indonesia and perhaps explains in part the previous limited access. The point here, however, is that the manipulation of this policy process by bribery is not peculiarly subject to facilitation by lawyers. Moreover, even if lawyers were important participants in the process, that involvement would be a negation of the juridical expertise that is the basis for the lawyer's role in the competition of capitals and their representatives elsewhere in the world. Second, NGOs do have some access to the policy process in the area of the environment. By statute, for example, they are now recognized parties in the process of preparing Environmental Impact Assessments. Nevertheless, even the environmental NGOs feel shut out of policymaking in the domain in which they are interested. One of their key demands now is that they be consulted prior to the promulgation of a new regulation in the area of their expertise.

88. It is this implicit and sometimes explicit threat by major corporations to locate production elsewhere that probably explains some national regulators' willingness to open up the regulatory process to representatives of these corporate producers and to bargain with them for favorable regulations.

domestic market is large and the nation is rich in natural resources. The potential of its markets and the large number of manufacturing projects underway make it impossible for foreign investors to dictate many of their investment terms. They must bargain the terms of those investments and, in most cases, form joint ventures with Indonesian partners.⁸⁹ Similarly, investors in the large natural resource sector involving petroleum, minerals, and, to a lesser extent, wood products cannot make the kinds of credible threats to go elsewhere available to other investors interested in production for export.⁹⁰

The particular forms in which Indonesian political conflicts develop also present limitations on the development of the kind of legal practice and regulatory environment that would favor transnational corporations and the global legal actors allied with them. Indonesian nationalism has long been an obstacle to the development of a more open, denationalized economy. Although Sukarno's anti-colonial ideology was defeated in the 1965 coup, the economic nationalism it advocated has continued even among officials in the New Order.⁹¹ This nationalism helps explain the relatively limited success of the program of deregulation initiated in the mid-1980s.⁹²

The corporatist form of much of Indonesian political activity also shapes the legal and other responses to global economic restructuring. Although much of the regulatory process, particularly

89. The same need to bargain due to the size and strength of the national market has been apparent in China. See MARGARET M. PEARSON, *JOINT VENTURES IN THE PEOPLE'S REPUBLIC OF CHINA* (1991).

90. This phenomenon is true in wood products to a lesser extent than in the other areas. In 1988, Indonesia imposed bans on the export of logs and rattan and later of sawn timber in an effort to stimulate its own wood processing industry. The effect on some foreign investors was that they closed their establishments rather than develop the necessary processing facilities. Of course, since Indonesia increasingly has the technical capacity, and the internal and external markets in wood products to compete alone, it was willing to suffer this withdrawal. At the same time, Indonesia showed flexibility in dealing with an American-owned company that dealt in rattan in Borneo without any written contract. Following the rattan export ban, the government negotiated an arrangement that allowed this producer to continue in operation and even increase his output.

91. Surveys of high army officers in the two decades since the coup have continued to show an unexpected and substantial distrust of foreign investment even as the New Order's U.S.-trained economists developed an export oriented growth policy based on foreign investment. HAL HILL, *FOREIGN INVESTMENT AND INDUSTRIALIZATION IN INDONESIA* 35 (1988).

92. See Liddle, *supra* note 85, at 422 (arguing that the economists' policies, including deregulation, have not completely "won the war" for political influence, because Suharto retained affection for the nationalists).

in the economic area, is closed to outside scrutiny, the Suharto regime has encouraged the development of professional, producer, trade, student and labor peak organizations with which it engages in limited bargaining. As in the case of the environmental NGOs described earlier, the government uses these peak organizations to co-opt the groups involved and at the same time to depoliticize them by ensuring that no unknown political party or agitator can seize a particular issue and organize around it. This corporatist form of politics thus has both a positive and a negative effect on the transmission of the impulse to restructure Indonesia. Depoliticization can strengthen the government's ability to carry out major restructuring. To do that, however, the government would have to dismantle or undermine the system of functional interest representation that provides much of its political support. The only way it could do that without losing legitimacy would be if such a move were sure to foster very rapid growth. So far, the government has not been willing to take that gamble.⁹³

7 Conclusion

Thus, we see that there are forces which impede the full internationalization of the Indonesian legal field, and the transformation of its mode of production of law. Nonetheless, changes are occurring and with time may gather momentum. Multinational law firms are still largely contained within a financial enclave, but have begun to move outside it. A few Indonesian firms have organized themselves on "Cravathist" lines, albeit on a very small scale. The pace of foreign-inspired legal reform has picked up, and may lead to real change for the first time. The pressure of international competition may prod the government to take the development of the business law system seriously. The increase in the number of foreign-educated lawyers may create a pool of "newcomers" who will want to create and exploit new markets. Aggressive lawyering and use of litigation for tactical purposes, as well as interdisciplinary legal practice, has arisen in the environmental field and may spill over to other areas even if the multinational corporate firms stay within their enclaves.

93. The Suharto regime's legitimacy is based chiefly on being able to bring about economic growth. This reflects an explicit choice made in 1966 when Suharto chose to adopt the technocratic, foreign-investment based strategy of Widjojo Mitisastro, a Berkeley-trained economist over the more inward-looking participatory strategy of Sarbini. Liddle, *supra* note 85, at 412-13.

VII. FINAL THOUGHTS: TOWARD A NEW COMPARATIVE LAW

This Paper has brought together three case studies of some of the complex interactions among legal, political, and economic forces and actors which have been set in motion by shifts in the global economy and changes in world politics. We have sought to develop a conceptual structure and methodology that will do justice to the complexity of these processes, while allowing us both to see similarities and identify differences caused by variation in national traditions and modes of production of law, regional integration of economies, position in the international division of labor, and local histories. We have endeavored to show how this approach can be used to illuminate processes as disparate as M&A activity in Europe, public interest challenges to NAFTA, and the transformation of legal fields in developing nations.

These "studies in the internationalization of legal fields and the creation of transnational arenas" neither cover the full field of globalization and the law, nor are meant to be the last word on the topics they explore. Taken together, they suggest only a few of the processes underway, and none is exhaustive. Even our study of Europe, which is based on a decade of research by Dezalay and his colleagues, simply illuminates a few aspects of the processes occurring in that region. The other studies are merely sketches, meant to illustrate how the concepts can be used and the methods deployed to form hypotheses and make preliminary assessments. While we know we have not produced the last word on Europe, let alone on NAFTA or Indonesia, and while we know we have only scratched the surface of "globalization," we do hope we have helped create a new approach to "comparative law," a field that has long languished on the margins of academic life. This approach focuses on practices more than rules, links legal to economic and political fields, incorporates both "international" and "domestic" factors, stresses the dynamics of fields, and highlights the strategies of key actors.

This approach to the political economy of legal change is a first step toward a renewal of interest in comparative legal development and its relationship to other social processes. This was what Max Weber tried to do a century ago,⁹⁴ and few have followed in his footsteps or equalled his achievement in the intervening years. Perhaps the time has come for a renaissance in comparative legal

94. See generally WEBER, *supra* note 10.

studies. More people are being affected by international forces, and may see the need for an understanding of these phenomena. The conditions for academic cooperation in the production of such knowledge, illustrated by the transatlantic partnership that produced this Paper, are improving. We are beginning to develop common frameworks for inquiry and forge the closer linkages among socio-legal scholars around the world necessary for the study of the interaction of law and global processes.

We hope this Paper contributes to that process. We know that the studies we have reported are limited and provisional, and while we hope they will be emulated, we also know they will inspire criticism. Such a result, which may spur others to develop better frameworks and conduct more detailed inquiries, is to be desired, for it will prove our work has contributed to the renaissance of comparative legal studies.