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Volume II

Tanina Rostain

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Volume II
Elite Practices, Personal Legal Services, and Political Causes

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Series Preface

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

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

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

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Introduction

The problem of power – how it is produced, legitimated, and deployed by lawyers, and contested by clients, the state and others – is a theme that runs through sociolegal research on lawyers and the legal profession. The research collected in this series adopts different methodologies and focuses on different arenas of professional activity to reveal the many dimensions of lawyers' power. Studies in Volume I, *Collective Projects, Professional Hierarchies, and the Construction of Transnational Regimes*, considered the rise and activities of the organized legal professions in different countries, the status, gender and race hierarchies that dominate the American legal profession, and the efforts of lawyers to construct transnational markets for legal services and new legal regimes. This second volume, *Elite Practices, Personal Legal Services, and Political Causes*, collects research on lawyers working in specific practice spheres. Starting from the fundamental insight that the American legal profession is stratified according to what types of client lawyers serve (Heinz and Laumann, 1982; Heinz *et al.*, 2005), Parts I and II comprise studies of lawyers in the corporate and personal legal services spheres in the United States. Part III turns to the practices of cause lawyering around the world.

Research on lawyers in the different arenas in which they work illuminates the strategies they pursue to amass and exercise power in relation to their clients, the state and others. Power in this context is, of course, multidimensional. In private practice one significant measure of a lawyer's power is financial success and status. Lawyers also seek to deploy other forms of power tied to claims of professionalism and expertise. Depending on the circumstances, lawyers in private practice invoke professional ideology to assert authority over the regulations that govern their practice, the norms that determine the conditions of their work and their clients' decisions.

Corporate Practice: The US Experience

Part I of this volume is devoted to American corporate practice. As studies by Heinz and Laumann demonstrate, if power is measured by the attainment of material rewards and status, lawyers who represent corporate clients are at the top of the bar's hierarchy (Heinz and Laumann, 1982; Heinz *et al.*, 2005). Marc Galanter and Thomas Palay credit the success of the corporate bar in large part to the organization of corporate practice (Galanter and Palay, 1991; see also Hobson, 1986, Smigel, 1964). Drawing on the model pioneered by Paul Cravath at his firm in the early twentieth century, corporate law firms proved effective mechanisms for concentrating resources and sharing human capital. Firms were organized around partnerships, and clients 'belonged' to the firm, not to individual lawyers. Associates, typically recruited from elite schools, were given the prospect of becoming partners after a lengthy probationary period during which they received training and worked under the supervision of more senior partners. Clients – large corporate enterprises, organizations or

entrepreneurs – had a recurrent need for transactional and other specialized legal services and typically enjoyed long-term relationships with a single firm.

To rationalize the prerogatives of corporate practice, corporate lawyers traditionally espoused an ideology that emphasizes their autonomy from clients (Gordon, 1988, 1990; Kronman, 1993). According to the corporate bar, corporate lawyers played an important role in mediating between broader public values and specific clients' interests. In this account, the organization of the corporate law firm, and in particular its large client base and long-term client relationships, conferred important epistemic and motivational advantages. Long-standing relationships with clients, formalized through general retainer agreements, provided lawyers with in-depth knowledge of their clients' business operations as well as the security to offer advice that clients might find unwelcome. Similarly, a large clientele allowed lawyers' to develop expertise in different areas of practice and empowered them to resist clients' more anti-social initiatives (Gordon, 1988, 1990; Kronman, 1993).

The extent to which lawyers actually behaved as independent counsellors during the law firm's heyday, circa 1960, is debated (cf. Gordon, 1988, 1990 with Felstiner, 1998, Auerbach, 1976). Since the 1960s the intensification of market pressures has altered the underlying conditions on which the independent counselor ideology was premised. Law firms have grown exponentially in size and undergone significant bureaucratization. If in the 1950s the largest firms numbered in the hundreds; 35 years later some firms employed more than 1000 lawyers (Galanter and Palay, 1991; Thomas, Schwab and Hansen, 2001). During this same period firms' relationships to their clients underwent a fundamental transformation. Corporations expanded their law departments and moved their routine legal work in-house. Inside counsel became much more active in overseeing the quality and price of work by outside firms, imposing budgetary limits and shopping around among different firms. Long-term retainer agreements fell into disuse, and corporations typically employed firms only in isolated transactions requiring highly specialized expertise. As a result, the balance of work done by firms shifted towards litigation and unique high-stakes transactions – a change that also reflected a substantial upsurge in complex corporate litigation (Galanter and Palay, 1991). With these changes in the nature of outside corporate legal services, technical expertise in narrow sub-specialties grew at the expense of broad knowledge of corporate law and the business affairs of clients, which were prerequisites for fulfilling the independent counsellor roles (Kronman, 1993). Market pressures also fed an increasingly adversarial ideology in litigation (ABA, 1998) and provided impetus for pursuing aggressive 'creative legal engineering' opportunities in transactional practice (McBarnet, 1992, p. 257; Powell, 1993; Flood, 1995).

The research in Part I investigates various ideological dimensions of corporate practice. Robert Nelson's study (Chapter 1) describes the political and ethical orientations of corporate lawyers practising in the Chicago area during the 1980s. Nelson found that corporate lawyers' social and political views broadly affirmed the legitimacy of legal institutions while also reflecting loyalty to corporate interests. In addition, his subjects exhibited a consistent commitment to their clients' positions on specific law reform issues. Although, in theory, corporate lawyers adhered to the view that they should act as the 'conscience of their client', in practice they rarely encountered opportunities to give clients advice bearing on broader social and moral concerns. Nelson also found a very low incidence of lawyers refusing to work on assignments that conflicted with their personal values, presumably because, as his informants reported, such circumstances almost never occurred. Nelson concludes that although the

power of large law firms, as measured by size, economic resources, and control over technical expertise, has grown, corporate lawyers' autonomy from their clients has diminished.

The intensified focus on profit has also transformed the ideology of in-house legal departments, which Robert Nelson and Laura Nielsen examine in Chapter 2. As these departments expanded in the 1980s and the legal matters they handled grew in number and complexity, an inside counsel 'movement' emerged that extolled general counsel's autonomy and decision-making authority within the corporation (Chayes and Chayes, 1985; Rosen, 1989; Gunz and Gunz, 2002). Nelson and Nielsen consider the extent to which the late twentieth-century trend towards the 'financial conception of control' in corporations, which subjects all corporate functions to rigorous financial analysis to assess their effect on profit or loss, has shaped the functions of lawyers working within corporations. They find that, although most in-house lawyers see themselves as 'cops' or 'counselors' in their day-to-day practice they overwhelmingly defer to managerial prerogatives. In addition, they find an increasing number of in-house lawyers who identify themselves as 'entrepreneurs' and incorporate a managerial focus on short-term profits into their role. Entrepeneurial lawyers treat law as a source of profit, to be marketed within the corporation and deployed aggressively in outside transactions. These lawyers tie their success in the corporation to divesting themselves of traditional corporate legal roles.

In a similar vein, Robert Rosen (Chapter 3) investigates how new corporate business strategies are likely to affect the demand for legal services, which in turn, is likely to affect the organization of large firms. He observes four trends, 'downsizing', 'outsourcing', 'self-managing teams' and 'porous borders', which lead companies to treat in-house lawyers as consultants, rather than counsellors, and law firms as consulting firms following the model of professional services firms. As consultants, lawyers must adopt a businessperson's perspective focused on 'adding value' to the company. Rosen observes related shifts in the delivery of services by outside firms. Seeking to mimic the successful organizational and marketing strategies of professional services firms, law firms have created client-relationship partners and industry groups, sold 'products' alongside services and adopted 'value billing' practices that focus on results obtained. As the corporation redesigned itself in the late twentieth century, so has the corporate law firm. If two traditional markers of professional power within law firms were autonomy from clients and the capacity to dictate the conditions of employment, Rosen's essay suggests that corporate lawyers have suffered a significant diminution of power along both dimensions.

Since the 1980s American corporate lawyers have become embroiled in various scandals – including the savings and loans crisis, the Enron debacle and the tax shelter controversy – which are generally attributed to intensified market pressures. As a result of these scandals, not only have lawyers experienced an increase in criminal and civil liability, but regulatory agencies have also imposed more stringent controls on corporate practice in response to perceived ethical and legal lapses. New laws, regulations and insurance requirements in specialized areas of corporate practice represent significant inroads into the autonomy of the corporate vis-à-vis external authorities (see, for example, the Sarbanes-Oxley Act of 2002; American Jobs Creation Act of 2004). The next two essays describe recent push-back strategies pursued by the corporate bar to resist market pressures and, at the same time, reassert corporate lawyers' authority to articulate the professional norms governing their practice.

In Chapter 4 Elizabeth Chambliss and David Wilkins describe the emerging role of compliance specialists within law firms. As they note, the title, compensation and structure of the compliance role varies from firm to firm. While some compliance specialists have a narrowly defined jurisdiction over conflict issues, others enjoy a much broader authority over a range of ethical and regulatory problems. Chambliss's and Wilkins's research suggests that corporate firms have sought to co-opt the increased regulatory focus on their practices by developing internal structures to counter the erosive effects of market pressures and renegotiating the boundaries of professional autonomy (see also Chambliss, 2006).

Tanina Rostain's essay (Chapter 5) considers the role of the organized tax bar in the tax shelter controversy of the early twenty-first century. As she observes, although individual tax lawyers have reaped significant financial rewards from designing, promoting and issuing legal opinions approving abusive tax schemes, the organized tax bar has supported various law reform initiatives to rein in the shelter market. In particular, the bar has favoured imposing a gatekeeping role on lawyers to prevent abusive tax schemes. As she notes, although this regulatory strategy relinquishes significant authority over tax practice to the IRS, it strengthens tax advisers' capacities to withstand client pressure to provide opinions on questionable transactions. Rostain argues that the tax bar's initiatives cannot be explained by lawyers' or clients' material interests. Instead, the bar's positions, read together, reflect a professional ideology under which tax lawyers' authority is grounded in knowledge of the judicially created doctrines that have arisen to address abusive tax shelters. She concludes that, in supporting meaningful law reform efforts to address tax shelters, the tax bar sought to reaffirm its traditional authority, which had been eroded by the tax shelter market.

Personal Legal Services

Part II turns to sociolegal studies of the personal legal services sector. Even though demand for corporate legal services has grown far more rapidly than demand for personal legal services, at the turn of the twentieth century, solo and small-firm practitioners still represented more than half of the American bar (Curran and Carson, 1994). As the studies that appear in Chapters 7 and 8 of Volume I show, during the last 20 years lawyers in this sphere have amassed much less power, as measured by income and status, than their corporate counterparts (see also Heinz and Laumann, 1982; Heinz *et al.*, 2005). The studies collected here consider other dimensions along which personal legal services lawyers construct and deploy power – in particular, the extent to which they attempt to use the law to empower their clients and themselves, assert power over their clients, or pursue strategies to strengthen their position in the market for their services.

Part II opens with three classic studies of personal legal services. In Chapter 6 Abraham Blumberg investigates whether *Gideon* v. *Wainright* and other contemporaneous Supreme Court precedents that affirmed the right to counsel strengthened defendants' rights to a fair trial in practice. Blumberg finds that defence counsel are co-opted by the court setting in which they work. In criminal court, defence counsel's conduct is driven by the organizational logic of the court bureaucracy whose priority is the speedy processing of cases towards guilty pleas, rather than an ideological commitment to secure their clients due process of law. Rather than empower their clients to assert their rights in the adversarial system, defence lawyers, with the assistance of other court personnel, are engaged in an elaborate 'confidence game'

to secure their fees and induce their clients to plead guilty. Blumberg concludes that court decisions expanding the rights of accused may – by increasing the resources devoted to criminal processes – have the unintended effect of creating a more elaborate and efficient organizational apparatus for the production of guilty pleas, a prediction borne out by studies of the state of criminal defence in the United States some 30 years later (Cole, 2000).

Stewart Macaulay's study (Chapter 7) revisits the question of the effectiveness of law reforms that expanded rights in the civil context. In his investigation into the effects of the then recently enacted state protection laws, Macaulay finds that lawyers approached by would-be plaintiffs either shunned these cases altogether or put their energies into settling them quickly and cheaply. He observes that lawyers' resistance to these types of claim was partly motivated by economic concerns – the cases were not likely to generate significant fees – and partly by ideological concerns – lawyers did not want to imperil their relations with the business community with whom they had ongoing professional relationships. He concludes that the expansion of civil remedies is of little assistance without the ability to mobilize legal services. Rather than effect meaningful legal change, these types of reform function as a form of collective social control.

In Chapter 8 Maureen Cain considers the question of whether lawyers control their clients and, if not, what function they play to perpetuate capitalist systems. Investigating solicitors in England in the mid-1970s, she concludes that they do not engage in the suppression of clients' needs and wants. She finds instead that the transactional lawyers in her sample played a translating function, turning their middle-class clients' express objectives into legal discourse to achieve the desired outcome. She suggests that lawyers are appropriately characterized as conceptive ideologists. In particular, they create the forms and instruments within which capitalist relations take shape. In proposing this view, Cain's study prefigures later work that investigates the ways in which lawyers' discourse exploits and reaffirms the constitutive powers of law (see, for example, Sarat and Felstiner, 1995; Constable, 1998).

The final three essays in Part II showcase more recent research in the personal legal services sphere. In Chapter 9 Austin Sarat and William Felstiner turn to the question of how lawyers talk to their clients to investigate the extent to which lawyers' characterizations of law serve to legitimate legal institutions and reinforce lawyers' status as guardians of the legal system. Contrary to the expectation that lawyers generally defend the rationality, determinacy and fundamental fairness of the legal order, they find that lawyers paint a picture of law that stresses its open-ended, opaque, and arbitrary qualities. Sarat and Felstiner conclude that their subjects construct their professional authority vis-à-vis their clients not around the legitimacy of legal institutions, but around their status as insiders with local knowledge and connections.

Chapter 10, by Herbert Kritzer, revisits the issue of whether lawyers control their clients in the context of settlement decisions and investigates whether in contingency fee cases, where lawyers have a financial interest in settling before trial, lawyers tend to manipulate clients into accepting settlements that disserve them. Kritzer finds that, in personal injury cases, plaintiffs' lawyers employ various devices to manage their clients' expectations and sell them settlements that the lawyers think are reasonable. Rejecting the explanation that lawyers are merely pursuing their immediate self-interest, Kritzer notes that these strategies also serve lawyers' long-term interest in obtaining new business. In personal injury practice, well-served clients are an important source of referrals. Kritzer's research suggests that the competitive market for services in some types of practice may not only function as a check on lawyers'

tendency to dominate their clients, but also ensure that the services rendered meet a minimal standard of quality.

Chapter 11, which sets forth the results of Jerry Van Hoy's ethnographic study of franchise law firms, offers something of a corrective to Chapter 10. In contrast to the more traditional lawyers described by Kritzer, entrepreneurial lawyers in the personal legal services sphere believe that their clients' highest priorities are cost and efficiency (Seron, 1996). Accordingly, they organize their practices in the form of high-volume firms that offer 'one size fits all' services. These firms, which include general practice franchise law firms as well as firms specializing in personal injury (Kritzer, 2001) or workers' compensation (Seron, 1996), place heavy reliance on support staff who significantly outnumber the lawyers employed and adhere to a hierarchical reporting structure and highly standardized procedures that all employees – staff and lawyers alike – are expected to follow. (Seron, 1996; Van Hoy, 1997). In his study, which was conducted in the early 1990s, Van Hoy observes that whatever discretionary authority exists in the firm is delegated to secretaries who conduct initial screenings, occasionally dispense legal advice, and draft letters and documents (based on boilerplate). Lawyer-employees are relegated to selling the services of the firm and 'processing' law – filling out internal forms so that the secretaries know which document to print. In describing the lawyers' hard-sell tactics – which imply a degree of individual attention to clients' particular needs and wants that are not reflected in the services rendered – Van Hoy suggests that the practice of law in franchise law firms is another type of 'confidence game' – this one driven by the logic of the market rather than the organizational logic of a legal institution.

Through franchise law firms, entrepreneurial lawyers have sought to tap into the significant unmet need for basic legal services among American middle- and working-class households (ABA, 1994), but the strength of this market may be their undoing. Entrepreneurial and traditional lawyers in the sphere of personal legal services are vulnerable to competition from paraprofessionals, who can provide specialized high quality services at less cost, and the Internet, which has made information about law and legal processes much more accessible to laypeople. The United States may be entering a 'post-professional era' in which routine legal services are being supplanted by less costly standardized services offered by non-lawyer experts and do-it-yourself products (Kritzer, 1998; see also Seron, 1996). In the late nineteenth century the solo general practice lawyer who served individual clients represented the apotheosis of the profession. At the start of the twenty-first century the availability of alternative service providers and the Internet explosion may render this type of practice an anachronism.

Cause Lawyering

Part III turns to several ground-breaking studies of cause lawyering around the world. The phenomenon of cause lawyering occurs in contrast and opposition to the private market for legal services. In private practice, lawyers espouse an instrumental conception of lawyers' services tied to the market. In this conception, lawyers offer their expertise for sale without necessarily embracing the goals of their clients. Cause lawyers, in contrast, are not agnostic as to the objectives of representation (Luban, 1988, p. xxii). On the contrary, their goal is to use law to challenge dominant power relations – to 'speak law to power' (Abel, 1998). In their practices, cause lawyers attempt to mobilize the procedural and substantive values reflected in

law. Some cause lawyers construct their authority around the idea that lawyering is a public profession, devoted to more than the sale of technical expertise; others seek to harness the normative power of conceptions of justice embodied, if imperfectly, in law itself – a strategy pursued by both right- and left-wing cause lawyers, as the studies in Part III demonstrate (see also Sarat and Scheingold, 1998, 2001, 2006).

In Chapter 12 Kenneth Mann and David Weiner offer a participant-observer account of the creation of the Israeli Office of the Public Defender, which was formed to effectuate the right – newly recognized in Israel – to an attorney in criminal proceedings. In an effort to insulate its work from the politics of the Palestinian–Israeli conflict, the office agreed from the outset to provide a zealous criminal defence to any eligible client regardless of background or religion and regardless of crime charged. To achieve this goal, the office made a point of hiring Arab attorneys and did not shy away from representing Palestinians charged with terrorist crimes. Mann and Weiner illustrate the tension built into their role as lawyers for accused terrorists in their description of the prosecution of Marwan Bhargouti, a highly popular Palestinian politician charged with orchestrating several terrorist attacks between 2000 and 2002. Bhargouti took the position that the prosecution was politically motivated and did not want his defence to lend any credence to the proceedings. He also viewed the OPD as an extension of the occupying powers of Israel and accordingly refused to mount a defence or cooperate with the OPD lawyers assigned to represent him. Recognizing that the principle of undivided loyalty to clients undergirded the legitimacy of the OPD, Bhargouti's lawyers concluded that their only option was to sit silently by while the case proceeded. To protect the professional values on which their work was premised, the public defenders were forced into the uncomfortable – and disempowering – role of doing nothing.

Chapter 13, by Stuart Scheingold, considers how socialist lawyers in England negotiated the unstable boundary between law and politics during the Thatcher regime. As Scheingold notes, on a conceptual level radical lawyering is riven by contradictions. To the extent that radical law practice is focused on obtaining welfare benefits for clients, it can be criticized for co-opting clients and reconciling them to the narrow constraints under which they live. In the same vein, practices based on rights-claims privilege individualist conceptions of the good over collective welfare. Scheingold finds that these tensions, though presenting interesting intellectual puzzles, did not especially trouble the radical lawyers he interviewed. Radical lawyers adopted a pragmatic approach in which their function was to empower their clients by giving voice to their grievances, and accepted rights as the only tools available to them. Rights, moreover, were under attack by Thatcherism, which sought to discredit the welfare state and institute a repressive law-and-order approach to crime control. For radical lawyers, standing up for clients who were put at risk by these policies was a sufficient moral imperative to ground their practices.

Finally, Ann Southworth (Chapter 14) demonstrates how conservative public-interest law firms gained prominence in the United States by borrowing the structures and strategies of liberal public-interest law firms. As she shows, beginning in the 1970s, liberal public-interest law firms emerged as an important force in shaping American law and policy. In structure and work, these firms resembled traditional corporate firms, with legal and support staff organized to pursue a mix of litigation, lobbying and other types of advocacy. These firms, which were supported by outside funding, rooted their legitimacy in the claim that they represented the interests of those who were unrepresented in the political and legal process and in the contrast

between their morally committed stance and the market orientation of lawyers in private practice. Two decades later, conservative public interests groups – most notably the Federalist Society – were successfully appropriating the organizational form and rhetorical strategies of public-interest law firms. Like their liberal counterparts, they had found outside sources of funding to employ full-time counsel, and staff were recruiting aggressively from elite law schools, and cultivating connections with like-minded faculties in the legal academy. They also adopted proactive strategies to address the issues they deemed important. By appropriating the approach of liberal firms, conservative public-interest law firms succeeded in redefining the meaning of 'public interest' in the United States to encompass a range of conservative positions and causes.

Conclusion

The studies collected in these two volumes investigate the varied sites of lawyers' organized and daily activity to expose the tensions that lie at the heart of the professional project. In common-law countries, and increasingly round the world, the profession's power is measured, on the one hand, by the wealth and status lawyers achieve in the private market for law-related services and, on the other, by the profession's success in invoking professional and legal values and professional ideologies that differentiate its members from pure market actors. These studies demonstrate how lawyers' ideological and expert claims generate professional authority and reveal the interdependencies between the power(s) of lawyers and the power(s) of law. They also highlight how professional ideologies interact with political and market forces to create opportunities for new iterations of professional power and constraints on its exercise.

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