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Review of Judging Credentials: Nonlawyer Judges and the Politics of Professionalism by Doris Marie Provine

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I. Demystifying Judges: Professions And Professional Ideology

Studies of the professions have all too frequently failed to examine rigorously professional discourse and ideology. As a consequence, professional world views are often taken as givens in empirical and theoretical scholarship on the professions. This is due in large part to the considerable influence of functionalism in the sociology of professions. Deriving from Durkheim (1933), and most notably set out in the work of Parsons (1954 a,b), functionalist theory views professionals as possessing socially useful esoteric knowledge and skills which they employ in the service of public and client good rather than for private gain. This view rather uncritically accepts the professions' claims to altruism and special competence, which legitimate prerogatives such as restrictive licensing and self-regulation, and it downplays the significance of professional involvement in market exchange and its consequences. Much scholarship in the functionalist tradition considers the rise of professional power and control as a phenomenon that self-evidently is rather than something that might be profitably examined historically and sociologically. As one legal historian revealingly writes:

> The general public has need for a professional man in whom it can repose a particular type of confidence whenever it is faced with some distressing problems, often of a very personal nature. Hence the most important aspect

> of the practice of law is that it is, and the inherent nature of things demands that is always shall be, a profession. (Chroust 1965: xi).

A very different and more recent approach advances a critical understanding of professions which highlights their political and social context. This scholarship, which has roots in Weber (1978), builds on the works of Hughes and his students (see *e.g.*, Hughes 1958). Hughes viewed professions not as inevitable products of social differentiation but as occupational groups which have managed both to achieve exclusive license to carry out activities denied other occupations and to claim successfully a broad mandate to define the nature and scope of their work. This perspective emphasizes the historical specificity and the contingency of professional control in the occupational marketplace. As subsequently developed by a diverse group of scholars (see, *e.g.*, Abel 1986, 1987; Freidson 1970a, b; Gordon 1983, 1984; Johnson, 1972; Larson 1977; Starr 1982; for a critique of this perspective see Halliday 1987) this critical approach renders professional claims of expertise and public-mindedness problematic. It views professional ideology itself as a subject for analysis and it explores the historical, political, economic and cultural conditions in which professional power develops and is employed.

Doris Marie Provine's *Judging Credentials* is a provocative work that draws on and furthers the critical approach to the study of professions. The book is a study of judges in lower courts of limited jurisdiction who are not lawyers, a group of considerable size. There are over 13,000 of them in the United States. In this work Provine examines the legal profession's assertion that these judges are inferior to judges who are lawyers. Contrary to both professional claims and popular belief, Provine argues that lay judges in America's lower courts perform as well as their lawyer counterparts. Her conclusions derive from extensive original survey data as well as from a thorough analysis of the pertinent literature on lay judges. Provine argues that although characterizations of lay judges' incompetence are empirically unsubstantiated, they nevertheless reveal much about the politi-

cal and cultural control exerted by professions. Provine's work demystifies lawyers' mandate for monopoly control over judgeships, and it challenges professional ideology while simultaneously exposing its considerable force in contemporary society.

II. The Rise of Professional Power and Emergence of Professional Control

In the opening chapters of her book, Provine provides an historical account of lay judges in the United States and of attempts by lawyers to drive them from the bench. This discussion is particularly effective because it denaturalizes the legal professionals' privilege and influences; it forces an examination of the social, political, and cultural conditions which supported the legal profession's growing prominence in the judiciary. Provine shows that this development is considerably more complex than conventional wisdom allows.

There were at first few lawyers practicing in Colonial America, Provine reminds us. Economic conditions in the largely agrarian colonies were inhospitable to full-time legal practice. Moreover, the prevailing religious sentiment in some colonies was antagonistic to the legal profession. Several colonial legislatures specifically barred lawyers from their membership. In this type of society, the bulk of legal business was handled in a self-sufficient fashion by common citizens. Not surprisingly then, judges in early America were infrequently lawyers. They nonetheless exhibited considerable sophistication and legal awareness in the exercise of their duties.

The expansion of the colonial economy and increased transatlantic trade created conditions amenable to a full-time practicing bar. Lawyers increased in number and power. The institutionalized bar became more politically active and successful in advancing professional interests. With bar support, several colonies enacted legislation restricting the practice of law to lawyers. Other factors besides professional self-interest helped to consolidate professional power. The Crown, for instance, after years of neglect, supported efforts to organize and strengthen the bar in order to encourage stability and

regularity in colonial legal business. It was during this period, Provine tells us, that lawyers began to assert the necessity of excluding nonlawyers from judicial posts. Interestingly, the arguments first offered in support of restricting judgeships to legally trained professionals did not emphasize the greater capabilities of lawyers. Most lawyers, after all, were still trained in a haphazard apprentice system while their competitors for judgeships who were not lawyers were often local gentlemen who had the benefit of higher formal education. Rather, lawyers argued for restricting judgeships to the brotherhood of the bar by claiming that lay judges were elitist and class biased.

The early bar's attempts to translate newfound power into institutionalized control met with limited success. There were formidable political barriers to professional control of the judiciary which included the Crown's unwillingness to cede total control to lawyers. However in post-Revolutionary America lawyers achieved greater power as well as increased monopoly control over the judiciary. These changes occurred, Provine explains, because of a variety of factors and despite a general atmosphere of hostility towards lawyers. Lawyers were able to exercise significant influence because of their prominence in the Continental Congress and in the Constitutional Convention, and they became increasingly well represented in state legislatures. Additionally, Provine argues, changing popular notions of law and litigation justified the argument for a judiciary dominated by lawyers. Law became regarded as a means "not simply to resolve isolated disputes but as a means to shape broad legal rules to changing conditions" (p.20). Provine argues that such an image of law facilitated the argument for an all lawyer judiciary capable of dealing with an expansive and technically complex system of common law. Thus supported by both political efforts and changing cultural beliefs, the bar's attempts to professionalize the bench met with slow but gradual success. By the mid nineteenth century lawyers had achieved a monopoly over higher judicial posts even though their attempts to extend this control to the lower courts met with little success.

Provine explores how legislative and judicial attempts to eliminate lay judges continued into the twentieth century. During the Progressive era court modernization advocates emphasized the need to professionalize the justice system. Reform advocates such as Roscoe Pound considered lay judges an anachronism. These critics claimed that lay judges were both incapable of understanding complex modern litigation and more susceptible to bias and corruption than lawyers. And yet despite the apparent appeal of such claims for both lawyers and the educated public, the organized bar was unable to convince most state legislatures of the necessity for eliminating lay judges from lower court judicial posts. Provine argues that this was less the result of any disagreement with the reformers' low assessment of lay justices than it was a capitulation to more pragmatic concerns such as institutional inertia, the political well-connectedness of lay judges, and the tremendous financial costs associated with replacing lay judges with lawyers.

A different source of criticism emerged in the 1960s when individual litigants rather than organized interest groups began to challenge the constitutionality of nonlawyer judges. Since courts recognized that criminal defendants have a right to legal counsel even for misdemeanor charges, it was argued that such a right was rendered meaningless when exercised before judges presumed to be uneducated in the law and thus unable to comprehend lawyers' arguments. This line of reasoning suggests that in order to make due process and equal protection rights effective it is necessary to provide criminal defendants with judges who are lawyers. Provine examines the mixed success such arguments have achieved. In California the state supreme court concluded that "[t]he absence of a law degree disables a judge from understanding counsel" and thus that "[t]he failure to provide a judge qualified to comprehend and utilize counsel's legal arguments ... must be considered a denial of due process" (p.68). This ruling paved the way for the legislative abolition of lay judges in the California lower courts. The United States Supreme Court found the claim that the use of lay judges in criminal cases is inherently unconstitutional less compelling. Importantly, however, Provine argues that this reflected the Court's recognition of practical concerns

such as the high cost of replacing lay judges with lawyers and deference to state authority more than any support for lay judges. Provine stresses that in both successful and unsuccessful attacks on the constitutionality of lay judges the underlying characterization of lay justices as inferior was never seriously challenged despite the noticeable absence of any systematic empirical data on the matter. Unencumbered by facts, legal arguments rested instead on horror stories and anecdotes about lay judges' judicial performance. A recurring theme of Provine's book is that the debate over the qualifications of lay judges occurs at a symbolic or ideological rather than at an empirical level.

These last points suggest that the bar's inability to achieve a monopoly over lower court judicial posts may represent a lost battle in a war otherwise won, since professional claims that lawyer judges were more autonomous, public-oriented, and technically proficient than lay judges prevailed even if attempts to abolish lay judges did not. Provine argues that it was not simply the presumably self-interested bar that supported eliminating lay judges. Rather, she tells us, the critique of nonlawyer judges struck responsive chords among the larger public due to the influence of a set of beliefs and values described under the rubric of the "culture of professionalism" (Bledstein's phrase) in which competence and expertise are equated with credentials. From such a set of beliefs the characterization of lay judges as incompetent logically follows. Its very taken-for-grantedness illustrates how deeply professional beliefs and values have come to be accepted as givens in American society. A special strength of Provine's work is that it renders such beliefs problematic.

III. Comparing Judicial Behavior

The core of Provine's study is an empirical assessment of the claims made by critics of nonlawyer judicial competence. Provine's central goal is to determine whether legal credentials make any difference in the quality of lower court judges as critics contend. In order to test this proposition Provine compared the attitudes and behavior of lay judges and judges who are lawyers in lower courts of limited jurisdiction. Although these judges process millions of cases

annually, this segment of the judicial system has not received much systematic scholarly attention.

Provine studied over 1500 lower court judges in nonmetropolitan areas of New York State. The bulk of her study data derives from a descriptive mail survey designed to elicit information regarding the judicial behavior and attitudes of her study population. Provine supplemented her survey data with limited fieldwork by interviewing twenty-six judges and observing their courtroom routines. Additionally, Provine brought to the study her four year experience as a town justice in rural New York.

Provine's study evaluates two broad criticisms of lay judges: that they lack adequate legal knowledge and they do not apply the law in an unbiased fashion. In order to test the first claim, Provine examined whether lay judges are aware of, understand, and adhere to mandated due process guarantees designed to protect criminal defendants. She also tested select behavior such as whether lay judges impose bail more frequently than judges who are lawyers, rely on arresting officers for advice on bail determinations, or punish more severely those defendants who plead not guilty and are subsequently convicted after trial. Affirmative answers to any of these issues would tend to support the notion that lay judges are neither as knowledgeable about the law nor as meticulous in adhering to due process guarantees as their counterparts who are lawyers. Provine found some differences between lay and lawyer judicial behavior, although it was not always in the direction that critics of lay judges would predict. Her fieldwork also provided her with examples of judicial misconduct, but this behavior was not limited to lay judges. She also tested the second claim that the lay judges lack consistency when exercising discretion in such areas as sentencing. The thrust of this claim is that these judges fail to apply the law in an unbiased fashion, that their decisions are made *ad hoc* rather than being grounded in legal principles and precedent. Provine concludes that her data do not support the breezy criticisms of lay judges so prevalent in the literature. She argues that lawyer and nonlawyer judges exhibit few statistically significant differences in the key indicators of knowledge and fairness. Rather, Provine contends that poor facili-

ties, the lack of administrative support staff, dismal salaries, as well as the legal professionals' attacks, account more for the negative image of lay judges than a lack of judicial competence.

How confident can we be in these findings? Provine is generally careful to ground her arguments in the data. Nevertheless, there are limitations to her mail survey research. The major premise of such research is that the data accurately measure actual behavior. Yet there are always concerns of selective memory associated with reporting past behavior. This is especially important in *Judging Credentials*, since the lay judges Provine studied are well aware of their second-class status, are sensitive to slights to their office, and often pride themselves on their capacity to exhibit lawyerlike knowledge and demeanor. Such respondents may be unlikely to provide answers that would serve to characterize them unfavorably. For these reasons *Judging Credentials* would benefit from greater analysis of actual courtroom behavior to supplement the self-reporting of the survey respondents. Provine does provide information gleaned from interviews and observations of the judges she studied, yet this fieldwork is not sufficiently extensive to serve as more than suggestive background material (nor was it intended to be). Ultimately, these seem rather minor concerns given the overall contributions of Provine's study.

While her survey data do not demonstrate conclusively that lay judges are "virtually indistinguishable" from judges who are lawyers, as she claims (p. 103), they do allow Provine to make a strong preliminary argument to that effect. Moreover, Provine's findings are generally supported by other related studies which she cites. In sum, Provine's data are more than sufficient to rebut the facile and sweeping critique of lay judicial competence so prominent in professional rhetoric.

IV. Summary And Conclusion

Provine makes a valuable contribution to law and society scholarship with her study of lay judges in the United States. *Judging Credentials* provides preliminary empirical data on a level of the judi-

ciary that remains understudied – since research on lower courts still lags behind the study of the appellate judicial process – and for this reason alone the book is to be commended. Additionally, *Judging Credentials* is significant for what it reveals about professional power and control. Provine's historically and empirically grounded analysis illuminates the politics of the legal profession's attempts to achieve monopoly control over the judiciary, and it convincingly challenges the profession's claims that lay judges are inherently inferior to judges with law degrees. Provine makes the case that the debate over the credentialling of judges often has more to do with professional self interest than with the public interest. She contends that a consequence of the bar's increasing control over the judiciary is that lay participation in and knowledge of judicial process diminishes and that dependence on lawyers and alienation from law increases.

Although Provine highlights the overt politics of judicial professionalization she is also sensitive to more covert forms of professional control operating at the ideological level. An ironic message in *Judging Credentials* is that although lay judges may be as qualified for the lower courts as judges who are lawyers, it is likely that professional claims to the contrary will remain unchallenged. The notion that credentials equate with competence is not only a central tenet of professional ideology, but it is also to a considerable extent an unquestioned popular belief. Even though lawyers as a class are frequently held in low esteem, attempts to curb lay judges by replacing them with lawyers are generally considered progressive. *Judging Credentials* thus begins to explore how professional values, beliefs, and world views exert hegemony. Provine's work is more preliminary than it is fully developed, but it complements other scholarship investigating professional ideology, and it suggests fruitful directions for future research. *Judging Credentials* is an exciting book which should appeal to a wide audience. Provine's arguments are provocative, and they merit serious consideration from readers interested in the lower courts and the sociology of professions.

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