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### The Power of Lawyers

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*American Bar foundation*

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## THE POWER OF LAWYERS\*

*John P. Heinz\*\**

Lawyers are often said to be powerful, but what sort of power do they have?

One thing we know is that a lot of them find their way into public office. Tocqueville, who is enjoying a minor popular renaissance at the moment, asserted:

The government of democracy is favorable to the political power of lawyers; for when the wealthy, the noble, and the prince are excluded from the government, the lawyers take possession of it. . . .

. . . .

. . . As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations.<sup>1</sup>

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\* This Lecture was originally prepared for delivery on April 7, 1983, as a John A. Sibley Lecture at the University of Georgia. I have drawn freely upon research that I have conducted over the past several years in close collaboration with Edward Laumann, Professor of Sociology at the University of Chicago. It is impossible to determine the origin of each of the ideas expressed here, but there can be no doubt that much of my thinking on this subject has been influenced by Laumann. While I owe him a great debt, he should of course not be held responsible for my conclusions and opinions. I am also indebted to my colleagues John Flood, Robert Nelson, and Rayman Solomon, and to Michael Powell of the University of North Carolina, all of whom read the manuscript and made helpful suggestions.

\*\* Professor of Law and Urban Affairs, Northwestern University; Executive Director, American Bar Foundation; Washington University, A.B., 1958; Yale University, LL.B., 1962.

<sup>1</sup> A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 275, 279 (H. Reeve trans. F. Bowen & P. Bradley rev. ed. 1945).

And beyond "public stations," lawyers are thought to exert great influence through their roles as the trusted confidants of captains of industry. This is the view of the lawyer as business advisor, sitting at the elbow of the corporation executive and whispering in his ear. No doubt this sometimes happens, but how often? And if lawyers have power, what might be the sources of that power?

Classic theory about the nature of the professions, about what distinguishes them from other occupations, has emphasized the importance of the autonomy of the professional—that is, of the control that he has over his work.<sup>2</sup> The argument is quite straightforward, and it runs this way: What distinguishes professionals from other folks is that professionals have a great deal of specialized, arcane knowledge. Because their clients usually lack this specialized knowledge, the clients are unable to evaluate or to supervise the professional's work, and that gives the professional a great deal of control in determining how to go about doing the work. The unquestioning acceptance of "doctor's orders" is the usual example.

A group of sociologists who have come to be known as the "functionalist school"—the most prominent among whom is the late Talcott Parsons<sup>3</sup>—emphasize the social utility (or function) of this professional autonomy. They suggest that, because the independence of the professional is based on special knowledge or exper-

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<sup>2</sup> A note may be in order about the senses in which "power," "autonomy," "control," and "influence" are used in this Article. Power is conceived here in terms of "the authoritative allocation of values," in David Easton's phrase. See D. EASTON, *THE POLITICAL SYSTEM* 222 (1953); D. EASTON, *A FRAMEWORK FOR POLITICAL ANALYSIS* 50 (1965). One who has the authority to allocate whatever is scarce and is valued by the society has power. "Authoritative" means not only that one can make a decision but also that one can make it stick. The denotation of "influence" is roughly the same as that of "power," though it may imply a lesser degree. Similarly, "autonomy" and "control" are used here as rough equivalents. A professional is said to enjoy autonomy to the extent that he has control of the work he does; to the extent that the client controls the work, the professional lacks autonomy. Thus, if one's work involves allocative decisions about resources that are scarce and valued, the autonomy or control that permits one to make those decisions authoritatively constitutes power or influence. There is a great deal more to be said on these issues, see, e.g., H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* (1950); but I will not say it. Arthur Bentley observed: "Who likes may snip verbal definitions in his old age, when his world has gone crackly and dry." A. BENTLEY, *THE PROCESS OF GOVERNMENT* 199 (1908).

<sup>3</sup> See T. PARSONS, *THE SOCIAL SYSTEM* (1951) [hereinafter cited as *THE SOCIAL SYSTEM*]; T. PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY*, 34-49 (rev. ed. 1954) [hereinafter cited as *ESSAYS*]; T. PARSONS, *Professions*, in *12 INTERNATIONAL ENCYCLOPEDIA OF SOCIAL SCIENCE* 536-47 (D. Sills ed. 1968).

tise that stands above or apart from the competing social, economic, and political bases of power in the society, professionals are able to play a mediating or integrative role, serving to draw disparate elements together, to resolve conflicts among them, and thus to preserve or enhance the functioning of the society. The professions are thus seen as a major stabilizing element of modern, specialized society, which otherwise might disintegrate through centrifugal force. Furthermore, because of their autonomy, professionals are thought to be free to adhere to higher values, as embodied in canons of professional ethics, and to embrace a sense of the commonweal that transcends the boundaries of the profession. Parsons argued that professionals are characterized by a "collectivity orientation."<sup>4</sup> And Justice Brandeis spoke of the lawyers' role that he called "counsel for the situation."<sup>5</sup> In this role the lawyer seeks to bring disputing parties together and to achieve a "fair" result; he does not pursue the client's narrow interest to the bitter end by using every possible device that is provided by the law, perhaps with results that are disastrous for all (except the lawyer).<sup>6</sup> The independence that at least sometimes permits lawyers and other professionals to pursue a broader, collectivity orientation rather than narrow, special interests thus gives professionals a sort of moral superiority. Furthermore, because their authority is based in scientific knowledge or other expertise that is independent of political ideology or social position, the influence of professionals is thought to have greater legitimacy than does authority that derives from more objectionable bases of power, such as guns or money. Or so the argument goes.

But there is another, competing school of thought that disputes this quite benign, rather complimentary view of the power of lawyers and other professionals. This second school, usually referred to as the "conflict" theorists, asserts that the power of professionals is based not so much in their special knowledge as in other, more common bases of social power—money, at least, and perhaps guns as well.<sup>7</sup> In this view, occupational groups seek to achieve pro-

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<sup>4</sup> See THE SOCIAL SYSTEM, *supra* note 3, at 434-36.

<sup>5</sup> See Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702, 703 (1965).

<sup>6</sup> See Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 125-28 (1979).

<sup>7</sup> See, e.g., M. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977); E.

fessional status because of the additional authority, deference, and independence that that status will confer upon them. Magali Larson has called this effort to achieve enhanced social standing "the professional project."<sup>8</sup> Varying occupations obviously meet with varying degrees of success in this project, and the conflict school would explain those differing outcomes by the extent to which each of the occupational groups is able to mobilize underlying bases of social power, including wealth, political or governmental authority, and the like. From this perspective, then, professionals are viewed as aligned with particular social or political interest groups. Because they are seen as less benign and more self-interested, they are thus also seen as having less entitlement to moral superiority or legitimacy and less ability to play a mediative role that binds the society together.

These two views differ in their hypotheses about the sources of professionals' power, then, but they agree that the power is real. To the extent that the professional project succeeds (in the conflict view), the professional acquires autonomy and power; to the extent that the knowledge, skill, or rectitude of the professional is valued in the society (in the functionalist view), the same result follows. But, regardless of the nature of the process through which autonomy might be acquired, the more fundamental issue is whether or how often professionals in fact enjoy autonomy or exercise power. That is, if an occupation gains recognition as a profession, will the members of that occupation necessarily or usually be able to exert control over the work that they do? Does the fact that a society values the professional's skills imply that he, or his profession acting collectively, will wield important power?

In addressing this more fundamental issue, it is necessary to note another distinction, one that is suggested by the phrasing of the last question. An analysis of the power of lawyers might focus on the relationships between individual lawyers and their clients and seek to determine which parties control those relationships, how often, and under what circumstances. In the alternative, the analysis might focus on the legal profession as a whole, on organi-

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FREIDSON, *PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE* (1970); E. FREIDSON, *PROFESSIONAL DOMINANCE: THE SOCIAL STRUCTURE OF MEDICAL CARE* (1970).

<sup>8</sup> See M. LARSON, *supra* note 7, at 104.

zations of lawyers, or on lawyers as an actual or potential interest group,<sup>9</sup> and then seek to assess the power of lawyers collectively within the broader society. Just fifty years ago, Karl Llewellyn made the distinction between the power of lawyers as individuals (or, I think we might add, as individual firms) and the power of lawyers as a profession. Llewellyn observed: "The Bar' is in this country an almost meaningless conglomeration. What we have is lawyers, by their tens of thousands—individual lawyers without unity of tradition, character, background, or objective; as single persons, many of them powerful; as a guild, inert beyond easy understanding."<sup>10</sup> I propose to discuss both the individuals and the guild, but to consider first the relationships between individual lawyers and their clients.

One might argue that it is foolish or illusory to try to analyze the autonomy of lawyers in the lawyer-client relationship. After all, one might say, if we look closely enough at anyone or at anyone's work, we will find that he is not truly free. We are all constrained by the persons with whom we deal. Thus, clients surely influence lawyers, and lawyers certainly influence clients. But this is a very crude, reductionist position. It ignores important differences in the degree of influence flowing in each of the directions. For example, professors are undoubtedly constrained by their students to some extent, but probably not nearly so much as students are constrained by professors. The difference in the degree of influence of each of these parties results from their relative control over the certification of attainment (read, "grades"), a special form of social power. In the master-servant relationship, it may well be true that the servant exerts some influence on the master, but it is not irrelevant to take note of which party is the servant and which the master.

A more sophisticated objection to the analysis of control or autonomy in the lawyer-client relationship argues that it is fallacious to posit any set of characteristics or "traits" that distinguishes the professions from other occupations. Proceeding from the conflict perspective, this argument says that what is essential to being regarded as a professional is the possession of enough social power of

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<sup>9</sup> See D. TRUMAN, *THE GOVERNMENTAL PROCESS* 34 (1951) (noting the possibility of identifying potential as well as existing interest groups).

<sup>10</sup> Llewellyn, *The Bar Specializes—With What Results?*, 167 *ANNALS* 177, 178 (1933).

some kind to be able to support a claim to professional status. Thus, the claim to professionalism is a claim to elevated social standing, a claim of entitlement to deference.<sup>11</sup> What distinguishes the occupations that succeed in their claims from those that do not is whether they can mobilize the resources necessary to induce other groups to recognize the validity of their claims. Recognition of a claim might in principle, then, be induced by wealth or intimidation rather than by arcane knowledge or expertise. In this view, autonomy might be an effect rather than a cause of professional status. That is, autonomy might result from the occupation's success in the "professional project"—from recognition of its claim to professional standing—rather than the other way around. If autonomy is a product of recognition as a profession, then the extent to which autonomy is exercised might be taken as a measure of the degree of success in achieving such recognition.

But it seems clear that autonomy or control is not a necessary nor a sufficient condition for recognition as a professional, and neither is autonomy guaranteed by one's having achieved wide recognition of one's professional status. An occupation can enjoy a great deal of autonomy and yet not be regarded as a profession. Bartenders in skid-row saloons, for example, usually have considerable latitude in deciding whether or not to honor their customers' wishes and in determining the level of craftsmanship to be applied in their art (i.e., whether or not to water the booze), but their claim to professionalism would not be taken seriously. The "mixologist" is a joke. By comparison, the corporate lawyer who operates within a narrowly delimited range of discretion enjoys high social standing and general recognition of the legitimacy of his claim to professionalism.

But the critique of the "trait" theory of professionalism (that is, of the attempt to define a set of inherent attributes that distinguishes the professions from other occupations), does not suggest to me that the issue of professional autonomy is irrelevant. Autonomy may not define the "professions," whatever occupations these may be thought to be, but it may nonetheless be of great interest for what it tells us about the distribution of power in the society.

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<sup>11</sup> See J. HEINZ & E. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 84-90 (1982); E. Shils, *Deference*, in SOCIAL STRATIFICATION 104 (J. Jackson ed. 1968) (discussion of bases, characteristics, and distribution of deference in society).

The issue of professional autonomy is an issue of who calls the shots. If corporate lawyers do, in fact, exert substantial influence over captains of industry, then they may have substantial effects on the distribution of scarce resources, on the allocation of wealth. If, however, lawyers are mere technicians, mere "hired guns," then the values and decisions of the lawyers may not have much independent influence on the distributive outcomes. The actions of lawyers will still be a part of the process, of course, but those actions would be guided or directed by others, and the lawyers might then be only agents for other interests, instrumentalities of their clients.

It may well be that lawyers enjoy a large amount of discretion in their work without having much effect on the distribution of wealth. Lawyers are surely likely to have control of technical decisions—such as whether to plead laches, whether to invoke rule 10(b)(5), or whether this is the best moment to take the deposition of the company's president—and these decisions no doubt have important consequences because some tactics will be more successful than others. But I would like to put to one side the distributive consequences that are produced by differences in the cleverness or ingenuity of alternative tactics, or by other skill differences among lawyers.<sup>12</sup> The relevant issue for an analysis of the power of lawyers in the dyadic lawyer-client relationship is not whether lawyers determine tactics or technique, but whether they modify their clients' goals or objectives. The distinction between goals and tactics is nicely illustrated by the coal miner's monologue from the English revue *Beyond the Fringe*:

Of course it's quite interesting work, getting hold of lumps of coal all day. It's quite interesting. You're given complete freedom to do what you like—your absolute free hand to do anything you like, provided you get hold of two tons of coal every day. But the method you do it, you can use any method open to you. Hackin' and hewin' is the normal one. Some people

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<sup>12</sup> In the long run, the market pricing mechanism probably determines the allocation of lawyers' skills. The more skillful lawyers—those with greater ingenuity, better judgment, and superior persuasive powers, who will usually be more successful—will be likely to cost more and thus to serve clients who are able to pay more. This tendency no doubt has important distributive consequences. It is but one of the reasons why the outcomes of legal processes will tend to favor parties with deep pockets over those with shallow ones.



prefer the hackin', others the hewin'. Some people do the combination. I'm a combination man myself. I do the hack and hew, both. . . . Then there's scrabblin' at it with your bare hands . . . . And there's a myriad others. But hackin' and hewin', as I say, it's quite a varied life you have down there.<sup>13</sup>

The issue, then, is whether the lawyer's freedom or autonomy is like that of the coal miner or, in the alternative, whether lawyers have sufficient authority or influence to modify the goals that are presented to them by their clients.

Another observer of British social phenomena, Terence Johnson, has developed a typology that may be useful in the analysis of this issue. Johnson suggested that occupations might be classified according to the allocation of power between the producer and the consumer (in our case, between the lawyer and the client). He classified as "collegiate" occupations those in which "the producer defines the needs of the consumer and the manner in which these needs are catered for," and he called "patronage" occupations those in which "the consumer defines his own needs and the manner in which they are to be met."<sup>14</sup>

Now, which applies to the legal profession? Is it a collegiate occupation—which is the way we are accustomed to think about the professions—where the "colleagues" within the profession have sufficient autonomy to determine the manner in which the work is to be done? Or is it a patronage occupation, where the clients call the shots? Edward Laumann and I have recently published a book in which we contend that part of the legal profession is of the collegiate type and part is a patronage occupation.<sup>15</sup> I cannot begin to present the argument here, but our basic contention is that the lawyers who serve corporate clients constitute a separate and distinct segment of the profession, and that this segment tends to be a patronage occupation, in Johnson's terms, while the lawyers who serve persons tend to constitute a more collegiate occupation. If one considers the nature of the clients in the corporate sector and the relative amounts of their power vis-à-vis their lawyers, and

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<sup>13</sup> Monologue from *Sitting on the Bench* as performed by Peter Cook in the original Broadway cast recording of *Beyond the Fringe*, Capitol Record No. W1792 (1962) (excerpt transcribed from the recording by the author of this Article).

<sup>14</sup> T. JOHNSON, *PROFESSIONS AND POWER* 45-46 (1972).

<sup>15</sup> See J. HEINZ & E. LAUMANN, *supra* note 11, at 360-65.

then makes the same sort of calculation for the personal client sector of law practice, one will begin to discern the basis of our argument. The corporations that are the clients of corporate law specialists have vast wealth and social power; though their lawyers are also wealthy, as lawyers go, and enjoy high social status, the power of the corporate clients will outweigh that of their lawyers. The lawyers are often dependent upon receiving repeat business from a few, large corporate clients, and they will thus be reluctant to do anything that would offend those clients. In the personal client sector of law practice, the opposite tends to be the case. Though some of the persons who are the clients in noncorporate legal practice are wealthy (undoubtedly, a disproportionate number of them are, especially in fields of practice such as probate), the social power of clients in the fields of law that deal primarily with personal problems more nearly approximates that of the lawyers themselves. In some specialties within the personal client sector, fields such as criminal law, civil rights, consumer work, divorce, and personal injury plaintiffs' work, the clients include large numbers of persons of lower social status. In those areas of practice, the lawyers will usually have higher socioeconomic standing than their clients, and the clients will be much less sophisticated than are the corporate clients, much less able to monitor or evaluate the performance of their lawyers. Moreover, the personal client lawyers will serve a much larger number of clients and will be much less dependent upon receiving repeat business from any one of them. They may, therefore, be more willing to act in ways that are contrary to a particular client's wishes. In short, in the personal client sector the lawyers will be in a much stronger position to define the clients' needs and to determine the manner in which those needs will be met (Johnson's definition of a collegiate occupation). They may well modify their clients' goals—as, for example, in determining the amount to be accepted in settlement of a personal injury claim.<sup>16</sup>

On the other hand, though the lawyers who serve persons rather than corporations may enjoy greater power vis-à-vis their clients, they may be subject to extensive constraints imposed by other actors in the legal system. Thus, personal sector lawyers may be required to please judges, court clerks, insurance claims adjustors,

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<sup>16</sup> See generally D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974).

bail bondsmen, and local bureaucrats. Overall, then, these lawyers might well enjoy less freedom or autonomy in their work than do the corporate lawyers.

If we are interested in the distribution of wealth, however, it is surely in the corporate sector that the most important decisions are made and that control is most consequential. Who does call the shots in the corporate sector? How often do the lawyers give their clients orders? Wilbert Moore recounts an anecdote about J.P. Morgan and his lawyer. As Moore tells it, J.P. Morgan's lawyer "commenting on a proposed business deal, remonstrated, 'But you can't do that, Mr. Morgan.' Mr. Morgan, the story goes, replied, 'Your job is to tell me how to do what I want to do.'"<sup>17</sup> Moore then comments: "Mr. Morgan's attorney may have done so, but I do not see the modern corporation lawyer so easily subdued. Within his own field, and it is a tremendous territory, his word is literally law."<sup>18</sup>

Perhaps Wilbert Moore is right, but he offers no evidence that the modern corporation lawyer is any the less subject to control by his client than was J.P. Morgan's lawyer. One of the most important developments in the corporate sector of law practice in recent years has been the growth in the number of inside corporate counsel—that is, house counsel rather than lawyers practicing in outside firms. At the very least, this development does not suggest the increasing independence of lawyers in the corporate sector of practice. Indeed, the shift toward inside counsel reflects a desire by corporation officers to exert a higher degree of control over their lawyers. Inside counsel will not often bite the hand that feeds them every day.

Much of the influence exercised by clients over their lawyers will not be manifested in direct confrontation. It does not often come to that. Rather, the lawyers will usually seek to anticipate the things that are likely to rile their clients and will take steps to avoid problems. Stewart Macaulay has given a good example:

[Lawyers position] themselves to serve those clients they are likely to see and those who occasionally bring them cases they prize. For example, a partner in a large Milwaukee law firm

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<sup>17</sup> W. MOORE, *THE CONDUCT OF THE CORPORATION* 185 (1962).

<sup>18</sup> *Id.*

decided that he could not be the campaign manager for a law school classmate's race for Congress in the early 1960s. The friend was a Democrat, and the law firm's major clients were large family-controlled corporations locally famous for supporting right-wing causes. The lawyer did not know and did not ask whether these clients would object; even raising the question carried more risk than he wanted to take.<sup>19</sup>

If this is typical, the political views and interests of lawyers' clients may have a substantial chilling or channeling effect on the lawyers' political activity (or lack thereof).

Indeed, we might even ask how often corporate lawyers see their interests or values as in conflict with those of their clients. It may be that corporate lawyers come to identify with their clients—with their clients' interests, positions, values, and lifestyles—so fully that the lawyers have difficulty in distinguishing their own interests from their clients' interests and seldom or never see a conflict between the two. If this were the case (and I believe that it is), then we would seldom find examples of real perceived conflicts between corporate lawyers and their clients and would have to look instead for examples of "objective" conflicts between the two interests.<sup>20</sup> That is, we would have to seek to identify situations where it seems to us that the lawyers *should* see their interests as in conflict with those of their clients, and then to examine what took place.

Let us consider an example. It is drawn from a new research project on Washington law practice that some of my colleagues and I are currently pursuing.<sup>21</sup> In recent years airline rates and routes have been almost completely deregulated, and there are a number of lawyers in Washington who formerly made their livings doing Civil Aeronautics Board cases full time (or nearly full time). Now there is not enough such work around to permit those lawyers even to keep their tank watches in repair. We interviewed a former CAB

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<sup>19</sup> Macaulay, *supra* note 6, at 163.

<sup>20</sup> I am not referring here to purely formal conflicts of interest or to conflicts between two clients.

<sup>21</sup> The Washington research is supported by the American Bar Foundation. The other principal investigators are Edward Laumann, of the University of Chicago, Robert Nelson, of the American Bar Foundation and Northwestern University, and Robert Salisbury, of Washington University.

specialist whose principal client had been a major airline, and we asked him whether he had anticipated the effect on his practice of the proposed deregulation and had taken any steps to oppose it. He said that he had not. This lawyer had held high office in the executive branch of the Federal Government, and he would have been in a position to exercise some influence in opposition to deregulation if he had chosen to do so. When we interviewed him, after deregulation, his practice had in fact fallen off substantially, and he was looking for a new specialty and new clients. We also asked him what his own thoughts or position had been on the deregulation proposal—that is, whether he had perceived the probable effect of deregulation on his practice and had thus realized that there was or might be a conflict between his own interests and the political position being pursued by his principal client. He said that he had not really thought about the problem often; he had been too busy practicing law before the CAB, and he simply assumed that everything would turn out all right. It always had. In short, he did not give much weight to the possibility that there might be a real conflict between his interests and those of his clients. He largely identified with his clients' interests and seemed reluctant to think of himself as in conflict with them.

My colleague at the American Bar Foundation, Robert Nelson, is now completing a major study of large law firms in Chicago.<sup>22</sup> As a part of that research, he asked a random sample of lawyers practicing in large firms this question: "Have you ever refused an assignment or potential work because it was contrary to your personal values?"<sup>23</sup> Of the 222 lawyers questioned, only thirty-six (or sixteen percent) had ever done so. Of those thirty-six, only a dozen had done so more than once.<sup>24</sup> Nelson then further inquired about the reasons for the refusals. Half had been based on reasonably clear violations of the Code of Professional Responsibility (e.g., cases of continuing criminal activity). Most of the other half were cases of the lawyer's disagreement on principle with the client's

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<sup>22</sup> See Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*, 1981 AM. B. FOUND. RESEARCH J. 97. Nelson has recently completed a book-length manuscript based on the same study. See R. Nelson, *Practice and Privilege: The Social Organization of Large Law Firms* ch. 8 (1983) (unpublished manuscript) (research in progress at the American Bar Foundation) [hereinafter cited as *Practice and Privilege*].

<sup>23</sup> See *Practice and Privilege*, *supra* note 22, ch. 8.

<sup>24</sup> *Id.*

position (e.g., an unwillingness to defend racial discrimination or serious environmental pollution).<sup>25</sup> But of the eighty-four percent of his respondents who had never found it necessary to refuse work because it was contrary to their values, the vast majority said that the reason they had never refused was that they had never been presented with work that they perceived as posing a moral issue or a conflict with their values.<sup>26</sup> Of course, it is quite possible that some large percentage of these lawyers may have had occasion to admonish their corporate clients or to complain to them about their behavior, and it is also possible that this may have had an effect on the clients' conduct without the lawyer ever confronting the necessity of withdrawing from representation. Within the limits of Nelson's data, however, the evidence is that corporate lawyers seldom feel that they need, for reasons of principle, to tell their clients to take their business elsewhere.

To provide any reasonably definite answers to the questions posed concerning the influence of lawyers on the goals of their corporate clients and thus on the distribution of wealth, one would need to have some measures of the nature of the relationships and interactions between lawyers and clients, including indicia of lawyer influence. Such measures might be obtained through direct observation, after-the-fact reports, or study of case files or other records, but any observation of those interactions by a researcher would of course raise difficult issues of client confidentiality. Lawyers and clients who were dealing with sensitive matters might well be reluctant to permit an outsider to look on.<sup>27</sup> A researcher who was licensed to practice law, however, or even one who was able to work as a paralegal, might be able to conduct such research while performing legal work for the client.<sup>28</sup> The present scholarly litera-

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.* Only about eight percent of Nelson's respondents said that their personal values should not be determinative or that, if they did not like the nature of the work, they should resign from the firm. *Id.*

<sup>27</sup> See Danet, Hoffman & Kermish, *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure*, 14 *LAW & SOC'Y REV.* 905 (1980). Douglas Rosenthal did manage to address these issues of lawyer versus client control in personal injury cases, but the greater power of lawyers vis-à-vis their clients in that context may well have made the lawyers more comfortable with the research and have rendered the clients less able to object to it. See D. ROSENTHAL, *supra* note 16, at 172-76.

<sup>28</sup> There does not appear to be any reason to suppose that such a researcher would be more likely to breach client confidentiality than would another legal representative of the

ture contains a great deal of speculation—some of it, mine—about the extent of the autonomy and influence of lawyers, but a modicum of systematic observation of lawyer-client relations would be far more persuasive than that entire body of speculation. On the present state of our knowledge, however, I do not find much evidence that the lawyers who serve corporations enjoy a highly independent, autonomous role, a role that would permit the lawyers' own values (as distinct from those of their clients) to determine the positions taken, with the lawyers thus having important, independent effects on the allocation of scarce resources. In short, it appears to me that corporate lawyers usually do their clients' bidding, rather than the other way around. Maybe that is as it should be. But, if so, where is the power of lawyers?

Perhaps we should return to Tocqueville's observation, noting the great presence of lawyers in American politics, and inquire whether that presence makes any difference. In order to make a difference, in the sense of producing different outcomes or an allocation of scarce goods that differs from the result that would occur otherwise, it would be necessary for the lawyers who occupy public roles to behave differently in them than do other citizens who occupy those same roles. Do they?

At least two studies were done by political scientists a couple of decades ago on the behavior of lawyers in state legislatures. Heinz Eulau and John Sprague, in *Lawyers in Politics*, present data supporting their conclusion that the votes of lawyer legislators are essentially indistinguishable from those of nonlawyers.<sup>29</sup> Another study, by David Derge, reaches very much this same conclusion—that lawyers, at least in state legislatures, do not differ in any substantive way from nonlawyer occupants of the same office.<sup>30</sup> Is there any good reason to doubt these findings? Lawyers might be expected to represent client interests in their political activities,

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client. Thus, I do not believe that either legal or research ethics would require the special permission of the client as a precondition to such research.

As is always the case in "participant observation" research, however, there is a risk that the researcher's role as a participant may compromise his objectivity as an observer.

<sup>29</sup> H. EULAU & J. SPRAGUE, *LAWYERS IN POLITICS: A STUDY IN PROFESSIONAL CONVERGENCE* (1964).

<sup>30</sup> See Derge, *The Lawyer in the Indiana General Assembly*, 6 *MIDWEST J. POL. SCI.* 19, 21 (1962); Derge, *The Lawyer as Decision-Maker in the American State Legislature*, 21 *J. POL.* 408, 427 (1959).

but nonlawyer politicians also surely represent the interests of the groups or factions who are their sponsors. These interest groups may well be identical with the lawyers' clients. Again, then, the available evidence appears to suggest that the power of lawyers, such as it may be, does not produce identifiable distributive consequences.

My tentative conclusion, then, is that the autonomy of lawyers as individuals or as firms may be greatly overrated. But what of the legal profession as a collectivity? Even if lawyers taken individually or as particular firms may not exert any great power that is independent of their sponsors, perhaps the organizations of the profession itself—particularly, the bar associations—might wield substantial power. As the collective voices of an elite profession, enjoying high social standing, they would seem to have great potential for the exercise of influence. What, then, of the power of the profession as a whole?

The first thing to note is that the profession is *not a whole*. Rather, it consists of at least two, quite separate parts. In our book, *Chicago Lawyers*, Laumann and I argue that there are two "hemispheres" of the legal profession: a corporate client hemisphere and a personal client hemisphere. We summarize our findings as follows:

The two sectors of the legal profession thus include different lawyers, with different social origins, who were trained at different law schools, serve different sorts of clients, practice in different office environments, are differentially likely to engage in litigation, litigate (when and if they litigate) in different forums, have somewhat different values, associate with different circles of acquaintance, and rest their claims to professionalism on different sorts of social power. . . . Only in the most formal of senses, then, do the two types of lawyers constitute one profession.<sup>31</sup>

Of course, the usual rule that lawyers serve one sort of client or the other, but not both, does not qualify as an iron law. There are some lawyers who stand astride the equator of the profession, with one foot in each hemisphere. But, because these lawyers tend not to be colossi, it is an uncomfortable straddle.

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<sup>31</sup> See J. HEINZ & E. LAUMANN, *supra* note 11, at 384.



The division within the profession is reflected in the bar's internal conflicts on major policy issues. The lines of conflict do not always mirror exactly the split between the two hemispheres of the profession, but lawyers representing corporations often are found in opposition to the lawyers who represent persons. For example, Watson and Downing found in their study of the politics of judicial selection in Missouri that, when a so-called "merit selection" system was adopted instead of the popular election of judges, electoral politics were replaced by "bar politics" in which the chief antagonists were the "plaintiffs' bar" versus the "defense bar"—that is, lawyers representing the persons who are the plaintiffs in personal injury cases were regularly opposed by lawyers representing the insurance companies that are usually the defendants in such actions.<sup>32</sup> And anyone who has observed the bar in recent years will be aware of the heated controversies over lawyer advertising, "no fault" in automobile accidents and in divorce, and rules for the certification of class actions, all of them issues that have tended to align lawyers who represent large corporations in opposition to those who represent persons and small businesses.

But, for the most part, the hemispheres of the bar have little need to come into conflict or even to intrude upon the consciousness of each other. They move in different social circles, they practice in different forums, and they seldom touch one another. Because of this separation, the bar is probably not likely to divide or disintegrate further. So long as each of the hemispheres minds its own business and does not go out of its way to interfere with the other, the two will have little contact and thus will be able to coexist peacefully. For this reason, I do not expect the major divide within the bar to be formalized by a split into two separate professions.<sup>33</sup> There is simply insufficient incentive for the formal split.

Does the existence of a de facto separation of the urban bar into two hemispheres diminish the power of the profession as a collectivity? Almost certainly. There are signs of erosion or reversals in the bar's "professional project," especially in the efforts to control

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<sup>32</sup> See R. WATSON & R. DOWNING, *THE POLITICS OF THE BENCH AND BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* 259-62 (1969).

<sup>33</sup> A similar separation into two distinct occupations was recommended in a report to the Carnegie Commission in 1920, but the split was never a serious possibility. See A. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 237-39, 419 (1921).

the supply of legal services and the rules governing the practice of law. In recent years, there has been an unprecedented increase in the number of lawyers. The existing law schools greatly expanded their enrollments, new law schools came into being, and bar examiners admitted to practice most of the resulting flood of new graduates. This increase in the supply of lawyers would surely be expected to have the effect of depressing the price of legal services, but the profession appears to have been either unwilling or unable to control the influx of lawyers. Moreover, recent court decisions have severely restricted the profession's control in such areas as fee schedules<sup>34</sup> and the rules governing lawyer advertising.<sup>35</sup> While it is true that these limitations have been imposed by the courts, especially by the United States Supreme Court, the courts might not have acted as they have if there had been a clear consensus within the bar on these issues.<sup>36</sup>

The principal impact, if any, of each of these three recent changes—i.e., in the supply of lawyers, in fee schedules, and in lawyer advertising—would fall upon the personal client sector of practice. It is here that the numbers of new lawyers would be felt most and would be expected to have the greatest effect on the price of legal services; bar association fee schedules were always irrelevant to lawyers in corporate practice; and the rules governing advertising by lawyers similarly were of little consequence in the corporate sector. Thus, on each of those issues, the segment of the bar that might expect to be hurt by the change was the personal client hemisphere; and, on each issue, the lawyers who serve corporate clients and the bar associations controlled by corporate lawyers were either indifferent or adopted positions favoring the change. If the corporate lawyers had supported the personal client lawyers, the resolution of these issues might have been different.

But the organized bar also includes substantial representation of lawyers from smaller communities and smaller firms. In the recent

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<sup>34</sup> See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

<sup>35</sup> See *Bates v. State Bar*, 433 U.S. 350 (1977).

<sup>36</sup> See M. Powell, *Developments in the Regulation of Lawyers: Intra- and Extra-Professional Controls* (Aug. 1981) (unpublished manuscript) (presented at the Am. Sociological Ass'n annual meeting, Toronto, Canada); M. Powell, *Professional Self-Regulation: The Transfer of Control from a Professional Association to an Independent Commission* (1976) (unpublished manuscript) (presented at the Am. Sociological Ass'n annual meeting, New York, New York).

meeting of the ABA's House of Delegates in New Orleans, it was principally the representatives of such constituencies who defeated proposed changes in the Code of Professional Responsibility (the "Kutak Commission" recommendations) that would have created new exceptions to the rule of confidentiality in the lawyer-client relationship.<sup>37</sup> There is some real competition between the two major segments of the legal profession for power within the organized bar and for control of its governing bodies. The resulting balance of power within most bar associations has meant that they devote much of their energy to engaging in "symbolic politics." More decisive action—action that would produce clear winners and losers—is usually blocked.<sup>38</sup>

Turning to another aspect of the power of the legal profession considered as a collectivity, we might note that Laumann and I found that the composition of the Chicago bar is becoming no less exclusive or socially elite, in terms of the socioeconomic class origins of the lawyers. Indeed, our finding was that younger lawyers come from privileged family backgrounds in even greater proportion than do older lawyers. Of Chicago practitioners who were admitted to the bar before 1960, sixty-eight percent had fathers who were employed in "professional, technical or managerial" occupations, while thirty-two percent had fathers employed in occupations of lower socioeconomic status. For those admitted to practice in 1960 or later, seventy-eight percent had fathers in professional, technical, or managerial occupations, and only twenty-two percent had fathers employed in less prestigious and remunerative occupations. Thus, among the younger lawyers the proportion drawn from less privileged socioeconomic origins decreased by a full ten percent.<sup>39</sup> If one of the objectives of the "professional project" is to enhance the social prestige of the profession by recruiting its personnel from the most elite social origins, the split in the profession between the corporate and personal client lawyers would not appear to be inhibiting the achievement of that objective. But is social exclusivity, in this sense, really any part of

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<sup>37</sup> See Taylor, *Lawyers Vote Against Disclosure of Fraudulent Activity by Clients*, N.Y. Times, Feb. 8, 1983, at 1, cols. 2-3.

<sup>38</sup> See Heinz, Laumann, Cappell, Halliday & Schaalman, *Diversity, Representation and Leadership in an Urban Bar: A First Report on a Survey of the Chicago Bar*, 1976 AM. B. FOUND. RESEARCH J. 717.

<sup>39</sup> See J. HEINZ & E. LAUMANN, *supra* note 11, at 190-91.

the goals of the leadership of the profession? I very much doubt it. Indeed, the leadership of the ABA and of other bar associations in recent years has supported affirmative action in law school admissions, higher levels of law school scholarship aid, and other measures designed to overcome socioeconomic barriers to entry into the profession. I do not believe that these actions have been a sham or have been intended as mere palliatives, even though they may in fact have had little effect. It is hard to imagine that most lawyers can really care very much whether their fellow members of the bar were reared in upper or upper-middle class homes, but that is, indeed, where most of them were reared.

It is also true that the limits that social background imposes on career opportunities do not cease upon entry into the profession, but have effects on the career paths that are open to lawyers after admission to the bar. One of the most striking and perhaps surprising of our Chicago findings is the degree to which the ethno-religious backgrounds of lawyers appear to determine the fields in which they specialize.<sup>40</sup> In a "learned profession," where arcane knowledge and professional skills are supposed to be what matters, one might not expect the social origins of the lawyers to have much effect on the sorts of work that they do. But Laumann and I found, for example, that Chicago lawyers who are Roman Catholics were three times more likely to be prosecutors than were either Protestants or Jews. Jews were more than twice as likely as Catholics to do divorce work, and Jews were incalculably more likely to handle divorces than were lawyers who were Episcopalians, Presbyterians, or Congregationalists—in our sample of 777 Chicago lawyers, we found no one from those Protestant denominations who did a large amount of divorce work.<sup>41</sup> What sort of legal work did the Protestants do? We found that Episcopalians, Presbyterians, and Congregationalists were five times more likely than either Catholics or

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<sup>40</sup> See J. HEINZ & E. LAUMANN, *supra* note 11, at 64-76, 182-206; Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 MICH. L. REV. 1111 (1978).

<sup>41</sup> See J. HEINZ & E. LAUMANN, *supra* note 11, at 331-32. The figures are based on calculations concerning lawyers who devoted 25% or more of their working time to each of these specialties or fields of legal work. The inclusion of practitioners who devoted smaller percentages of their time would probably result in greater ethnic heterogeneity in the field categories, while the use of a higher time percentage would probably produce an even more homogeneous set of practitioners within each field.

Jews to practice securities law or to do antitrust defense work. These examples are merely illustrative, of course, and I should caution you that we had only relatively small numbers of respondents in some of these categories, but the examples will serve to give an idea of the flavor of our findings (a bitter flavor, to my taste).

If the bar itself is not seeking to bring about this sorting and channeling of lawyers by their social origins, then why does it occur? What produces it? The late Everett Hughes suggested one possible answer when he characterized some lawyers as the "utter captives and choreboys of their clients." That phrase—which has been quoted often, mostly out of context—occurs in the course of a discussion of the extent to which Chicago solo practitioners are constrained in choosing their cases or lines of work:

Lawyers who practice alone—at least a sample of them taken in Chicago—are utter captives and choreboys of their clients. They have no freedom to choose a branch of law and make themselves expert or learned in it. Most of them, in time, do find their practice narrowed to a special line of chores: they have become specialists by default.<sup>42</sup>

Our more recent Chicago findings continue to support Hughes' observation. But perhaps Hughes' proposition is too simple—or, at least, too short. No doubt lawyers respond in large measure to client demands, but just how do client interests come to determine the social types of the lawyers that serve them? The principal determinants, I believe, might be labelled prejudice and propinquity. Part of the reason that the bonds of ethnicity and religious background have an effect on lawyer-client relationships is that social background provides a recognized or perceived basis for mutual trust. Within many ethnic communities, people who share the ethnic identity are seen as also sharing a common set of values and a common base of experience. People who look like, act like, and talk like me are more likely to be perceived as sympathetic to my interests and as trustworthy with my confidences. This applies to law-

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<sup>42</sup> Hughes, *The Professions in Society*, 26 CAN. J. ECON. & POL. SCI. 54, 60-61 (1960). In this passage, Hughes was referring to the dissertation research of his student, Jerome Carlin. Carlin's dissertation was later published. See J. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* (1962).

yers. And it applies not only in the personal client hemisphere, but in the corporate hemisphere as well. The social organization of networks of acquaintance serves to structure the patterns of referral of clients to lawyers and of lawyers to clients, and those social networks often follow ethnoreligious lines. Again, this may apply not only in the neighborhoods, but in the world of corporate enterprise. Ethnic patterns in the organization of business activity are reflected in the relationships of such clients to their lawyers. The social stratification of the bar thus corresponds closely to the stratification of the broader society within which the lawyers work.

What does all this have to do with the power of lawyers? Just this: it suggests that the norms that govern the legal profession—that organize the social structure of the profession, that determine which lawyers will serve which clients, and that define who gets what legal services—come from without rather than from within the bar. The legal profession, viewed either as a collectivity or as a set of individuals and firms, appears to lack the power necessary to establish and enforce its own norms. The profession may, perhaps, even be unable to define or identify those norms. It may not know what they are.

If the issue of professional autonomy is an issue of who calls the shots, then my observations imply that lawyers are not really calling the shots very often in our society. I, for one, am not at all sure that that is a bad thing. Pending further, more satisfactory research, however, I conclude that the prestige of the legal profession, the influence of lawyers on their clients, and the collective political action of lawyers do not often bring about an allocation of the society's scarce resources that differs in any substantial way from the distribution that would have been willed by the lawyers' clients or by the polity apart from that prestige, influence, or action. Not often at all.

