CRITICAL JUSTICE

SYSTEMIC ADVOCACY IN LAW AND SOCIETY

Francisco Valdes
University of Miami School of Law

Steven W. Bender
Seattle University School of Law

Jennifer J. Hill

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entirely this complex status quo but rather negotiate strategically in situations that may involve risk, uncertainty, ambiguity, and conflict.

Doing so requires advocates to recognize that the legal industry, as a self-regulated profession, currently exercises a monopoly over law. The legal industry's "primary" sites or platforms of practice—particularly the purportedly more prestigious sites like law schools and large law firms—are structured to advance elite interests and mute criticism. But even "alternative" sites or platforms of practice—like nongovernmental organizations, governmental agencies, or small firms serving "average" people—are not insulated from handcuffs and blindfolds. Like law itself, such alternative sites represent important but insufficient initiatives to create opportunity for critical innovation.

Advocates recognize that profit and power shadow our work; we all are constrained and complicit. This clear-eyed recognition lays the groundwork for reflection and action to reduce, in context, the industry's handcuffs and blindfolds wherever they block the path toward Critical Justice. The next step, immediately below, is to look more closely at *how* law operates as an industry to secure for elites status, profits, and power.

9.1 LAW AS AN INDUSTRY PURSUES PROFITS OVER JUSTICE

The legal "profession" is a for-profit industry, with owners, workers, customers, and regulators in constant socioeconomic interplay. Law, like other industries, increasingly obeys economic rules of capitalism as widely practiced in the United States today. Yet law claims to be not only a venerable profession but also a unique one: the only one in which practitioners are charged to act as "officers of the court" because they collectively are entrusted with the "administration of justice" under the rule of law. To situate law as an industry, this section presents three excerpts that examine how the profession operates chiefly as a for-profit industry.

The first excerpt, by labor law scholar Marion Crain, reviews how economic interests pushing for "commodification" and "bureaucratization" are pressuring the legal profession to become increasingly like any industry. In the face of these forces, Crain explores how legal workers—including lawyers—may respond *collectively* to counteract this push toward the "proletarianization" of legal work. In practical terms, Crain asks whether legal workers—lawyers and others—will unionize on a mass scale in light of history's lessons.

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THE TRANSFORMATION OF THE PROFESSIONAL WORKFORCE

Marion Crain
79 Chi.-Kent L. Rev. 543 (2004)

Is human labor a commodity? The Clayton Antitrust Act of 1914 proclaimed that it is not. Announcing that labor is not a commodity, however, does not make it so. The institution of slavery represented the complete commodification and objectification of human beings and their labor. Other workers appear almost fully commodified—laboring under inhumane and dangerous conditions for minimal wages in poultry processing plants, slaughterhouses, maquiladoras, sweatshops, and recycling operations. Partially commodified workers toil in industrial settings and service industries alike. . . . Commodification of human beings' labor, it seems, is an inevitable byproduct of advanced capitalism.

Where do professionals fall on this commodification continuum? For professionals, work has historically been a calling that constitutes personal identity and confers a relatively privileged class status, rather than a commodity to be sold on the market. . . . Professionals' experience of work has been characterized by autonomy and the privilege to self-regulate through peer review and codes of ethics enforced by professional associations. These professional privileges were secured through a social bargain in which expertise acquired through lengthy education and dedicated to public service was exchanged for a market monopoly over the knowledge area in which expertise was asserted. The professions believed that this social bargain immunized them from the influence of capitalism and its pressures to commodify human beings' labor and constrain autonomy in the quest for higher profits. Professionals' monopoly power over knowledge furnished sufficient leverage that legislation or unions to protect against abuses of power by employers seemed superfluous.

The transformation of professional work over the last quarter century suggests, however, that professionals are not immune from the commodification process. . . . Professionals who once shunned unions as the antithesis of professionalism are now embracing them, seeking protection from the labor laws against the effects of commodification. . . .

. . . The transformation of the professional class from a self-employed group to salaried employee status renders professionals vulnerable to the traditional strategies by which management has controlled other workers: ideological proletarianization and technical de-skilling. . . .

What Is A Profession? The Social Bargain Conferring Professional Status and Privilege

Modern societies institutionalize the valuable commodity of scientific knowledge through the concept of professionalism. Professions are conceptualized as occupations characterized by a theoretical knowledge

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base and skills acquired through extended education and extensive training; the key characteristic of a professional is that she applies this knowledge in a nonroutine fashion using independent discretion and judgment, on a case-by-case basis. Professions traditionally claim the right to structure and regulate the education and credentialing systems that entitle members to practice. At its core, then, professionalism entails the right to autonomy at work and the collective right to exert exclusive authority over members' professional integrity (the right of peer review). Authority to self-regulate is founded upon the esoteric character of professional knowledge, which in turn makes it difficult for the public to assess performance or for the government to regulate it. The professions thus maintain an economic monopoly over recruitment, training, and credentialing, a political monopoly over areas of expertise, and an administrative monopoly over determining what standards shall apply to practitioners.

The fundamental basis of professionals' claim to occupational privilege and a market monopoly over specialized areas of expertise is meritocratic. The university and its professional training program legitimate the cultural privilege of professionals. The link between professional status and knowledge is reinforced by hierarchies internal to the professions. The more closely a professionals' work is linked to pure knowledge, divorced from public service, the more status she possesses. . . .

. . . Professional standards are established by the professions, and monopoly power over the market for them is enforced by the state. Competing products are eliminated; licensure, qualifying exams, and a diploma are the tools by which the monopoly is maintained. In effect, the commodity that professional associations market to society is knowledge itself, and knowledge workers are the delivery system for that commodity.

. . . Thus, the professions have historically acted collectively in establishing and asserting a property right in expertise and a concomitant right to control and exploit that property for personal profit. . . . Control over knowledge and technique is the quintessential element that defines, structures and maintains any craft; professionals are no different than other skilled workers in this regard. The difference in their economic status and socially privileged position is one of degree, rather than one of kind.

The Future of Professions in an Advanced Capitalist Information Economy: Is the Social Bargain Still Viable?

. . . Principles of scientific management (or "Taylorism"), originally developed for application to manual labor, were ultimately applied to white-collar work and to the professions through the medium of bureaucratization.

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Scientific Management

An important strategic tool in employers' control over manual labor was scientific management, which achieved popularity during the first half of the twentieth century. Scientific management refers to the systematic process of dividing jobs up into discrete components so as to centralize control over the knowledge of the labor process in management and increase profits. Its aim is to wrest from skilled workers control over the knowledge that constitutes the craft. . . .

Scientific management was used very successfully to maximize output in the industrial workplace, particularly among relatively low-skilled workers. . . . The assembly line was the prototypical example of technological control: production appeared to be regulated by the technology rather than by people. . . . No worker possessed a complete picture of the product; the conception of work was divided from its execution. . . .

Bureaucratization

If scientific management was the key tool in bringing unskilled workers under the thumb of the industrial machine, bureaucratization was its parallel in the sphere of the skilled worker. In the bureaucratic reorganization of work, management's profit goals are brought to bear on the labor process in such a way that the skilled worker's work is transformed. Ultimately, the worker's control over his craft is undermined. . . .

. . . Bureaucratization refers to the manipulation of the social organization of work through a pattern of specialization scientifically designed to maximize productivity; in this respect, it closely resembles scientific management. . . . [B]ureaucratic control ultimately and insidiously molds workers to organizational objectives and ties them to a division of labor conceptualized by management and policed by the application of "neutral" rules and policies. . . .

Bureaucratic control effectively metamorphoses into ideological control over the work objectives and process because only management speaks and interacts directly with the larger society (*i.e.*, patients are clients of the institution, not patients of an individual doctor). Professionals thus lose the ability to forge their own relationships with clients or to define the uses to which their skills are put; management makes those decisions. Of the various modes of control, bureaucratic control is probably the hardest to resist for professionals because it isolates the worker from the community that he or she serves.

Deprofessionalization

Professionals' historical status as self-employed entrepreneurs was instrumental in avoiding commodification of professional work through

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scientific management or bureaucratization. The shift away from self-employment and increasing dependence of the professions upon large organizations as an institutional base for the exercise of professional authority create the potential for the application of techniques designed to control and restrict professionals' sphere of influence. . . . Multi-professional worksites such as hospitals, law firms, accounting firms, and architectural firms organized professionals to work in layers. Such multi-professional worksites developed their own internal hierarchies of professions.

For the first time, professionals found themselves vulnerable to the management techniques to which nonprofessional workers had long been subject. Professionals followed the pattern established in the crafts: they lost control first over the ideological direction of their work (the product itself, and the ends to which it is put), and later over the technical aspects of the labor process (how tasks will be carried out and time/pace of work).

Ideological Control

Ideological proletarianization posed a significant threat to professional identity. It stripped professionals of their sense of professional values and purpose, restricting the professions to the realm of technique. The loss of professional autonomy and ideological control is especially grave for a group that has traditionally approached its work as a calling. . . .

In an effort to adapt their expectations to the shifting conditions of their worksites, professionals dissociated themselves from the ideological context of their work, withdrawing from areas in which they lacked voice or power, and investing instead in the areas in which they still enjoyed power (technical expertise). . . . The professional adapts further by aligning herself with the employing institution and advancing institutional goals and interests rather than those of clients, professional values and ethics, or larger societal interests. At the same time, professionals redefine their personal goals so that they are congruent with institutional goals. . . .

Technical Control

The professions initially defended their professional status by expanding their technical expertise. The retention of technical discretion over the day-to-day attributes of work assisted professionals in maintaining, at least temporarily, many of their professional privileges and status. Ultimately, however, management began to chip away at professionals' technical expertise as well. As in the crafts, technical proletarianization proceeded in two phases: first, workers lost control over their time; later, the work itself was standardized according to a plan devised by management.

Time

Time is a critical measure of the worth of work. Indeed, the basis of the entire occupational hierarchy is that the time of those in subordinate

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positions is worth less than the time of those in supervisory positions, so that tasks must be delegated for reasons of cost effectiveness. Not surprisingly, then, loss of control over hours of work and pace of work are a significant source of concern among professionals because they signal a loss of status. The core attribute of professional work is that because it requires the exercise of discretion and judgment and cannot be standardized, "it cannot be established from the outside *that a given result should be obtained in a given time*." . . .

Standardization of Tasks

Bureaucratic organization of work has proven effective in expropriating knowledge from the professions, standardizing what is known, and dividing it among professionals through specialization of function organized in hierarchical fashion. Like the assembly line, the effect of bureaucratization is to press professionals toward specialization in order to produce economies of scale while potentially raising the quality of service. As the professional specializes, he or she becomes a mere technician, sacrificing the freedom of broad scope professional work and losing the ability to establish the objectives of his or her own work. When specialized professionals perform under the direction of management, often coordinating with other professionals in a division of labor specified by management, they relinquish the autonomy and control over the objectives of their work that they once possessed. Thus, professional knowledge increasingly becomes encoded in the structure of the organizations rather than residing with professionals themselves. . . .

Law

Private Law Firms

Law firms once assumed the form of partnerships, characterized by professional values and a familial spirit. The modern market has pressed them toward a large firm business model organized hierarchically. . . . The modern firm is organized vertically by rank and tenure. When confronted by declining profits in the recession of the 1980s and early 1990s, law firms behaved as their [corporate] clients did—they downsized, starting with associates at the bottom of the firm hierarchy. In short, as Second Circuit Judge Irving Kaufman observed, "the largest law firms have acquired the *characteristics of the corporations* they have represented."

The traditional partnership represented "the ultimate cooperative organization, a marriage of equals" and was characterized by equality in management and profit-sharing among the equity partners. By contrast, the large law firm concentrates power and control in a relatively small number of partners who make decisions with little or no input from the other partners in the firm. An executive committee dominated by a select cadre of senior partners typically exercises ideological control over the firm's work, determining content of the firm's work, the firm's growth rate,

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and performance standards for associates. A managing partner or partners exerts ultimate control. Rules, procedures, annual performance reviews, and bonuses tied to billable hours or positive performance serve as the enforcement tools for maintaining technical control. Associates are provided with every incentive to identify with management, rather than with labor. Conflict with management is muted; constraints on autonomy are perceived as arising from the client.

Inevitably, lawyers sacrifice autonomy to the larger goals of the bureaucratic law firm. By far the most significant tool of technical discipline that large firms exercise over lawyers is the billable hour. . . . Billable hour requirements have increased dramatically over the past half-century, moving from 1100 hours per year in 1950 to 1900 hours per year in 2000. . . .

Pressure on the billable hour and the significance of quantity of hours worked was intensified by the trend, led by Cravath, Swaine & Moore in the 1980s, to raise salaries of first year associates to unprecedented levels, a move soon followed by other large law firms across the nation. This shift, which [legal scholar Robert] Gordon calls "one of the most antisocial acts of the bar in recent history,"

> devalues public service by widening the gulf . . . between starting salaries in private practice and in government and public interest law. It drives impressionable young associates toward consumption patterns and expectations of opulence that will be hard to shake off if they want to change careers. It forces every lawyer in the firm, especially the associates who are its supposed beneficiaries, to pay heavily for it in extra billable hours and, insofar as high incomes for the partners depend upon low partner-associate ratios, in reduced prospects of reaching partnership.

. . . Some firms are shifting work to contract or staff attorneys, who are paid much less than partner-track associates and bill at a lower rate, or to nonlawyer professionals like paralegals. . . . All of these strategies are profit-maximizing moves that reflect the use of scientific management or bureaucratization to divide the professional work into its component parts. . . .

Unions for Professionals? Organizing Doctors and Lawyers

. . . [H]ow likely is it that professionals' outrage over diminishing status will find expression in unionism?

Shifting Tides

At first blush, professionals' traditional strong commitment to an individualist ethos would appear to make them unlikely candidates for a collectivist strategy. Professionals' working conditions were historically organized around an ideology of individualism: individualized work,

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individualized clients, and individual specialization of function. Nonetheless, professionals have always been joiners, working collectively through professional associations to maintain their market monopoly (through furthering professional education, conducting peer review, and maintaining and refining licensing and certification standards). . . . Accordingly, when the professional associations began to respond to the tendency of corporate employers to commodify the professions by endorsing unionization and collective bargaining, the stage was set for change. . . .

Lawyers

Lawyers have been far less inclined toward unionization than doctors, despite the presence of a similar trend in the profession toward employee status, bureaucratization and loss of ideological control over work, loss of control over time, standardization of output, and loss of autonomy. . . . Why are lawyers relatively quiescent in the face of pressures toward commodification?

The ABA historically opposed unionization for attorneys, and specifically banned government lawyers from joining unions. The bar's primary concern was the creation of divided loyalties (between client and union), specifically, the worry that the union-member-attorney would surrender her independent judgment and be required to submit to direction by the union officers and directors even when client interests were compromised. In 1967, the ABA changed course and permitted attorneys to join unions. . . .

With the ABA's imprimatur, unions gained a foothold among government lawyers and lawyers employed in the nonprofit sector. Government lawyers, court-appointed public defenders, and legal aid attorneys began to seek the protections of collective action or union organization. The impetus for organizing has fallen into two categories: demands for better pay, and demands for improvements in working conditions that would facilitate competent performance of the lawyer's role (such as reduction in case loads, office space consistent with maintaining client confidentiality, adequate library resources, computer equipment, access to online legal research tools, and nonlawyer support staff such as law clerks and paralegals). Both of these sorts of demands involve a defense of professional identity. The first is directed toward defending class status and professional prestige, while the second category demands are necessary for lawyers to fulfill the social bargain as competent professionals. Legal services attorneys have been willing to strike to press their demands.

Private law firms have been the least likely crucibles for unionism. Nonetheless, in April 2003, sixteen lawyers at Parker Stanbury in Phoenix, Arizona voted unanimously to join Teamsters Local 104. . . . Union substitutes seem even more promising as vehicles for attorney

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representation and voice. One such vehicle emerged on the Internet in 1998: www.greedyassociates.com. Although the name of the organization and its website connotes only monetary concerns, the website has proved to be a lightning rod for discussion of a variety of issues, many of which reveal a perception that professional identity is under siege at a broader level. . . .[2]

In short, collective protest does exist in the private for-profit sector, albeit in nontraditional forms. In addition to participation on websites, many young attorneys have expressed their dissatisfaction through exit from the profession. Others have stayed in the profession but endured health problems and clinical depression, or adopted dysfunctional coping methods such as substance abuse. An entire genre of books dedicated to assisting lawyers in finding meaning in life has grown up in the last two decades. . . .

Reconceptualizing Unionism: Unions for Individualists

With this positive evidence of willingness to engage in collective action to defend professional identity, why haven't professionals forged a stronger alliance with traditional unions? While some professionals have been willing to do so, many have resisted. The most significant basis for this reluctance to make common cause with traditional unions is a fundamental unwillingness to sacrifice class privilege by allying with workers beneath them in the occupational and social hierarchy. This is often expressed as a profound commitment to an ethos of individual achievement and merit.

The Role of Class Privilege

Privilege and status play a vital role in the construction of professional identity. Professionals' distance from the working class is a significant common bond among professionals. . . . [R]ather than allying itself with the working class to advance common interests, the professional class has sought to differentiate itself from the working class, endeavoring to retain privileges not available to nonprofessionals so as to maintain its status. . . . Because unions are associated exclusively with the working class, resort to unionization would symbolize a loss in status. Ultimately, professional status has become "an ideological consolation used by employers to accommodate professional workers' needs for status privileges, or a negotiating device used by professionals themselves to justify wages and privileges that differ from those of other workers."[3] Thus, alliances between

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[2] Discussions of lawyers, concerns about professional identity and standards, and unionization have appeared regularly in a variety of blogs and websites. E.g., Law Firm Associates Should Unionize, Prawfsblawg (Feb. 28, 2008), www.prawfsblawg.blogs.com/prawfsblawg/2008/02/law-firm-associ.html.—Eds.

[3] Professionals as New Workers, in Professionals as Workers: Mental Labor in Advanced Capitalism 15–16 (Charles Derber ed. 1982); see also Marion Crain, Colorblind Unionism, 49 UCLA L. Rev. 1313, 1320–22 (2002) (arguing that a similar commitment to white privilege stopped white workers from allying with black workers throughout much of the labor movement); Marion C. Burke, Lessons from Labor Feminists: Using Collective Action to Improve Conditions for

professionals and non-professional workers may threaten professional identity.

More insidiously, professionals' concern with status and privilege also blocks alliances *among professionals*, at least in the form of unionization. Capitalist ideology traditionally links job entitlement to individual performance, ensuring that individuals assume both the credit and the blame for their positions in the employment hierarchy[,] . . . [an assumption] attributable to a "pervasive and often unfounded faith in the American Dream of individual opportunity and occupational mobility." . . .

Unions for Generation X?

. . . Nevertheless, evidence is mounting that Generation X workers are favorably disposed toward unions as a vehicle for voice in the workplace. In a recent AFL-CIO study . . . [a]mong Generation X, 58 percent said they would join a union if given the opportunity. . . .

Reconceptualizing Unionism

. . . Clearly, unions must reconceptualize themselves if they are to take advantage of these opportunities. . . . Despite the widespread perception that unions are for blue-collar workers, architects, engineers, chemists, teachers, journalists, air line pilots, and musicians all formed unions in the New Deal pro-union atmosphere of the 1930s and 1940s. The AFL-CIO reports that 50 percent of union members in 2000 were white-collar employees, and many of those are professionals (primarily government employees, teachers and professors, nurses, physicians, social workers, and psychologists). Professionals are now the largest contingent of union members in any occupational category—greater than 22 percent in 2000. . . .

Conclusion: Musings About Workers, Professional Identity, and Organizing

When professional status is challenged at its core, as it has been throughout the 1980s and 1990s by managerial cost cutting strategies and bureaucratization, professionals feel their work becoming commodified and their identity questioned. Perhaps it should not surprise us that such a challenge has led to organizing, even among groups not previously believed to be strongly disposed toward union organizing. . . .

Where their investment in professional training and status is so significant, and especially where the deprofessionalization of an occupation is industry-wide, professionals are likely to prefer voice (unionization) over exit. Professionals have become more receptive to collective strategies that offer the hope of reprofessionalization on an occupation-wide level.

Women Lawyers, 26 Am. U. J. Gender Soc. Pol'y & L. 559 (2017) (reviewing top-down and bottom-up efforts at workplace reform and concluding that bottom-up collective strategies may work best for addressing gender bias in the legal industry).—Eds.

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Organizing issues for professional employees and white-collar employees thus revolve primarily around dignity and professional autonomy rather than around purely economic issues. . . .

Professional organizing is an expression of outrage at the breach of the social contract between professionals and society, which professionals believed would shield them from commodification. . . . If unions can reconceptualize themselves to provide some of the best features of professional associations (skills training, support for professional achievements and goals at an individual level) while retaining the leverage of collective action and organization, professionals may embrace them. If unions build it, perhaps professionals will come.

Crain reviews "deprofessionalization" in law as part of larger economic pushes for ever-greater profits. Lawyers increasingly have lost ideological and technical control over their work, especially in large institutions, so that the profession is more and more an industry that, like any other, places profit above all.[4] In the face of this loss of control over the nature, purposes, and organization of their work, many lawyers are focusing on becoming technical specialists and "withdrawing from areas in which they lacked voice or power." The adaptation of lawyers in large firms, government services, and even many nonprofits or legal services programs includes aligning with the employer to advance "institutional goals and interests rather than those of clients, professional values and ethics, or larger societal interests." This brings into question the elevation of profit over justice. How does that affect the idea that law is an honorable "profession"? What concerns does that raise about how the legal system will "administer" justice in the future? Will legal workers organize in unions or other collectives? The following excerpt provides an example of bottom-up action in response to these developments.

Legal workers of all sorts—not just lawyers—face the consequences of the commodification of labor and the accelerating conversion of law into an industry like any other. In the following excerpt, legal activist Tyler Kasperek Somes recounts and deconstructs the organized resistance of legal services workers to these conditions during a strike by the Legal Services Staff Association (LSSA) in 2013 against their employer, Legal Services NYC (LSNYC). Somes illustrates how collectivized struggles take place through repeated rounds of contestation involving both legal and extralegal action, underscoring the importance for systemic justice of

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[4] This phenomenon within law is transnational, driven in part by larger agendas of corporate globalization discussed more fully in Part VI. See Joanne Bagust, The Legal Profession and the Business of Law, 35 Syd. L. Rev. 27, 29 (2013) (describing how "many of Australia's elite corporate lawyers are at risk of being reduced to mere functionaries, proletarianized in a process of capitulation to the power of their clients and to the productive forces of 'big business' ").

organized groups within the legal industry and the power of critical coalitions.

THE LEGAL SERVICES NYC STRIKE: NEOLIBERALISM, AUSTERITY AND RESISTANCE

Tyler Kasperek Somes
71 Nat'l Law. Guild Rev. 8 (2014)

. . . The strike at Legal Services NYC shows that the people working in these agencies are already capable of successful movement-building. It suggests an alternative approach to civil legal services, one where representation is only the beginning of a relationship that leads into issue-based community organizing and strategic campaigning for progressive reform.

Neoliberalism as a Political Project

"Hey Joe, Hey Joe! Your corporate greed has got to go!" chanted hundreds of strikers and their allies as they established picket lines at the entrances of One JP Morgan Chase Plaza . . .

Chase Plaza is . . . home to Milbank, Tweed, Hadley and McCloy, a corporate law firm where the chairman of the Legal Services board of directors, Joseph Genova, is one of the equity partners. Milbank frequently represents the financial houses, including JP Morgan Chase. . . . Mr. Genova might seem an unlikely figure to lead the nation's largest provider of civil legal services to low-income individuals, but such is the state of today's non-profit legal services sector.

In the half century since the foundation of the federally funded Civil Legal Services [CLS], the United States Congress has imposed a series of reforms that fundamentally reshaped the program.

. . . [Before the reforms, d]uring its early years, the CLS program contributed meaningfully to the political empowerment of poor and working class people, but its very success made it a target of neoliberal policymakers intent on neutralizing its effectiveness.

Civil Legal Services and the Welfare Rights Movement

. . . Congress [funded] a nationwide CLS program in the Economic Opportunity Act Amendments of 1966 as a part of the War on Poverty. In a one-year period, over 300 agencies received $42 million in funding, leading to the creation of over 800 community law offices and over 2,000 lawyers for the poor. . . .

. . . CLS providers pursuing "law reform" (broad legal challenges to specific practices or systems) would receive priority funding over those emphasizing individual casework. CLS attorneys were markedly successful

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in this endeavor: they brought 164 cases before the Supreme Court in eight years, of which they won seventy four. . . .

In addition to courtroom victories, CLS attorneys made strategic and operational contributions to campaigns of mass mobilization. Among the best examples is Mobilization for Youth's (MFY) alliance with the welfare rights movement in New York City. . . .

Funded by initial grants from the Kennedy Administration and various foundations, MFY was a precursor to the storefront Community Action Agencies (CAAs) that were established by the hundreds during the War on Poverty. MFY operated offices in several Manhattan neighborhoods where residents could receive direct services like legal assistance and registration for welfare. In addition, MFY conducted aggressive community organizing campaigns that included rent strikes against negligent slum owners, education boycotts against school segregation and demonstrations at constructions sites demanding jobs for people of color.

While working as researchers at MFY, in 1966 Frances Fox Piven and Richard Cloward co-wrote an essay entitled *The Weight of the Poor: A Strategy to End Poverty*, in which they proposed an anti-poverty campaign "based on the fact that a vast discrepancy exists between the [welfare] benefits to which people are entitled and the sums which they actually receive." By organizing people onto the welfare rolls *en masse*, they expected to create a "bureaucratic disruption in welfare agencies and fiscal disruption in local and state governments," which would be resolved with reforms favorable to the poor, such as a guaranteed minimum income.

Mobilization for Youth tested this "crisis theory" with a campaign to flood the Department of Social Services with applications for winter clothing grants, an item provided for under the welfare code but rarely requested by welfare recipients. They hired a community organizer to recruit clients and establish the Lower East Side's Committee of Welfare Families, one of many local welfare rights groups emerging around the city. When grant applications were denied by the city, MFY's Legal Unit would request fair hearing with the Department, the mere request of which was usually sufficient to obtain the clothing allowance. In the end, two-thirds of the committee members received grants, which the organizers considered a resounding success. . . .

The Rise of Neoliberalism: The Case of Legal Services

President Richard Nixon's appointment of Donald Rumsfeld as Director of the OEO in 1969 could symbolically mark the beginning of the neoliberal era, during which White House administrations of both parties supported reducing the government's role in the economy. During this period, which continues today by all appearances, neoliberal policymakers have moved to sharply curtail the political agency of poor and working people and

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substituted "discipline" for "relief" as the public policy mechanism functioning to regulate social discontent.

Following its peak in the late sixties, the welfare rights movement suffered a series of setbacks as conservative politicians invoked the racialized discourse of "welfare queens" to increase their percentage of the white vote and win elections, both nationally and in New York City. Once in office, these policymakers introduced "welfare-to-work" reforms, transforming redistributive subsidies for people in poverty into a disciplinary mechanism that pushed them onto the lowest rung of the labor market. . . .

After their participation in the welfare rights movement and other causes, MFY staffers came under an intense investigation by the New York Police Department and New York City Council. City Council President Paul Screvane withheld MFY's funding pending the outcome of his inquiry and issued a report that criticized the MFY for fomenting racial discord by, among other things, organizing for the March on Washington. In 1968, MFY's legal department formed a new organization, MFY Legal Services, Inc., which focused exclusively on strategic litigation and individual casework. Today, this is the only branch of the historical MFY remaining. MFY's community organizing efforts ground to a halt when foundations withdrew their funding and Congress eliminated the . . . Community Action Program.

The local response to MFY's campaigns in New York presaged the neoliberal reaction to the CLS program nationwide. In 1974, the Ford Administration moved the program into the Legal Services Corporation (LSC), a new executive agency governed by a board of directors drawn from the partnership ranks of major law firms. . . .

Neoliberal policymakers have transformed the character and purpose of the American CLS program. . . . Today, the Legal Services Corporation polices the activities of its own funding recipients to enforce conformity with regulations designed to inhibit them from achieving that same large-scale reform. . . .

Austerity and Authority

. . . In the 2013 contract negotiations at Legal Services NYC, management presented dramatic deficit projections as the rationale for demanding concessions from union negotiators on wages, retirement contributions and healthcare coverage. Among other cutbacks, these changes would have interrupted physical therapy and mental health treatments midstream for a number of union members. They would have removed fertility procedures as an affordable treatment option; imposing a heteronormative condition on gay, lesbian, transgender and gender non-confirming couples which had not existed previously.

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As in all unionized workplaces, the employer faced an obligation to bargain for these demands, rather than impose them unilaterally. . . .

Management's demands were predicated on a "fiscal crisis" resulting from the reallocation of LSC appropriations away from New York City. . . .

The union's negotiating team immediately contested these projections. They pointed out that even using management's estimates, LSNYC could expect a working capital surplus of nearly $7 million at the end of 2014. . . .

With the economic rationale for concessions deconstructed the authoritarian impulse behind management's demands became clearly visible. . . .

The Legal Services NYC Strike

During the contract negotiations, the LSSA bargaining team met with LSNYC management in the Times Square office of Seyfarth Shaw, an infamous union-busting law firm retained by LSNYC to advise them on the bargaining process. . . . [T]he Board of Directors signaled its readiness to use aggressive anti-union tactics typically employed only by for-profit corporations.

Fortunately for the union membership, rank and file activists initiated a campaign of education, mobilization and escalation several months before the strike. . . .

Over the winter, activists from different neighborhood offices convened the Activism Committee. The Committee charted a course of escalating actions that would peak in the spring ahead of a possible strike vote. . . . [Small actions] helped build a culture of resistance, in which people felt increasingly comfortable in their ability to confront authority and to express their perspective on the negotiations.

Street demonstrations were also a crucial part of the pre-strike mobilization. The union organized a traditional rally outside a Board meeting, a *cacerolazo* [where protesters bang pots and pans] inside a Board meeting, a day of lunchtime pickets and even a one-day strike. Each protest built on the previous one by escalating the level of subversion of the normal workplaces roles and routines . . .

By capturing each of these actions on camera, the union was able to produce an impressive amount of independent media. The union was able to build an audience and solidarity network in advance of the strike by promoting these actions on Facebook and Twitter. . . .

On May 1, as May Day demonstrations continued throughout Manhattan, the two bargaining teams met in the glass-walled office space of Seyfarth Shaw. . . . Two weeks later, the union voted to strike by an overwhelming 88 percent [and shifted activities to the Milbank site].

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The decision to shift citywide protests to the Milbank office reflected an understanding of the power dynamics at play within Legal Services NYC's management. . . .

By observing board meetings, the union learned that the vast majority of board members were disengaged from their responsibilities and likely to defer to a small group of decision-makers. Thus, the union developed a "corporate campaign" that attempted to engage absent board members and disincentivize the decision makers from prolonging the strike. . . .

On May 30, the *New York Law Journal* ran a front-page article covering the protests outside of Milbank Tweed, doubtlessly embarrassing the firm. . . . The Research Committee pulled the e-mail addresses of Milbank's New York partners and sent them updates on the strike, prompting Mr. Genova to write an office-wide defense of his conduct, which subsequently leaked out of the firm.

Finally, the union identified the recurring corporate clients of Milbank Tweed. The Research Committee collected the contact information of attorneys in their General Counsel's office and sent letters asking them to question Milbank about the strike. The Milbank partners in charge of those relationships were copied in on these communications, creating additional pressure within the firm on Mr. Genova.

At the height of the strike, the board of directors retaliated against the union by terminating the strikers' healthcare without sending individual notices to the employees. . . . In one instance, a member's spouse was denied a chemotherapy treatment in the middle of a hospital visit. . . .

Although the board of directors held formal decision-making authority with respect to negotiations, the various organizations that provide funding to Legal Services NYC could offer significant leverage by threatening to withhold that money. The City Council budget approval process provided the most immediate opportunity to do this, so the union members began regular lobbying on the steps of City Hall. . . .

. . . [M]anagement finally relented. From their pre-strike position, management dropped demands for reduced retirement contributions, increases to healthcare deductibles, increases to healthcare coinsurance and cutbacks across a variety of specific provisions of the healthcare plan. The union secured zero layoffs through the term of the contract and strict ratios in layoffs between management and bargaining unit positions in the events of significant layoffs.

Conclusion: Beyond Services

Civil legal services providers are potentially very well positioned to build power with progressive social movements, as the community members who approach them for representation could also receive political education and integration into campaigns of collective action. Who would be better

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positioned to organize homeowners against foreclosure practices, for example, than the legal services attorneys and housing counselors to whom they turn for assistance by the thousands?

Most CLS providers have abandoned the goal of organizing for power and are instead focused on resolving as many individual cases as possible, perhaps with an occasional attempt at "impact litigation." This approach has come under sustained criticism for providing only survival-level services to a fraction of the populations in need, enabling the long-term diminution of social services, reproducing oppressive social relationships, siphoning potentially radical challenges into reformist initiatives and failing to challenge the structural systems that perpetuate poverty. . . . [T]hese service providers comprise a "non-profit industrial complex" that addresses expectations of professional progressives more than the needs of their clients.

. . . Ultimately, only repealing the prohibitions on community organizing and other activities will enable [CLS providers] to fully join the progressive movement. They can begin building a movement culture by taking small steps, such as referring clients with closed cases to strategic organizing campaigns in relevant practice areas. . . .

Somes provides a concrete example of law as an industry increasingly like any other—the process of deprofessionalization that Crain reviewed above. The lawyers, paralegals, and others working in legal services programs enter with a commitment to helping individuals and combatting injustice. But Congressional restrictions—often reinforced rather than resisted at the level of local legal services management, Board leadership, state Bar foundations, or Bar associations—divide individual services from collective struggle. The top-down result is the devaluation of legal workers who provide most individual services—specifically, those who disproportionately are women, many linked by class, race, ethnicity, and personal histories to the communities they serve. Additionally, these potential sites of holistic social struggle are reduced to atomized centers that separate working class women or women of color from broader struggles. This elite-driven process illustrates industry handcuffs, blindfolds, and hierarchies.

However, legal workers—including lawyers—can organize to protect themselves from top-down exploitation. Legal workers are well positioned to develop a dual consciousness of law and justice and to use legal instruments of advocacy. With collective resources, they can employ extralegal means such as direct actions, media campaigns, tailored interventions to pressure specific decision makers or influencers, and public education. With the experience of workplace struggles like that described by Somes, legal workers become better prepared to tackle

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sectoral and societal issues. For example, legal workers can act collectively to change their organizations' boards to end the domination of wealthy individuals, fight back against Congressional or other funder restrictions, and expand alliances with community groups to oppose neoliberal austerity measures, using the historic legal services-welfare rights alliance as a model.

Legal scholars Willmai Rivera-Perez and Juan Garcia-Ellin next examine the effects of these same industry trends on law school as professional training. The same dynamics seen above in practice settings also are squeezing "justice" out of legal education, perhaps even more than in earlier times. As with Crain and Somes, this excerpt shows how top-down profit-seeking frequently overcomes all else within law, while blindfolding the public to this reality. The disconnect between law and justice can be measured in material and symbolic metrics. Taken together, these three excerpts suggest that the legal profession increasingly functions as an industry that acts by choice—by design—to maximize profits regardless of the special public role that law and lawyers purportedly play in advancing "equal justice under law."

FLEXIBLE ACCUMULATION: CHANGES IN THE LEGAL PROFESSION AND THEIR EFFECTS IN LEGAL EDUCATION

Willmai Rivera-Perez and Juan C. Garcia-Ellin
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Introduction

. . . That legal education is in a crisis seems to be a cyclical topic that reappears whenever there is an economic crisis. . . . After reports of lawyers being fired from big firms, legal education became, once again, the culprit. . . .

Crisis in the Legal Profession

In 2008, media outlets started reporting about a crisis in the legal profession. First, news regarding the firing of hundreds of lawyers from the largest law firms was reported. Then there [was] news reporting that large percentages of law school graduates could not find jobs requiring bar passage. Finally, reports came indicating the high number of law school graduates who are drowning in debt because of the high costs of attendance. . . .

As a response to the perceived lack of jobs, many reasons have been presented to explain the "crisis." The most popular of these are: 1- law school graduates are not "practice-ready," that is, they do not take courses that help with the day-to-day minutiae of legal work; 2- law school is too expensive, primarily because tenured academic-type professors make too much money; and 3- the federal government hands out too much money in

student loans with the result of tricking students, particularly those attending non-elite law schools, into incurring debt that they have no chance in being able to repay.

The solutions presented to solve these "problems" that are causing the "crisis" have all been directed at reforming legal education. Some of the more popular solutions are: 1- increasing the number of clinical or lawyering skills courses; 2- eliminating tenure for law professors and substituting them for practicing attorneys to teach in an adjunct basis; 3- changing the JD from a 3-year to a 2-year course of study; and 4- reducing the number of law schools and limiting the availability of student loans. These solutions are supposed to be directed at making law graduates more practice-ready, reducing the expenses of law schools so that they can lower tuition and to shrink the pool of applicants for law positions so as to decrease the percentage of unemployed lawyers.

When the data is examined closely, there is a clash between the statistics and the [alleged] causes. . . . It is a contradiction that the largest law firms are generating record profits and at the same time hiring a lower number of attorneys. With this increase in capital accumulation, what is the crisis really about?

Changes in the Regime of Accumulation

To better understand the changes in the legal profession, we must first understand the changes in the global economic system. . . . What we have experienced are changes in the regime of accumulation within capitalism. Simply put, the global economic system is still one in which capital accumulation is the main objective but the social organization and social regulation of that objective [have] changed since the advent of the industrial revolution.

After the Great Depression in the USA, the legal framework of the New Deal adopted much of the ideas brought forward by Milton Keynes regarding government regulation and control of the economy. This way the country transitioned from a *laissez faire* to a Fordist mode of regulation of industrial capitalism. The main characteristics of Fordism are: mass production of goods in which costs were reduced through economies of scale; large amounts of workers needed to be both producers and consumers of goods; and an extensive regulatory scheme (heavily influenced by Keynesian theory) in which the government would regulate the production and consumption process as well as the relationships between employers and employees. . . .

The entire Fordist regime was predicated on mass production and mass consumption of goods. . . . Within the Fordist regime, full time work and benefits were needed to guarantee a large amount of consumers with economic power. . . . At the same time, to lower the costs even more, . . . a

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higher level of standardization was achieved to the production process as well as to the product design. . . .

During the 1970s and after the oil crisis, Fordism began to change into what now is called Post-Fordism or Neo-Fordism. These changes are now also encompassed within the term of "flexible accumulation." As the term suggests, this new regime is organized under the premise of more flexibility in the production of goods (and services) that would improve the capital accumulation process. . . .

The Legal Profession as an Economic Activity

. . . [I]t can be fairly easy to forget that the law profession is an economic activity. Similar to any other economic activity, it is influenced by the changes in the regime of capital accumulation.

. . . [S]imilar to many other economic activities during Fordism, the largest law offices in the USA and the UK began utilizing practices associated with more industrial economic endeavors . . . [by attempting] to standardize as much as possible the offering of services that are supposed to be an individualized activity.

Large law firms provide a service: legal representation and counseling. Throughout the Fordist years the organization of law firms had some elements of standardization and tasks were internally organized so as to make their performance more effective. For example, many firms were divided in divisions or departments depending on the topic of the cases they would [handle], such as Civil, Corporate, Contracts, Mergers, Criminal, etc. Also, the less experienced attorneys were tasked with the less specialized work, such as writing motions or reading case files, while more experienced attorneys would do the more specialized work like writing legal briefs and conducting trials or oral argument[s]. . . . Finally, all tasks were performed by employees of the firm within the firm headquarters, under the supervision of the partners.

Until very recently, these large law firms with hundreds of lawyers have worked in a very similar structure. With the recent economic crisis, corporate clients have been attempting to reduce their legal fees as a way to reduce costs and therefore increase their profits. As part of the need to reduce costs large law firms have adopted the practices that other types of businesses had [fallen] into with the goal of flexibilizing their process of capital accumulation. . . .

. . . In simple terms the law firms began to fire employees, reduce benefits, alter working arrangements, and decrease prices. . . .

. . . Now law firms are outsourcing all sorts of tasks. Through the use of technology, law firms are outsourcing non-legal tasks to non-legal firms. Tasks such as answering services or client billing have been outsourced not only to an entirely different firm but in some cases they have been offshored

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to an entirely different country. Some non-specialized or basic legal tasks, such as organizing and archiving of case files, have been outsourced to non-legal firms. Some of this work would have been performed by junior associates, and now is being performed by non-attorneys off-site.

The most significant tasks that have been outsourced, and in many cases offshored, have been some specialized legal tasks. The most common type, of course, is the sub-contracting of a highly specialized attorney or firm to handle a specific aspect or topic of one case. Yet, there are other law-related tasks that are performed by "legal services" firms. There are firms that specialize in the review, management and analysis of documents for large-scale litigation. . . .

The most controversial of these outsourcing practices is the subcontracting of Legal Process Outsourcing firms (LPOs). These are firms that perform legal tasks for a law firm but the actual task [is] performed in another country. This offshoring of legal work has been questioned due to possible ethical violations but the ABA has expressed itself as having no objection to this type of outsourcing as long as the attorney-client privilege is preserved. Firms like *Pangea3*, *CPA Global* and *Integreon* are some of the better known LPOs, and most of their work is performed in India. Some of the tasks these firms perform are legal research, contract management, intellectual property and even e-discovery. Similar to other types of businesses, law firms can benefit themselves through the exploitation of the spatial unevenness of global capitalism. With the offshoring of legal work, costs are being reduced and therefore capital accumulation expands. . . .

Effects on Legal Education

. . . How is this reduction in hiring by large law firms causing a problem for law schools? The answer is not that complicated. For decades, many law schools would partially base their prestige in the amount of graduates who could find employment in large law firms and therefore receive a large salary. This view of prestige was supported by some of the ranking systems of law schools in the United States. The possibility (or reality for some law schools) of their graduates finding jobs in these large law firms was used as a way to justify constant increases in law school tuition and expenses. The argument goes that the increasing tuition was an investment that would guarantee the student with a good paying job at a large law firm.

. . . [W]ith the restructuring of the regime of accumulation and the outsourcing and offshoring of legal work, there are fewer positions available for recent graduates at large law firms. . . . If the problem is that those students graduating from law school are not finding jobs, how do the proposed solutions attack that problem?

The short answer to the question is that they do not. The proposed solutions to the crisis in legal education do not address the supposed

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problem. . . . [W]hat is happening is that large law firms have fewer positions to fill due to the economic restructur[ing] So, it is not that law graduates cannot find jobs but that one possible place of work is less available.

Second, one of the solutions proposed is to change the curriculum so that graduates are more "practice ready." Once again, this proposal does not help with the supposed problem of law graduates not finding jobs. With this solution, law firms are switching the burden to the recent graduates by telling them that they do not possess the necessary skills when in fact, that has nothing to do with this proposal. . . . After all there are fewer positions to fill and the graduates improving their resumes will not increase the amount of positions available. On the other hand, this solution is just another strategy through which law firms flexibilize their accumulation of capital. If the law schools cave in and change their curricula to satisfy, even more, the needs of the large law firms, then these firms will save time and capital that would otherwise be needed to train the new employees. . . .

Third, another solution proposed is that the law [school] is reduced from three to two years. This proposal is supposed to reduce the amount of money students spend on tuition and therefore reduce the graduates' student-loan debt. Whereas we agree in general terms that student debt should be reduced, this proposal does not necessarily address the supposed problem. . . . [A] reduction in years may mean that law graduates will not necessarily be better candidates for the job market.

Fourth, the proposals for reducing tuition and eliminating tenure for full time professors, which is geared to decrease costs and therefore lower tuition even more, are not unique to law schools. . . . [T]he constant reduction in government spending in education, particularly to public universities, is the biggest cause of increasing tuitions. This, of course, is part of the post-Fordist discourse of limiting education to satisfy the needs of the market. . . .

Fifth, the proposals to limit the number of non-elite law schools and to reduce the availability of student loans are problematic on two fronts. On one hand they are based on the premise that the law school graduates who are not getting jobs in large law firms are those who attended non-elite schools. On the other hand, the subtext is that because of the "lack of jobs" it is not fair to let someone incur a debt that he/she will not be able to repay. . . . [T]herefore, only those people who can afford to pay for it should be the only ones attending law schools. These two proposals' only consequence will be the closing of opportunities for those who cannot afford to attend an elite law school, therefore leaving only the privileged classes with the chance to obtain a legal education and to shape legal doctrine in the future.

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Conclusion

. . . [W]hen analyzing legal education, we should be aware of the socioeconomic changes in the legal profession before accepting proposals that do not address the actual problems that law graduates confront.

Finally, there is no “lack of jobs” for lawyers. A simple internet search will point us to the increasing needs of legal services, particularly representation in criminal matters, by the less privileged, immigrants, and those living away from large urban areas. We should be looking into finding ways to have the continued flow of law school graduates help to fulfill the needs of such a large segment of the population. An increase in clinical courses directed at providing criminal and civil representation to underprivileged and working-class clients would help, as would an increase in subsidies, or forgiveness of student debt, to those willing to provide pro-bono work for indigents. . . . [A]n increase in public spending on education, to help with a reduction in tuition costs, should be on the table, and should be included as part of the strategies being pursued towards making the legal profession more accessible to those who are more vulnerable to injustice. During this era in which capital accumulation has become more flexible . . . we should not fall into the trap of contributing to that cause and focus on continuing to be aware of what are the real challenges within legal practice today and work towards more social justice, not less.

Rivera-Perez and Garcia-Ellin examine the legal industry—firms and schools—as an economic activity adopting the same techniques as others to flexibilize, and thus maximize, profit making. This top-down push exploits all resources, including human ones, to further concentrate wealth. “Success” in this unrelenting drive for ever-greater profits is measured exclusively in economic gains to elite institutions. The process necessarily drains resources from other endeavors of the system or society: the more that productivity is pocketed by the few, the less it can be put to work for public purposes. At the same time, law becomes less concerned with justice. As a trio, the above excerpts help legal and other “professional” workers better unlearn and relearn the systemic contexts of their industry—across dimensions of training, practice, organization, funding, and social impact.

NOTES AND QUESTIONS

1. *Technology’s Promise and Peril*. The legal industry is changing dramatically because of the advent of legal technology to augment and in some instances replace the lawyer. Of course, technology of the last century such as the desktop computer helped eliminate lower-paid administrative positions in law firms and elsewhere, as business professionals increasingly created their own legal documents rather than rely on the old model of staff transcribing

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text from dictaphones. But the record $1 billion invested in 2018 in legal technology signaled that investors aim to fundamentally disrupt the work of lawyers, particularly that of lower-level associates, through artificial intelligence and machine-learning.[5] Large law firms themselves are seeking a piece of this burgeoning market, as they form subsidiaries to develop legal technology and sell products directly to clients.[6] If law firms shift their attention and resources more toward developing legal technology for sale to clients, rather than engaging in traditional lawyer-client relationships, what impact would that have on the tension between law as a profession and as a for-profit industry? How might that shift—as law firms become technology innovators—affect the potential for collective resistance strategies that Crain discusses?[7]

9.2 ELITES DESIGNED LAW AS AN INDUSTRY FOR GROUP POWER AND PRIVILEGE AND TO "TAKE OUT" DISSENT OR COMPETITION

Elites have designed and enforced law consistent with their own self- and group-interest; we already know this feature as failure by design. Below we see it in action in excerpts that, first, show how elites build up law as an infrastructure to protect and preserve their interests, while simultaneously taking out adversaries by depriving them of the same resources and capacities. This "double-whammy" secures for elites an advantage in every contest even before it begins. The final excerpt documents how elites originated, consolidated, and institutionalized the current system for self-advantage—using social identities to organize and maintain the profession based on social and economic castes.

We start by examining "wealth management," which encompasses the lawyer practice specialty of trust and estate planning. Economic sociologist Brooke Harrington examines how the legal and financial specialties that make up wealth management operate "in the deepest part of capitalism"[8] to preserve wealth intergenerationally through, and sometimes despite, law. Professionals in wealth management use the tools of law, law

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[5] https://blog.lawgeex.com/legaltech-hits-1-billion-investment-as-lawyers-embrace-automation.

[6] www.lawsitesblog.com/2019/05/wilson-sonsinis-tech-subsidiary-sixfifty-releases-first-product-for-calif-privacy-compliance.html (discussing the compliance "app" developed by the law firm's technology subsidiary as well as the potential for developing technological advances for access to justice purposes).

[7] For discussion of organizing and resistance within the tech industry, see Rick Paulas, A New Kind of Labor Movement in Silicon Valley, Atlantic (Sept. 4, 2018), www.theatlantic.com/technology/archive/2018/09/tech-labor-movement/567808/ (discussing that most organizing of white-collar tech workers has centered around single-issue campaigns rather than through forming unions); Kate Conger and Noam Scheiber, Employee Activism is Alive in Tech. It Stops Short of Organizing Unions, N.Y. Times (July 8, 2019), www.nytimes.com/2019/07/08/technology/tech-companies-union-organizing.html.

[8] Brooke Harrington, Capital Without Borders: Wealth Managers and the One Percent 232 (2016).