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Chapter 4

“Bringing the Lawyers Back In”

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What role do lawyers play in American courts and society? How do lawyers contribute to U.S. judicial processes? Public depictions of lawyers are mixed. For every Atticus Finch (*To Kill a Mockingbird*) fighting racism, Erin Brockovich battling industrial polluters, or dedicated public defender working hard to free an innocent defendant, there are lawyers who cut ethical corners, charge outrageous fees, or exacerbate conflict by filing frivolous litigation. What *do* lawyers do?

One view of lawyers resides in popular jokes. Marc Galanter opens his masterful survey of lawyer jokes and legal culture with the following:

“Question: How many lawyer jokes are there?”

Answer: Only three. The balance are documented case histories” (Galanter, 2005, 3).<sup>1</sup>

Galanter shows that lawyer jokes succeed with their humor because they tap into the public’s deep ambivalence about lawyers. From the country’s earliest days, lawyers played two roles. They were exalted as “America’s aristocracy,” in the words of Alexis de Tocqueville in the 1830’s. But lawyers were also reviled as troublemakers, hired guns for the mercantile elites, or simply beyond the reach of the common person. These dueling images of lawyers, as savior or scum, continue to contend for popular approval.

Certain lawyer jokes have been told for centuries, and were common in England as well. Galanter calls these jokes “the enduring core” and most of them focus on “what lawyers do” (Galanter, 2005, 17). Consider three different clusters of jokes, each of which pokes fun at a different aspect of lawyers’ behavior. Lawyers earn their living through their words, but their legal jargon and complicated discourse can obfuscate the truth and defy common sense. Thus, one category of jokes centers on *lawyers’ command over language*.

How can you tell if a lawyer is lying?

His lips are moving (Galanter, 2005, 31).

Or consider the drunken lawyer who mistakenly argued for the wrong side in trial and, when corrected, calmly continued: “Such, my lord, is the statement you will probably hear from my brother on the opposite side of the case. I shall now show your lordship how utterly untenable are the principles and how distorted are the facts upon which this very specious statement has proceeded” (Galanter, 2005, 41).

Another category of jokes focuses on the lawyer as “*economic predator*,” who charges exorbitant fees but does little to earn it:

“Why do you want a new trial?”

“On the grounds of newly discovered evidence, your Honor.”

“What’s the nature of it?”

“My client dug up \$400 that I didn’t know he had” (Galanter, 2005, 69).

During my research in the Los Angeles criminal courts, I often heard a similar joke whispered by court personnel when a private defense lawyer moved for a continuance: “Oh, he’s just waiting for Witness Green to appear” (Mather, 1979). Galanter traces a

joke about the eighteenth century English judge, Lord Mansfield, which reappeared in a twentieth century version: “When President Theodore Roosevelt was trying to persuade his son to become a lawyer, he used the following argument: ‘A man who never graduated from school might steal from a freight car. But a man who attends college and graduates as a lawyer might steal the whole railroad’” (Galanter, 2005, 72). Jokes about lawyers’ greed and pursuit of economic gain underscore the dissatisfaction people feel about the fact that they must pay someone in order to achieve justice. Why shouldn’t access to the law and to courts be free? Why should money enter into the equation of legal rights and wrongs? (Galanter, 2005, 94-96).

Because lawyers represent people in conflict and are supposed to advocate zealously for their clients’ interests, it is not surprising that lawyers appear in numerous jokes as *creators of conflict* or “fomenters of strife” (Galanter, 2005, 114). In one *New Yorker* cartoon, a small child looks up to her mother and says, “When will I be old enough to start suing people?” (Galanter, 2005, 131). Do lawyers manufacture conflicts and construct their clients’ injuries? The next joke taps into that pervasive belief:

“Are you badly injured?”

“Can’t tell till I see my lawyer” (Galanter, 2005, 119).

There is also the old joke about the sole lawyer in a small town whose business was suffering but then a second lawyer moved to town and they both thrived (Galanter, 2005, 118).

What I like about these jokes – besides the fact that they lighten up my introduction -- is that they underscore the complex and equivocal nature of lawyers’ work. The first cluster of jokes points to the power and influence that lawyers have from

their command over legal language, i.e. their ability to frame and argue cases in many different ways. The second joke cluster points to the tension between lawyers' pursuit of private gain and their role as officers of the court, as members of a public profession. This tension underscores the interests, including financial self-interest, which lawyers may have that are distinct from those of their clients. Finally, what role do lawyers play in creating or dampening conflicts? This is an enormous area for lawyers' discretion and is central to current debates over civil justice, tort reform, plea bargaining, and public interest litigation.

Lawyer jokes call attention to the *independent* influence of lawyers. That is, lawyers are not simple conduits for client interests, faithfully translating preconceived goals into legal language and shepherding clients through the legal process. Rather, lawyers frequently add their own goals, ideas, and values to clients' problems and conflicts. In class action, social reform, or government litigation, the identity of the "client" is unclear, giving lawyers considerable independence over action. A growing body of empirical research focuses on the contributions of lawyers in litigation.<sup>2</sup>

Yet all too often judicial process textbooks report uncritically the legal profession's official and politically neutral view of lawyering. In this view, the work of lawyers consists of: advising and counseling clients; representing clients before public bodies; drafting written documents; negotiating conflicts; and litigating cases in court.<sup>3</sup> These tasks sound straightforward and technical, dependent on skill, training, and specialized legal knowledge. The political, value-laden, or contested nature of lawyers' work is not immediately obvious. Lawyers seem to be highly trained technicians; yes, you need one to go through court, but the lawyer won't substantively alter the client's

case. Yet the jokes reveal a more skeptical – and perhaps more accurate - view of what attorneys do. Lawyers translate client objectives but they also transform them through legal language (Cain, 1979; Mather and Yngvesson, 1981). And lawyers have their own incentive structure apart from that of their clients, such as the pursuit of a political cause, an interest in maintaining smooth relations with opposing attorneys, or a desire to maximize fees.

The political science literature recognizes the importance of legal representation for *access* to court, but sometimes ignores the contribution of lawyers in court. In many quantitative judicial process studies, cases are coded by different types of issues, by types of litigants such as individual, private organization, or government; by the number of interest groups in support; and by the judges' political party or ideology. But only a few researchers have specifically investigated the impact of lawyers on case outcomes and they found significant effects from variation in lawyers' experience and specialization (Haire, Lindquist, and Hartley, 1999; Kritzer, 1990; Kritzer, 1998; McGuire 1993; McGuire, 1998; McGuire, 1999).

In this chapter I explore the work of lawyers, especially trial lawyers. My chapter title borrows from Evans, Rueschemeyer, and Skocpol's well-known book, *Bringing the State Back In* (1985), which challenged a society-centered paradigm of inputs and outputs and instead presented governments as independent actors, varying in state autonomy, state capacity, and organizational structure to exert influence on social and political outcomes<sup>4</sup>. Similarly, the judicial politics paradigm depicts clients directing cases as inputs into court with court decisions as outputs. But lawyers influence the entire litigation process from case filing through settlement negotiations, pretrial motions, trial,

and appeal. By including variation in lawyers' independence from clients, lawyers' capacity and resources, and the structure and social networks of the legal profession, we can develop a more complete understanding of the judicial process.

In the next section I summarize the argument for bringing the lawyers back in, by emphasizing the content and political impact of lawyers' work. Looking at the legal process from mobilization of law to settlement or trial underscores the crucial contributions lawyers make in shaping case outcomes and also in developing law and policy. Lawyers are not just agents of their clients, however, but are also members of a profession. The third section of this chapter describes the population of the legal profession, including its history of discrimination, its current demographics, and lawyer differences according to workplace contexts. While this section provides a macro, or aggregate, view of the profession, the fourth section explores several specialized communities of legal practice such as divorce lawyers, criminal defense and prosecutors, personal injury attorneys, and public interest or cause lawyers.

### **The Content and Impact of Trial Lawyers' Work**

Lawyers' work goes far beyond a set of technical, predetermined responsibilities, and instead includes a range of choices, which are contingent and uncertain. The results of those decisions shape the caseloads of trial courts, the experiences and perceptions of litigants, the outcomes of cases, the meaning of legal rules, and the development of new law. Thus, as Christine Harrington puts it, we should examine "the ideological content and political significance of the work that lawyers do" (Harrington, 1994, 55). Taking the

rather straightforward set of lawyer tasks described earlier, consider what these tasks really entail.

Advising and counseling clients involves helping them see whether or not their conflict or problem constitutes a legal case. Lawyers *construct cases* by renaming problems in legal language. A prosecutor listens to a victim of racial violence and constructs a “hate crime;” a neighbor’s bitter complaint over a borrowed lawnmower becomes a charge of “petty theft;” a fight becomes an “assault.” Or, in civil law, an employer hitting on his employees becomes a “sexual harassment” claim; an auto accident from careless driving becomes a “tort”; injury from a defective chain saw becomes a “products liability” case. Advising also entails *educating individuals and organizations* about what the law is – the meaning of legal terms and rules, their application to specific facts, and how the legal process works.

Martin Shapiro wrote, “Law is not what judges say in the reports but what the lawyers say – to one another and to clients – in their offices” (Shapiro, 1981b). What understanding of law and what view of the legal system do clients receive from lawyers in their offices? And how does this vary by the type of client and lawyer? “No, we can’t take that legal action because it will just alienate the opposing side;” or “because the judge will never approve it;” or “because you don’t have the funds to support it;” or “because I can help you settle your problem without it;” or “because you’ll regret litigation in the long run;” or . . . Lawyers have myriad reasons against filing litigation. Lawyers’ advice on the limits or inapplicability of law may stem from their legal knowledge, their economic self-interest, their personal values, or a host of other factors.

Client counseling thus influences *popular legal consciousness*, that is, popular understandings of law and the legal system.

Despite the common perception that Americans and their lawyers are eager to define all problems as legal claims, the empirical evidence shows a far more complex pattern (see Haltom and McCann, 2004 for summary; see also Miller and Sarat, 1981). Some personal problems require legal action – transfer of real estate, executing a will, adoption, and divorce come to mind. Increasingly, however, people are representing themselves, filling out forms from the Web, or locating specialists besides lawyers to provide help for these actions. Rates of *pro se* (self-representation) have increased dramatically in family law, for example (Mather, 2003a). Individuals who are defendants in civil actions are especially likely to lack lawyers. In divorce cases, wives are twice as likely as husbands to have legal counsel due largely to the fact that husbands are more frequently the defendants (Mather, 2003a, 149).

Many potential plaintiffs in civil cases never file legal claims because they cannot afford -- or choose not -- to go to a lawyer, or because a lawyer rejects their case. Since there is no constitutional right to an attorney in a civil case (as exists for criminal cases), those seeking to file civil claims must have the funds to pay for private counsel, be accepted by a contingency fee attorney, or be eligible for free legal services. Hourly fees of private attorneys are beyond the reach of many claimants. A contingency fee means the lawyer collects a fee only if the case is won. But this type of fee is typically only used in certain kinds of cases (e.g., those with large financial awards) and contingency fee attorneys accept only a relatively small portion of clients seeking their counsel. There are also limited free, or reduced fee, legal services for civil claims

available through federally funded or group funded legal services, law school clinics, or through private attorneys acting in a pro bono capacity. This patchwork of civil legal services means that advice and counsel depends upon client finances and the nature or size of the claim. Consequently, the economics of legal practice influences the civil law caseloads. Lawyers also shape court caseloads by steering conflicts away from courts and into alternative dispute resolution proceedings or, conversely, by initiating legal cases to take advantage of newly passed statutes or judicial rulings. Private lawyers are thus the *gatekeepers of civil trial courts*, while prosecuting attorneys are key *gatekeepers of criminal trial courts*.<sup>5</sup> Whether lawyers decide to represent clients and claims, or not, depends on a host of resource and other factors. There is nothing automatic or fixed about the lawyer's task of representing clients before public bodies.

Prosecutors represent governments, bringing criminal charges against defendants in state and federal courts. Nearly all chief state prosecutors are elected officials, serving a county-based jurisdiction. Some work part-time and alone, while other chief prosecutors oversee hundreds of assistant attorneys. Because of the large number of rural counties, the median number of assistant prosecutors in 2005 was only 3, while in counties over 1 million in size, the median was 141 (Perry, 2006). The nature of advice and counsel that prosecutors offer to victims is quite different in a small community than that in a large bureaucracy in an urban area. Most large offices also have specialized units for domestic violence prosecution, which smaller offices do not. U.S. Attorneys, the chief federal prosecutors, are appointed by the President for each federal district court. Although the method of selecting prosecutors differs between the state and federal systems, both have political accountability, which has the potential to influence decision

making, especially in highly visible cases. State prosecutors in some areas face severe resource constraints that sharply limit their ability to do adequate investigation and case preparation.

Drafting documents involves setting out the pleadings and arguments in a civil case or the facts and rationale for charges in a criminal case. Through lawyers' writing and advice to clients, they use law, that is, they *implement statutory law or rulings of appellate courts*. Conflict between prosecuting and defense attorneys over the constitutionality of a search that produced the cocaine in evidence, for example, defines the law of search and seizure for that particular court, at least until overturned on appeal.

Client advising and drafting documents may also lead lawyers to suggest or allow *new interpretations of law*. Lawyers for Enron – or, a decade earlier, lawyers for Lincoln Savings & Loan<sup>6</sup> -- endorsed their corporate clients' creative new ways of organizing financial transactions. With the collapse of these companies, the interpretations were rejected (and the attorneys sanctioned) but how many other similar schemes continue in force undetected and unchallenged? President George W. Bush's Legal Counsel Alberto Gonzales wrote memos that argued for a new interpretation of the international Convention Against Torture (which the U.S. has signed) to expand the range of techniques the U.S. military could legally use in interrogating detainees considered to be terrorists. Some consider these infamous "torture memos" to be a blatant violation of professional legal ethics, purely political and unconstrained by law (Abel, 2005). But until the interpretation is adjudicated, Gonzales' interpretation remains in some sense "legal."

The notion of creative legal advising can also provide a euphemistic cover for unethical, unconstrained behavior of lawyers who do whatever their clients want. These examples call to mind a lawyer joke that I retold several times without realizing that it was, according to Galanter, the “single most prevalent of all current lawyer jokes” (Galanter, 2005, 192-195).

Why have research labs started using lawyers instead of white rats in their experiments? There are three reasons: first, there are more of them, second, the lab assistants don't get attached to them; and third, there are some things a white rat just won't do.

According to the preamble of the Model Rules of Professional Conduct, lawyers are supposed “to advocate zealously for their clients within the bounds of the law.” Powerful clients who work regularly with the same lawyers can urge them to *push the bounds of the law to suit the client's objectives*. Lawyers whose jobs depend on one or small number of clients, such as the President's counsel, in-house counsel or corporate counsel to one or two firms, may find it difficult to resist client demands.

Another realm of creative legal interpretation in drafting documents results from explicitly political or cause lawyering (Sarat and Scheingold, 1998; Scheingold and Sarat, 2004). Lawyers with an agenda for social or political change may counsel clients to enter litigation designed to test the bounds of the law or to *formulate new legal claims*. Test case litigation has led to the development of constitutional rights in numerous areas, from the earlier liberal rulings (e.g., school desegregation and gender equality) to the more

recent conservative ones (e.g. property rights and antiabortion). Attorneys sometimes even seek out clients for the claims rather than the other way around. Political activists and cause lawyers recognize the advantages of having a sympathetic plaintiff as the poster child for a cause. Other cause lawyers developed their legal theories out of their work with clients. Feminist legal advocates, for example, constructed legal theories of sexual harassment (MacKinnon, 1979; Marshall, 2003; Marshall, 2005), comparable worth (McCann, 1994), and self-defense for battered women who killed their husbands (Schneider, 2000) from their experiences advising clients.

New legal formulations underscore lawyers' political power as revealed in the first cluster of lawyer jokes, which centered on lawyers' language. What is verbal idiocy to some constitutes creative lawmaking to others. The first legal claims to extend the benefits of marriage to gay couples were ridiculed for altering the meaning of the word "marriage," but some courts (and a small but increasing segment of the public) have since accepted those claims. *Lawmaking* in the judicial process results from lawyers' command over language, particularly in an adversarial, common-law system that depends upon parties to initiate legal claims (Levi, 1949; Kagan, 2001). Lawyers use logic or metaphorical reasoning to expand (or narrow) legal categories to suit the facts of a client's case. When judges make decisions, they are then choosing between the legal formulations presented to them by the lawyers.

Representing clients before public bodies and drafting written documents require lawyers to *construct a narrative* on behalf of the client or else to match the client's narrative with a predetermined one. What does the client want to do with her land? How does the family want to set up the trust? Why is the organization seeking the permit?

How does the company justify denying the claim? Why didn't the tenant pay the rent? Why did the defendant have a gun in his satchel? What happened after the fight was over? Does she have a medical reason to explain the marijuana growing in the basement? Some legal problems require little discretion and attorneys learn quickly how to slot the pegs into their proper holes to convince public agencies or to produce appropriate documents. But other issues require considerably more tailoring and choice, with lawyers juggling the story as told by the client with alternative versions. And what should a lawyer do when faced with competing narratives, or a disagreement between her recommendation and the client's? Which one should be privileged when the lawyer prepares the legal documents or presents the case to the court? What does it mean for a lawyer to "represent" a client -- to do what the client wants (delegate) or to do what the lawyer thinks is best (trustee)? Add a systematic race and class difference between lawyer and client, and the lawyer's task as representative of the client becomes much more political and contested (White, 1990; Cunningham, 1989; Alfieri, 2005).

Negotiation and litigation round out the list of lawyers' tasks. These two processes overlap and intersect with various stages in between settlement and trial, and with decisions to settle shaped by consideration of the alternative of trial. Most cases do settle, and trials in the U. S. (especially jury trials) are rare.<sup>7</sup> In the federal courts in 2005, only 1.4 percent of all civil cases were decided by a judge or jury, down by more than one-half from a decade earlier. Only 4.4 percent of the federal criminal cases went to trial in 2005, also a significant decrease (U.S. Courts, 2006; Galanter, 2004). In the state trial courts of general jurisdiction in 2002 (based on almost half the states), 16 percent of all civil case dispositions were by trial (fewer than one-quarter of those by jury trial), and

just over 3 percent of all criminal case dispositions were decided by judge or jury trial (Ostrom, Strickland, and Hannaford-Agor, 2004, 775-776).

What do lawyers contribute to the overwhelming majority of cases that settle? In ordinary litigation, they often *broker* transactions and agreements (Kritzer, 1990). That is, they act as intermediaries between their clients and other parties or organizations such as the court. As justice brokers, they exact a fee for their work and they draw on their insider knowledge of people and informal processes to do their work. Through such repeated interactions with others, lawyers *establish going rates* and *create operational categories* for handling of cases in order to achieve what they consider to be appropriate results. In theory these rates reflect shared views of a likely judicial ruling, so that the settlements are bargained “in the shadow of the law” (Mnookin and Kornhauser, 1979). But in some areas of law, there are so few judicial rulings and so many lawyer-influenced settlements that the rates lack much judicial input. For example, when Congress required states to adopt new rules for child support, divorce lawyers in several states interpreted the new numbers as a fixed -- not minimum -- amount that noncustodial parents were required to pay in support (Jacob, 1992; Mather, McEwen, and Maiman, 2001).

Parties who frequently use the legal system (“repeat players”) exercise greater control over their lawyers than do parties who are infrequently in court (“one-shotters”) and thus more dependent on their lawyers’ advice and counsel (Galanter, 1974; Heinz and Laumann, 1982; Heinz et al, 2005). Repeat players in the legal process include large organizations, such as corporations or governments, in contrast to one-shotters who are typically individuals.

Another key advantage of repeat players in litigation rests on their ability to play the game for long-term gain of the development of legal rules, that is, to settle those cases that might lead to unfavorable rules and to push for trial in cases where more favorable rules could be established (Galanter, 1974). When experienced lawyers recommend settlement or trial to clients who regularly use the legal system, part of their settlement calculus involves the *strategic selection of cases for law-making opportunities*. Lawyers for one-shot clients typically seek maximal gain in the instant case whereas counsel for repeat players may prefer to trade off a single monetary loss for the longer-term advantage of a favorable legal precedent. For example, an individual employee suing her employer seeks to win her specific case, whereas the employer potentially facing many similar claims will decide to settle or litigate according to the case's impact on the development of legal precedent. Catherine Albiston (2003) found strong support for this pattern in her study of employment cases under the Family and Medical Leave Act. Nearly half of the cases in federal court were won by defendants (employers) on motions of summary judgment in their favor, a procedure for avoiding trial. On appeal, the appellate courts overwhelmingly upheld the lower courts' judgments and thus weakened the power of the federal law to guarantee employees medical leave. In cases where plaintiffs (employees) won at jury trial or through a generous settlement, they were paradoxically "losing by winning" (Albiston, 2003, 168). That is, because jury verdicts and settlements never reached the appellate courts, the successful employees did not establish a judicial determination of their rights under the statute. Similar research on eight years of litigation under the disability rights statute found that employee plaintiffs

had a relatively high win rate in cases at trial but their overall win rate was only 13 percent due to large number of adverse summary judgments (Colker, 2005, 78-79).

Knowledge of the different stages of negotiation and litigation requires more than identifying the procedural steps or filing technical motions. It requires understanding the long-term consequences of actions and legal arguments, making choices about when to settle and when to appeal. Lawyers' effectiveness in negotiation and litigation has been linked to their reputation (Kritzer, 1998; 2004) and their reliability (McGuire, 1993; 1999). Exaggeration or misrepresentation of claims for one client can backfire for a lawyer's other clients. Conversely, experienced lawyers who provide judges with high quality and trustworthy information bring added advantage to their clients (McGuire, 1999). Interestingly, one study found lawyer expertise to be a dichotomous rather than continuous variable in terms of its effect on judicial voting (Haire, Lindquist, and Hartley, 1999, 683). That is, lawyers were either experts or non-experts within a particular court and area of law. Other research has similarly found a crucial dichotomy between "insider" and "outsider" criminal lawyers according to their familiarity and expertise within a local court (Mather, 1979) and between "reasonable" and "unreasonable" divorce lawyers in their approach to negotiations (Sarat and Felstiner, 1995; Mather, McEwen, and Maiman, 2001).

Lawyers also draw on their substantive knowledge of where the law is, has been, and might be going as they craft arguments and create analogies for judges or juries. Lawyers have won or lost cases not only because of the judges' political ideologies but because they selected the wrong legal arguments, as Epstein and Kolbyka (1992) detail in their analysis of capital punishment and abortion cases before the Supreme Court. In

litigation, lawyers *marshal expertise* and *construct arguments for particular audiences* (Wahlbeck, 1997; Mather, 1998). Judges constitute only one of the many audiences for legal argument; others include jurors, potential litigants, other lawyers, interest groups, specialists in the area, or the mass media. Depending on a lawyer's strategy, her arguments may be aimed narrowly within the courtroom or more broadly to newspapers, CNN, Fox News, and other media outlets.

Stuart Scheingold and Austin Sarat (2004) distinguish between cause lawyers, who explicitly use their legal skills to pursue political or social ideals, and conventional lawyers who simply pursue their clients' objectives. They acknowledge some convergence and overlap between the two in legal practice, but argue that "cause and conventional lawyers are marching to distinctly different ethical drummers" (Scheingold and Sarat, 2004, 10). Cause lawyers, they note, typically work as salaried employees for advocacy organizations, in small firms devoted to particular goals, or on pro bono cases in medium or large firms. However, in contrast to the richly drawn picture of cause lawyers from various studies, their image of conventional lawyers comes from official pronouncements of the bar in which lawyers are indifferent to the values of their clients, zealously advocate for them, and would have no "qualms about switching sides" (Scheingold and Sarat, 2004, 7). But is this an accurate picture of conventional lawyers? Research discussed below on specialization in the legal profession, social networks among lawyers, and shared values reinforced in daily practice suggests the need for a more nuanced understanding. Lawyers who do not wear their political values on their sleeves may still be deeply engaged in promoting certain values and ideals through their client service. I question the usefulness of the distinction between cause lawyers and

conventional lawyers<sup>8</sup> and would encourage more study on a wide variety of different types of lawyers to explore the role of commitment in legal work.

In sum, how does a focus on lawyers help in understanding judicial politics? If one seeks to explain *case outcomes* at any stage in court, then, as described above, there is good reason to believe that lawyers could exert some independent effect. The effect could come from a lawyer's political commitment, fee, expertise, experience, skill, reputation, or myriad other factors. Besides the substantive outcome (e.g., win or lose? size of award or length of sentence?) there is the type of disposition (e.g., dismissal, pretrial settlement, summary judgment, judicial decision, or jury verdict). Litigants' perceptions of *case disposition processes* are also important, although they tend to be studied more by sociologists and psychologists than by political scientists (e.g., How did claimants and defendants experience the legal process? Were they treated equally and with respect? Did they perceive court procedures to be open and fair? Did they think their lawyer helped them?)<sup>9</sup> Perceptions of case processing contribute to popular knowledge of law as well as to compliance and the legitimacy of courts.

Besides the outcomes and processes of individual cases, what about lawmaking through litigation? If one seeks to explain *how law changes* – not just why cases settle, how judges or juries make choices, or how clients perceive the legal process – then knowledge about lawyers and their political goals becomes even more important. In addition to consideration of lawyers' expertise, workplace, and relationship to clients, one might add lawyers' own values, experiences, political commitments, and relations with other lawyers. To what extent do lawyers trade off cases against one another, settling some, but aggressively pursuing others in order to take strategic advantage of

opportunities in the legal environment? When new laws are passed (such as the Family and Medical Leave Act or the Americans with Disabilities Act) or when the potential for new case groupings of similar injuries arise (e.g. from asbestos, Bendectin, or Vioxx), then early verdicts send crucial signals about how the law is developing. A favorable verdict or judicial ruling may influence other legal decision makers, and simultaneously encourage others to pursue similar claims (and perhaps become clients of the lawyers engaged in the litigation). How do lawyers' own business strategies for building a successful practice, or their political principles, interact with their interest in legal change?

In complex litigation such as mass torts, plaintiff lawyers are fighting each other for clients yet they may also coordinate efforts against what they define as a common adversary, the corporate defendant. The Master Settlement Agreement of 1998 between the major tobacco companies and Attorneys General for 46 states illustrates the need for coordination as well as the independence of government lawyers in making this new law (Mather, 1998; Derthick, 2002; Schmeling, 2004). Lawyers working on political litigation, such as tobacco control, civil rights, gay marriage or antiabortion campaigns, face problems of coordinating strategy for broader legal change while also effectively representing clients in individual cases. The fact that lawyers work in an economic world of competition for clients and a social world of cooperation to resolve conflicts may lead to cross cutting ties that impact their legal strategy. In the United States, lawyers also work in a federal system, which means that variation in state politics provides a huge range of lawmaking opportunities through state litigation in addition to the federal courts.

## The Legal Profession

Bringing lawyers back into judicial politics requires more than studying them as individuals who vary in ability, expertise, background, commitment, and so forth. Most important, lawyers are not randomly distributed to cases. Indeed, individual attorney differences and patterns of client representation across legal specialties reflect the fundamental structure of the American legal profession. With the number of lawyers almost tripling since 1970 and with change in the market for legal services, that structure has undergone significant transformation. The bar's historic pattern of discrimination against women and minorities also affects their recruitment and career choices. Let us consider several key features of the legal profession today.

To begin, the legal profession is highly stratified by income and prestige. In no other profession is the gap between the highest and lowest paid practitioner as large as it is in the legal profession. The average annual income in 1995 of the top quartile of Chicago lawyers was *ten times* the average income of lawyers in the bottom quartile, a gap that had widened considerably in the past two decades (Heinz et al, 2005, 317). Who earns the top salaries and who are their clients? Although 8 percent of the nation's lawyers work for government (with about half of those in public defender or prosecutor's offices), it is the private practitioners who have the highest incomes.

Lawyers' income is also associated with firm size (Heinz et al, 2005). In 2000, 28 percent of all firm practitioners in the country worked in firms of over 100 lawyers (Carson, 2004, 8). Attorneys earning over a million dollars a year typically work in firms with over 1000 attorneys, a fact duly reported by *American Lawyer* in their annual listing

of the highest law firm salaries, “The Am Law 100.” In contrast, one study of franchise law firms found that staff attorneys on average barely made more than their legal secretaries (Van Hoy, 1995, 711). In other words, lawyers working in solo practice or in small firms typically earn a pittance compared to those working at enormous national or global law firms.

Both income and firm size are associated with the nature of lawyers’ clientele. Lawyers in large firms generally serve corporate clients while those in smaller firms or solo practices serve individuals and small businesses. These two hemispheres of the legal profession, first described by Heinz and Laumann (1982), continue to divide lawyers according to the clients they represent. The amount of time lawyers devote to the corporate legal sector has grown. Corporate law work consumed 64 percent of lawyers’ time in 1995 compared to 29 percent of lawyers’ time in the personal services/small business sector and 7 percent in other fields (Heinz et al, 2005, 43). Further, the educational backgrounds and social characteristics of lawyers working in these two hemispheres differ, with graduates of elite law schools and higher-class backgrounds typically working in the large corporate law firms. Graduates of local law schools, and those with middle-class backgrounds are more likely to work as solo practitioners or in small offices serving individual clients.

Lawyers increasingly specialize in specific legal fields (e.g., antitrust, criminal defense, divorce, environment, banking, patents, civil rights) rather than handling a broad range of legal work as general practitioners. In response to a list of 42 legal areas, one-third of Chicago attorneys said that they practiced in only *one* of them, a significant rise in lawyers’ specialization (Heinz et al, 2005, 37). And even within specialized areas of

law, lawyers specialize further by concentrating on different types of clients or issues. Thus there are pecking orders within law specialties as well as across them. Attorneys working in solo practices (who are more likely to work in a variety of fields) are also finding that they need to develop some special expertise as a way to attract clients (Seron, 1996).

Historically the legal profession was comprised of white males. State laws prohibited women from becoming lawyers; in 1873 the U.S. Supreme Court upheld a typical Illinois statute against a woman's constitutional challenge. By the twentieth century states had changed their laws, but informal discrimination against women lawyers continued. Harvard Law School, for example, did not admit women until 1950 and many schools discriminated in admissions on grounds of sex, race, or ethnicity until the change in federal law in the 1970s. Women lawyers constituted only 3 percent of the bar in 1971, but made up 29.4 percent of the profession in 2005 (ABA, 2006). Racial and ethnic minorities have also dramatically increased in the legal profession, after years of systematic discrimination by the American Bar Association and law school admissions. Beginning in the 1960s, with civil rights laws and affirmative action, the percentage of lawyers who are African American, Asian, or Hispanic rose to over 10 percent in 2005 (Bureau of Labor Statistics, 2005).

Although patterns of recruitment and promotion in large corporate law firms are now more favorable to women and minorities than in earlier decades, partnership remains difficult to attain. According to 2006 figures, women comprised 18 percent of partners in the nation's major law firms, while minorities were 5 percent; minority women constituted only 1.5 percent of partners in large firms (NALP, 2006). Women are more

likely to work in certain fields such as family law and criminal prosecution, and slightly more likely than male lawyers to work for government or in solo private practice, rather than in private firms (Carson, 2004). For new law graduates, women were almost twice as likely to choose work in public interest positions than men (ABA, 2006).

How, if at all, do these macro structural characteristics of the legal profession influence the behavior of lawyers in ways that could affect case outcomes or the mobilization or creation of law? The answer, I believe, can be found through a focus on communities of practice. Through such communities, lawyers articulate and share informal norms that guide them in their work. Lawyers do not practice simply as individuals. Even when they work as sole practitioners - as did almost one-half of all private lawyers in 2000 (Carson, 2004, 7) - they typically have ongoing relationships with others in a local community (banks, insurance companies, real estate brokers, women's shelters, political groups, etc.) depending on the nature of their practice. For private practitioners working in firms, their workplace creates an institutional environment that may affect their practice through the social bonds of work groups, the economic ties of billing practices, or the firm's organizational culture. And specialists in certain fields of law dealing with similar cases on a daily basis, perhaps encountering the same attorneys in negotiations, share informal understandings about how to approach work. Government lawyers such as prosecutors or legal services lawyers similarly develop work routines around shared political goals, resource constraints, and their personal backgrounds and values. The next section illustrates collegial control through communities of practice.

## Communities of Practice

In our research on divorce attorneys, we found that “divorce lawyers understand and make choices at work through *communities of practice* – groups of lawyers with whom practitioners interact and to whom they compare themselves and look for common expectations and standards” (Mather, McEwen, and Maiman, 2001, 6). These communities were fluid and overlapping, reflecting differences in types of practice, income of clients, gender of lawyer, and geographic areas. Nevertheless, members of the overall divorce lawyer community shared an understanding of informal norms governing the process and substance of handling divorce.<sup>10</sup> Most saw themselves as reasonable lawyers who might differ in their evaluation of particular facts but who approached cases with a similar framework and common expectations of likely outcomes. Advocacy for one’s client, for example, meant negotiating to achieve an equitable settlement, but being willing to go to trial if necessary. Advising involved educating clients about what to expect, and teaching them realistic expectations about case outcomes, knowing that there was no such thing as a “win” in a divorce. Divorce lawyers who regularly worked with one another hated facing outsider lawyers who occasionally did a divorce case but who “haven’t a clue as to what’s been happening in the practice of family law” (Mather, McEwen, and Maiman, 2001, 51).

But within the general divorce bar lay more particularized norms. Divisions existed between specialists whose practices were heavily concentrated in divorce and those who handled divorce as part of a more general practice. Specialists tended to use more formal discovery techniques, spent more time negotiating settlements or litigating,

and had an expansive notion of legal expertise to include family dynamics, pensions, and tax law. Divorce specialists were disproportionately women and they represented more affluent clients. Thus, the collegial control that emerged from different communities of divorce practice reflected the intersection of lawyers' specialization, gender, and class of clientele.

As an example, compare the views of two lawyers, a male general practitioner and a female divorce specialist. Both noted the increased complexity and formality in divorce but differed in their assessment of the change. The general practitioner explained:

It becomes very difficult now to deal in divorce cases because there has I think developed in New Hampshire a cadre of attorneys who specialize in divorce work, and they make it very difficult to settle a lot of divorce cases that I find frankly are nickel and dime divorce cases and that normally ten years ago or five years ago were able to be settled. And you simply can't settle them. They always end up going to trial with lots of pretrial discovery and interrogatories. In the old days--I am old enough to say "in the old days"--we would get letters from attorneys and telephone calls and you get: "This is what my client has." And now you get interrogatories (Mather, McEwen, and Maiman, 2001, 53).

But in contrast to the generalist's desire for the speedier informal settlements, the following specialist preferred to work with attorneys who share *her* ideas about practice:

I tend to call this group, with some exception, the ham and egggers. By and large I

don't like to see them on the other side of a case. A lot of these people do not work a file the way a divorce file should be worked. They resist a legitimate request by the other attorney because they're time-consuming. I'll have ongoing problems with discovery from these types of attorneys. They will not respond to legitimate and reasonable request for information, which means you have to either file a motion, get them in court and tell the judge that they have to do it, or they've got to find some alternate means to get the information. I prefer working with [divorce specialists]. I prefer it because I know what I'm dealing with. I know that as far as the broad rules that they'll be supplied with that there's an air of professional courtesy that will exist between myself and the other attorney and that makes the thing go smoother and probably result in a better outcome for both parties (Mather, McEwen, and Maiman, 2001, 54).

The general practitioner preferred the “old days” in part because informal sharing of information saved time and money for his less affluent clientele. But gender dynamics were also at work. Those informal exchanges took place within a “good old boys” network and some women attorneys, as newcomers to the community, felt they had been excluded from the conversations or were not taken seriously in negotiations. The formal techniques of discovery preferred by the specialist were an attempt to equalize the playing field and also allowed her to enact her feminist ideals on behalf of her (mostly) female clients.

Collegial norms developed within different communities of practice influence lawyers in those communities concerning how they represent clients, approach opposing

counsel, and think about their work. These norms reflect broader shifts in the legal and social environment and in the organization of practice. Changes such as the increased specialization in divorce law, increased complexity of divorce procedures and the introduction of divorce mediation, the entry of women into the divorce bar, greater differentiation of clients by income, feminist consciousness, and the decline of solo practice could all be seen as important forces affecting collegial control of lawyers. As we concluded:

Collegial control thus is a microlevel concept, insofar as it identifies the influences on crucial work decisions in day-to-day practice . . . at the same time these microlevel processes are embedded in much larger social and institutional developments that can profoundly affect the nature of collegial control of legal work (Mather, McEwen, and Maiman, 2001, 81).

A focus on the communities of practice in allows us to explore linkages between the macro structure of the legal profession described earlier and the decisions of individual lawyers. The conceptual lens of collegial control may not fit all communities of practice. In some fields of law the image of a lawyer acting alone and unconstrained by colleagues may be more apt. But a significant body of research on lawyers outside of the divorce bar supports the concept. For example, variation in local legal cultures was observed through lawyers working in different cities who each followed informal norms about what constitutes inappropriate delay in civil courts (Church, 1985). Also, a major study of three different law firms found that each developed its own style for dealing with

clients and colleagues and standards for success and creating meaning in work; organizational culture explained these differences (Kelly, 1994). Other examples of communities of practice include: the informal procedures and standards created by business lawyers in Silicon Valley to facilitate dispute resolution outside of courts (Suchman and Cahill, 1996); the lawyer/client and lawyer/lawyer interactions of attorneys on both sides of the “OSHA bar,” the community of lawyers in regulatory politics around the Occupational Safety and Health Act (Schmidt, 2005); and the fields of criminal law and personal injury law.

Criminal law attorneys resemble divorce lawyers in that both are typically low in prestige and income, their practices center around local trial courts, they work repeatedly with attorneys on the other side, negotiation is common, cases depend heavily on facts rather than legal complexity, and clients are often one-shot litigants (although there are undoubtedly more repeaters among criminal defendants than those getting divorced). Criminal court practitioners operate in workgroups, seek predictability of outcomes that leads to an aversion to trial, develop patterns of plea bargaining (“going rates”) to settle cases, know “what a case is worth” in bargaining and also which cases should be tried (see e.g, Eisenstein and Jacob, 1977; Heumann, 1978; Mather, 1979). Criminal court communities share legal cultures but also have more particularized sets of views for judges, prosecuting attorneys, public defenders, and private defense counsel. The private defense bar divides further into low-cost attorneys who represent many clients and the more high-end lawyers who specialize in drug cases or white-collar crime. Thinking about criminal courts as communities helps to integrate findings from individual,

organizational, and environmental approaches to trial courts (Eisenstein, Flemming, and Nardulli, 1988).

Personal injury plaintiff lawyers also organize themselves and their work through social networks (Parikh, 2001). Kritzer (1998) shows the importance of reputation for contingency fee attorneys and suggests that the concept of professional reputation functions to constrain lawyers' greed. Maintaining a good reputation helps in getting clients and also bolsters their credibility in negotiations with insurance adjustors and other counsel. Legal culture also explains how Personal Injury (PI) attorneys screen cases and make decisions to accept clients with injuries from medical malpractice. Attorneys doing plaintiff work in personal injury law rarely switch to the defense side. The political divisions between the sides are too strong. Personal injury defense lawyers work with insurance companies, hospitals, and corporations. Their social networks involve chambers of commerce, business, and political organizations that lobby for tort reform (Haltom and McCann, 2004). Thus, the political ideology of tort lawyers (on both sides) is embedded in their daily practice, not only in their representation of clients but also in their contributions to judicial campaigns and their political associations now that tort reform has become a partisan issue.

This brief survey of different lawyer communities begins to provide the answer to the question posed earlier about the how the macro characteristics of the legal profession help to explain the behavior of lawyers in the judicial process. That is, how do we link aggregate social structure of the profession to individual choices of lawyers? First, we see lawyers embedded in professional communities that shape their values and influence their decisions. In these communities, lawyers *do* "take sides" in the work that they do.

Contrary to the romantic 19<sup>th</sup> century image of the legal professional who goes briefcase in hand to represent whoever hires him, the 21<sup>st</sup> century lawyer specializes in certain areas of law and certain clienteles as well. Personal injury lawyers do not switch sides, nor do corporate lawyers ever change places with lawyers handling individual problems (except to do an occasional divorce for a corporate client). A recent survey of the political values of lawyers revealed enormous differences – between the liberalism of the labor lawyer, environmental or antitrust plaintiff lawyer vs. the conservatism of lawyers for management, or environmental or antitrust defense. Similarly lawyers’ political views were associated with the type of organization where they worked – with the most liberal working solo or for government and the most conservative working in large firms (Heinz et al, 2005).

Second, where do these political value differences come from? On the one hand, law school graduates self-select into different kinds of firms and different areas of practice. Gender differences can be seen here as well as differences from substantive interests and personality (e.g., the high risk, more extroverted toward litigation or the quieter, more conservative toward tax or banking). The most ambitious law grads may seek out the highest paying and most prestigious positions. The selection process runs two ways, however, and firms choose as well. The major corporate law firms only select top students from the elite law schools so that career path is rarely open to graduates of regional or local law schools. At the individual level, then, there is an initial sorting process at work through which law school graduates select, or are channeled to, different kinds of firms.

On the other hand, there is a second level of sorting that involves the collegial and client influences on lawyers after they are on the job. Young lawyers work for a few years in a position to get experience or pay off loans, and then decide the field or firm is not for them. Personal satisfaction is lowest for lawyers working in large law firms, leading some to decide that quality of life matters more than money (Heinz et al, 2005). Selective attrition and lawyer mobility thus help attorneys to find their niche in the profession. For those who stay for years in the same firm, they may come to adopt the values and ideals of their clients. As Karl Llewellyn said in 1933, “the practice of corporation law not only works for business men toward business ends, but develops within itself a business point of view . . . toward the way in which to do the work” (quoted in Heinz et al, 2005, 310). Hence, some of lawyers’ political values might be learned on the job.

The relative power of clients over lawyers illustrates a third way to think about connections between communities of practice and lawyers as political actors. Tenets of professionalism require attorneys to advocate zealously for their clients but also to exercise independent judgment. When facing a choice between what a client wants and what the professional thinks is right, lawyers listen to the norms of their communities of practice. The organizational context explains some of the differences across communities. In large firms, Nelson (1985) found that attorneys closely identified with their clients and rarely saw a conflict between their own personal values and what they were asked to do. Lawyers in large firms also had the least autonomy to design their own work strategies or refuse clients or work assignments, in comparison to attorneys in smaller firms or solo practice (Heinz et al, 2005). In certain specialized fields of practice such as divorce,

criminal defense, and personal injury (plaintiff), lawyers are more independent from their clients and more likely to be “in charge” of decisions (Rosenthal, 1974; see Southworth, 1996 and Mather, 2003b for a summary of this literature).

Finally, formal professional controls can augment the informal collegial control to further reinforce differences in lawyers across fields of specialization and across sides in conflict. Some legal specialties have adopted guides for conduct that recognize the particular nature of their field. The American Academy of Matrimonial Lawyers publishes its own standards to define and reinforce the special features of divorce law practice. And patent law goes the farthest by administering its own special exam for admission to certain kinds of patent law practice (Graham, 2005).

Another type of professional control lies in the ethical prohibition against representing clients where there is a conflict of interest. Many firms have interpreted this expansively to mean that they will avoid “positional conflicts,” those in which the sides are opposed but there is no direct conflict between the parties. Thus, lawyers representing banks will not allow their firms to represent debtors in bankruptcy; and others say they “represent either the insurer or the insured. And it’s very hard to do both” (Shapiro, 2001, 150). Declining to represent certain interests out of loyalty to their clients also has significant consequences for lawmaking, as suggested by one large firm lawyer:

We will not try to advance certain theories in a tax court, because we know that there will be adverse reaction – I mean adverse impact – on lots of clients. . . .In the antitrust area. . . we wouldn’t, probably, like to challenge too many mergers, because we do a lot of mergers and acquisitions. We might not

like to go in and try to make new law in the antitrust area to expand the reaches of the antitrust laws, because it would impact, probably, a lot more clients than the one that we're helping. The same way in the securities law. You wouldn't want to necessarily try to make new law that would be adverse to, quote, "corporate America". . . (Shapiro, 2001, 148).

These different mechanisms allow, and indeed encourage, lawyers to reflect their political and moral values in choices about where to practice and about what kind of legal work to do.

## **Conclusion**

As I reflect back on lawyer jokes and the themes of this chapter, I recall the three points of comparison between lawyers and laboratory rats (too many of them; not likeable; and there are some things a rat just won't do). The large number of lawyers in the U.S. is obvious. But how many is too many, and what is the standard for comparison? The number of lawyers per capita in the U.S. is high but it is not the highest in the world. Moreover, given our governmental structure in which power is decentralized through federalism and dispersed among three branches, Americans have historically been suspicious of centralized regulation and relied more on legal claims as forms of political participation and lawsuits to call attention to problems and assert legal rights (Kagan, 2001).

Second, law assistants *do* get attached to lawyers - they marry them, hire them to resolve conflicts, support litigation campaigns for their favorite causes, and vote for them as public officials entrusting them to make law. In fact, there are many lawyers in all three branches of government (see Miller, 1994). Lawyers' choices, along with stratification in the profession and informal norms in different communities of practice, produce very different kinds of lawyering behavior. Third, and as a consequence of this variation, lawyers differ in their likelihood to refuse client demands to do certain things. Some lawyers are beholden to their clients and act as hired guns for them, while others because of the context of their work show more independence.

We might think of the structure of the legal profession as creating and reinforcing a kind of selective breeding for different types of lawyers. Each sector or community of practice has its own collegial controls and rewards. Those who succeed in a community become its leaders, articulating its values and norms, and attracting more likeminded types. But the rejected or unhappy lawyers migrate to other specialized fields or organizational settings and attract more likeminded ones there. This sorting process within the profession has political impact as well as its obvious economic and social consequences.

The three clusters of lawyer jokes described at the outset emphasize and speak to different communities in the profession. Command over language includes the verbal skills needed especially for litigation, appellate work, and lawmaking. Lawyers' greed is rewarded in the highest echelons of corporate law work in the largest firms. And conflict escalation could point either to lawyers' self-interest in manufacturing conflicts to

generate fees, or to lawyers' public-regarding interest in constructing legal claims in order to fight for a cause.

## Notes

\* Many thanks to Jesika Gonzalez for her helpful research and editorial assistance.

<sup>1</sup> The jokes discussed in this section are drawn from Galanter (2005). Galanter organizes his collection of lawyer jokes into eleven clusters or categories, three of which I address here.

<sup>2</sup> During the 1970s, political science studies of lawyers flourished as attention was focused on issues such as poverty law, criminal justice, citizen participation, and social reform litigation. See, e.g. Casper (1972), Heumann (1978), and Mather (1979).

Rosenthal (1974), and Olson (1984). More recent research includes McCann (1994), Harrington (1994), Kritzer (1990; 1998), Sarat and Felstiner (1995), Mather, McEwen, and Maiman (2001), Sarat and Scheingold (1998), and Scheingold and Sarat (2004).

<sup>3</sup> These descriptions from popular judicial process texts (Neubauer and Meinhold, 2004, 153-156; Baum, 2001, 55-56) closely resemble those found in law school texts on clinical legal practice. Elsewhere in these judicial process texts, the authors do explore important aspects of lawyers' behavior and of the legal profession.

<sup>4</sup> See also Abel and Lewis (1995) who argue for "Putting Law Back into the Sociology of Lawyers." I realized after completing this chapter that I am also borrowing its title from my coauthors on an earlier project; see McEwen, Rogers, and Maiman (1995), "Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation."

<sup>5</sup> In civil cases litigants who represent themselves (*pro se*) play the gatekeeper role, while in criminal cases police play this role as well.

<sup>6</sup> See Simon (1998) on the role of lawyers and professional ethics in the context of the Lincoln Savings & Loan debacle. On Enron, see the comprehensive edited collection of commentary and analysis by Rapoport and Dharan (2004).

<sup>7</sup> The American Bar Association Section on Litigation recently sponsored a major research project on “The Vanishing Trial.” Data and analysis from the project are found in 15 articles published in Volume 1 (3) of *Journal of Empirical Legal Studies* (2004). See, e.g., Galanter (2004) and Ostrom, Strickland, and Hannaford-Agor (2004).

<sup>8</sup> According to Scheingold and Sarat, cause lawyers are defined by their moral and political commitment, that is, their “intent” to serve particular ideals. “Serving a cause by accident does not, in our judgment, qualify as cause lawyering” (Scheingold and Sarat, 2004, 3). Labeling behavior according to intent is a slippery definition, providing little guidance to researchers seeking to investigate cause lawyering. Further, if cause lawyers can have “mixed motives,” as the authors acknowledge (Scheingold and Sarat, 2004, 4), then why can’t conventional lawyers as well? And if so, that supports the argument of this chapter that many so-called conventional lawyers are, like cause lawyers, “political actors whose work involves doing law” (Scheingold and Sarat, 2004, 3).

<sup>9</sup> See Casper (1972) for a classic survey of defendants’ perceptions of the criminal process.

<sup>10</sup> This profile of divorce lawyers at work is drawn from our book (Mather, McEwen, and Maiman, 2001) but the general picture is consistent with other studies of the divorce bar.

See e.g., Sarat and Felstiner (1995); Gilson and Mnookin (1994); Erlanger, Chambliss, and Melli (1987); and Kressel (1985).