4 Lawyers and Politics

This is a study of lawyers that explicitly considers their political context and the political consequences of their professional practices and social organization. It follows a small but growing school (e.g., Halliday 1987; Halliday and Karpik 1997) that takes lawyers' politics seriously, that considers political interests and political obstacles rather than focusing excessively on lawyers' economic interests and market obstacles. This study also moves one step beyond seminal studies of the internal organization of legal professions (e.g., Heinz and Laumann 1994) that largely ignore the political causes and political consequences of the bar's social structure.

The fundamental importance of politics is obvious in socialist legal systems, especially socialist criminal justice systems. Any attempt to model crime rates and rates of criminal prosecution in the socialist context must include political factors. The dynamics of criminal justice significantly follow political trends and political campaigns (Manion 1998). This chapter shows how the political logic of legal change in China extends to the legal profession.

The administration of law in China is undifferentiated from the state (Gregg 1995). The courts, procuracy, and public security remain government bureaucracies. As Potter (1999: 674) puts it, "Law is not a limit on the party-state, but rather is a mechanism by which political power is exercised and protected." In the first phase of the post-Mao revival of lawyers, the legal profession, too, was incorporated into the state system. One of the main themes running throughout this study is an apparent paradox—how emancipation and independence from the state does more to buttress state authority than to restrain it. This paradox was built into Shue's (1988) highly stylized image of the rural
reforms and greater village autonomy in China opening up the countryside to greater state penetration. Such a paradox is also part of portrayals of the Chinese legal system: for example, greater court discretion has actually undermined judicial independence and enhanced state intervention and control (Woo 1999).

After the end of the Cultural Revolution in 1976 and Deng Xiaoping's ascendance to power in 1978, the legal system was revived and rapidly developed. The new importance attached to procedural and substantive guarantees were directly related to the Cultural Revolution and its victims. It is a widely held belief among Chinese legal scholars that Peng Zhen, perhaps the most important architect of the post-Mao legal system (cf. Potter 1998), was so committed to the revival of law at least in part because of his persecution and oppression during the Cultural Revolution (em28). Deng Xiaoping, certainly the most prominent champion of the legal system and the development of the legal profession, experienced similar suffering.

The importance of the Cultural Revolution as the reason for rebuilding a legal system was clearly articulated during the Eleventh Central Committee in 1978. 1979 saw both the revision of the CL, which contained a provision on the right to a defense lawyer, and the restoration of the MOJ (Liu and Cha 1999). The Gang of Four trials in 1980 represent both the beginning of and a contributing reason for the revival of the legal system. A major showcase for the revived and revamped legal system, these trials of Mao Zedong's wife, Jiang Qing, and her alleged co-conspirators for masterminding the Cultural Revolution were a nationally televised lustration exercise, an important first step to cleansing the nation of the blood and bile left by this ten-year period of chaos. Importantly, the infamous and nationally reviled defendants had ten lawyers representing them. This was the public's first exposure to the function of the revived legal profession, and clearly was not a great public relations maneuver on behalf of lawyers. Indeed, the reputation of lawyers' "speaking on behalf of bad people" (ti huairen shuohua) and the
damage this reputation continues to inflict on lawyers’ public image is in large part rooted in these trials (Liu and Cha 1999).

According to one lawyer interviewed, "When Deng Xiaoping revived the system of lawyers and strengthened the rule of law in 1978 and 1979, I'm afraid he wasn't so farsighted as to be thinking about meeting the needs of the market economy. At the time the main feeling was that the lessons of the Cultural Revolution was too large. The legal system had been demolished. He himself was treated harshly. So he definitely desired to build the rule of law" (lf21). According to another interview subject, many members of the first cohort of lawyers chose this career because of brutal Cultural Revolution experiences (lf05). It was only several years later that government leaders became more sensitized to the legitimizing functions of lawyers both in the global economy and with respect to international political relations. That is, the initial motivation behind the legal reforms was domestic political legitimacy. As we will see, only later did concerns with global legitimacy permeate the policy arena.

The legal reforms unfolded very rapidly. The BLA was revived in 1979 at the same time the MOJ. The BBJ was revived in 1980. In the same year the NPC passed the Provisional Regulations on Lawyers in which lawyers were officially defined as "state legal workers." In the beginning the role of lawyers was predominantly in a criminal defense capacity. They worked in offices inside the Bureau of Justice on cases assigned by the state. In short, the beginning of lawyers is the beginning of serving state needs, of doing the bidding of the state. The following reflects the lack of differentiation between lawyers and the state in the early years of the profession:

Chinese lawyers are state legal workers. They are not professionals in the Western sense. They shoulder highly political and professional tasks and obligations....In other words, politically, lawyers should be patriots first and foremost, and at the same time, they are revolutionaries who firmly adhere to the socialist road. By satisfying these two basic political requirements, lawyers working within socialist laws serve the fundamental interests of the state and the people by performing
their services and guaranteeing the proper functioning of the socialist legal system. (Du and Zhang 1990: 195)

Mechanisms for the state control of lawyers include control over admission to the bar, at least partial control over lawyer publicity and the public image of lawyers, and substantial control over criminal defense practice. These three mechanisms show parallel trajectories over time. The vicissitudes of lawyers' publicity, admission to the bar, and the rate at which lawyers passed the national lawyers examination are all bound to political circumstances—namely, the national Strike Hard anti-crime campaigns of 1983 and 1996 and the prosecution of counterrevolutionary elements following the crackdown in 1989. After substantial *People's Daily* publicity of the revived legal profession in 1980 and 1981, coverage precipitously dropped in preparation for the first Strike Hard campaign, which demanded the coordinated efforts of all judicial workers, including lawyers, to ensure the efficient processing of large volumes of accused criminals. If everything one knew about lawyers came from the *People's Daily*, one would have assumed lawyers dropped off the face of the earth in 1982–83, 1989–91, and 1996–97 (Figure 4.1). Not coincidentally, lawyers in Beijing remember clearly 1990 and 1996 as the two most difficult years in the history of the lawyers examination (Figure 4.2). These extremely low pass rates adversely affected entry into the bar, as we can see both in official government data (Figure 4.3) and my survey data (Figure 4.4).
Figure 4.1. *People's Daily* Headlines Containing "Lawyer," 1979–2000

NOTE: Two trend lines appear in this figure because the *People's Daily* has divided its electronic collection into separate databases by time period. Unfortunately headline subtitles are included in the 1979–1996 database but not in the 1996–2001 database, hence the discrepancy between the two databases for 1996. Raw numbers are in Table M.12.
Figure 4.2. Lawyers Examination Passing Rates, China as a Whole and Beijing, 1988–2000

SOURCE: For China as a whole, Sun (1999) and FZRB (2000); for Beijing, BSB (2001, Table 20–12). Also see Zhao (1999: 174) and Cui, Zhang, and Xiao (1999: 238–9). Raw numbers appear in Table M.10 and Table M.11.

Figure 4.3. Number of Licensed Lawyers, China as a Whole and Beijing, 1986–2000

[Graph showing the number of licensed lawyers, China as a whole and Beijing, from 1986 to 2000.]

SOURCE: see Appendix M

Figure 4.4. Year Lawyer License Obtained, Beijing and Multi-City Samples

[Graph showing the year lawyer license obtained for Beijing and multi-city samples from 1979 to 2000.]

NOTE: n=892; Beijing sample n=409, multi-city sample n=483.
The work of the courts, too, follows a political logic. Politics explain the spikes in 1990 and 1996 in criminal cases processed by the courts (Figure 4.5). And the work of the courts, in turn, exerts a significant effect on the work of lawyers. After the first Strike Hard campaign was launched in August and September, 1983, the BBJ issued a circular entitled *Notice Regarding Strengthening the Work of Lawyers During Activities to Strike Hard Against Criminals* that instructed its lawyers to cooperate with the goals and methods of the strike hard campaign: "As a People's Lawyer, it is mandatory, under the unified leadership of the Party, to cooperate closely with the public security, procuracy, and courts, to cooperate in the fight against criminal elements, and to strike hard with strength and swiftness." "Lawyers must educate defendants on confessing to their crimes, showing repentance, and informing on their accomplices and other criminal elements." This Beijing notice mirrors one circulated by the MOJ (Tanner 1999: 96–7). As a more recent report on the history of lawyers in Beijing summarized, "In 1983 and 1984, the criminal defense work of Beijing lawyers was in support of national Strike Hard activities" (Cui, Zhang, and Xiao 1999: 292). Consequently there was an upsurge in criminal defense work accompanying the strike hard anti-crime campaign (Cui, Zhang, and Xiao 1999: 293). This increase mirrors the national pattern (Li 1997: 903). But, in accordance with the official directives, this upsurge was characterized by lackluster and perfunctory legal defense, expedited justice, and very few appeals (Tanner 1999: 97).

The highly sensitive and politically important trials that followed the crackdown of the 1989 student movement followed a similar pattern. In 1989 the Research Office of the ACLA wrote and circulated an essay entitled "Vigorously Bring into Full Play the Defense Functions of Lawyers in the Process of Trying Riot and Counter-Revolutionary Rebellion Cases." In addition to being circulated to local lawyer associations in six provinces and cities for meetings, it was also circulated nationally by the ACLA. It contained instructions on how to handle cases of this nature (Cui, Zhang, and Xiao 1999: 290).
On June 19, 1989 the BBJ issued the Notice Regarding Bringing into Full Play the Functions of Lawyers in the Struggle to Vigorously Strike Counter-Revolutionary Rioters and Criminal Elements who Attack, Smash, Steal, Burn, and Murder instructing law firms to assign only the most politically loyal lawyers to handle these important cases (Cui, Zhang, and Xiao 1999: 293). Citing different sources and regulations, the tightening of MOJ control over lawyers in 1989 is also discussed in Guo (2000: 109).

In short, the actions of lawyers, who are widely regarded by procurators, public security officers, and judges as a nuisance and a hindrance to their work, are severely checked during political campaigns assigned as much importance as Strike Hard and the prosecution of the 1989 "rioters" and "hooligans." The work of lawyers is perceived by these other judicial actors to entail "speaking on behalf of bad people" (ti huairen shuo hua). As one lawyer described, "Many lawyers [representing the students of 1989] were severely criticized and warned by the government" (em12). As we will see in more detail later in this chapter and throughout this dissertation, defiance of official expectations is not a matter to be taken lightly. Wang Haiyun, a lawyer with over twenty years of experience and selected as one of China's "top ten lawyers" in 1995, recounted in a speech to the Criminal Law Committee of the ACLA the tremendous risk he took in 1983 by successfully defending two defendants facing death sentences. At the time, when his leader chastised him for his impudence, Wang asked this leader to take care of his family should any harm come to him for providing a similarly rigorous criminal defense in the future (Wang 2002).
Lawyers as a Political Threat

Lawyers in socialist regimes are perceived to threaten state interests. There are two components to this threat. First, under socialist legality, legal institutions are a tool of class struggle; legal work by definition is political (Shih 1996). The political character of legal practice is particularly acute in the case of criminal defense. Challenging the state procuracy simply by defending criminal suspects can be harshly punished as an act hostile to state interests, especially during anti-crime campaigns (cf. Tanner 1999: 96–7). Second, lawyers threaten the individual careers of judges. Like other areas of the central planning system (a.k.a. "the command economy"), case quotas are imposed on local courts and procuracies. Directives from above significantly determine the composition of cases a court will accept and process in any given year; hence the influence of political campaigns such as Strike Hard. Accordingly, a judge's performance is evaluated
according to the number of verdicts reversed on appeal, and poor performance by this standard is often punished by cutting the judge's bonus. Therefore, in order to protect their careers and personal incomes, judges routinely seek the views (qingshi) or request the guidance (zhidao yijian) of their administrative superiors before deciding cases (Liu Sida 2002; Clarke 2003). Under these circumstances, simply doing one's job as a lawyer can represent a challenge to the parochial interests of local state officials.

Under socialist legality, law is a political tool that serves the interests of the state (Potter 1994a, 1994b, 1999). Socialist legality is fundamentally about compliance, about "strict observance of the law combined with Party spirit" (Markovitz 1996: 2295). It is "a principle which facilitates an effective enforcement of Party policy through the implementation of law as an instrument of social engineering" (Petrova's 1996: 543). Under socialist legality, the interests of lawyers and their clients are subordinated to state interests. In Cuba, for example, the lawyer's duty is to ensure compliance, to represent the interests of the state and not of clients (Michalowski 1995). As Markovitz (1996: 2297) writes about the case of East Germany, "No intermediary should come between the citizen and the parental state"; "Socialism did not like individual challenges to state authority. It liked even less for such challenges to be articulated and sharpened by professional squabblers." In China socialist legality created a fundamental conflict of interest (Feinerman 1987: 120–1; Zheng 1988: 500–501; Peerenboom 2002: 377–83). In the Soviet bar, this conflict is what Freidman and Zile (1964: 35–6) call "serving two masters." Ultimately, "the lawyer is gravely tempted to neglect the interests of his clients in order to advance the interests of society (that is, of the state, since totalitarian states define the social interest as identical with state interests)."

A separate conflict exists between judges and prosecutors on the one hand and the interests of lawyers on the other: "socialist judges were political functionaries committed to asserting the parental authority of the state....Under socialism, both judges and
prosecutors were partisan: not to one of the parties before them, but to the Party and its goals" (Markovitz 1996: 2280, emphasis in original). As a result, "East German legal officials remained suspicious of attorneys until the very end" (p.2284). In the Soviet Union, "Procutators and judges were hand in glove on every level...members of the same team. But the lawyers didn't make the team. They were, so to speak, in a separate league, a minor one." The Soviet advokatura were "quasi-private agents with no official status, no official power or prestige" (Feifer, cited in Burrage 1993: 581). Early in the course of their post-Mao development in China, lawyers gained the reputation of "speaking on behalf of bad people" (Zheng 1988: 481n46; Luo 1998: 26; Xiao 2000). Markovitz (1996: 2285) describes a similar situation in East Germany: "To socialists, attorneys in civil law cases represented private, and very likely egotistical, interests; worse yet, defense attorneys operated as apologists for offensive and self-seeking antisocial behavior." As a lawyer in Beijing put it, "In reality, the public security, the procuracy, and the courts [the gongjianfa] are in opposition to lawyers [duili de]" (lfi12).

I hasten to add that these structural features of lawyers operating under socialist legality are not attributable entirely to socialism, but reflect the influence of attorney systems elsewhere in the civil law world (Friedman and Zile 1964: 35). In the civil law world, lawyers in private practice are distinguished from and have lower levels of status and prestige than legal practitioners employed by the state (Abel 1988). The marginalization of Indonesian lawyers is strikingly similar to the socialist marginalization of lawyers:

A professional lawyer before the court is typically viewed as an adversary to the judges and public prosecutors....Another underlying case of antagonism between judges and legal professionals is that the latter lack a clear status, manifested in law, regarding their function....For judges, who are often receptive to the norms of status rather than function, lawyers are regarded as secondary figures who are merely private sector actors because the requisite status is normally derived from the governmental positions [sic]" (Kadafi 2002: 7).
It is clear that a theory of legal professions based exclusively on private-sector lawyers, ignoring the equal if not greater significance of lawyers employed by the state, can be of only very limited value (Berends 1992). It is essential to measure and assess the consequences of a power asymmetry between private-sector lawyers and state officials in the courts and other government agencies. Despite the closer affinity of Chinese lawyers to their Continental European counterparts, however, it is also clear that their gradual but irrevocable "unhooking" from the state has been influenced by models from lawyers in the common law world, particularly from the United States (Alford 1995: 38).

**Lawyer Purges**

The foregoing shows the extent to which politics animates the history of lawyers in post-Mao China. But this process goes much further back. The history of lawyering in China is the history of purges associated with the Revolution and subsequent political campaigns.

In September 1949, the system of lawyers that prevailed during the Republican period (1911–49) was formally abolished (Cui, Zhang, and Xiao 1999: 219). Consequently, Republican lawyers were labeled "black lawyers" and purged in 1949–50 (Guo 2000: 99). In 1952, when remaining remnants of "old society" were detected, a new purge was launched with the MOJ's *Notice Regarding Banning Black Lawyers and Their Litigation-Trickster Actions*. An additional 76 "black lawyers" were identified and punished (Cui, Zhang, and Xiao: 219). According to an investigation into the fate of "old lawyers" published in 1956, of 308 lawyers who registered in Beijing in the final year of the Republican state, 36 were confirmed dead, 6 were in prison, 13 had left Beijing, 102 were still in Beijing, and the fate of the remaining 151 was unclear. In terms of new jobs, 9 were serving as cadres in city government, 33 were primary and middle school teachers, and only 1 continued working as lawyer. The remainder were working in central
government offices, the Law Press (Falü Chubanshe), and other work units (Cui, Zhang, and Xiao 1999: 221–2).

In 1954 a new system of lawyers modeled after the Soviet system was developed on an experimental basis in several cities including Beijing, Tianjin, Chongqing, and Shenyang. The new system was formally established in 1955, the same year in which the BBJ was established.

Following the 1956 Hundred Flowers Campaign in which many lawyers sympathized and participated with intellectuals who harshly criticized the new government, they were branded "Rightests" and purged anew in 1957 (Guo 2000: 99–100; Lubman 1999: 77–8; Peerenboom 2002: 45). In 1957, 30 percent of lawyers in Beijing were classified as "Rightests." In 1958, the Beijing No. 1, No. 2, and No. 3 Legal Advisory Offices were merged into the (unified) Beijing Legal Advisory Office and relocated to the administrative jurisdiction of the MOJ (Cui, Zhang, and Xiao 1999: 223). The fallout was so severe that the MOJ was itself abolished in 1959 (Lubman 1999: 154; Peerenboom 2002: 45). Finally, lawyers were eradicated completely with the start of the Cultural Revolution in 1966. After the complete elimination of lawyers, law school professors were specially appointed to provide counsel in court cases that involved foreign parties (Cui, Zhang, and Xiao 1999: 224). It should not be surprising, therefore, that people were very reluctant to become lawyers when the bar was revived in 1979. The people who were called upon to serve as lawyers were understandably skittish, especially given that it was precisely the lawyers purged in the 1950s and 1960s and law students prevented from practicing law who, given their unique qualifications, were asked to fill the new positions (em16).

The 1949–1957 period was a process of demolishing lawyers and the legal system. The vestiges of the old society were weak to begin with, so they were destroyed....In 1976 when the Leftists were smashed, this is when the revival of the legal system began. Everyone was in favor of promoting the construction of a
rule of law society. In 1979 when the system of lawyers was revived, we were still at the stage of thinking and planning. The real developments began in 1980. The *Criminal Law* and *Criminal Procedure Law* were promulgated in the second half of 1979. The year afterwards the lawyer associations and bureaus of justice started to be organized. The bureaus of justice lagged behind the lawyer associations. The lawyer associations were the first to emerge....At the time a lot of people were scared by all the earlier political campaigns. As a result, in 1979 and 1980 no one dared work as a lawyer. They were under the pressure of political fear because they had to speak against the courts, speak against the government, and defend people arrested by the government. So various measures were adopted. The Organization Department of the Party Central Committee [*Zhongyang Zuzhi Bu*] issued a directive in 1979 stating that lawyers must be respected as civil servants, that they were government officials (em28).

Guo (2000: 101) makes the same point:

To enable lawyers to perform their work without the threat of being accused as ‘accomplices’ of the suspects, it was necessary to make them State legal workers, which was at a similar level to judges and public prosecutors. At a certain moment, the Supreme People's Court even issued circulars to criticise certain judges for their critical attitude towards lawyers. In order to make lawyers look like part of the government establishment, China went so far as to create a police-style uniform clothing for lawyers.

According to one interview subject, the decline in the numbers of lawyers after 1989 is not unusual in historical perspective. Lawyers tend to suffer during political campaigns, he pointed out. Having graduated from the Beijing Institute of Political Science and Law in 1964, he had personal experience with political campaigns and lawyer purges. That during the 1996 Strike Hard campaign the probability of passing the national lawyers suddenly dropped precipitously was no coincidence, he explained (em16; see Figure 4.2).

China is not exceptional with respect to lawyer purges. Indeed, elsewhere in the world, the replacement of lawyers often follows the replacement of regimes. After the establishment of the German Democratic Republic, lawyers from the Nazi regime were purged (Markovitz 1996: 2273). Following the collapse of the Soviet Union and the reunification of Germany, lawyers were immediately purged (p.2272; Blankenburg 1995). Similarly, following the Soviet takeover of Hungary, lawyers were purged from
positions of power (Sajo 1993: 141–2). Indeed, following the American Revolution, lawyers loyal to the British were purged from the bar, many of whom fled to Canada (Chroust 1965).

**Change and Continuity**

What are the effects of lawyers' emancipation? On the surface lawyers seem to be more politically influential. The emergence of government counsel is one indication. Municipal governments are contracting more of their legal work out to private law firms. The "rule of law" slogan in China, "yi fa zhi guo," refers to the national level, translated literally as "ruling the nation according to the law." Now this slogan has been applied to lower levels of government—e.g., "yi fa zhi shi," or "ruling the city according to the law"—as they put increasing numbers of lawyers on retainer. According to a high-ranking government official I interviewed, various government bodies including the NPC Political Consultative Committee are organizing regular meetings with lawyers to solicit their ideas and feedback. Lawyers are also invited to participate on various legislative projects (em28). Indeed, one of the members of the drafting team for the *Lawyers Law* informed me that the MOJ organized symposiums for lawyers in six cities (including Beijing, Shanghai, Guangzhou, Chengdu, and Shanghai) at which they were invited to submit their opinions on how to draft the law (em27), which is less surprising given that lawyers were the subject of this law.

More significant are the increasing numbers of stories of lawyers challenging political authority, albeit at the local level. A local lawyer in Jiangxi Province acquired national notoriety by setting up a center for fighting predatory government offices engaging in the so-called "three arbitraries" (*san luan*)—arbitrarily levying fees, arbitrarily levying fines, and arbitrarily launching inspections (Xiao and Wang 2001). A lawyer I interviewed in Beijing boasted about having recently won a case to depose a
corrupt village head (em19). The celebrity of some lawyers such as Zhou Litai, who exclusively represents industrial injury victims, have extended as far as *The New York Times, The Washington Post, Newsweek*, and other prominent foreign media outlets.

However, this small step forward has been accompanied by at least two large steps backwards. Zhou Litai’s practice in Shenzhen was shut down by the local Bureau of Justice (Smith 2002). Basically, the *tuogou* privatization campaign of 2000, by pushing all remaining lawyers into the private sector, has eliminated one of the last remaining vestiges of their state-sector membership and with it the protections accorded such membership. Whereas lawyers in their former incarnation were civil servants, now their de facto status is as businesspeople. They say they are treated as "private entrepreneurs with legal knowledge" (*dong falü de getihu*) (em14 and em18; lfi13). Lawyers working on cases assigned by the state receive more cooperation and more protection than lawyers who develop their work independently (Liebman 1999: 226–7). I will explore these patterns in greater depth in Chapter 10.

**The Plight of the Criminal Defense Lawyer**

Lawyers universally acknowledge a criminal defense crisis, a crisis that only seems to be intensifying. Criminal defense work has always been frustrating in China. Lawyers are still not particularly useful in a criminal defense capacity. Successfully defending a "not guilty" plea remains almost impossible. Acquittal rates remain at or below 1 percent even after the revisions to the *CPL* (Chu 2001: 187). An empirical study of criminal cases found that the presence of a lawyer had absolutely no effect on case outcome (Lu and Miethe 2002). In a career spanning over 20 years, a prominent criminal defense lawyer in
Beijing could boast only a few successful "not guilty" defenses; successfully obtaining a lighter punishment was far more typical (em16).¹

A far more serious problem facing the criminal defense bar, however, is the way in which the revised CPL is being used as a pretext for attacking the legal profession (Yu 2002). More specifically, attention has largely focused on Article 306 of the CL on fabricating or concealing evidence. Compared to the earlier versions, the revised CL and CPL were drafted with the promise of granting lawyers greater rights, and early grades were very high. These early assessments, however, were unable to anticipate the way in which Article 38 of CPL, Article 306 of CL, and Article 45 of Lawyers Law were to be used against lawyers.² Instead, the focus was on the new rights lawyers were promised, including early intervention and early access to criminal defendants (e.g., Hecht 1996; Clarke 1998).

According to Chinese legal scholars, the revised CPL offered a radical new procedural model that equalized the statuses of the various parties in the judicial system:

¹ As in many "inquisitorial" systems, the burden of proof in Chinese criminal procedure rests with the defendant (Chu 2001: 159–62). In the Soviet context, Rand (1991: 42) calls this "accusatory bias." A recent opinion issued by the Supreme People's Court imposing the burden of proof on defendants in administrative litigation (typically government offices sued by individual citizens or groups of citizens) (Shi and Tu 2002) may open a similar path to criminal procedure reform and shift the burden of proof to the state prosecution.

² Article 306 of the CL: "If, in criminal proceedings, a defender or agent ad litem destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces the witness or entices him into changing his testimony in defiance of the facts or give false testimony, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention; if the circumstances are serious, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.” Article 38 of the CPL: "Defense lawyers and other defenders shall not help the criminal suspects or defendants to conceal, destroy or falsify evidence or to tally their confessions, and shall not intimidate or induce the witness to modify their testimony or give false testimony or conduct other acts to interfere with the proceedings of the judicial organs.” Article 45 of the Lawyers Law: "If a lawyer commits any of the following acts, the judicial administration department of the people's government of a province, autonomous region, or municipality directly under the Central Government shall revoke his practice certificate; where the case constitutes a crime, criminal responsibility shall be pursued according to law: (1) divulging State secrets; (2) bribing a judge, prosecutor, arbitrator or other relevant working personnel or instigating a party to do so; or (3) providing false evidence, concealing important facts or intimidating or inducing another with promise of gain to provide false evidence or conceal important facts."
The reforms moved the criminal justice system away from what was known as the straight-line model (xianxing jiegou), in which the case moved from the public security (which gathered evidence) to the procuracy (which prosecuted the criminal suspect) to the courts, all of which worked together collusively in pursuit of a successful prosecution, essentially neutralizing the criminal defense lawyer. This process was called "working together conscientiously toward a guilty verdict" (gongtong xiang youzui fangxiang nuli). With the new CPL, this biased, inquisitorial system was ostensibly replaced by a new model known as the "triangular" model (sanjiao jiegou) in which the rights and statuses of all the involved parties were equalized (e.g., Long 1998). The courts were supposed to stand in the middle between the procuracy (which prosecutes criminal suspects on the basis of evidence provided by the Public Security Bureau) and the defense lawyer to adjudicate neutrally. The purpose was to make the process less inquisitorial and more adversarial. Before the Criminal Procedure Law was revised, lawyers were regarded and treated as an annoyance, as a thorn in the side of the gongjianfa. Consequently lawyers had tremendous difficulty doing their jobs—gaining access to clients, conducting investigations, and gathering evidence. The new CPL was therefore celebrated as a source of new rights for lawyers. The expanded role and rights of lawyers included pretrial involvement and access (tiqian jieru), in particular the formal right to access to clients in police custody. In reality, however, things have only gotten worse. Not only does access to clients remain exceedingly difficult, but the new CPL provides a legal basis for arresting and prosecuting lawyers. In practice, the CPL has served as ammunition in the state prosecution's suppression of the bar. This is how one lawyer put it:

At the current time criminal defense work is very hard [xingshi an nanban], and gathering evidence is very hard [quzheng nan]. If there's a deposition, I can tell immediately if it's been coerced. There are often contractions between pieces of evidence. The lawyer is very clear that there are evidentiary problems, so he
approaches the client to discuss the case. As soon as they start chatting he knows why! When the defendant's account and the deposition provided by the public security are not the same, we look for witnesses and record their accounts. Most people are unwilling to cooperate. In their language, 'Ordinary people like us are afraid of the public security, we don't dare open our mouths.' In the end, after great persuasive efforts, the truth comes out and we record it. Then we go to court. Lo and behold! Our evidence and the public security's are different! At this time it's possible the court will indict the lawyer for fabricating evidence because lawyers have no immunity [huomianquan]. When the evidence is contradictory, the public security asks, 'How is this possible? How could the account you provided to the lawyer be different from the deposition you made to us?' The client gets scared and spurts out, 'I have no idea what the lawyer recorded. After he finished taking his notes I just signed my name!' In reality, the notes of the lawyer and the public security are exactly the same. My good man, you're finished! This lawyer has now become a criminal suspect charged with fabricating evidence! (lfi04)

Lawyers are indeed getting locked up in significant numbers. The cases of Yang Weilin (Becker 2000) and Liu Jian (Rosenthal 2000) were among the first to be reported in the international press. The case of Li Kuisheng and his torture at the hands of police (Eckholm 2001) is one of the most widely publicized cases, although the case of Zhang Jianzhong (Pomfret 2002a), one of Beijing's official "top ten lawyers" and director of one of the largest law firms in China, has also attracted close international scrutiny. Within China, the cases that have received particular attention include that of Wang Yibing, a criminally prosecuted lawyer who was eventually acquitted but was so traumatized by his treatment at the hands of the public security that he and his wife, also a lawyer, not only abandoned the profession but abandoned their urban lifestyle to become monk and nun (Pu 2001). Photos of Zhou Jian blindfolded and with leg splints, taken immediately after his rescue from the kidnappers who tortured him (public security officers being the primary suspects), were featured on the website of the Zhongguo Lüshi (Chinese Lawyer) magazine, the official journal of the ACLA (also see Du 2002). These are just a few of the many highly publicized cases of lawyers suffering at the hands of public security officers and procurators. Altogether 21 such cases are summarized in Luo Xuan (2002),
and 5 cases are described in detail in ACLA (2002c). Hence the classic image of lawyers as a thorn in the sides of procurators, judges, and police.

As Figure 4.6 shows, the upshot of this assault on the criminal defense bar has been a stagnation in lawyers' criminal defense work (also see Li 2002). At least since the late 1980s the development of lawyers' criminal defense work has lagged far behind the development of other fields. The emergence and development of the cooperative and partnership law firm created new pressures to make ends meet. As one journalist put it, "Criminal defense cases grew more slowly starting in 1987 and 1988 because some law firms became self-accounting from an economic management standpoint. Fees from criminal defense work are relatively low, which led to the emergence of a phenomenon called 'with fees earned from a criminal defense case one can only afford to buy an old hen.' This severely damaged lawyers' enthusiasm for criminal defense work" (reprinted in Li 1997: 904–5). Although the stagnation of criminal defense work shown in Figure 4.6 is already quite dramatic, it would probably appear more dramatic if the unit of analysis were "time" devoted to or "fees" generated from these various fields instead of the "case."

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3 Although a lack of data prohibits identifying factors associated with lawyer arrests in a definitive way, impressionistically there seems to be an association with the defense of government officials charged with corruption in ongoing official anti-corruption efforts, a major government priority in China. For example, both Li Kuisheng and Zhang Jianzhong, perhaps the most famous lawyers arrested, were quite well known for defending high ranking government officials accused of corruption.

4 In March 2001 I attended a symposium featuring Alan Derschowitz and Donald Clarke organized on behalf of Beijing's most prominent criminal defense lawyers. During the question and answer session that followed Derschowitz's talk, the lawyers' questions focused exclusively on how he protects himself against police harassment, how he gathers evidence without government interference, and so on. Incidentally (and ironically), about a year after attending this symposium Zhang Jianzhong was arrested.
Figure 4.6. Distribution and Volume of Lawyers’ Work, China as a Whole and Beijing, 1986–2000

A. China

B. Beijing

NOTE: The unit of analysis is the "case." In the Beijing data, economic and civil cases are apparently collapsed in 1990.
But of course economic pressure is not the whole story. Figure 4.7 shows that the political and criminal risks that lawyers bear for doing criminal defense work has also contributed to the decline of criminal defense work. Before the revisions to the CL and CPL, the proportion of criminal cases with defense counsel had already gradually declined, consistent with the gradual stagnation of criminal defense work we saw in Figure 4.6. It may seem counter-intuitive that the proportion of criminal cases with defense lawyers reached an all-time low in 1996 during the "Strike Hard" campaign, a time when lawyers were explicitly instructed to prepare for a large volume of criminal defense work and to cooperate with the aims of the campaign. In fact, lawyers' criminal defense work did increase in terms of absolute numbers, but the number of criminal cases processed in court shot up so precipitously that there was a shortage of lawyers; hence a historically large proportion of cases were processed without defense lawyers. Furthermore, cooperating with the aims of the campaign not only meant denying criminal defendants a vigorous defense, but also meant refusing representation altogether to criminal defendants who were deemed unambiguously guilty.5

Immediately following the revisions in 1996 and 1997, however, the incidence of lawyer representation of criminal defendants increased dramatically. This suggests lawyers became more confident about their role and protections in criminal proceedings; the great hoopla surrounding the revisions of these laws seems to have worked. But this confidence was short-lived. By 1999 levels of criminal defense counsel had started waning again. This pattern also emerged in our qualitative interview data. Many of the

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5 Article 4 of the 1983 Notice Regarding Strengthening the Work of Lawyers During Activities to Strike Hard Against Criminals states, "Vigorously enforce Article 6 of the Provisional Regulations on Lawyers and refuse to represent defendants who do not state the facts of the case truthfully. Do not provide a defense when the facts of the case are clear, when evidence is reliable, when the crime is serious, and when popular indignation is great." Article 6 of the Provisional Regulations on Lawyers stipulates that "Lawyers who believe that the defendant did not state the facts of the case according to the truth have the right to refuse representation."
lawyers we interviewed said they now avoid criminal defense work. The following explanation provided by one informant is typical:

With criminal cases, you definitely don't want to gather evidence; just go directly to trial. The main risk with criminal work is being accused of fabricating evidence. Most criminal cases are brought to me by the family of the defendant. They are hoping to turn the case around. With respect to the gathering of evidence, by the time the case reaches me the public security has usually already concluded its investigation. If there's a witness with a good heart who tells the truth to the lawyer, once we get to court we'll see that this account is different from the procurator's evidence. The lawyer then gets arrested. Lawyers therefore tend to follow the path of least resistance [shunganpa]...in reality lawyers very seldom fabricate evidence. We're not talking about cases worth millions of yuan. A lawyer doesn't need to lose his career for a single case. Usually it's the public security that fabricates evidence. Furthermore, criminal cases are extremely difficult and don't bring much income. (lfi13)

With the threat of the "big stick 306," lawyers rarely risk challenging the prerogatives of these state agents (Liu Guiming 2002). The consequences of an unsuccessful challenge are too grave. Lawyer Lu, a confident and somewhat impetuous intern at our law firm field site, in the process of investigating a case for a second-instance trial, discovered evidence that the defendant and the judge had some sort of special relationship. Upon submitting this evidence to the intermediary court, the judge informed him point-blank that he would be criminally charged with fabricating evidence according to Article 306 of the CL if he continued pursuing this legal strategy. Lawyer Ni, an older, more experience lawyer, when hearing about this, said Lawyer Lu's strategy was naïve and foolish (lfi21).

Growth in criminal defense work has been slower than any other field of practice. On average, the volume of lawyer cases increased over 700 percent (from 277,328 to 2,238,793 cases) between 1986 and 2000. This overall growth was fueled by economic and civil litigation, and by non-litigation work. In contrast, the number of criminal cases handled by lawyers nationally increases by only 130 percent (from 136,837 to 317,108 cases). In terms of absolute numbers, the number of criminal cases processed in court increased by 269,328 between 1986 and 2000, while the number of cases with lawyer
representation increased by only 180,271 (see Tables M.8 and M.9). Most importantly, between 1989 and 2000, the criminal defense work of Beijing lawyers actually declined from 5,002 cases to 4,300 cases (Table M.7), while the overall number criminal cases processed by courts increased from 7,798 to 11,501 (Table M.6).

More generally, lawyers' enthusiasm for litigation work of all kinds has waned over time in Beijing. In 2000, lawyers' out-of-court work accounts for about 40 percent of all "cases" (see Tables M.5 and M.7). Many lawyers interviewed complained about the demanding nature of trial work—demanding both physically and financially owing to the additional extra-legal investments necessary to get a judge on their side (e.g., em33). For China as a whole, however, many lawyers do not have the luxury of choosing. The financial pressure that pushes many lawyers into litigation work helps explain the much greater importance of trial work for lawyers in China as a whole than for lawyers in Beijing (Figures 4.6 and 4.7; also see Appendix M).
Notes for Figure 4.7, Estimated Percentage of Court Cases With Lawyer Representation, China as a Whole and Beijing, 1986–2000

NOTE: The denominator (total number of court cases) for China as a whole includes both first and second instance cases. For Beijing, whether or not the denominator includes second instance cases is not specified in the source. The percentage of cases with lawyer representation was estimated as the number of cases (of a given type) handled by all lawyers as a proportion of all first-instance cases (of the same given type) accepted by the People's Courts. With respect to legal counsel in Beijing, the problem with this method is that it assumes that representation in Beijing courts is performed exclusively by lawyers registered in Beijing. Certainly a considerable number of cases are handled by lawyers from outside Beijing. As a result, our denominator (first-instance court cases) is inflated, leading to an undercount of instances of legal counsel. However, this potential undercount is counterbalanced by the number of cases Beijing lawyers handle in courts outside Beijing. That is, the numerator (cases handled by Beijing lawyers) is inflated because Beijing lawyers do a lot of work outside of Beijing. In short, this method yields accurate estimates only insofar as these two sources of bias cancel each other out. See Appendix M for raw numbers.
The abuse of lawyers' rights in the process of carrying out criminal defense duties has been a problem from the beginning. Scholarly research and articles in the media dating back to the early 1980s reveal a similar pattern of official obstruction. However, the problem was not of the same magnitude owing to lawyers’ official status as "state
legal workers." The obstruction and abuse of lawyers intensified following the emancipation of lawyers. As one lawyer explained, "[In the 1980s this issue] wasn't nearly as salient as it is now. Because of what’s happened over the past two or three years, especially after the promulgation of [the CL's] Article 306, this problem has become extremely pronounced." Discussing the case of Liu Jian, the Nanjing lawyer whose arrest, trial, and imprisonment was covered by The New York Times (Rosenthal 2000), he emphasized that taking risks can too easily lead to procurators’ invoking Article 306 (em16).

**The Administration of Lawyers**

Chinese lawyers are administered jointly by the relevant bureau of justice and the local lawyers association. Termed a system of "combined administration" (liang jiehe), the idea is to unite administrative management and professional management; in a lawyers system "with Chinese characteristics," one cannot be separated from the other. This is what Luo (1998: 19) calls a "dual structure for the management of lawyers." Like the early Japanese bar, which remained under authority of the Ministry of Justice until 1933 (Rabinowitz 1956: 77), and the Chinese bar in the Republican era (Xu 2001: 109), lawyer associations in contemporary China more closely resemble the German model of close governmental supervision and regulation of lawyers and their associations than the American model of self-governance (cf. Rueschmeyer 1973). Thus, emancipation from the state sector does not mean emancipation from state control.

The official responsibilities of the lawyer associations include: (1) professional development strategy, system of regulations, public image propaganda, membership fee administration, relations and interchange, and legal aid; (2) professional guidance through seminars, workshops, and other educational activities; (3) membership activities (registration, fees, protection of lawyer rights, bonuses, social security, and so on); and
(4) member discipline, occupational dispute resolution, occupational liability insurance, and the regulation of advertising (BJFZRB 2001b).

The plight of the criminal defense lawyer has attracted the attention of the lawyer associations. The lawyer associations have taken some action on behalf of their constituent members. Officially they are charged with protecting the rights and interests of lawyers. In February 2000 the ACLA submitted a written opinion to the NPC recommending the revision of the CL to remove Article 306 (ACLA 2002a). Liu Guiming, the editor-in-chief of the ACLA's journal, Zhongguo Lüshi (Chinese Lawyer), is one of the most vocal critics of China's criminal defense debacle (e.g., Liu Guiming 2002). The ACLA's Committee for the Protection of the Rights of Lawyers publishes an annual report on the quantity and character of the cases they accept directly from lawyers or from local lawyer associations on behalf of lawyers alleging abuse or who have been indicted for various offenses. Between 1995 and 2001, the Committee accepted a total of 166 cases. Consistent with the kinds of stories printed in the media, the majority of cases consist of lawyers or their clients accused of withholding or fabricating evidence (27), lawyers alleging torture or beatings, kidnappings, imprisonment, or being held hostage (23), lawyers alleging being illegally imprisoned, detained, summoned for trial, or having their licenses confiscated (21), and lawyers alleging the obstruction of their professional duties (41) (ALCA 1999; ACLA 2002c). According to Wang (2001), 70 to 80 percent of all cases processed by the Committee are related to Article 306 of the CL. In 2001 the ACLA organized a nationally televised "defense contest" that enjoyed stellar ratings. It has been suggested that the purpose of the debate contest was to promote and enhance the image of the criminal defense lawyer in order to gain public sympathy for lawyers whose rights are abused. Beyond the criminal defense crisis, there is anecdotal evidence that the bureaucracies overseeing lawyers are working to advance the interests of their members more generally.
The apparent responsiveness of the lawyer associations is related to the greater authority and jurisdiction they have been granted in recent years. In 1998 the MOJ handed many of its responsibilities over lawyers to the ACLA, including the "concrete work" of administering the national lawyers examination (ZGLS 1999). The local bureaus of justice, however, retain responsibility for "organizing" the new judicial examination. This is consistent with the general shift from micro-management to macro guidance on the part of the MOJ and local bureaus of justice ongoing since the mid-1990s (Yuan 1999). The more immediate background to these changes is the 1998 national administrative reforms that drastically revamped the organization of government, shifting many government responsibilities to "intermediary organizations" (zhongjie zuzhi) and "quasi governmental" (ban guanfang de) agencies, including professional associations (see Brødsgaard 2002; Worthley and Tsao 1999). Most officials in the lawyer associations are elected by their lawyer members. In Beijing elections have been in place since 1995 (Cui, Zhang, and Xiao 1999: 264).

Despite this apparent power shift to the lawyer associations and their lawyer members, not much seems to have changed in practice. As we will see, lawyers complain bitterly about their alienation from the organizations that ostensibly represent their interests. As Luo Xuan (2002) reminds us, only a tiny fraction of abuses ever even reach the ACLA; most are either not reported or handled by local lawyer associations. Moreover, even when the ACLA gets involved, lawyers generally do not believe its intervention to be particularly helpful. Indeed, efforts by the ACLA on behalf of lawyers arguably reinforce the status quo. A revealing example is the "Research Symposium on Lawyer Political Participation " hosted by the ACLA on June 20, 2001 (ACLA 2002a; Gao 2002). During this symposium, an alliance between the ACLA and the United Front Department of the CCP (Tongzhan Bu) was announced (lawyer conference notes, September 1, 2001). The assistance of the United Front Department of the CCP to
advance the political status and political influence of lawyers is clearly a Faustian bargain; charged with luring members of the private sector and overseas Chinese into the fold of the CCP, the Department is a powerful agent of political co-optation.

Consistent with the popular sentiment that their professional associations have sold them out, lawyers understandably portray their associations as parasitic money-grubbers. The local bureaus of justice collect a percentage of gross law firm receipts, no less than 15 percent. At the same time, the local lawyers association gets 5 percent of gross firm receipts as an institutional membership fee (Ma 2001). The result is intense competition between bureaus of justice for jurisdiction over lawyers and law firms. Bureaus of justice are divided into provincial-level, municipal-level, and district-level bureaus and offices. In Beijing, 65 law firms were under the authority of district-level justice offices in 2002 (ACLA 2002e). Within bureaus of justice at each administrative level are offices charged with the administration of lawyers, the "lawyer administration offices" (lǐ guān chú). The primary tasks of these offices include: registering lawyers and law firms, organizing the national lawyers examination, issuing and renewing licenses, and participating in disciplinary matters. According to Luo (1998: 20), the struggle that has ensued between lawyers and the bureaus that oversee them and between competing bureaus has "impeded a sense of solidarity and community between lawyers and law firms under various levels of supervising authorities."

The consensus among lawyers is that the lawyer associations are not particularly relevant or helpful with respect to legal practice. Indeed, the associations seem to generate more consternation than anything else. The lawyer associations seem to reinforce lawyers' emancipation, and in so doing further subject lawyers to the predatory

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6 According to Luo (1998: 20), law firms are required to turn over 10–15 percent of their annual profits to the authorities that oversee them.
actions of other state agents, including the tax bureaus, the procuracy, and the public security bureaus. The associations certainly do not appear to increase organizational capacity and cohesion in the bar.

When asked if the Beijing Lawyers Association does much administration of the profession, the ubiquitous response is that the Association's main focus is on collecting fees, not administration. As one lawyer puts it, "The Bureau of Justice's administration of lawyers is just about collecting fees from lawyers because they really hate lawyers" (lf112). Another lawyer stated that he has had no direct contact with any leader in the Association of Bureau, that he has only seen their photos (lf113). The Association's administration of lawyers is mostly limited to the organization of a few conferences each year as well as frequent professional training seminars, attendance at eight of which is a condition of the annual renewal of a lawyer's license to practice. The lawyer associations are popularly known as the "second government" for their subordination to the bureaus of justice. These two organizations together are known as the "two mothers-in-law" (liang ge popo) (em11). (In the Soviet Union the Ministry of Justice was referred to by lawyers as the "wicked stepmother" [Rand 1991: 66].) There is a popular perception that the Association is not very responsive when it comes to defending lawyers' rights, but is immediate and vigorous when it comes to investigating complaints filed against lawyers (em11). Lawyers' animosity towards the administration of the bar is represented by the following statement:

Lawyer Association leaders are ostensibly elected. However, in reality they are appointed. The current secretary-general [Ji Lizhi] was the former director of the Bureau of Justice's Lawyer Administration Office [Lü Guan Chu]. In fact, the Lawyers Association and the Bureau of Justice are located in the same building. Our 2,500 yuan annual registration fee is split between the two of them. The Lawyers Association is responsible mainly for organizing training seminars and processing complaints against lawyers. So there is an overlap between the functions of the Lawyers Association and the Bureau of Justice. Some people say the Lawyers Association is 'betrayer of the Chinese people' [Han jian]. The
Lawyers Association doesn't publish an annual report detailing how it spent our registration fees. The leaders aren't even lawyers but take our money and constantly go on inspection tours. (lfi21)

Despite the growing number of elected positions in the lawyer associations and the growing number of association leaders emerging from the ranks of practicing lawyers, the MOJ remains committed to the dual structure of administration. Autonomous, voluntary lawyer associations are unlikely to appear anytime soon.