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Know the Law: A History of Legal Specialization

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KNOW THE LAW: A HISTORY OF LEGAL SPECIALIZATION

MICHAEL ARIENS*

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I. INTRODUCTION

In 1991, Victoria A. Stewart sued her former employer, the law firm of Jackson & Nash, claiming that it negligently misrepresented itself and fraudulently induced her to join the firm. Stewart claimed that she joined Jackson & Nash after being told that the firm had been hired by a major client for assistance with environmental law issues and that she would manage the firm's environmental law department. When no environmental work appeared, she was then, she stated, put to work on general litigation matters. According to Stewart's complaint, her "career objective—continuing to specialize in environmental law—was thwarted and grossly undermined during her employment with Jackson."¹ As a result, Stewart claimed damages to her professional reputation, a loss of professional opportunities and "damage to her 'career growth and potential.'"² On appeal from an order dismissing the case, the United States Court of Appeals for the Second Circuit held that Stewart's claim of fraudulent inducement survived a motion to dismiss and remanded for trial Stewart's claim that her career as a lawyer was harmed when the firm failed to develop her expertise in environmental law.³

Stewart's claim is indirectly supported in a recent article by David Stevens in *Barrister*, the magazine of the Young Lawyers' Division of the American

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1. *Stewart v. Jackson & Nash*, 976 F.2d 86, 87 (2d Cir. 1992), *aff'g in part and rev'g in part* 778 F. Supp. 790 (S.D.N.Y. 1991) (quoting Count I of Stewart's complaint).

2. *Id.* (quoting Count I of Stewart's complaint).

3. *Id.* at 90.

Bar Association. Stevens wrote, "In law, you gotta have a specialty."⁴ Specialization, according to Stevens, is "an essential investment is [sic] your future."⁵ Stevens quoted an unnamed partner practicing in Los Angeles: "Look, we need associates who are good generalists, . . . but we make partners [those] who are marketable specialists."⁶

In another indication of the importance of specialization for lawyers, a name partner at a large Dallas law firm, discussing the future of corporate legal work, was quoted as saying, "The traditional law firm model will be reserved for very sophisticated providers of very specialized services, so specialized that they can't be done in-house."⁷ Simon Rifkind has declared specialization the greatest change in the legal profession during his sixty years as a lawyer,⁸ and a recent report of the American Bar Association's Task Force on Law Schools and the Profession: Narrowing the Gap concluded, "[I]t has become increasingly clear that every lawyer is obliged as a practical matter to limit the subjects on which he or she will keep abreast and develop particular competence."⁹

Lawyers today commonly make claims of specialization.¹⁰ Part of the

4. David Stevens, *Are You Partnership Material?*, BARRISTER, Fall 1992, at 14, 15.

5. *Id.*

6. *Id.* at 15-16.

7. Bruce Rubenstein, *Airlines Demanding Huge Cuts in Legal Fees: Will They Get Cuts in Quality, Too?*, CORP. LEGAL TIMES, June 1993, at 1, 36 (quoting William A. Brewer, III).

8. See Simon H. Rifkind, *Shift to Specialization Biggest Change in Law*, N.Y. L.J., May 23, 1988, at S36. Rifkind, a former federal judge, is a name partner in the large New York law firm Paul, Weiss, Rifkind, Wharton & Garrison. An indication of the trend toward specialization is the existence in the ABA's Section of Litigation of 25 committees on substantive law. The inside back cover of every issue of *Litigation* lists the committees.

9. TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT-AN EDUCATIONAL CONTINUUM 42 (1992) [hereinafter, MACCRATE REPORT] (footnote omitted).

10. The July 1993 issue of *Wisconsin Lawyer*, for example, contained four professional announcements of certification of specialization or induction into specialized legal societies. See *Personal Mentions*, WIS. LAW., July 1993, at 58. Other professional announcements in that issue, largely announcements of employment changes, usually included statements indicating the limitations of the individual's practice. See *id.* (containing announcements placed by attorneys, generally noting that their "practice is limited to," or that they "concentrate in," particular types of legal matters). These announcements, in a state whose supreme court has just recently *rejected* an effort to "certify the certifiers," suggest a profound change in the profession's understanding of what it means to be a lawyer.

In early 1992, the Board of Governors of the State Bar of Wisconsin voted 29-4 to request the Supreme Court of Wisconsin to create a State Board of Legal Certification, which would not certify lawyers as specialists, but would regulate those agencies that did. Lawyers could use approved certifications in advertisements. See *Governors Back Proposal for State Board to 'Certify the Certifiers'*, NEWSL. ST. B. WIS., Apr. 1992, at 1. The proposed rule was published in the February 1993 issue of *Wisconsin Lawyer*. See *In the Matter of the Amendment of Supreme Court Rules: SCR Chapter 14 Lawyer Specialization*, WIS. LAW., Feb. 1993, at 47.

present claim to professional status in the practice of law is the achievement of expertise not in “law” as such, but in particular fields or aspects of law. It is the lawyer’s expertise in environmental law, bankruptcy, or real estate, not the lawyer’s degree in law or licensure by the state, that permits the lawyer to claim the mantle of professional. As stated in the *MacCrate Report*, “changing law and new complexities have put an increasing premium on specialization to maintain competence and to keep abreast of subject matter.”¹¹ Thus, Victoria Stewart’s claim was that Jackson & Nash denied her the opportunity to claim true professional status.

This claim of professional status, of course, often carries with it the economic benefits accorded professionals and other experts in modern American society. Just as important, however, is that this claim of professional status accords the claimant a more respected position within the legal profession. The *Wall Street Journal*’s report of Stewart’s case, for example, notes with apparent sympathy that Stewart “now practices general insurance defense law in California.”¹²

It was not always so. The September 1939 issue of *The Reader’s Digest* contains a condensed version of Bellamy Partridge’s book *Country Lawyer*.¹³ The book is the story of the life of Samuel Selden Partridge, the author’s father, a lawyer in a small town in upstate New York during the Gilded Age. In praising his father’s work, Partridge wrote, “The city lawyer can specialize in whatever field he likes. But the country lawyer must be ready to handle almost any kind of case that comes along.”¹⁴

Echoing this romantic perception of the country lawyer was Robert H. Jackson, who, before entering President Franklin Delano Roosevelt’s administration and later joining the Supreme Court, practiced law for many years in the small city of Jamestown, New York. About the country lawyer, Jackson wrote:

The Wisconsin Supreme Court recently rejected the proposal. *See Supreme Court Rejects Specialization Board, Pro Hac Vice Proposals*, NEWSL. ST. B. WIS., Aug. 1993, at 1.

On the other hand, at its recent convention, the ABA approved certification programs of the American Bankruptcy Board of Certification, the National Board of Trial Advocacy, and the Commercial Law League of America. *See* Ellen J. Pollock, *Certification Approved*, WALL ST. J., Aug. 17, 1993, at B2; *Small Steps*, A.B.A. J., Oct. 1993, at 125.

11. MACCRATE REPORT, *supra* note 9, at 40. The report continued, “Although solo and small-firm practice continues predominately to serve individual clients, the lawyers in these practice settings, like in all other practice settings, are increasingly becoming ‘specialists.’” *Id.*

12. *See* Ellen J. Pollock, *Firms Liable for Promises to Employees*, WALL ST. J., Oct. 7, 1992, at B1, B6. This strikes me as revealing in two respects: first, it indicates that the firm for which she worked was not prestigious enough to mention; second, it indicates that her claim was valid, for she now practiced “general insurance defense law,” not environmental law.

13. *See* Bellamy Partridge, *Country Lawyer*, in READER’S DIG., Sept. 1939, at 111 (condensed version of BELLAMY PARTRIDGE, *COUNTRY LAWYER* (1939)).

14. *Id.* at 117.

He did not specialize, nor did he pick and choose clients. He rarely declined service to worthy ones because of inability to pay. Once enlisted for a client, he took his obligation seriously. He insisted on complete control of the litigation—he was no mere hired hand. . . . The law to him was like a religion, and its practice was more than a means of support; it was a mission. He was not always popular in his community, but he was respected. Unpopular minorities and individuals often found in him their only mediator and advocate.¹⁵

These statements are important for the manner in which the lawyer is defined as a professional. Bellamy Partridge defined his father's professionalism as a lawyer as a consequence of his father's facility with "law," not just particular aspects of law. Robert Jackson defined a lawyer's professionalism as both a thorough knowledge of law and independence from both clients and the community in which the lawyer practiced law. The emblematic figure of the country lawyer was, of course, Abraham Lincoln.¹⁶

Country lawyers were not the only ones taking this approach. Shortly after World War II, a three-volume history of the large New York City law firm known presently as Cravath, Swaine and Moore, authored by name partner Robert T. Swaine, was privately published.¹⁷ The firm, famous in legal circles for institutionalizing the system of associates hired on salary to work solely on firm matters, had been pilloried regularly during the 1930s in the progressive press as a "law factory."¹⁸ Everything that appellation

15. Robert H. Jackson, *The County-Seat Lawyer*, 36 A.B.A. J. 497, 497 (1950). For more on Jackson, see generally EUGENE C. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* (1958); Philip B. Kurland, *Robert H. Jackson*, in 4 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 2543 (Leon Friedman & Fred L. Israel eds., 1969); 3 *MEMORIALS OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* 47-172 (Roger F. Jacobs ed., 1981).

16. See Charles W. Moores, *The Career of a Country Lawyer—Abraham Lincoln*, 35 A.B.A. REP. 440 (1910); William L. Ransom, *Abraham Lincoln...Profession a Lawyer*, Address at the Annual Dinner of the Peoria Bar Association (Feb. 15, 1936), in 22 A.B.A. J. 155, 156 (1936) ("He attained professional distinction without leaving the ranks of those who will always be the great reservoir of strength and stability for our country and our profession—the country lawyer.") When he spoke those words, Ransom was President of the ABA. See *id.* at 155.

The Lincoln Legal Papers project, by searching nearly all of the county courthouses in Illinois, is in the midst of a thorough reconstruction of Abraham Lincoln's career as a lawyer in Illinois. See Joe P. Bean, *The Undiscovered (So Far) Lincoln*, SAN ANTONIO EXPRESS-NEWS, Sept. 30, 1993, at 6-B; Cameron McWhirter, *Unveiling the Mystery of Lincoln's Early Years*, SAN ANTONIO EXPRESS-NEWS, Oct. 3, 1993, at 1-L.

17. See ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS: 1819-1947* (1946-48).

18. Ferdinand Lundberg, *The Law Factories: Brains of the Status Quo*, 179 HARPER'S MAG. 180, 189 (1939). Karl Llewellyn earlier expressed the progressive concern with the influence of law factories in the legal profession. See K.N. Llewellyn, 31 COLUM. L. REV. 1215, 1217 (1931) (book review) ("Let this be written large, for senior partners in *law-factories* to ponder

brought to mind—from meaningless, repetitive work to treating law as a business rather than a profession—was anathema to Swaine. Swaine denied the charge that the lawyers of the Cravath firm were simply specialists,¹⁹ quoting at length Carl A. de Gersdorff's *Memorial* to his deceased partner Paul D. Cravath: "Cravath's organizing genius gradually transformed the firm into a cohesive team containing men both with training and experience designed to give them a comprehensive view of the problems of the office clients as well as specialists highly trained through concentration in particular fields"²⁰

Throughout American history, lawyers have defined and redefined what it means to be a lawyer.²¹ These acts of definition have been attempts to communicate reasons for extending authority to lawyers in a culture largely opposed to simple assertions of status and authority. The history of legal specialization is an important part of the modern (post-1870) history of the legal profession.

Although American lawyers have rarely defined "professionalism" in clear terms,²² they have relied repeatedly upon two justifications of the idea of law as a profession: (1) the acquisition of the particularized knowledge of law, and (2) independence from both clients and the market when engaged in the practice of law. The history of the legal profession's treatment of specialization is interwoven with the profession's views of the importance of knowledge and independence. In the early 1900s, some prominent members of the profession expressed dismay at the changes in the legal profession. Several biographies and autobiographies of prominent lawyers of the late nineteenth century noted the displacement of the advocate, or trial lawyer, by

on: Law does not exist for corporation executives alone.") (emphasis added).

19. See 1 SWAINE, *supra* note 17, at 575.

20. *Id.* (quoting Carl A. de Gersdorff). De Gersdorff's memorial tribute was published in the 1941 *Yearbook of the Association of the Bar of the City of New York* and can also be found in OTTO E. KOEGEL, WALTER S. CARTER: COLLECTOR OF YOUNG MASTERS OR THE PROGENITOR OF MANY LAW FIRMS app. V at 379-88 (1953).

21. See SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750-1900, at 67-87, 206-39 (1991); JAMES W. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 333-75 (1950). See generally DENNIS R. NOLAN, READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION (1980).

22. See Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in LAWYERS' IDEALS/LAWYERS' PRACTICES 189-91 (Robert L. Nelson et al. eds., 1992). A brief history of the rise of lawyer professionalism is contained in RICHARD L. ABEL, AMERICAN LAWYERS 44-48 (1989). Two books regularly cited by historians and sociologists of the legal profession are MAGALI S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977) and BURTON J. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA (1976).

the office, or corporate, lawyer at the pinnacle of the profession.²³ Those elder members of the profession greatly regretted the passing of the advocate from the apex of the profession and the devolution of the practice of law from a profession to a business. In their view, the increasing importance of the office lawyer was causing a decline in the profession of law because office lawyers, particularly office lawyers in large law firms, were no longer independent of their clients, but instead were captive employees of their clients. The gravest charge made against lawyers was the accusation attributed to Jay Gould: “[B]rains were the cheapest meat in the market.”²⁴ Those more accepting of the change of the work of the elite²⁵ lawyer claimed professional status for office lawyers by defending their independence. The apologists offered the oft-quoted statement of Elihu Root, for many the epitome of the independent corporate lawyer: “‘About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.’”²⁶

Office lawyers also were criticized for restricting their practices to particular substantive areas of law. Unlike the country lawyer, who knew “law,” the office lawyer knew only certain aspects of the law. The specialist’s concentration of knowledge affected his status as a professional in two ways: first, the specialist’s general ignorance prevented him from acting as an independent public servant; second, the specialist’s lack of general knowledge limited his judgment as a lawyer. The very attempt to specialize, then, formed the basis for a critique of the office lawyer’s lack of professionalism.

During the 1920s, the large law firm was institutionalized, and the corporate lawyer was established as the exemplar of the successful lawyer. A backlash against the work of the large-firm lawyer took place during the 1930s, but this backlash was not accompanied by an attack on the specialization found in the “law factory.” Instead of suggesting a return to the ideal of the generalist country lawyer, critics, largely progressive critics, suggested ways in which specialization might be used to benefit society rather than the interests of corporate clients of large law firms.

The call in the 1950s for increased professionalism in law included claims

23. See sources cited *infra* note 51.

24. George F. Shelton, *Law as a Business*, 10 YALE L.J. 275, 276 (1901).

25. By “elite” I mean only lawyers who practiced law in large law firms in major cities. This term is not a qualitative judgment of their work.

26. 1 PHILIP JESSUP, ELIHU ROOT 133 (1938) (quoting Elihu Root). However, Jessup also quoted a client of Root’s as saying, “I have had many lawyers who have told me what I cannot do; Mr. Root is the only lawyer who tells me how to do what I want to do.” *Id.* at 185. Jessup interpreted this comment, variously attributed to Thomas Fortune Ryan and William C. Whitney, as indicative of Root’s ability to solve complex business problems within the law, not as indicative of Root’s willingness to bend the law for essentially illegal or immoral purposes. See *id.* at 185-87.

of the necessity of legal specialization. At that time, proponents of specialization flipped the traditional argument of lawyer professionalism on its head. One aspect of this new argument was that the explosive growth in complexity of law, particularly federal law, ethically (or professionally) required lawyers to place limits on their practices. Instead of claiming knowledge of all of law, true professionals limited their practices to areas in which they were expert. A second aspect of this argument was that particular expertise allowed lawyers greater independence from clients. The expertise of legal specialists made them authorities in particular fields of law, an authority which allowed them to be more than the instruments of their clients' private interests and desires.

Most of the proponents of this new definition of professionalism were academics and large-firm lawyers. Opposing this redefinition of the professional was the successor to the country lawyer: the general practitioner. General practitioners, like trial lawyers and country lawyers before them, retained the earlier notion of professionalism: because professionalism required a lawyer's knowledge of law as such, any diminution in the amount of law known by lawyers lessened the lawyer's professional standing.

The largest and most influential institution through which lawyers tried to promote the formal recognition of specialization was the American Bar Association (ABA). The ABA's initial response to suggestions to acknowledge and regulate specialization by lawyers was the classic bureaucratic response: during the 1950s and 1960s, the ABA fashioned several committees which attempted to craft a proposal allowing state bar associations to recognize specialization. With but a slight exception, the proposals of these committees failed miserably. In the 1960s, the pressure to permit recognition of specialties intensified. The institutional bar continued to state the goals of specialization in professional terms, and implied that resistance to formal recognition of specialization was based on economic, that is, nonprofessional reasons. By the end of the 1970s, the ABA adopted a *Model Plan of Specialization*, and several states, including California and Texas, structured specialization plans. By that time, specialization in the practice of law was acknowledged as part of the "professionalism" of lawyering. Opposition to legal specialization was no longer undertaken by the country lawyer or general practitioners, but by those claiming that specialization was an attempt by the bar to extract monopolistic prices for legal services.

Lawyers not part of the elite of the profession first viewed the formal acknowledgment of specialization as a way to create even more hierarchical divisions within the bar. It was one thing for elite lawyers quietly to specialize; it was another for the bar to formally recognize this as an aspect of the professionalism of a lawyer. This formal recognition placed general practitioners at a competitive disadvantage in relation to elite lawyers and undermined their independence from their clients, because the general practitioners' claims to knowledge were made more tenuous.

Formal recognition of legal specialization was largely underway when the

Supreme Court decided *Bates v. State Bar*,²⁷ which constitutionally protected the commercial speech of lawyers. The *Bates* decision had a twofold impact on the specialization movement: it both hastened the process of formally recognizing specialties and made formal recognition superfluous. Constitutional protection of commercial advertising by lawyers displaced the legal profession from its claimed position between the state and the marketplace. The fear generated by *Bates* was the regularly recurrent fear within the legal profession that the practice of law would devolve from a profession to a business. However, *Bates* also gave advocates of specialization the opportunity to use the economic threat posed by legal clinics to create acceptance by general practitioners of this new understanding of professionalism. The ability of general practitioners to advertise themselves to prospective clients as specialists in bankruptcy, personal injury law, labor law, consumer litigation, or the like, was not only an effective economic weapon against legal clinics, but reestablished lawyers' claims to a particular knowledge that made them professionals. For lawyers whose clients were largely individuals this claim of particularized knowledge also led to a renewed claim of independence from the market and, in addition, to a "unity" with specialists in large law firms and a separation from lawyers practicing in clinics. Finally, because the original arguments in the 1950s and 1960s in favor of formal recognition of specialists were couched in terms of competent legal service, access to justice, and greater benefits to the client, lawyers serving individuals used the same arguments to stave off the claims that advertising would lead to the decline of the legal profession and that specialization was no more than a form of economic rent-seeking. But although *Bates* hastened the process of formally establishing recognized specialties, the Supreme Court's decision in *Peel v. Attorney Registration and Disciplinary Commission*²⁸ has effectively ended the process, for the Court's decision effectively negates the power of bar associations to regulate claims to specialization.

If all this is true, then there has been a transformation in lawyers' understanding of the reasons justifying their position in society and, therefore, a transformation in their understanding of what it means to be a "professional." Although this transformation has taken place in part for instrumental reasons,²⁹ I will focus in this article on the ideological reasons for this transformation. The ideological reasons include: the influence of the ABA in

27. 433 U.S. 350 (1977).

28. 496 U.S. 91 (1990).

29. The instrumental reasons are the usual suspects: the industrialization of the United States; the economic value of expertise, or product differentiation; the development and growth of the large law firm; the impact of the regulatory state on the practice of law (and the creation of that species of lawyer known as the "Washington lawyer"); the increasing proliferation of well-paying institutional clients like large corporations; and, recently, the influence of advertising by lawyers and the decline of the notion of loyalty between law firm and lawyer.

promulgating and proselytizing specialization standards; a continuing insistence by the legal profession of the importance of the idea of a unified bar; the large increase in size and influence of the legal academy, consisting of persons usually "specializing" (as teacher, scholar, or consultant) in no more than a few subject areas of law; the American culture's amazing faith in experts, and the ever-narrowing refinements of expertise; and, most importantly, a continued belief by lawyers in the ideals of "professionalism," an ideal that distinguishes the practice of law from business.

II. THE AUTHORITY OF LAWYERS

Historians and sociologists of the legal profession turn regularly to de Tocqueville to explain why lawyers in America have traditionally been accorded such tremendous authority and power in an officially nonhierarchical society. De Tocqueville observed that "lawyers . . . form the highest political class and the most cultivated portion of society."³⁰ This has, for most of American history,³¹ reflected the position of lawyers. This authority traced itself not only to the belief (or faith, if you will) in law, but to the belief by lawyers themselves in the importance of understanding the "artificial Reason and Judgment of Law."³²

In his fascinating study of the history of professional authority in the United States,³³ Professor Samuel Haber suggested that during the last half of the eighteenth century and the early part of the nineteenth century, lawyers were able to claim honor and authority in the practice of law for two reasons: (1) a lawyer practicing law treated it as an honored profession rather than a trade; and (2) a lawyer understood that practicing law was not simply the application of the lawyer's skills or techniques, but a knowledge of the science of law.³⁴ Haber's model was James Wilson, signatory to the Constitution, Supreme

30. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 278 (Henry Reeve trans. & Phillips Bradley ed., 1945) (1835).

31. The long, dark night of the Jacksonian era eclipsed, for a time, the authority of lawyers in American society, and has been a sore spot for apologists of the legal profession. See DEREK BOK, *THE COST OF TALENT: HOW EXECUTIVES AND PROFESSIONALS ARE PAID AND HOW IT AFFECTS AMERICA* 27 (1993) ("The years from 1830 to 1870 proved to be the nadir of the legal profession."); ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 223-49 (1953) (calling the period "The Era of Decadence"). But see GERARD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS 1760-1840*, at 168-97 (1979) (concluding that by 1840, the legal profession in Massachusetts was immune from frontal attacks on its authority).

32. STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY* 8 (2d ed. 1989) (quoting Sir Edward Coke's report of his response to King James I's claim to supreme authority to interpret the law).

33. HABER, *supra* note 21.

34. See *id.* at 86.

Court Justice, and first lecturer in law at the University of Pennsylvania. For Wilson, “[t]he lawyers who practiced law as a profession . . . looked to the underlying principles of science, and, secure in these, could range widely and boldly in their practice.”³⁵

This twofold understanding of the profession of law was also exemplified in sentiments offered by two famous antebellum Massachusetts lawyers, Daniel Webster and Joseph Story. Webster’s biographer, Claude Fuess, quoted a letter from Webster dating to the earliest days of his law practice: “Our profession is good if practised in the spirit of it; it is damnable fraud and iniquity, when its true spirit is supplied by a spirit of mischief-making and money-catching.”³⁶ As a young man, Joseph Story wrote a friend, “Law I admire as a science; it becomes tedious and embarrassing only when it degenerates into a trade.”³⁷

In 1871, in the Preface to his *Cases on Contracts*, Dean Christopher Columbus Langdell connected university-based legal training with the notion of law as a science.³⁸ He repeated that theme in 1886 on the occasion of the 250th anniversary of the founding of Harvard College:

[To improve the Harvard Law School, i]t was indispensable to establish at least two things: first, that the law is a science; secondly, that all the available materials of that science are contained in printed books. If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practises it. If it be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences.³⁹

The idea that law is a science has had a powerful hold on American lawyers.⁴⁰ Thomas Jefferson wrote that the science of law would be

35. *Id.*

36. 1 CLAUDE M. FUESS, DANIEL WEBSTER 86 (1930) (quoting January 19, 1806 letter of Daniel Webster). Webster later was notorious for his avarice. See James W. Ely, Jr., *Book Review*, 8 CONST. COMMENTARY 246, 248 (1991) (reviewing THE PAPERS OF DANIEL WEBSTER, LEGAL PAPERS, VOLUME 3: THE FEDERAL PRACTICE (Andrew J. King ed., 1989)) (quoting disgruntled client as saying “Webster, like all the Lawyers, is unreasonable in relation to Money Matters.”).

37. Joseph Story, Letter to Thomas Welch (Oct. 19, 1799), in 1 LIFE AND LETTERS OF JOSEPH STORY 81, 83 (William W. Story ed., 1851).

38. See C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871).

39. Christopher C. Langdell, Address at the Commemoration of the 250th Anniversary of the Founding of Harvard College (Nov. 5, 1886), in A RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE 85 (1887).

40. See generally THE GLADSOME LIGHT OF JURISPRUDENCE (Michael H. Hoeflich ed., 1988)

threatened if it were not protected from lower classes of attorneys.⁴¹ In 1827, Lemuel Shaw, Chief Justice of the Supreme Judicial Court of Massachusetts from 1830 to 1860, said, “[T]he law is a science founded upon reason and principle, and no law can stand the test of strict inquiry which palpably violates the dictates of natural justice”⁴² George Sharswood, whose 1854 essay on professional ethics became the primary source for the legal profession’s 1908 *Canons of Professional Ethics*, wrote: “The American lawyer must thus extend his researches into all parts of the science, which has for its object human government and law. . . .”⁴³ In his biography of Joseph H. Choate, Theron Strong favorably compared the “court lawyer” to the “business lawyer” on the ground that “[t]he business of the Court lawyer calls for intellectual capacity of a high order, developed by assiduous study of the law as a science, and by literary culture.”⁴⁴ And in two essays concerning the legal thought and practice of elite lawyers from 1870 through the early years of the twentieth century, Professor Robert W. Gordon noted the recurrent theme of the development of the science of law.⁴⁵

The other pillar of professionalism, independence, was tied to the notion of the lawyer as “officer of the court.”⁴⁶ As an officer of the court, a lawyer

(collecting speeches from 18th- and 19th-century lawyers which often advert to the idea of law as a science). I have discussed the connection between the development of the modern legal profession and the belief that law is a science in Michael Ariens, *Modern Legal Times: Making a Professional Legal Culture*, 15 J. AM. CULTURE 25 (1991).

41. “I think the bar of the General Court a proper and an excellent nursery for future judges if it be so regulated as that science may be encouraged and may live there. But this can never be if an inundation of insects is permitted to come from the county courts and consume the harvest.” Thomas Jefferson, Letter to George Wythe (Mar. 1, 1779), in 2 THE WRITINGS OF THOMAS JEFFERSON 166 (Paul L. Ford ed., 1893), quoted in ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 404 (1921).

42. Lemuel Shaw, Profession of the Law in the United States, Address before the Suffolk, Mass. Bar (May 1827), in 7 AMER. JURIST AND L. MAG. 56, 68 (1832).

43. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 26 (5th ed. 1884), reprinted in 32 A.B.A. REP. 26 (1907).

44. THERON G. STRONG, JOSEPH H. CHOATE 128 (1917).

45. The essays are Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920* [hereinafter Gordon, *Legal Thought and Legal Practice*], in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 82-90 (Gerald L. Geison ed., 1983); Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1870-1910* [hereinafter Gordon, *The Ideal and the Actual*], in THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 51, 52-57 (Gerard W. Gawalt ed., 1984) [hereinafter THE NEW HIGH PRIESTS].

46. See JULIUS H. COHEN, THE LAW: BUSINESS OR PROFESSION? 22 (rev. ed. G.A. Jennings Co. 1924) (photo. reprint 1979) (“It is because of the lawyer’s position as an *officer of the court* that the disciplinary process is made practicable.”); ARTHUR H. DEAN, WILLIAM NELSON CROMWELL 1854-1948: AN AMERICAN PIONEER IN CORPORATION, COMPARATIVE, AND INTERNATIONAL LAW 167 (1957) (claiming that William Cromwell, a first-generation office lawyer, “never forgot that he was first and foremost an ‘officer of the court’”); HABER, *supra*

was under a duty to serve the interests of justice, not just the interests of the client. Even though the client paid for the lawyer's service, the lawyer was a professional, whose main purpose was "[p]ursuit of the learned art in the spirit of a public service."⁴⁷ Because the making of money was merely an incidental purpose of the legal profession,⁴⁸ the lawyer's duty to the cause of justice should not and could not be purchased by the client. Once elite legal practice shifted from advocacy to office practice, however, the concept of the lawyer as an "officer of the court" was stripped of its original meaning. Lawyers' claims that their public duties made them independent of their clients were no longer available. Coupled with the increasing wealth generated by such office lawyers and the firms built around corporate practice, the prominence of the office lawyer threatened the identity of the profession as a profession.

At the same time, however, the increasing complexity of the work undertaken by lawyers, particularly office lawyers, created a greater strength in the "law as science" concept.⁴⁹ Knowledge remained a necessary component of being a true professional. However, the professionalism of office lawyers was attacked because their narrow expertise robbed them of any breadth of judgment.⁵⁰

note 21, at 208 (citing, among others, Thomas Cooley); BERYL H. LEVY, CORPORATION LAWYER: SAINT OR SINNER? 173-74 (1961) (linking the independence of lawyers to the idea of the lawyer as "officer of the court"); REED, *supra* note 41, at 3 ("From their earliest origins the law has accorded to these 'officers of the court' certain special and exclusive privileges, which set them apart from the mass of the people as truly as if they were, in a strict sense, public officials."); SHARSWOOD, *supra* note 43, at 58 & nn.1-2; *id.* at 83 ("Now the lawyer is not merely the agent of the party; he is an officer of the court."); Alfred Hemenway, The American Lawyer, Address at the 1905 Annual Meeting of the American Bar Association, in 28 A.B.A. REP. 390, 390 (1905) ("On admission to the Bar each [lawyer] becomes an officer of the court."); William L. Ransom, Some Impressions of American Lawyers Today, Address at the 1936 Annual Meeting of the American Bar Association, in 22 A.B.A. J. 663, 664 (1936) (commenting as ABA President that "[t]he Bar and people are coming to realize that lawyers as well as Courts are a vital part of the administration of impartial justice under law; that the lawyers of a State are the officers of its Courts and are responsible to its Courts"); *An Ancient And Honorable Profession*, 11 MARQ. L. REV. 113, 113 (1927) ("The law is an ancient and honorable profession. An attorney at law is an officer of the court, and an inherent part of our judicial system.") (quoting *In re Board of Law Examiners*, 210 N.W. 710, 711 (Wis. 1926) (Doerfler, J.)).

47. POUND, *supra* note 31, at 5.

48. *Id.*; accord CANONS OF PROFESSIONAL ETHICS Canon 12 (1908) ("In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.").

49. See essays cited *supra* note 45.

50. See Louis D. Brandeis, The Living Law, Address to the Chicago Bar Association (Jan. 3, 1916), in 10 ILL. L. REV. 461, 469-70 (1916) ("The growing intensity of professional life tended also to discourage participation in public affairs, and thus the broadening of view which comes from political life was lost. The deepening of knowledge in certain subjects was purchased at the cost of vast areas of ignorance and grave danger of resultant distortion of judgment."); Robert H. Jackson, Address to Beaver County Bar Association, Beaver Falls, Pennsylvania (Mar.

III. A HISTORY OF SPECIALIZATION

A. *The Changing of the Bar: 1870-1900*

During the last third of the nineteenth century, the work of both elite and nonelite lawyers changed markedly. This change apparently precipitated a crisis of professionalism among elite lawyers during the first decade of the twentieth century, a crisis caused in part by a fear of the impact of increased lawyer specialization.

A number of biographies exist of elite lawyers whose practices encompassed much of the Gilded Age.⁵¹ These works, written between 1917 and 1940 and almost exclusively concerned with the practice of law in New York City, unanimously agreed that the “great” lawyers before the turn of the century were advocates, or in today’s parlance, trial lawyers.⁵² Underlying the authors’ extensive recounting of the relationship of the subjects to the great events or great people of their times, however, were efforts to recount the lost golden age of the legal profession. A wistfulness is evident on the part of the authors (and often on the part of the subjects as well) for a type of legal

30, 1935), *quoted in* Eugene C. Gerhart, *Organization for the Practice of Law: How Lawyers Conduct Their Practice*, 37 A.B.A. J. 729, 731 (1951) (“No person who rightly appreciates the advantages of the division of labor will deny an important place in an advisory and consultive way to the specialist, but his seat is not the seat of judgment. That calls for a breadth of view and understanding that may not be so deep as the specialist’s, but must be broader.”); Shelton, *supra* note 24, at 279 (“Specialization in the law and the devotion of years to a perfection of knowledge in one branch, results in only a partially developed man.”).

51. Some of those biographies are: JOSEPH S. AUERBACH, *THE BAR OF OTHER DAYS* (1940) (a collection of short biographies); CHESTER L. BARROWS, *WILLIAM M. EVARTS: LAWYER, DIPLOMAT, STATESMAN* (1941); WILLIAM N. BRIGANCE, *JEREMIAH SULLIVAN BLACK: A DEFENDER OF THE CONSTITUTION AND THE TEN COMMANDMENTS* (1934); ALEXANDER C. FLICK, *SAMUEL JONES TILDEN: A STUDY IN POLITICAL SAGACITY* (1939); *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* (David J. Danelski & Joseph S. Tulchin eds., 1973) [hereinafter *AUTOBIOGRAPHICAL NOTES OF HUGHES*]; PHILIP C. JESSUP, *ELIHU ROOT* (1938); and EDWARD S. MARTIN, *THE LIFE OF JOSEPH HODGES CHOATE* (1920); STRONG, *supra* note 44; and THERON G. STRONG, *LANDMARKS OF A LAWYER’S LIFETIME* (1914). An excellent study of prominent lawyers in late-19th-century New York City is contained in GEORGE MARTIN, *CAUSES AND CONFLICTS: THE CENTENNIAL HISTORY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, 1870-1970* (1970) [hereinafter *GEORGE MARTIN, CAUSES AND CONFLICTS*]. An autobiography that focuses on a slightly later period is GEORGE W. PEPPER, *PHILADELPHIA LAWYER* (1944).

Although these works are more hagiography than biography, they provide helpful insights. The most successful portrayals are Jessup’s *Elihu Root*, a very sympathetic but full discussion of Root’s work, and Brigance’s *Jeremiah Sullivan Black*, which successfully rescues a figure from oblivion.

52. *See, e.g.*, BARROWS, *supra* note 51, at viii (“[Evarts’s biography] will preserve to posterity the portraiture of a great lawyer and advocate of the time before the day of specialists when the leaders of the American Bar were great lawyers and advocates”) (quoting George F. Hoar).

practice no longer undertaken by elite lawyers, and one result was that the authors discussed the “great” cases tried by nineteenth-century lawyers in great detail.

For example, the biographers of Joseph Hodges Choate and William M. Evarts, long partners in the firm of Evarts, Southmayd and Choate, spent a great deal of time regaling the reader with stories of cases tried against or with James Coolidge Carter,⁵³ David Dudley Field,⁵⁴ William Curtis Noyes,⁵⁵ and Charles O’Conor.⁵⁶ At some point before the end of the century, the authors dejectedly noted, there was a shift in the practice of law from the advocate to the “office lawyer.”⁵⁷ One reason for the unhappiness of the biographers was the passing of the individual lawyer from the center of study and a turn to the importance of the large law firm.⁵⁸ A second reason was the perception that this change in the “best” lawyers was a cause of the decline in the idea of law as a profession.

The best example of this change in the practice of law is found in *The Autobiography of Thomas L. Chadbourne*.⁵⁹ Chadbourne began his career

53. James Coolidge Carter (1827-1905) is best remembered today as a vociferous foe of codification efforts led by his rival David Dudley Field. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 403-05 (2d ed. 1985). According to George Martin, Carter “was probably the most famous lawyer of the 1890’s.” GEORGE MARTIN, CAUSES AND CONFLICTS, *supra* note 51, at 173. Although no full-length biography of Carter exists, a couple of short ones are Frederick C. Hicks, *James Coolidge Carter*, in 4 DICTIONARY OF AMERICAN BIOGRAPHY 536 (Allen Johnson & Dumas Malone eds., 1943), and George A. Miller, *James Coolidge Carter*, in 8 GREAT AMERICAN LAWYERS 3 (William D. Lewis ed., 1909).

54. David Dudley Field (1805-94) was the author of the Field Code, New York’s Code of Civil Procedure, and was an ardent proponent of codification of the laws. See generally HENRY M. FIELD, THE LIFE OF DAVID DUDLEY FIELD (1898); DAUN VAN EE, DAVID DUDLEY FIELD AND THE RECONSTRUCTION OF THE LAW (1986); Frederick C. Hicks, *David Dudley Field*, in 6 DICTIONARY OF AMERICAN BIOGRAPHY 360 (Allen Johnson & Dumas Malone eds., 1943); Helen K. Hoy, *David Dudley Field*, in 5 GREAT AMERICAN LAWYERS 125 (William D. Lewis ed., 1908).

55. According to William Evarts’s biographer, William Curtis Noyes (1805-64) was not as well known as several other New York lawyers, “but Evarts never opposed a higher type of lawyer.” BARROWS, *supra* note 51, at 59. GREAT AMERICAN LAWYERS contains no biography of Noyes, but a brief essay on Noyes can be found in Austin L. Moore, *William Curtis Noyes*, in 13 DICTIONARY OF AMERICAN BIOGRAPHY 592 (Dumas Malone ed., 1943).

56. Charles O’Conor (1804-84) was the oldest of these advocates. He always practiced without partners, though he used future Harvard Law School Dean Christopher Columbus Langdell as an assistant to help prepare cases. See GEORGE MARTIN, CAUSES AND CONFLICTS, *supra* note 51, at 20 & n.*. No full-length biography of O’Conor exists, but see Henry E. Gregory, *Charles O’Conor*, in 5 GREAT AMERICAN LAWYERS 81 (William D. Lewis ed., 1908), for a short biography of O’Conor.

57. See, e.g., GEORGE MARTIN, CAUSES AND CONFLICTS, *supra* note 51, at 187.

58. Law firm biographies not cited elsewhere include WILLIAM W. CLARY, HISTORY OF THE LAW FIRM OF O’MELVENY AND MYERS: 1885-1965 (1966) and HENRY TAFT, A CENTURY AND A HALF AT THE NEW YORK BAR (1938).

59. THE AUTOBIOGRAPHY OF THOMAS L. CHADBOURNE (Charles C. Goetsch & Margaret L.

in Chicago as a clerk to former Judge Russell Wing, a trial lawyer.⁶⁰ In 1893, Chadbourne moved to Milwaukee to open his own practice.⁶¹ In his view, the panic of 1893 “worked a tremendous change in the legal profession.”⁶² Chadbourne turned from representing individuals in the trial of civil and criminal cases to working in behalf of corporations whose operations were affected by laws regulating commerce. Three years later and only twenty-five years old, Chadbourne returned to Chicago to practice law with Judge Wing.⁶³ He wrote that he intended to “work a change in Wing’s practice.”⁶⁴ Although Chadbourne initially accepted criminal and personal injury cases brought to the firm, he recalled, “It finally dawned on me that with the same thought and energy, we could make much more money by changing our practice and making it more corporate and commercial and less trial and criminal.”⁶⁵ At the age of thirty-one, Chadbourne moved to New York City and practiced corporate law exclusively.⁶⁶ His practice, combined with interrelated business ventures, made Chadbourne a multi-millionaire. Chadbourne’s writing contained none of the wistfulness found in the generation of elite lawyers that preceded him. There was only the quest for the deal, and for money.

That a desire for wealth was the reason Chadbourne decided to become an office lawyer did not make him exceptional. It is clear, from this distance, that the accumulation of wealth was the driving force behind much of the migration of the elite of the profession from court work to corporate work. First-generation corporate lawyers like William Nelson Cromwell, Francis Lynde Stetson and Paul D. Cravath earned enormous fortunes. Another first-generation office lawyer, John W. Sterling,⁶⁷ who “never under any circumstances appeared in court,”⁶⁸ made Yale University the residual beneficiary of his estate. By the time it was finally disbursed, the amount received by Yale totaled more than \$35,000,000.⁶⁹ Second-generation corporate lawyer John W. Davis, who first practiced law in West Virginia in the late nineteenth

Shivers eds., 1985). Chadbourne, with the help of journalist George Creel, penned this autobiography in 1928, when he was 57. Although he lived for another decade, he never updated this autobiography, which he wrote for his young daughters.

60. *See id.* at 20.

61. *See id.* at 27.

62. *Id.* at 28.

63. *See id.* at 31.

64. *Id.* at 34.

65. *Id.*

66. *See id.* at 49.

67. On Sterling, and the firm he helped found, see generally WALTER K. EARLE, SHEARMAN AND STERLING (1973).

68. GEORGE MARTIN, CAUSES AND CONFLICTS, *supra* note 51, at 194.

69. *Id.*; EARLE, *supra* note 67, at 188-89.

century, moved to New York City in 1921 and enjoyed an average annual income of \$400,000 before the end of the decade, although this declined to an average of \$275,000 after the Crash of 1929.⁷⁰ In the depression year of 1936, John Foster Dulles of Sullivan and Cromwell earned \$377,000.⁷¹

Because a lawyer's independence from both his client and the passions of the community was a strongly held justification for treating law as a profession rather than a business, the idea that the wealthiest lawyers might be dependent upon their clients was an extremely unattractive proposition to many lawyers. The fact that many of the wealthiest lawyers were perched atop large pyramids of lower-paid lawyers led to some distrust of the large law firm's professional ethos. At least two prominent lawyers who benefitted financially from this transformation of the legal profession, Charles Evans Hughes and Elihu Root, clearly attempted to distance themselves from any dependence on the clients of the large law firm.

After Charles Evans Hughes resigned from the Supreme Court and failed in his 1916 presidential bid, he returned to the practice of law. His *Autobiographical Notes* state, "I was especially desirous to have the position of independent counsel,"⁷² resulting in his declining offers to join Guggenheim Brothers and Cadwalader, Wickersham & Taft before finally deciding to rejoin his old law partners as counsel.⁷³ After serving for four years as Secretary of State to Presidents Warren Harding and Calvin Coolidge, Hughes again returned in 1925 to the private practice of law. He later wrote of this time, "As in the years before I became Secretary of State, I maintained a position of complete independence at the bar, taking cases which I thought should be argued, regardless of popular feeling, and refusing those in which for one reason or another I did not care to appear."⁷⁴ After Elihu Root first entered public life, his return, temporarily in 1904-05 and permanently in 1915, to the private practice of law did not involve joining a law firm as a partner. Root decided not to join his old law firm, but "confined himself to acting as

70. See Jerold S. Auerbach, *Lawyers and Clients in the Twentieth Century*, in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES* 353, 355 (Lawrence M. Friedman & Harry N. Scheiber eds., 1978). On Davis, see generally WILLIAM E. HARBAUGH, *LAWYERS' LAWYER: THE LIFE OF JOHN W. DAVIS* (1973).

71. NANCY LISAGOR & FRANK LIPSUS, *A LAW UNTO ITSELF: THE UNTOLD STORY OF THE LAW FIRM SULLIVAN AND CROMWELL* 110 (1988). Due to a new partnership agreement in which Dulles agreed to reduce his percentage of firm profits, this amount was actually lower than Dulles would otherwise have received. See *id.* at 109-10. Nearly half of American lawyers earned less than \$2,000 a year at the time. *Id.* at 109.

72. *AUTOBIOGRAPHICAL NOTES OF HUGHES*, *supra* note 51, at 186.

73. *Id.* at 186 & n.2.

74. *Id.* at 285. When Hughes was nominated for the second time to the Supreme Court in 1930, his nomination was nearly derailed by criticism of his affinity for work for wealthy corporations. *Id.* at 295-97. Hughes has been criticized for attempting to avoid the consequences of his choice to work in behalf of large corporations in Auerbach, *supra* note 70, at 355-56.

counsel.”⁷⁵

The decisions by Root and Hughes to act as independent counsel rather than as partners in law firms may be usefully contrasted with William Evarts’s decision in the 1880s. After serving as Secretary of State for President Rutherford B. Hayes from 1877 to 1881 and representing the United States for a short time at the Paris Monetary Conference, Evarts returned at age sixty-four to his old law firm and the practice of law. These divergent career decisions between Hughes and Root, on the one hand, and Evarts, on the other, suggest that between the 1880s and 1915 there was not only a substantial shift in the practice of law, but also a shift in the relations among lawyer, law firm, and client.

This shift in the practice of law has become part of the story of the rise of many of today’s large law firms. One example is the New York City law firm of Sullivan and Cromwell. The death of sixty-one-year-old Algernon Sullivan in December 1889 gave William Cromwell the opportunity to redirect the practice of the firm away from the courts, favored by Sullivan, and toward office practice, favored by Cromwell.⁷⁶ The shift in the relations among lawyer, law firm, and client was a precipitating cause in creating a crisis of professionalism. Although this crisis peaked roughly during the first two decades of the twentieth century, it remains with us today.

The standard story is that the increasing importance of the corporation in American economic development, and the legal fees generated by the need for corporate counselling, led to two developments: first, the substitution of corporate counselling for advocacy as the leading form of the practice of law; and second, the creation of the large law firm.⁷⁷ Hurst’s seminal history of American law places these changes in the practice of law in the late nineteenth century.⁷⁸ Samuel Haber’s work dates the rise of the large law firms at the

75. 1 JESSUP, *supra* note 26, at 413.

76. LISAGOR & LIPSIUS, *supra* note 71, at 23.

77.

Around the turn of the century, the professional talents of courtroom advocacy and brief-making were referred to again and again as “lost arts,” as the occupation of the successful lawyer centered more and more upon counseling clients and offering business advice. General and versatile talent, less needed than in the old days, was replaced by specialized practice and the division of labor within law firms. The firms themselves grew larger; the process of concentration and combination in business, which limited profitable counseling to fewer and larger firms, engendered a like concentration in the law. Metropolitan law firms, as they grew larger and more profitable, moved into closer relationships with and became “house counsel” of the large investment houses, banks, or industrial firms that provided them with most of their business. But the relation that was the source of profit brought with it a loss of independence to the great practitioners.

RICHARD HOFSTADTER, *THE AGE OF REFORM* 158-59 (1955).

78. See HURST, *supra* note 21, at 297-98, 306-07.

turn of the century.⁷⁹ George Martin's history of the Association of the Bar of the City of New York, a voluntary bar association of the most prominent lawyers in New York, suggests that the changes began about 1890,⁸⁰ and Chadbourne believed that the shift in practice was a consequence of the panic of 1893.⁸¹

Although it should not surprise lawyers that a depression may result in an increase in business, the instrumental reason for such an abrupt change can be traced to the particular work created by the panic: railroad reorganization.⁸² As noted by Paul D. Cravath nearly a quarter of a century later, the reorganization of a railroad's assets and liabilities rarely meant the dissolution of the railroad. That is, even during the period of reorganization, the continued existence of the railroad was a given, unlike the case in which a manufacturing company was reorganized.⁸³ Reorganization counsel, then, were given the opportunity to meet and impress future clients with their work reorganizing railroads. Chadbourne's autobiography makes clear that the reorganization lawyer's work was quite lucrative. These instrumental reasons,

79. See HABER, *supra* note 21, at 232-33.

80. GEORGE MARTIN, *CAUSES AND CONFLICTS*, *supra* note 51, at 187. At least one commentator of the time agreed, observing: "Litigation has declined, and counsel work has become the leading feature of practice. The chief forum of the lawyer has been transferred from the court house to the office." *The Decline of Litigation*, 1 AM. LAW. 5, 5 (1893) quoted in MORTON KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 350 (1977).

81. See THE AUTOBIOGRAPHY OF THOMAS CHADBOURNE, *supra* note 59, at 28; accord Robert T. Swaine, *Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A. J. 89, 89, 91 (1949) (noting that "during the 1880's and 1890's, many leading advocates of New York, Philadelphia, Boston and Chicago were devoting an increasing part of their practice to office work"). Walter Earle, partner in and historian of the law firm of Shearman & Sterling, suggested that the change in the practice of law began in 1873 with the advent of the industrialization of the United States. EARLE, *supra* note 67, at 28-29. Of course, that was also the year in which the firm of Shearman & Sterling was founded. *Id.* at 23. David Dudley Field's biographer Daun van Ee also suggested that the change in the practice of law occurred about 1870. VAN EE, *supra* note 54, at 218-19, 290. It was around this time that Field represented Jim Fisk and Jay Gould in the infamous Erie Railroad takeover battles. *See id.* at 221-31.

82. With a great deal of clarity, Professor Robert Gordon has explained the impact of railroad reorganization work on the practice of elite lawyers. See Gordon, *Legal Thought and Legal Practice*, *supra* note 45, at 101-09. An early criticism of the inefficiency of railroad reorganization, and the role played by lawyers in fostering this inefficiency is SAMUEL UNTERMYER, *THE LAWYER-CITIZEN—HIS ENLARGING RESPONSIBILITIES* 15-24 (1916) (address at the July 27, 1916 meeting of the Commercial Law League).

83. Paul D. Cravath, *The Reorganization of Corporations; Bondholders' and Stockholders' Protective Committees; Reorganization Committees; and the Voluntary Recapitalization of Corporations*, Lecture Before the Association of the Bar of the City of New York (Mar. 1 & 8, 1916), in *SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION* 153, 211-12 (1917).

in my view, helped change the practice of the elite lawyer.

But there was also another reason: the growth of law schools and law graduates. From 1870, when Langdell arrived at Harvard Law School, to 1890, the number of law schools nearly doubled, from thirty-one to sixty-one.⁸⁴ By 1910, the number of law schools had more than doubled again, to 124.⁸⁵ The number of law students enrolled in law schools increased from 1,653 in 1870 to 19,567 by 1910.⁸⁶ This massive rise in the number of law students, as demonstrated by Jerold Auerbach,⁸⁷ included a large number of post-Civil War immigrants, particularly Jews and Catholics whose parents (or who themselves) had emigrated from southern and eastern Europe.

At the same time that office practice became particularly lucrative, the number of lawyers increased dramatically, particularly in New York City, where elite lawyers were concentrated. The professional ethos would not permit elite lawyers to justify the shift in the practice of law solely for the reason that office practice paid better.⁸⁸ Instead, the argument for corporate practice as the leading form of practice was made for reasons of knowledge. Trial work came to be seen as beneath the level of professional complexity involved in corporate counselling. Elite corporate lawyers and their successors justified the transition on the basis that more knowledge of law was involved in corporate counselling than in trial work. Most trial lawyers were “unprofessional,” relying on their relationships with judges (a nod to the history of judicial corruption in New York) and obtaining work by peddling their licenses to “practice” law. Lurking behind this professional excuse was a class-based justification to separate office from trial lawyers. There were, then, ideological justifications for the shift.

During the first two decades of the twentieth century, however, some elite lawyers trained in the art of advocacy refused to accept this portrayal of the court lawyer. Instead of accepting as a given the greater legal complexity of corporate practice as compared with advocacy, these older elite lawyers contended that the art of advocacy was more difficult than office practice.⁸⁹

84. WAYNE K. HOBSON, *THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY, 1890-1930* at 108 tbl. 1 (1986).

85. *Id.*

86. *Id.*

87. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 50, 119-29 (1976).

88. Walter Earle's history of Shearman & Sterling allows that one of the reasons for the firm's turn to corporation law was monetary, but this reason was listed as the last of three reasons. EARLE, *supra* note 67, at 36 (“Besides, corporation law was becoming more interesting, more important, and more remunerative.”). Even after World War II, apologists for the large law firm downplayed the relationship between wealth and the practice of law in a large law firm. See DEAN, *supra* note 46, at 86-87; LEVY, *supra* note 46, at 166-69; HARRISON TWEED, *THE CHANGING PRACTICE OF LAW* 10 (1955).

89.

The successful lawyer is, at present, viewed from the standpoint of commercial

It was not until the 1920s that office practice came to be accepted as the "leading" form of legal practice. Its acceptance as such, however, led to a greater acceptance of the professionalism of the legal specialist.

The dichotomy between the work and position of the office lawyer and the advocate was enormous. The advocate was a public figure, practicing his art in the courtroom for juries, reporters and the general public; office lawyers were anonymous figures engaged in activities in the privacy of their offices. The advocate attracted business by making a reputation for himself in notorious cases drawing public attention; the office lawyer attracted business by directing public or governmental attention to anyone other than his client. The advocate, at least the plaintiff's attorney, represented most of his clients for one case only; the office lawyer might represent one client in a number of legal matters. The advocate represented an individualistic ethos; the office lawyer, as a member of a law firm, represented a collective ethos.⁹⁰

Some changes to the work of lawyers were accepted readily. The absorption of conveyancing work by title companies was defended on efficiency grounds.⁹¹ The deposing of the trial lawyer from the pinnacle of the profession, on the other hand, was resisted for reasons which today would be regarded as professionalism reasons. The office lawyer was attacked for lacking both independence from his client and knowledge of law.

B. *The Business of Lawyers: 1900-1945*

An article in the 1901 *Yale Law Journal* by a San Francisco lawyer named George Shelton set in relief the fear, as his title made clear, of *Law as a Business*.⁹² To Shelton, one cause of the decline of the profession of law was

shrewdness and a large professional income. The measure of his professional worth is his dollar-producing value. If this is the criterion of success, the business lawyer is undoubtedly successful, but he is not the great lawyer. His reward is pecuniary; that of his brother in the Courts is found in the estimation of his professional ability and skill by his brethren of the Bar, and an appreciative public. The business of the Court lawyer calls for intellectual capacity of a high order, developed by assiduous study of the law as a science, and by literary culture. That of the business lawyer is, to a large extent, commercial.

STRONG, *supra* note 44, at 127-28.

90. The biographies of the great advocates are all histories of the lawyers, not their firms. Conversely, the "biographies" of the founders of the large corporate law firms are more histories of the firms than biographies of the founders.

91. See George W. Bristol, *The Passing of the Legal Profession*, 22 *YALE L.J.* 590, 590-92 (1913); Robert T. Platt, *The Decadence of Law as a Profession and Its Growth as a Business*, 12 *YALE L.J.* 441, 442-44 (1903); COHEN, *supra* note 46, at 269-70. There was less joy, particularly by elite lawyers, about the creation of trust companies to handle work formerly monopolized by lawyers.

92. Shelton, *supra* note 24.

that “with the advent of the business lawyer has come also greed of gain as the prime incentive to professional activity.”⁹³ He also complained, “The mercenary spirit which governs the practice has made the contingent fee a legitimate source of income. The lawyer becomes the litigant himself.”⁹⁴ Shelton felt that contingent fees compromised the integrity of the attorney.⁹⁵ Furthermore, Shelton believed that the results of the rise of the large law firm were “the gradual decline of the country practitioner as an influential factor,”⁹⁶ and the disappearance of the independent lawyer.⁹⁷

Seven years later, the *Yale Law Journal* published an article, written by Champ Andrews, echoing that same theme. Titled *The Law—A Business or a Profession?*,⁹⁸ this tale of a conversation among a judge, a successful lawyer, and the lawyer’s law student son argued the debasement of law from a profession to a business. Andrews suggested that, “[n]owadays the bigger the lawyer, the more he becomes the clerk, the hired man of the business man.”⁹⁹

Another attack on the commercialization of the profession is found in *The American Lawyer: As He Was—As He Is—As He Can Be*, a book by John R. Dos Passos.¹⁰⁰ For the 63-year-old author, organizer of the Sugar Trust,¹⁰¹ the decline in the profession of law was closely connected to the change in the calling of the lawyer from advocate to office lawyer. The profitability of office practice, and the involvement of lawyers in the business affairs of corporate clients, utterly changed the legal profession. Dos Passos, like Shelton and Andrews, charged that “law has become a business.”¹⁰²

93. *Id.* at 277.

94. *Id.* at 279.

95. *See id.* at 279-80.

96. *Id.* at 280.

97. *Id.* at 281-82.

98. Champ S. Andrews, *The Law—A Business or a Profession?*, 17 *YALE L.J.* 602 (1908).

99. *Id.* at 608.

100. JOHN R. DOS PASSOS, *THE AMERICAN LAWYER: AS HE WAS—AS HE IS—AS HE CAN BE* (1907).

101. Gordon, *The Ideal and the Actual*, *supra* note 45, at 58.

102. DOS PASSOS, *supra* note 100, at 46. A similar complaint heard before the turn of the century is found in 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 492 (spec. ed. Legal Classics Library 1987) (1888):

But I am bound to add that some judicious American observers hold that the last thirty years have witnessed a certain decadence in the Bar of the greater cities. They say that the growth of enormously rich and powerful corporations, willing to pay vast sums for questionable services, has seduced the virtue of some counsel whose eminence makes their example important

One attempt to reinstall the ideals of the profession was the publication from 1907 to 1909 of *Great American Lawyers*, biographies of 96 deceased lawyers in eight volumes. The editor was William Draper Lewis, Dean of the University of Pennsylvania Law School, whose progressive efforts in the ABA and whose work as first director of the American Law Institute

At a speech before Harvard University alumni in June 1905, President Theodore Roosevelt prayed that businessmen and lawyers adopt lofty ideals in public life. He charged:

We all know that, as things actually are, many of the most influential and most highly remunerated members of the bar in every centre of wealth make it their special task to work out bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws which are made to regulate in the interest of the public the use of great wealth.¹⁰³

Roosevelt suggested that instead of blindly adopting the interests of their clients in evading the law, lawyers would better serve the public interest by creating a spirit of respect for law to “shap[e] the growth of the national soul.”¹⁰⁴

Roosevelt’s speech struck a nerve in the profession; a second event struck a nerve in the public. During the last half of 1905, in the Aldermanic chamber of New York’s City Hall, the Armstrong Committee, whose legal counsel was a New York lawyer named Charles Evans Hughes, investigated the scandal of the life insurance industry. The scandal began over the struggle by some of the great financiers of the day, including George Gould, E. H. Harriman, and Thomas F. Ryan, to take control over the Equitable Life Insurance Company.¹⁰⁵ Shortly after beginning his investigation, Hughes decided to investigate the entire life insurance industry. Hughes uncovered self-dealing, the payment of outrageously high salaries to management, dubious “investment” actions, a precipitous decline in dividends even when profits skyrocketed, and the self-perpetuation in office of directors and executives through the clever use of proxies.¹⁰⁶ From September through the end of December, Hughes’s investigation captivated the public’s interest. That there was a close connection between the insurance companies and elite

make him an interesting figure in the intellectual history of American law and the legal profession. On Lewis, see generally Stephen Botein, *William Draper Lewis*, in *DICTIONARY OF AMERICAN BIOGRAPHY: SUPPLEMENT FOUR, 1946-1950*, at 490 (John A. Garraty & Edward T. James eds., 1974).

103. Theodore Roosevelt, Address at Harvard University (June 28, 1905), in *4 THEODORE ROOSEVELT, PRESIDENTIAL ADDRESSES AND STATE PAPERS* 407, 419-20 (1910).

104. *Id.* at 420.

105. See MORTON KELLER, *THE LIFE INSURANCE ENTERPRISE, 1885-1910: A STUDY IN THE LIMITS OF CORPORATE POWER* 245-64 (1963); GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916*, at 94-95 (1963). For Hughes’s view of the Armstrong investigation, see *AUTOBIOGRAPHICAL NOTES OF HUGHES*, *supra* note 51, at 121-27.

106. See KELLER, *supra* note 105, at 253; GEORGE MARTIN, *CAUSES AND CONFLICTS*, *supra* note 51, at 197-98.

corporate lawyers did not endear the profession to the public.¹⁰⁷

At the ABA's 1905 annual meeting, its President, Henry St. George Tucker, used Roosevelt's speech as a catalyst to urge the Association to begin work on a code of ethics.¹⁰⁸ The delegates charged a committee with assessing the advisability of adopting a code of ethics.¹⁰⁹ At the ABA's next annual meeting, the committee recommended the appointment of another committee to draft such a code.¹¹⁰ The primary sources used for these canons of ethics were a series of lectures on legal ethics by a deceased Pennsylvania judge named George Sharswood¹¹¹ and Alabama's 1887 code of ethics. The ABA in 1907 published Sharswood's lectures as a volume of its series of annual reports¹¹² and adopted a total of thirty-two *Canons of Professional Ethics* at its 1908 annual meeting.¹¹³

The 1908 *Canons of Professional Ethics* contained at least two efforts to expunge "commercialism" from the legal profession: Canon 13, which concerned contingent fees, and Canon 27, which forbade lawyers to advertise. Canon 13 was the only canon proposed by the Committee on Canons of Ethics which was amended. As originally drafted, Canon 13 permitted contingent fees only in carefully regulated situations: "Contingent fees may be contracted for, but they lead to many abuses and should be under the supervision of the court."¹¹⁴ A number of ABA members vociferously opposed proposed Canon 13, defending contingent fee arrangements on both moral and professional grounds.¹¹⁵ Canon 13 was amended to permit lawyers a greater flexibility in taking a fee contingent on an award from the jury.¹¹⁶

107.

The problem for the legal profession in this was exemplified by Root, who was a director of Mutual Life. Though none of the revelations of the investigation specifically implicated him in the scandals, nevertheless he had been part of a system which the country condemned as dishonest and corrupting and which the state legislature now set out to reform.

GEORGE MARTIN, *CAUSES AND CONFLICTS*, *supra* note 51, at 198.

108. See Henry S. Tucker, Address of the President at the 28th Annual Meeting of the American Bar Association (Aug. 23, 1905), in 28 A.B.A. REP. 299, 383-88 (1905) (quoting Roosevelt, *supra* note 103).

109. See *Transactions of the 28th Annual Meeting of the American Bar Association*, 28 A.B.A. REP. 3, 132 (1905).

110. See *Report of the Committee on Code of Professional Ethics*, 29 A.B.A. REP. 600, 600 (pt. 1, 1906).

111. On Sharswood, see generally Samuel Dickson, *George Sharswood*, in 6 GREAT AMERICAN LAWYERS 123 (William D. Lewis ed., 1909).

112. See SHARSWOOD, *supra* note 43.

113. See *Transactions of the 31st Annual Meeting of the American Bar Association*, 33 A.B.A. REP. 3, 86 (1908).

114. *Transactions of the 31st Annual Meeting of the American Bar Association*, 33 A.B.A. REP. 3, 61 (1908).

115. See *id.* at 62-75.

116. In its final version, Canon 13 read: "Contingent fees, where sanctioned by law, should

Professor Jerold Auerbach has argued that the attack on the contingent fee was a class-based attack. In his telling, “[n]othing plunged the professional elite deeper into despair than contingent fees and the proliferation of negligence lawyers whose practice depended upon them.”¹¹⁷ I accept that the elite were overly concerned with the encampment of “negligence” lawyers in the legal profession; however, Auerbach’s history ignores the professionalism crisis created by the contingent fee. For many lawyers supporting the adopting of a code of ethics, the issue of contingent fees was at least as much about professional independence as about the exclusion of Jews (or Catholics or others) from the legal profession.

The regulation of contingent fees in the ABA’s *Canons of Professional Ethics* was a classic effort of progressive reformers. Like many progressive reforms, the *Canons* presented a number of conservative features. Yet the idea behind them was classically progressive because it attempted to create, in lawyers, a shield between the market and the system of justice. Today, the attempt in the early 1900s to regulate contingent fee agreements can be critiqued from either the right or the left. The attack from the right is that the market for contingent fee arrangements will solve most (and maybe all) inequities, and the attack from the left is, as Auerbach has argued, that the attempt to regulate contingent fee arrangements protects the economic interests of the proprietary class alone and attempts to maintain an ethnically pure legal profession. Although each argument contains some truth, both critiques fail to consider the desire of progressives to raise professional standards, bureaucratize institutions, and regulate economic markets. There was more than a touch of prejudice on the part of many elite lawyers; more crucial, however, is that the lawyer’s claim to professionalism was premised at least partly on his independence, and a failure to regulate contingent fee contracts affected the profession’s claim to independence.

Attacks on the unprofessionalism of contingent fees were not new. Sharswood’s 1854 *Essay on Professional Ethics* acknowledged the legality of contingent fees, but attacked them as ethically improper. Sharswood wrote:

It is to be observed, then, that such a contract changes entirely the relation of counsel to the cause. It reduces him from his high position of an officer of the court and a minister of justice, to that of a party litigating his own claim. Having now a deep personal interest in the event of the controversy, he will cease to consider himself subject to the ordinary rules of professional conduct.¹¹⁸

be under the supervision of the Court, in order that clients may be protected from unjust charges.” CANONS OF PROFESSIONAL ETHICS Canon 13 (1908).

117. AUERBACH, *supra* note 87, at 45.

118. SHARSWOOD, *supra* note 43, at 160. Sharswood’s entire discussion of contingent fees is found in *id.* at 153-64.

George Shelton's attack on the commercialism of the profession primarily attacked the business lawyer and secondarily attacked the contingent fee arrangement.¹¹⁹ Julius Henry Cohen's 1916 attack on the commercialization of the legal profession includes a strong criticism of the contingent fee arrangement, but his attack was less upon the availability of the arrangement than upon its unregulated use. Like Sharswood, Cohen believed that the contingent fee made the lawyer a principal in the litigation, clouded his judgment, and made him a speculator in lawsuits.¹²⁰ This did not mean that the arrangement was to be outlawed, for Cohen admitted, "[W]here the client is poor, this is perhaps the only way by which he may get adequate professional assistance."¹²¹ The real issue was the lawyer's independence, for Cohen claimed: "Yet every practitioner knows that the contingent fee arrangement is more often a convenience for the rich to join with a lawyer in speculation over the results of a lawsuit."¹²²

The contingent fee arrangement was a side issue for both Shelton and Cohen. To Cohen, writing after the adoption of the 1908 *Canons of Professional Ethics*, the main issue concerning the commercialization of the practice of law was the solicitation of clients, prohibited by Canon 27. In Cohen's view, once solicitation was permitted, the answer to the question posed by his book's title, *The Law: Business or Profession?*, was "business." Solicitation made law a trade, not a profession, and turned one's clients into customers. Not only did solicitation lead to the lawyer's dependence upon the client, it turned the lawyer from the ideals of disinterested service to the pursuit of wealth.

The first specific charge connecting legal specialization with the commercialization of the profession came in 1910. New Jersey gubernatorial candidate Woodrow Wilson gave the annual address at the ABA's annual meeting that year. Wilson's speech was titled *The Lawyer and the Community*.¹²³ Wilson began with the assertion that the whole history of society was

119. Shelton, *supra* note 24, at 279-80.

120. COHEN, *supra* note 46, at 209-10.

121. *Id.* at 209. A similar statement is in SHARSWOOD, *supra* note 43, at 154:

For a poor man, who is unable to pay at all, there may be a general understanding that the attorney is to be liberally compensated in case of success. What is objected to, is an agreement to receive a certain part or proportion of the sum or subject-matter, in the event of a recovery, and nothing otherwise.

122. COHEN, *supra* note 46, at 210. Whether or not this was true, Cohen's language makes clear that justifications of regulation of contingent fees necessarily were made on the basis of professionalism, not for economic or class reasons. A recent criticism of the inefficiency of the contingent fee is contained in BOK, *supra* note 31, at 141-44. To see Bok use arguments progressive reformers have used since at least the turn of the century is striking, but it should not be considered surprising.

123. See Woodrow Wilson, *The Lawyer and the Community*, Address at the 33d Annual Meeting of the American Bar Association (Aug. 31, 1910), in 35 A.B.A. REP. 419 (1910),

a struggle for law.¹²⁴ After spending some effort to prove this point, he then made the traditional knowledge-based claim of lawyers to authority: "We are lawyers. This is the field of our knowledge. We are servants of society, officers of the courts of justice."¹²⁵ But this was not how the profession acted.¹²⁶ Wilson then made the connection:

A new type of lawyers has been created; and that new type has come to be the prevailing type. Lawyers have been sucked into the maelstrom of the new business system of the country. That system is highly technical and highly specialized. It is divided into distinct sections and provinces, each with particular legal problems of its own. Lawyers, therefore, everywhere that business has thickened and had a large development, have become experts in some special technical field. They do not practise law. They do not handle the general, miscellaneous interests of society. They are not general counsellors of right and obligation. They do not bear the relation to the business of their neighborhoods that the family doctor bears to the health of the community in which he lives. The [sic] do not concern themselves with the universal aspects of society. The family doctor is himself giving place to a score of specialists; and so is also what one might call the family solicitor. Lawyers are specialists, like all other men around them. The general, broad, universal field of law grows dim and yet more dim to their apprehension as they spend year after year in minute examination and analysis of a particular part of it; not a small part, it may be, perhaps the part which the courts are for the time most concerned with, but a part which has undergone a high degree of development, which is very technical and many-sided, and which requires the study and practice of years for its mastery; and yet a province apart, whose conquest necessarily absorbs them and necessarily separates them from the dwindling body of general practitioners who used to be our statesmen.¹²⁷

Wilson's solution was that lawyers remember the ideal of service to which they were all called. The ideal of service necessitated that lawyers remain attuned to the general interest of the country. Specialization led to expert counselling of special interests, and the greatest special interest facing the country was the interest of the corporation, aided by the "corporation lawyer," in circumventing the law.¹²⁸ Specialization, then, was incompatible with the ideal of service, and incompatible with the definition of professionalism.

Printed immediately after Wilson's speech in the ABA's *Annual Report*

reprinted in Woodrow Wilson, *The Lawyer and the Community*, 192 N. AM. REV. 604 (1910).

124. *Id.* at 419.

125. *Id.* at 421.

126. *See id.* at 423.

127. *Id.* at 424-25.

128. *See id.* at 426-35.

is a paper by Charles W. Moores discussing the legal practice of Abraham Lincoln, the symbol of the country lawyer.¹²⁹ Lincoln was the type of lawyer held out to the public (and the profession) as embodying the best traits of the profession.¹³⁰ He practiced law in the traditional manner, representing clients in all kinds of legal matters, and representing any clients who came to him. He refused to let the passions of the community determine the vigor of his defense of one who was criminally accused, and he remained an independent lawyer who knew the whole field of law.

The internal crisis faced by the legal profession during the 1910s involved issues both of independence and of knowledge. Further, these issues were found in bold relief at both ends of the legal profession. The elite lawyer, as a specialist representing the interests of his corporate master, appeared to lack both the breadth of knowledge and independence expected of the lawyer. The negligence lawyer, whose knowledge of law was suspect, proliferated as the number of unregulated law schools increased. With the elite lawyer, little was attempted to remedy this lack of professionalism.¹³¹ Dealing with the negligence lawyer was another matter.

An emerging professional class of law professors at the "national" law schools¹³² believed that night and part-time law schools provided an insufficient professional education and that the students enrolled in these schools should not enter the profession.¹³³ In 1913, the ABA's Committee on Legal Education and Admissions to the Bar requested the Carnegie Foundation for the Advancement of Teaching to investigate legal education.¹³⁴ The Founda-

129. See Moores, *supra* note 16. The Director of the Lincoln Legal Papers Project also has claimed that Lincoln would take any clients who requested his services and has called him "the ultimate general practitioner." Cameron McWhirter, *Unveiling the Mystery of Lincoln's Early Years*, SAN ANTONIO EXPRESS-NEWS, Oct. 3, 1993, at 1-L, 5-L.

130. Indeed, Alfred Hemenway called Lincoln "a typical American lawyer." Hemenway, *supra* note 46, at 400-01.

131. However, blatant conflicts of interest were frowned on. In 1921, the Association of the Bar of the City of New York laid charges against elite lawyer Thomas Chadbourne. The accusations were (1) that Chadbourne, while representing George Gould, the executor of Jay Gould's will, failed to inform the court of improprieties that he knew George Gould to have committed as executor, and (2) that Chadbourne had represented both George Gould and the Missouri Pacific Railroad when Gould tried to take over the railroad. The Grievance Committee of the Association found a basis in the charges and took Chadbourne to court, but the Appellate Division later acquitted Chadbourne. See GEORGE MARTIN, *CAUSES AND CONFLICTS*, *supra* note 51, at 368-70; THE AUTOBIOGRAPHY OF THOMAS CHADBOURNE, *supra* note 59, at 87-94.

132. See Jerold S. Auerbach, *Enmity and Amity: Law Teachers and Practitioners, 1900-1922*, in *LAW IN AMERICAN HISTORY* 551 (Donald Fleming & Bernard Bailyn eds., 1971); John H. Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 35 J. LEGAL EDUC. 311 (1985).

133. See Auerbach, *supra* note 132, at 575-80.

134. See *Transactions of the 36th Annual Meeting of the American Bar Association*, 38 A.B.A. REP. 5, 25 (1913).

tion agreed to fund a study of legal education directed by a nonlawyer named Alfred Z. Reed.

A decade earlier, the Foundation inquired about funding a study of legal education and was rebuffed by the ABA. The Foundation then turned to a study, under the direction of Abraham Flexner, of American medical education. The result of this study, widely known as the Flexner Report, was published in 1910.¹³⁵ The Flexner Report was credited with enhancing the prestige of the medical profession and the future care of patients by increasing the standards of medical education. One apparent consequence of the Flexner Report was a radical reduction of the number of medical schools and medical students, although one historian of American medicine believes that such a view misstates the role of the Flexner Report.¹³⁶

When the Foundation agreed to investigate the state of legal education in 1913, it was the hope of the elite of the legal profession that this report would have the same impact on legal education as they believed the Flexner Report had had on medical education. Due in part to the intervention of World War I, and in part to Reed's petulance at having his work upstaged by Reginald Heber Smith's book *Justice and the Poor*,¹³⁷ Reed's report was not published until 1921.

Even seventy-plus years after its publication, Reed's report, *Training for the Public Profession of the Law*,¹³⁸ is an amazing document. Reed's report was propelled by two ideas: first, that the profession of law was a public profession; and second, that a unitary bar not only did not exist, it could not exist.

As members of a public profession, lawyers provided services to the community in which they lived and were also part of the "governing mechanism of the state."¹³⁹ As such, the lawyer functioned in a broadly

135. ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA* (1910).

136. "[C]hanging economic realities, rather than the Flexner report, were what killed so many medical schools in the years after 1906." PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 118 (1982).

137. See ROBERT B. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 115 (1983).

138. REED, *supra* note 41.

139. REED, *supra* note 41, at 3. A recent history of legal education by Professor Paul Carrington shares Reed's conclusion about the public or political nature of the legal profession, while disagreeing with his conclusion about the unattainability of a unitary bar. See Paul D. Carrington, *One Law: The Role of Legal Education in the Opening of the Legal Profession Since 1776*, 44 FLA. L. REV. 501 (1992). Carrington wrote:

[Most law teachers] have supposed . . . that the enduring health of our democratic legal institutions depended on sharing the legal profession as broadly as possible. At the same time, . . . they have been generally right in insisting that those who share the profession should recognize the unity of the common professional enterprise: one law, one profession whose work is informed by common values, with a shared duty

political manner. Lawyers were political not simply in the sense of providing society with many of its legislators and most of its judges; they were political because "private individuals cannot secure justice without the aid of a special professional order to represent and to advise them."¹⁴⁰ According to Reed, that was the reason lawyers were officers of the court.

Regarding the unitary bar, Reed concluded, "The evil—the very great evil—of the present situation, as a result of which all part-time legal education now rests under a justified cloud, lies in the perpetuation of the theory of a unitary bar, whose attainments are to be tested by uniform examinations."¹⁴¹ In Reed's view, there was no such thing as a unitary bar or "'a' standard lawyer."¹⁴² The bar was widely differentiated, based in large part on the educational background of the lawyer. The fiction of a unitary bar caused the differing types of law schools to attempt to hinder each other's development rather than prepare their own students for the various kinds of legal practice awaiting the graduates of each type of law school.

Because the unitary bar was unattainable, Reed concluded that night or part-time law school programs of education should not be abolished. As a public profession, "the interests . . . of the community demand that participation in the making and administration of the law shall be kept accessible to Lincoln's plain people."¹⁴³ Instead of continuing to strive for the unattainable, Reed proposed formal recognition of a stratified bar based both upon the type of legal education the lawyer received and, possibly, the lawyer's functions in the community.¹⁴⁴

Reed implicitly accepted two premises of the differences between the elite and nonelite practitioners. First, he accepted the inevitability of legal specialization: One reason for formal recognition of a differentiated bar was that "[t]he task of preparing students to engage in the general practice of the law has now become a very difficult one."¹⁴⁵ Second, he assumed that only nonelite lawyers were advocates, or trial lawyers, stating, "Conveyancing, probate practice, criminal law and trial work are examples of topics that seem particularly appropriate for the relatively superficial schools."¹⁴⁶

Unlike the rest of his report, Reed's statements about the reality of the

to one public.

Id. at 603.

140. REED, *supra* note 41, at 3.

141. *Id.* at 57.

142. *Id.*

143. *Id.* at 418.

144. *See id.* at 237-39.

145. *Id.* at 419.

146. *Id.* at 419. This was a qualified assessment only, for Reed noted, "All this is mere guesswork . . .," *id.*, and also suggested that stratification might be based on "the economic status of the client," *id.*

differentiated bar were quite conclusory, and, by his own admission, his predictions about the work of different types of lawyers amounted to guesswork. By premising his recommendations on the idea of a differentiated bar, Reed touched an exposed nerve of the profession. For at least forty years, the goal of bar leaders and legal academics was to increase professional knowledge in order to enhance the authority of the profession. Raising the educational standards among all law schools offered the best opportunity to increase professional knowledge. Those devoted to raising educational standards believed that Reed's insistence that a place be kept for "superficial" law schools—and, of course, for "superficially" trained lawyers—would result in a lessening of professionalism.¹⁴⁷

By 1921, the large¹⁴⁸ law firm was a set piece in the professional landscape. However, the profession was still unable to fit specialization comfortably within the concept of professionalism. Reed's willingness to let local law schools teach their students conveyancing, probate, criminal law, and, most importantly, trial work was based on the unstated premises that the professional hierarchy began with corporate work, that the elite lawyer was not an advocate, and that the elite and nonelite lawyers resided in at least two different legal worlds. Although Reed believed that he was stating the obvious, he was also striking (possibly inadvertently) in at least three ways at the two pillars of the profession: knowledge and independence. First, Reed's proposal that the profession be formally realigned contemplated that the idea of law as a science could be limited only to some (read "elite") lawyers. For the nonelite lawyer, law was not a science. Second, Reed categorized "law" based on the lawyer's type of practice. In his scheme, a lawyer's knowledge would not be of all of "law," but only some of it. Third, any Reed-inspired attempt to offer part-time and night law schools a better chance to survive threatened the independence of lawyers by creating an oversupply, particularly an oversupply of lawyers who were deemed "unfit."

Training for the Public Profession of the Law was not published until August 1921. In 1920, legal academics at the most prestigious law schools attended the meeting of the Section of Legal Education and Admissions to the Bar at the 1920 ABA convention and forced the creation of a Special Committee on Legal Education.¹⁴⁹ At the July 1921 meeting, that committee, whose chairman was the eminence grise of the legal profession, Elihu

147. There was always the fear of a neo-Jacksonian outburst, recalling a time during which egalitarianism overrode any concern for standards. Coursing through this quest for standards, of course, was prejudice.

148. "Large" in 1921 is very small by today's standards. See Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915*, in *THE NEW HIGH PRIESTS*, *supra* note 45, at 3, 5.

149. See *Proceedings of the Section of Legal Education and Admissions to the Bar*, 45 A.B.A. REP. 465 (1920).

Root, reported its findings. The Root Committee concluded that legal education was adequately undertaken only in law schools. It proposed both increasing educational requirements before entering law school from a high school diploma to successful completion of two years of college and making the bar examination a prerequisite to the practice of law.¹⁵⁰ These proposals ensured that all graduates of law schools were competent to practice law.

By engaging in “guesswork” regarding the functions of the differentiated bars, Reed left himself open to criticism of his entire claim that there was no such thing as a unitary bar.¹⁵¹ Anticipating the Reed Report,¹⁵² the Root Committee further claimed that the legal profession was indeed a unified profession. The Committee’s report was adopted by the ABA, and it was later used to persuade state and local bar associations and examiners to raise standards for admissions to the bar.

The elite of the profession widely rejected Reed’s report. The intensity of the drive to maintain an outward unity in the legal profession led to increasing interest in bar admissions as a gatekeeper to the profession. Both legal educators and bar examiners worked to provide a semblance of a legal canon. Although it held no formal status as an accrediting agency, in 1923 the ABA began certifying law schools as being in compliance with its new, uniform standards. It also successfully promoted stricter evaluations of bar applicants by state bar examining authorities.¹⁵³ Finally, also in 1923, the elite of the profession organized the American Law Institute, dedicated to formulating a restatement of the law.¹⁵⁴

150. See *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 A.B.A. REP. 679 (1921).

151. Albert Kales, a legal academic, made just such an attack. See Albert Kales, 35 HARV. L. REV. 96, 97-98 (1921) (book review). After setting forth Reed’s opinion of a differentiated bar, Kales wrote:

Such an analysis of our present situation and such a program for emphasizing it in the future cannot be too severely condemned. It is superficial. It is false. It is impolitic. . . . It can only end in disaster to the graduates of university law schools and, therefore, disaster to the university law schools themselves. . . . Successful lawyers do serve the rich. They are far from leaders of the first rank, however, unless they maintain so independent a position in the community that any interest feels safe in employing them. Witness Mr. Hughes’ employment by the miners in the Indianapolis cases.

Id. at 98. For Reed’s somewhat evasive response, see Alfred Z. Reed, *Scholarship or Opinion?*, 35 HARV. L. REV. 355 (1922).

152. According to Susan K. Boyd, the official historian of the ABA Section of Legal Education and Admissions to the Bar, “[t]he Root Committee was given advance copies of Reed’s book.” SUSAN K. BOYD, *THE ABA’S FIRST SECTION: ASSURING A QUALIFIED BAR* 26 (1993).

153. In addition to organizing, in January 1922, a Special Conference on Legal Education, *id.* at 24, the ABA Section of Legal Education sponsored, in 1931, the creation of the National Conference of Bar Examiners, *id.* at 37.

154. A history of the origins of the American Law Institute is found in N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 L.

Unlike the first two decades of the century, when prominent lawyers sounded a call to prevent law from becoming a business, the opposition to the methods and efficiencies of “business” all but disappeared in the 1920s.¹⁵⁵ In 1924, Felix Frankfurter wrote his friend, large-firm lawyer Charles C. Burlingham: “Don’t you think it would be like a breath of fresh air in our dank national atmosphere if a few lawyers who did matter would say we don’t like all this degradation and enveloping commercialism and general corrupting atmosphere?”¹⁵⁶ When John W. Davis’s name was floated for the Democratic nomination for President in 1924, Frankfurter wrote in several unsigned editorials in *The New Republic*¹⁵⁷ that Davis was an “employee of Big Business”¹⁵⁸ and concluded, “Latterly clients have had lawyers and not lawyers clients.”¹⁵⁹ Despite Frankfurter’s warnings, for the brightest Harvard Law School graduates of the 1920s, the pinnacle of the legal profession became the private practice of law on Wall Street.¹⁶⁰ In a May 1921 speech given to students at Boston University Law School, Chief Justice Taft urged newly graduated lawyers to avoid losing their independence and identity and not practice law solely in behalf of corporations.¹⁶¹ Taft condemned the fact that “[a]ble lawyers have yielded to the inducement of large salaries and embraced exclusively the cause of large corporations.”¹⁶²

By the end of the decade, specialization was entrenched in the large law firm.¹⁶³ This realization also was first recognized, in a slight fashion, in the amended *Canons of Professional Ethics*. The original Canons made no mention of specialization or restriction of practice. A lawyer knew *law*. This statement is reflected in the appraisal of Emory Buckner by his good friend Felix Frankfurter. When Felix Frankfurter was asked to recommend a lawyer to handle a complex admiralty case, Frankfurter responded: “Get Emory Buckner—he’s the best trial lawyer in New York. That makes him the best

& HIST. REV. 55 (1990). I have discussed the intellectual influence of the American Law Institute’s work on the codification of evidence in Michael Ariens, *Progress Is Our Only Product: Legal Reform and the Codification of Evidence*, 17 LAW & SOC. INQ. 213 (1992).

155. The information in this paragraph is taken from AUERBACH, *supra* note 87, at 130-57. Not all opposition vanished, however. In 1924, Julius Henry Cohen revised and reissued his 1916 cautionary discussion of the dangers of commercialism, *The Law: Business or Profession?*

156. Felix Frankfurter, Letter to Charles C. Burlingham (Feb. 14, 1924), *quoted in* AUERBACH, *supra* note 87, at 139.

157. AUERBACH, *supra* note 87, at 139, attributes the editorials to Frankfurter.

158. *John W. Davis*, 39 NEW REPUBLIC 224, 225 (1924).

159. *Why Mr. Davis Shouldn’t Run*, 38 NEW REPUBLIC 193, 193 (1924).

160. *See* AUERBACH, *supra* note 87, at 140.

161. William H. Taft, Legal Ethics, Address Before the Boston University Law School (May 9, 1921), in 1 B.U. L. REV. 233, 242-44 (1923).

162. *Id.* at 244.

163. *See* HOBSON, *supra* note 84, at 402-03.

admiralty lawyer, even if he's never had an admiralty case.'"¹⁶⁴

The first formal recognition of the advance of legal specialization was the adoption by the ABA of Canon 45 of the *Canons of Professional Ethics*. Added to the Canons of Ethics in 1928, it declared that "specialists" were not exempt from the principles of the Canons.¹⁶⁵ Five years later, the ABA first acknowledged the professional and economic value of specialization by adopting Canon 46 of the *Canons of Professional Ethics*. Canon 46 formally permitted lawyers undertaking specialized legal work exclusively for other lawyers to advertise such specialized legal work in a "dignified" manner in legal periodicals.¹⁶⁶

The 1920s, not surprisingly, was the decade in which corporate lawyers were accepted at the top of the legal profession. Many of the law firms created by first-generation business lawyers were reorganized. John Davis reorganized the law firm created by J. P. Morgan's counsel Francis Lynde Stetson into the firm known today as Davis, Polk and Wardwell.¹⁶⁷ In the mid-1920s, the law firm of Sullivan and Cromwell was reorganized, and John Foster Dulles became one of its managing directors.¹⁶⁸ The law firm of Shearman & Sterling grew greatly after a merger in 1918 with the firm of Cary & Carroll.¹⁶⁹ The firm of Root, Clark, Buckner & Howland, consisting of six lawyers (including, as counsel, Elihu Root) at the beginning of 1919,¹⁷⁰ consisted of more than thirty lawyers by the end of 1920,¹⁷¹ and thirty-nine by 1922.¹⁷²

The growth of the large law firm was phenomenal. Professor Wayne Hobson has noted that between 1915 and 1924, the number of major law firms in five American cities grew markedly in number and size.¹⁷³ In 1915, Hobson counted twenty-seven major firms containing 237 lawyers; nine years later, there were 101 major firms containing 1,303 lawyers.¹⁷⁴ In 1929, James Grafton Rogers wrote about the historical development of the American lawyer.¹⁷⁵ Calling the model modern lawyer a "business lawyer," Rogers

164. MARTIN MAYER, *EMORY BUCKNER* 1 (1968) (quoting Felix Frankfurter).

165. See *Canons of Professional Ethics*, 53 A.B.A. REP. 769, 769 n.*, 781 (1928).

166. See *Canons of Professional Ethics*, 58 A.B.A. REP. 697, 709 (1933).

167. See HARBAUGH, *supra* note 70, at 251-55.

168. See LISAGOR & LIPSIOUS, *supra* note 71, at 100-01.

169. EARLE, *supra* note 67, at 205-07 (noting that the merger was effective January 1, 1919).

170. MAYER, *supra* note 164, at 126.

171. *Id.* at 127.

172. GERALD T. DUNNE, *GRENVILLE CLARK: PUBLIC CITIZEN* 47 (1986).

173. The cities studied were New York, Chicago, Boston, Cleveland, and Kansas City. Hobson, *supra* note 148, at 5.

174. See *id.*

175. James G. Rogers, *Types of the American Lawyer, Past and Present*, 15 A.B.A. J. 531, 534 (1929).

stated, "Today this model represents the ambition of most young men, the standard of greatest achievement."¹⁷⁶ Three years later, Rogers wrote *American Bar Leaders*, biographical essays of the presidents of the ABA during its first fifty years. In his foreword, Rogers spoke confidently of "the march on and off the stage in turn of the soldier-lawyer, the orator or advocate, the 'railroad lawyer,' the 'trust-buster,' the 'business lawyer,' and the entry at last of the international lawyer on the scene."¹⁷⁷ This inevitable progression of the legal profession toward bigger and better seemed as natural as the progression of the economic structure of American society.

The emergence of the corporate lawyer as a "leader" of the bar occurred in part as a consequence of the assumption by second-generation business lawyers of roles in bar associations and politics.¹⁷⁸ Both Charles Evans Hughes and John W. Davis were nominated for President of the United States. Elihu Root served as Secretary of State and Senator from the state of New York. All three served as Presidents of the ABA during its maturation as an institution claiming to represent the American legal profession, and each also served a term as President of the Association of the Bar of the City of New York. On the other hand, first-generation business lawyer John W. Sterling never joined any bar association and never participated in any professional activities or in public life. None of the name partners in the law firm presently known as Cravath, Swaine and Moore ever served as President of either the American or New York City bar associations.¹⁷⁹

It should not have been surprising that, in the midst of the Great Depression, there was a reaction against the perceived excesses of large corporations and their advisors, the corporate lawyers. During the 1930s, the issue was neither whether the corporate lawyer represented the pinnacle of the profession nor whether legal specialization existed; instead, the issue was whether the corporate lawyer was properly undertaking his role as a professional.

Two remarkable articles drawing attention to the connection between legal specialization and commercialism were published in 1933. One was an essay, titled *Modern Legal Profession*, written by Professor Adolf Berle for the

176. *Id.*

177. JAMES G. ROGERS, *AMERICAN BAR LEADERS* v (1932). Essentially the same statement is found in Rogers, *supra* note 175, at 534.

178. Professor Samuel Haber, in his history of the professions, including the legal profession, from 1750 to 1900, has noted that first-generation corporate lawyers were not bar association leaders. See HABER, *supra* note 21, at 212 (noting that corporate lawyers Francis Lynde Stetson and James Dill were not leaders of the ABA).

179. From 1905 to 1922, however, Edward Cairns Henderson was a name partner of the Cravath firm. Although never President of the Association of the Bar of the City of New York, he served a number of years as chairman of its library committee. See GEORGE MARTIN, *CAUSES AND CONFLICTS*, *supra* note 51, at 336.

Encyclopaedia of the Social Sciences.¹⁸⁰ The other was a paper written by Karl Llewellyn for The American Academy of Political and Social Science and published under the title, *The Bar Specializes—With What Results?*.¹⁸¹

Berle's article is a brilliant sociological dissection of the American legal profession, particularly compared with the legal profession in civil-law countries. Berle first noted that, though "[i]n theory all lawyers were alike,"¹⁸² the American legal profession was hierarchically segregated on the basis of function and size.¹⁸³ At the top was the law factory, the large law firm which acted largely as business counsel; in the middle were lawyers practicing in firms of from three to twenty members, who divided their work among the courts, business, and politics; and at the bottom were the vast majority of lawyers, practicing alone or in pairs, whose primary function was to handle the affairs of individuals and small businesses.¹⁸⁴ It was the first group, the business lawyers, which especially aroused Berle's ire.

The transformation of the economy at the end of the nineteenth century, according to Berle, led to the transformation of the lawyer.¹⁸⁵ Instead of protecting the rights of individuals from exploitation by private interests, the business lawyer "became a virtual annex to some group of financial promoters, manipulators or industrialists."¹⁸⁶ The business lawyer had sacrificed his independence for the monetary rewards of corporate practice, contributing only "the creation of a legal framework for the economic system, built largely around the modern corporation."¹⁸⁷ Berle noted, "The impression grew that the lawyer existed to serve and not to counsel his clients."¹⁸⁸ The modern view of the lawyer as servant of the client justified the lawyer in using any legal lever available to further the client's interests. The traditional view was that the lawyer was an officer of the court, a counsellor of the client, and consequently duty-bound to serve justice, even at the expense of his client's interests.¹⁸⁹ The modern view, in Berle's opinion, was that the lawyer was

180. A.A. Berle, Jr., *Modern Legal Profession*, in 9 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 340 (Edwin R.A. Seligman et al. eds., 1933).

181. K.N. Llewellyn, *The Bar Specializes—With What Results?*, 167 ANNALS AM. ACAD. POL. & SOC. SCI. 177 (1933). This paper was later republished in the Commercial Law League's journal, the *Commercial Law Journal*. See K.N. Llewellyn, *The Bar Specializes—With What Results?*, 39 COM. L.J. 336 (1934).

182. Berle, *supra* note 180, at 340.

183. *Id.* at 340-41.

184. *Id.* at 342.

185. *Id.* at 341.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 343.

“the paid servant of his client.”¹⁹⁰ To Berle, the “commercialization” of the bar caused lawyers to abandon their traditional social functions of influencing public life and law in America.¹⁹¹ Instead of enabling the lawyer to act as an independent influence for the public good, “the specialized learning of the lawyer was his private stock in trade to be exploited for his private benefit.”¹⁹²

Llewellyn began his paper with the observation that “[t]he most significant fact about the modern metropolitan bar” was that it had “moved mass-wise out of court work, out of a general practice akin to that of the family doctor, into highly paid specialization in the service of large corporations.”¹⁹³ The result, according to Llewellyn, was several-fold: “Those-who-have” were represented exceedingly well; trial courts were deprived of the best lawyers, who practiced law in their offices advising corporations; and the poor man’s case was left unserved.¹⁹⁴ The solution, according to Llewellyn, was for the metropolitan bar association to establish offices in various parts of the city to act as clearinghouses for the legal problems of the poor, providing those persons with the names of several attorneys, each of whom would be willing to provide the necessary legal services.¹⁹⁵

Neither essay questioned the expertise or knowledge of the lawyer in the law factory. As legal progressives, both Berle and Llewellyn were interested in improving the quality of service provided by lawyers. Llewellyn readily acknowledged that quality craftsmanship had been attained in the law factory. Indeed, part of Llewellyn’s acceptance of the increasing emphasis on specialization in the practice of law was to equate specialized legal practice with professionalism. Llewellyn’s complaint was not with specialization, but with the maldistribution of the work of lawyers.¹⁹⁶ Berle’s broader com-

190. *Id.*

191. *Id.* at 343-44.

192. *Id.* at 344.

193. Llewellyn, *supra* note 181, at 177.

194. *Id.* at 179-80.

195. *Id.* at 180-81.

196. Llewellyn first made the complaint two years earlier, in a review of a book titled *A Lawyer Tells the Truth*. Llewellyn wrote:

Let this be written large, for senior partners in law-factories to ponder on: Law does not exist for corporation executives alone. It is not, even, for stockholders alone, or those whose income tax can, under proper counselling, be cut. The courts, especially, are for *all* citizens who have, or believe they have, rights of which their own efforts fail to induce fulfillment. And the financial importance of a case turns quite as much on the marginal utility of the sum in question to the litigant as it does on the absolute size of the sum involved. Let this also be written on the walls: making court services effective is not a matter of radicalism. Accepting the criterion not of what in some Utopia ought to be, but of what our polity has for some centuries professed, courts stand on one footing with the roads and parks, not with a “right to

plaint was that this maldistribution was performed in the blind service of those who wielded great economic power, to the exclusion of the public-service model of the legal profession. Although both were leery of some aspects of legal specialization, both saw specialization as creating advantages for the proper practice of law.

Llewellyn's call for a redistribution of legal resources was not heeded. There was, however, a rise in complaints by the progressive press about the trends in the practice of law.¹⁹⁷

One year later, in a speech dedicating the Law Quadrangle at the University of Michigan, Justice Harlan Fiske Stone excoriated the corporate lawyer for failing his public responsibility to the community:

The changed character of the lawyer's work has made it difficult for him to contemplate his function in its new setting, to see himself and his occupation in proper perspective. No longer does his list of clients represent a cross section of society; no longer do his contacts make him the typical representative and interpreter of his community. The demands of practice are more continuous and exacting. He has less time for reflection upon other than immediate professional undertakings.¹⁹⁸

The type of lawyer Stone attacked most fiercely was the corporate lawyer: "The successful lawyer of our day more often than not is the proprietor or general manager of a new type of factory, whose legal product is increasingly the result of mass production methods. More and more the amount of his income is the measure of professional success."¹⁹⁹ Even so, Stone believed that specialization was necessary, and, in raising the level of the lawyer's proficiency and technical skill, a beneficial consequence of the change of the role of the lawyer in the modern commercial and industrial society of the United States. The harm was that a learned profession had become an "obsequious servant of business, and [become] tainted . . . with the morals and manners of the market place in its most anti-social manifestations."²⁰⁰ Because they were engaged in the highly specialized service of business and

work," a "right to bread" or a "right to shelter." It is the business of the bar to see that people have access to the courts, and to fair treatment in them.

Llewellyn, *supra* note 18, at 1217.

197. See Mitchell Dawson, *Frankenstein, Inc.*, 19 AM. MERCURY 274 (1930); William M. Downing, *New York Lawyer*, 91 SCRIBNERS MAG. 23 (1932); John W. Harrington, *The Big Shops of the Law*, 11 AM. MERCURY 143 (1927); Lundberg, *supra* note 18; Ferdinand Lundberg, *The Legal Profession: A Social Phenomenon*, 178 HARPER'S MAG. 1 (1938); Ferdinand Lundberg, *The Priesthood of the Law*, 178 HARPER'S MAG. 515 (1939).

198. Harlan F. Stone, *The Public Influence of the Bar*, Address at the Dedication of the University of Michigan Law Quadrangle (June 15, 1934), in 48 HARV. L. REV. 1, 6 (1934).

199. *Id.*

200. *Id.* at 7.

finance, modern leaders of the bar were both less well-rounded and less independent than bar leaders of the past.

Instead of being pessimistic, however, Stone was optimistic that specialization placed the bar in the position where “the possibilities of its influence are almost beyond calculation.”²⁰¹ In Stone’s view, it was necessary to reformulate the calling of the lawyer in light of the changes in modern society. The goal of higher standards of conduct, a goal that could be achieved in part by through the influence of legal academics and law schools, would provide the bar with another opportunity to perform its duty to society.

The nonelite practitioner struggled greatly during the Great Depression. While elite practitioners like John Foster Dulles and John W. Davis earned enormous incomes, a large percentage of lawyers were barely eking out a living.²⁰²

Although specialization was ensconced in the large law firm, the nonelite lawyer remained, in fact and in perception, a general practitioner. In 1937, the ABA created a Special Committee on the Economic Condition of the Bar, which collected and analyzed several extant surveys of the legal profession. The Committee’s conclusion concerning a survey of the legal profession in Wisconsin was: “A general absence of specialization, a fairly miscellaneous clientele, and a large amount of work in the fields of property, collections, and torts, appear to be characteristic of the run of the bar.”²⁰³ A survey by Yale Law School Dean Charles Clark and Research Associate Emma Corstvet of fifty lawyers practicing law in New Haven and Hartford tried to make a claim for specialization not made by lawyers themselves. The respondents claimed that they were not specialists and that specialization did not pay, but Clark and Corstvet concluded that specialization “was more general than first believed,” as long as specialization was defined as a type of work undertaken more than twenty percent of the time.²⁰⁴

On March 1, 1941, the Seventh Annual Cincinnati Conference was held in Cincinnati, Ohio. Titled *Law and Lawyers in the Modern World*, the Conference was devoted to conditions of practice and efforts to make the administration of justice more efficient and inexpensive. Among the speeches was a talk about legal specialization by a lawyer named Walter Fisher. Fisher first noted the “narrow judgment” argument: “It is true that specialization tends to make men narrow, rather than broad, and that lawyers with breadth of experience and point of view are greatly needed.”²⁰⁵ With that caution,

201. *Id.* at 9.

202. See SPECIAL COMM. ON THE ECONOMIC CONDITION OF THE BAR, AMERICAN BAR ASS’N, THE ECONOMICS OF THE LEGAL PROFESSION 15 (1938).

203. *Id.* at 31.

204. Charles E. Clark & Emma Corstvet, *The Lawyer and the Public: An A.A.L.S. Survey*, 47 YALE L.J. 1272, 1288 (1938).

205. Walter T. Fisher, Address at the Cincinnati Conference on Law and Lawyers in the

Fisher then turned to the need and value of legal specialization, stating, "Specialization has the advantage of permitting a *specific task* to be done better and cheaper."²⁰⁶ In addition, Fisher opined that specialization would drive out bad lawyers in favor of good lawyers.²⁰⁷ Finally, Fisher predicted that specialization was the future of the profession, claiming, "[U]nless the lawyer specializes, the sphere of his usefulness is bound to dwindle."²⁰⁸ Fisher then discussed the Chicago Lawyer Reference Plan, which allowed members of the Chicago Bar Association to list themselves as specialists in one or more fields of law.²⁰⁹

At least one of the other panelists agreed with Fisher's prediction about the need for, and utility of, legal specialization.²¹⁰ The concluding talk was then given by future Supreme Court Justice Wiley Rutledge, who said, "I shall say only this: I agree with Mr. Fisher, not only that specialization is here, that it is going to stay, but that it is bound to increase. That is simply because the nature of our society and, therefore, the service the lawyer must render to it, are going to continue becoming more highly specialized. That is as inevitable as the further evolution of machines."²¹¹

Although none of the participants in the symposium disputed the future importance of legal specialization, one intriguing fact was noted with little comment and no explanation. Most respondents to the Chicago Bar Association's plan to provide a reference service requested that they be listed as general practitioners, not as specialists. A total of 267 respondents listed themselves as general practitioners. Only 160 lawyers claimed inclusion in one or more of the seventeen categories of specialized law practice. Twenty-six respondents listed themselves as specialists in real estate, the highest number of self-proclaimed specialists in any field.²¹²

By the beginning of World War II, elite lawyers fully embraced specialized legal practice. Progressive academics also accepted the necessity and utility of legal specialization. On the other hand, nonelite practitioners remained wedded to the concept of the country lawyer, or general practitioner.²¹³

Modern World (Mar. 1, 1941), in 15 U. CIN. L. REV. 123, 158 (1941).

206. *Id.* at 159.

207. "Until something constructive is done to build up personal injury specialists, we can expect courts and legislatures and the public to be tolerant of ambulance chasing and other methods of which we disapprove." *Id.* at 160.

208. *Id.*

209. *See id.* at 160-63.

210. *See* Lloyd K. Garrison, Address at the Cincinnati Conference on Law and Lawyers in the Modern World (Mar. 1, 1941), in 15 U. CIN. L. REV. 166, 173 (1941).

211. Wiley Rutledge, Address at the Cincinnati Conference on Law and Lawyers in the Modern World (Mar. 1, 1941), in 15 U. CIN. L. REV. 228, 236 (1941).

212. *Id.* at 161.

213. That the idea of the country lawyer as an ideal type remained important in the bar's

C. *The Administrative State and the Practice of Law: 1945-69*

Shortly after the end of World War II, the American Law Institute, together with the ABA, began a national program of continuing legal education.²¹⁴ The project was an effort to ensure the professionalism of lawyers by enhancing their knowledge of law. As the institutional bar worked to increase professionalism by organizing continuing legal education programs, commentators noted the fact of extensive legal specialization. In announcing the reversal of its previously held opinion that professional announcements sent to lawyers and nonlawyers which included a statement of legal specialization were improper, the Committee on Professional Ethics of the New York State Bar Association reported that it “recognized that specialization of the Bar has increased as specialization in every other field has increased, and felt that to shut one’s eyes to this obvious development was futile.”²¹⁵ In 1949, corporate lawyer Robert T. Swaine belatedly responded to progressive critics of the 1930s and defended the large-firm lawyer’s practice, including its specialization, in the *American Bar Association Journal*.²¹⁶ That same year, *Fortune* magazine profiled the American legal profession and noted that the lawyers in the largest law firms were “highly specialized operator[s].”²¹⁷

Beginning in 1950, the ABA began its efforts to formally recognize legal specialization. The ABA appointed a special committee to determine whether to amend Canon 27, which forbade nearly all forms of advertising, to permit lawyers to place on their letterhead recognized specialties.²¹⁸ The next year, despite prior adverse formal opinions from the Committee on Professional Ethics, the ABA amended Canon 27 to allow admiralty and patent lawyers to state their specialties on letterheads or shingles.²¹⁹ The stated reason of the ABA’s House of Delegates for creating the exception for admiralty and patent lawyers was “that substantially the entire time of lawyers in these fields is spent in their specialty, and that little or no practice by these specialized lawyers is done in other fields.”²²⁰ A 1951 article in the *American Bar*

conception of itself may be indicated in John W. Davis’s perception of himself as a lawyer. Jerold Auerbach has noted that Davis, the most visible symbol of the corporate lawyer during the 1920s, “diligently . . . reiterated his pride that he was ‘born and raised a country lawyer, and a country lawyer, I suppose, I shall remain.’” AUERBACH, *supra* note 87, at 137 (quoting John W. Davis).

214. See generally PAUL A. WOLKIN, ALI-ABA XL! (1988) (discussing the history of continuing legal education efforts of the American Law Institute and American Bar Association).

215. *Professional Announcements*, 19 N.Y. ST. B. ASS’N. BULL. 152, 153 (1947).

216. Swaine, *supra* note 81.

217. *The U.S. Bar*, FORTUNE, May 1949, at 90, 172.

218. See *Proceedings of the House of Delegates*, 75 A.B.A. REP. 102, 122-23.

219. See *Proceedings of the House of Delegates*, 76 A.B.A. REP. 107, 123-24 (1951).

220. *Id.* at 124. The special committee which made the recommendation to the House of Delegates relied largely on the history of such usages by admiralty and patent lawyers, dating

Association Journal examining the organization of a lawyer's practice suggested the necessity of specialization in all but the smallest offices in the smallest towns.²²¹ In his *President's Page* column in the February 1953 issue of the *Journal*, Robert G. Storey announced the creation of a special committee to advise the Board of Governors whether it should prescribe minimum standards of education and experience to practice as a specialist. Storey wrote:

The legal profession has not kept pace with the rapidly changing events and demands of our time. Admission to the Bar is a license to a lawyer to perform almost any legal operation that an unsuspecting client may invite. The neophyte lawyer is automatically certified as competent to advise a corporation on its tax liabilities, to draw oil unitization agreements, and to negotiate consent decrees in antitrust suits.

. . . .

In thus providing for continuing legal education, the Bar and the law school co-operating in the project do more than benefit lawyers who have an ambition for greater knowledge. They benefit principally the public in that the lawyers to whom problems are taken in special fields have superior competence. As these specialists develop in the law, they are being recognized by lawyers and by the public, and, to an increasing extent, technical problems will be referred to technical legal experts for solution.²²²

The next year, the Special Committee on Specialization and Specialized Legal Education recommended that the ABA create a permanent committee to regulate specialization. The permanent committee would "encourage the formation of groups of lawyer specialists in the approved fields of specialization."²²³ The Committee also recommended amending Canon 46 to permit lawyers to send to other lawyers a brief, dignified notice of membership in a specialty group.²²⁴ At the ABA's 1954 Mid-year Meeting, the House of Delegates refused to adopt the Committee's recommendations and substituted vaguely worded recommendations supporting some form of regulation of specialization and delegating the task to the Board of Governors.²²⁵ A

back to before the adoption of the Canons of Ethics. *See Report of the Special Committee to Study the Matter of Amendment to Canon 27*, 76 A.B.A. REP. 437, 438 (1951).

221. *See* Gerhart, *supra* note 50, at 730-31.

222. Robert G. Storey, *The President's Page*, 39 A.B.A. J. 91, 91, 158 (1953).

223. *Special Committee on Specialization and Specialized Legal Education*, 79 A.B.A. REP. 582, 583 (1954).

224. *See id.*

225. The recommendations were:

1. That the American Bar Association approves in principle the necessity to regulate voluntary specialization in the various fields of the practice of the law for the

subcommittee of the Board of Governors proposed creation of "The Council of Legal Specialists," which would have the exclusive authority both to establish fields of specialization and to regulate any "Society" of legal specialists organized within those fields.²²⁶ Opposition to this proposal led to withdrawal of the recommendation pending an October 14, 1954 meeting of the Board of Governors.²²⁷ At that meeting, speakers overwhelmingly opposed the proposal of the Board of Governors, and the Board decided to defer any action.²²⁸

The most thorough response to the Board's proposal, a statement by the ABA's Committee on Unauthorized Practice of the Law, was published in *Unauthorized Practice News*. The Committee based its opposition to established fields of specialization on the traditional understanding of professionalism. One professionalism argument focused on the difference between the profession of law and the pursuit of business: "[T]he proposal is concerned more with labels and with the obtaining of clients than with the establishment of standards to be enforced by appropriate sanctions."²²⁹ The Committee added:

[T]he proposal is more than likely to result in the creation of a number of "splinter groups" of lawyers whose activities will not bear so much on the policing of the field as on the exchange of information and the obtaining of clients. The so-called "Societies" are more apt to be like trade associations or craft unions than like the true professional societies needed for the purpose.²³⁰

This, the Committee believed, would lower "the standards of the entire

protection of the public and the bar, and

2. That the American Bar Association approves the principle that in order to entitle a lawyer to recognition as a specialist in a particular field he should meet certain standards of experience and education, and

3. That the implementation, organization, and financing of [a] plan of regulation to carry out such principles is delegated to the Board of Governors, subject to final approval by the House of Delegates.

Proceedings of the House of Delegates, 79 A.B.A. REP. 447, 450 (1954).

226. See *Report of Subcommittee of the Board of Governors Implementing the Recommendations of the Special Committee on Specialization and Specialized Legal Education*, 79 A.B.A. REP. 403, 403 (1954).

227. See *Proceedings of the House of Delegates*, 79 A.B.A. REP. 115, 137 (1954).

228. *Editor's Note*, 42 A.B.A. J. 610, 610-11 (1956).

229. *Statement of Committee on Unauthorized Practice of Law on Specialization and Specialized Legal Education*, UNAUTHORIZED PRAC. NEWS, Dec. 1954, at 4, 5 [hereinafter *Unauthorized Practice Committee Statement*].

230. *Id.*

profession.”²³¹

The second professionalism argument relied on the older understanding of law and lawyers. The Committee asserted, “[T]he law is a seamless web; . . . it cannot be divided into separate compartments; and . . . a general knowledge of and proficiency in the law is required for its successful practice in all fields.”²³² The Committee then predicted that the proposal would be “particularly offensive to the country lawyer”:²³³

The country lawyer is of necessity a general practitioner. . . . [Country lawyers] are proud of the fact that they are lawyers, in the traditional sense of the term, and not specialists and they will resent the Association’s recognition and approval of this newly created and self appointed class of experts within the profession.²³⁴

Even so, a number of commentators claimed that the era of legal specialization was at hand. As in the 1930s, most of these commentators were legal academics or elite corporate lawyers. In 1954, in celebration of its 200th anniversary, Columbia University sponsored a symposium on the topic of *The Metropolis in Modern Life*.²³⁵ The subsequently published collection of articles generated by the symposium included a study of the impact of the large city on the professions. Two commentators on this study were Reginald Heber Smith,²³⁶ at that time Director of the Survey on the Legal Profession, and Columbia University Law School Professor Harry Jones.²³⁷ Smith believed that the professional practice of law could be maintained only by specialization, due to the law’s “[b]ulk and complexity.”²³⁸ The dilemma lay in maintaining a proper lawyer-client relationship. The solution, according to Smith, was to organize the practice of law in partnerships of legal specialists.²³⁹ Jones agreed, noting, “[I]t is likely that an effort to achieve effective cooperation *among* specialists offers more promise than any attempt to turn the

231. *Id.* at 6.

232. *Id.* at 8. About the “seamless web” the English legal historian Frederic W. Maitland once wrote: “Such is the unity of all history that any one who endeavors to tell a piece of it must feel that his first sentence tears a seamless web.” Frederic W. Maitland, *A Prologue to a History of English Law*, 14 L.Q. REV. 13 (1898).

233. *Unauthorized Practice Committee Statement*, *supra* note 229, at 8.

234. *Id.*

235. See THE METROPOLIS IN MODERN LIFE vii (Robert M. Fisher ed., 1955).

236. See Reginald H. Smith, *Commentary*, in THE METROPOLIS IN MODERN LIFE, *supra* note 235, at 307.

237. See Harry W. Jones, *Commentary*, in THE METROPOLIS IN MODERN LIFE, *supra* note 235, at 312.

238. Smith, *supra* note 236, at 309.

239. *Id.*

clock back *from* specialization."²⁴⁰ All that was necessary was for legal educators to ensure that the specialist was provided an education broad enough to allow the specialist to recognize "interdisciplinary" problems.²⁴¹ Two years earlier, a Washington lawyer named Charles Horsky delivered a series of lectures at Northwestern University concerning *The Washington Lawyer*.²⁴² After explaining the work of the Washington lawyer before administrative agencies and independent commissions, in Congress, and before special courts like the Court of Customs and Patent Appeals, Horsky concluded: "Almost every Washington lawyer is a specialist."²⁴³

Two members of the ABA's Special Committee on Specialization and Specialized Legal Education refused to let die the issue of formal recognition of specialization. In the December 1955 issue of the *American Bar Association Journal*, the Chairman of the Special Committee, University of Michigan Law School Professor Charles Joiner, raised the stakes of the debate by arguing that the legal profession would either control specialization and prosper from it, or fail to do so and be destroyed by it.²⁴⁴ In an appeal to both the professional and economic interests of lawyers, Joiner suggested that "[i]naction at the present time will be equal to a vote for the uncontrolled splitting of the profession and its organization into separate warring groups competing for clients."²⁴⁵ In Joiner's view, the only way to prevent fragmentation of the legal profession was to acknowledge and regulate legal specialization. Further, Joiner felt that regulation was necessary to prevent the problem of the "in-looking" specialist, who interpreted everything in terms of the particular specialty.²⁴⁶

Another member of the Special Committee, a seventy-year-old elite

240. Jones, *supra* note 237, at 312.

241. *Id.* at 313.

242. CHARLES A. HORSKY, *THE WASHINGTON LAWYER* (1952). Horsky was a long-time lawyer at Covington & Burling. See JOSEPH C. GOULDEN, *THE SUPERLAWYERS: THE SMALL AND POWERFUL WORLD OF THE GREAT WASHINGTON LAW FIRMS* 28-31 (1972).

243. HORSKY, *supra* note 242, at 161; accord GOULDEN, *supra* note 242, at 16 ("Washington Law is highly specialized, and highly fragmented . . .").

244. See Charles W. Joiner, *Specialization in the Law: Control It or It Will Destroy the Profession*, 41 A.B.A. J. 1105, 1105 (1955) [hereinafter Joiner, *Control It*]. Other, less extreme, commentaries touting the need for controlled specialization were Charles W. Joiner, *Specialization in the Law? The Medical Profession Shows the Way*, 39 A.B.A. J. 539 (1953); Carl G. Paffendorf, Comment, *Legal Specialization—Why The Objections?*, 12 U. MIAMI L. REV. 229, 230 (1958) (concluding that benefits of controlled legal specialization included "a more learned and proficient crop of attorneys" and "the satisfaction of a great public need"); and Henry S. Drinker, *Legal Specialists: Specialized Legal Service*, 41 A.B.A. J. 690 (1955).

245. Joiner, *Control It*, *supra* note 244, at 1105.

246. *Id.* at 1170. Joiner tied this argument to the case against unauthorized practice of law. Without regulation of specialization, Joiner claimed, "those interested in the prevention of unauthorized practice will have little ammunition." *Id.*

lawyer named Harrison Tweed²⁴⁷ gave the Fourteenth Annual Benjamin N. Cardozo lecture.²⁴⁸ Tweed was a founding partner in the white-shoe New York City firm of Milbank, Tweed, Hadley and McCloy and was an expert in estates and trusts. Tweed's father spent most of his legal career as a railroad lawyer, working as general counsel to the Chesapeake & Ohio Railway Company and the Southern Pacific Company. His maternal grandfather was William M. Evarts, the famous New York trial lawyer of the mid-to-late nineteenth century. Tweed was a prominent advocate of legal aid and was thrice President of the Association of the Bar of the City of New York, the oldest bar organization in continuous existence.²⁴⁹

Tweed's lecture was titled *The Changing Practice of Law*. Tweed's concern was not with lawyers in large firms, who he believed adequately performed their work, but with lawyers practicing alone.²⁵⁰ Tweed suggested that the opponents of legal specialization were holding onto the false premises of the ideal of the omniscient lawyer and the seamless web of the law. Although a lawyer in the past might have been able to know all of the law, the complexity of modern life and law made that a practical impossibility. Even the most knowledgeable lawyer knew just part of the law. Consequently, the lawyer necessarily specialized to practice law professionally.²⁵¹ At a time when accountants/tax preparers and others began to use their specialized expertise to take work from lawyers,²⁵² the only ethical response was for lawyers to specialize as well. If bar associations attempted to assert a monopoly for lawyers in all tax work by charging accountants with the unauthorized practice of law, lawyers would be engaged in trade union-like protectionism at its worst.²⁵³

247. On Tweed, see generally Roger K. Newman, *Harrison Tweed*, in *DICTIONARY OF AMERICAN BIOGRAPHY: SUPPLEMENT EIGHT 1966-70*, at 662 (John A. Garraty & Mark C. Carnes eds., 1988).

248. The lecture was given in late October 1955 to the members of the Association of the Bar of the City of New York and was published as TWEED, *supra* note 88.

249. Tweed's grandfather William Evarts was the first president of the Association. See GEORGE MARTIN, *CAUSES AND CONFLICTS*, *supra* note 51, at 23.

250. See TWEED, *supra* note 88, at 15-17.

251. Tweed observed:

Many lawyers have learned that most clients require a proficiency which the lawyer cannot give if he has spread his education and reading and experience over the entire legal territory. In order first to have clients and then to be able to conscientiously handle their legal problems, a proficiency is necessary which can be acquired only by a certain amount of specialization.

Id. at 17.

252. The intrusion by accountants and others into the work of the lawyer was noted by *Fortune* in its May 1949 portrait of the profession, see *The U.S. Bar*, *supra* note 217, at 174-76, and was the subject of a student-written note in the mid-1950s, see Note, *The Practice of Taxes as the Practice of Law: The Lawyer-Accountant Dispute*, 39 *MINN. L. REV.* 873 (1955).

253. See TWEED, *supra* note 88, at 11 & n.12.

The claim that specialization was necessary was made to a profession in which two-thirds of its 177,000 members in private practice were sole practitioners.²⁵⁴ Although both professionalism and economic arguments were made in favor of formal recognition of specialization, the easier argument was the economic argument. Empirical data showed that the larger the law firm (and thus, it was claimed, the greater the legal specialization), the greater the income of the lawyer. Blaustein and Porter reported that sole practitioners earned less than one-fifth the annual incomes of lawyers in firms of nine or more members²⁵⁵ and that pairs of lawyers who worked as partners earned fifty percent more than sole practitioners.²⁵⁶

The professionalism argument was more difficult. One classic justification of the lawyer as professional was his knowledge of law. Addressing this issue, one advocate of specialization acknowledged, "Abraham Lincoln could practice law in the frontier community of which he was a part without special competence in any field but with a general facility which enabled him to handle all types of cases in an acceptable manner."²⁵⁷ For specialization to succeed, this vision of the ideal lawyer had to be turned on its head. Joiner, Tweed, and other proponents of specialization claimed that modern life (read "progress") demanded that lawyers recognize that professional competence required them to limit their practices. The difficult proposition was to convince lawyers that specialization suited the ideology of the profession of law.

The intensity of the effort by corporate lawyers (and their friends) to connect specialization with professionalism is clearly illustrated by two books published shortly after Tweed's and Joiner's pleas went unheeded. Arthur H. Dean, a partner in the law firm of Sullivan and Cromwell, wrote a biography

254. See ALBERT P. BLAUSTEIN & CHARLES O. PORTER, *THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION* 8 (1954).

255. *Id.* at 11 tbl. 2 (noting that a 1948 study by the Department of Commerce found that the average income of sole practitioners was \$5,759, that the average income of an attorney in a firm consisting of nine or more members was \$27,246, and that comparable median figures were \$4,275 and \$21,500, respectively).

256. *Id.* This was also true when calculated either as an average or as a median.

257. Charles B. Nutting, *Training Lawyers for the Future*, Address at the Dedication of the New Building of the Hastings College of Law (Mar. 26, 1953), in 6 *J. LEGAL EDUC.* 1, 7 (1953). Nutting was not defending the classic position, for he also said, "One of my theories about practice is that it is becoming more and more specialized. Although we still tend to think of the general practitioner, of whom the country lawyer is the prototype, as being typical of our calling, it is quite evident that he is passing from the scene just as the family doctor is vanishing into the realm of legend." *Id.* Most of Nutting's speech was later reprinted in the *American Bar Association Journal*. See Charles B. Nutting, *Training Lawyers for the Future: Some Theories About the Practice of Law*, Address at the Dedication of the New Building of the Hastings College of Law (Mar. 26, 1953), in 41 *A.B.A. J.* 607 (1955).

of founding partner William Dean Cromwell privately published in 1957.²⁵⁸ Several years later, lawyer and legal scholar Beryl Harold Levy²⁵⁹ wrote a book titled *Corporation Lawyer: Saint or Sinner?*²⁶⁰ The rehabilitation—indeed, veneration—of the corporate lawyer permeates both books.

According to Dean, Cromwell was unlike the “trial lawyer-politician-statesman-orator-classicist,” but was more suited to the Gilded Age.²⁶¹ Cromwell possessed a “flair for figures, [a] passion for facts and more facts, and [an] insistence on realistic, economic analysis rather than polished rhetoric, literary allusion or poetical quotation,”²⁶² the strengths of the trial lawyer. Not only was this new breed of attorney a “hard-headed business counsellor[],” but he also enjoyed the “creative imagination . . . to devise new legal forms.”²⁶³ Dean’s biography of Cromwell portrayed the work of the office lawyer as the highest and best use of the intelligent lawyer’s abilities. In other words, the shift of the professional elite from the trial lawyer to the office lawyer was made not for monetary reasons, but for reasons of intellect, or knowledge.²⁶⁴

Dean’s biography of Cromwell takes a curious turn near its middle. In a twelve-page digression, Dean discussed the nature of the practice of law in the large law firm.²⁶⁵ More particularly, he tried to dispel the charge that specialization had adversely affected the profession of law. Criticizing Justice Stone’s 1934 speech at the dedication of the University of Michigan Law

258. DEAN, *supra* note 46.

259. Levy has recently written an illuminating sketch of his own life and work. See BERYL H. LEVY, *ANGLO-AMERICAN PHILOSOPHY OF LAW: AN INTRODUCTION TO ITS DEVELOPMENT AND OUTCOME* xv-xxiii (1991).

260. LEVY, *supra* note 46.

261. DEAN, *supra* note 46, at 52.

262. *Id.*

263. *Id.* at 53.

264. A similar argument was made by a New York and Virgin Islands lawyer named Roger Siddall, whom Tweed cited with approval:

The practice of law is an art, in many instances a high art, and as with . . . many other artistic pursuits the best results are obtained where there is a substantial divorce between the activity of the pursuit itself and the objective of obtaining monetary compensation.

That this is an impractical ideal and pretty much a visionary conception in the practice of a small office I agree but in a large office things can be different and the ideal can come closer to achievement. I have seen it with my own eyes and I know it can happen.

ROGER B. SIDDALL, *A SURVEY OF LARGE LAW FIRMS IN THE UNITED STATES* 132, *quoted in* TWEED, *supra* note 88, at 51-52 n.19.

Siddall later voiced in the *American Bar Association Journal* his disdain for the call for acknowledgment and regulation of legal specialization. See Roger B. Siddall, *Specialization in the Law: A Retort to Professor Joiner’s Call for Control*, 42 A.B.A. J. 625 (1956).

265. See DEAN, *supra* note 46, at 76-87.

Quadrangle,²⁶⁶ Dean argued that “in [Stone’s] widely shared fear there is some of the deceptive plausibility of the half truth.”²⁶⁷ Like Reginald Heber Smith and Harrison Tweed, Dean concluded that the cause of specialization was the increasing complexity of society, not the rise of the large firm. The lawyer’s intelligent contemporaries in business accepted the lawyer’s counsel only if it was based on expert knowledge, and that expert knowledge was found in the large law firm, just as in the past it was once found in the sole practitioner. Using the offering of Ford Motor Company stock by the Ford Foundation as an example, Dean concluded:

A considerable amount of close cooperation between specialists in a number of fields, and therefore of practice in partnership, is simply unavoidable if today’s commerce is to receive the competent advice required to permit its nationwide and frequently worldwide scope of operations to continue on the unrelenting and exacting time tables now customary in financial matters.²⁶⁸

Returning to Cromwell, Dean suggested that Cromwell epitomized the true legal professional:

Cromwell never forgot that he was first and foremost an “officer of the court,” a professional man. . . . He had a high standard of ethics and lived up to his code. He fought hard on behalf of his clients. But he never thought that his duty to his clients, which he placed very high, required him to forego his duty to his country or his duty to the courts, or, indeed, to society.²⁶⁹

As an officer of the court and conscious of his duty to society, Cromwell was the modern embodiment of the lawyer as professional, and a worthy historical heir to Abraham Lincoln, the personification of the country lawyer.

Levy’s book offers many of the same judgments found in Dean’s biography.²⁷⁰ For Levy, like Dean, the story was straightforwardly instrumental: Before 1870, life and the economy in America were simpler. The

266. See *supra* text accompanying notes 198-201.

267. *Id.* at 81.

268. *Id.* at 85. Then, like many others before and after him, see, e.g., GLENN GREENWOOD & ROBERT F. FREDERICKSON, *SPECIALIZATION IN THE MEDICAL AND LEGAL PROFESSIONS* (1964), Dean analogized the specialization of legal practice to specialization in the medical profession, see DEAN, *supra* note 46, at 85.

269. DEAN, *supra* note 46, at 167.

270. For example, much of Chapter 9 of *Corporation Lawyer*, titled *Cromwell: The Institutional Firm*, is taken almost directly from Dean. Compare LEVY, *supra* note 46, at 51-69 with DEAN, *supra* note 46.

industrial revolution gave birth to the "Office Corporation Lawyer"²⁷¹ and caused the death of the courtroom lawyer, for the court room was inefficient, cumbersome, and creaky.²⁷² Levy wrote, "[T]he typically big-league lawyer today is a partner in a large law office of specialists in various phases of corporate and financial law."²⁷³ He felt that although large law firms were indeed "factories," with a "high degree of division of labor and specialization,"²⁷⁴ lawyers in such firms should not feel guilty, for they were true exemplars of the "bar's best tradition."²⁷⁵ Again like Dean, Levy cited Justice Stone's excoriation of the profession,²⁷⁶ but reminded his readers that lawyers were "supported and strengthened by the persisting tradition of an independent bar," whose members remained officers of the court.²⁷⁷ To Levy, it was wrong for lawyers "to cling to the idea of an omniscient lawyer" and to reject "special certificates for legal specialists."²⁷⁸ Just as in the medical profession, the "necessity for specialization" existed in the legal profession.²⁷⁹

In the 1960s, the ABA twice renewed its efforts to formally recognize legal specialization. In 1961 the Board of Governors created a new Special Committee on Recognition and Regulation of Specialization in Law Practice.²⁸⁰ The Special Committee in 1962 presented to the House of Delegates a much more modest proposal than the 1954 Special Committee's.²⁸¹ Even this more modest plan to formally certify lawyers was opposed by lawyers outside the elite of the bar.²⁸² What is most interesting about the opposition

271. LEVY, *supra* note 46, at 22.

272. *Id.* at 24-25.

273. *Id.* at 25.

274. *Id.* at 38.

275. *Id.* at 85.

276. *Id.* at 169-71.

277. *Id.* at 173.

278. *See id.* at 154.

279. *Id.*

280. *See Report of the Board of Governors*, 87 A.B.A. REP. 54 (1962). Two members of the Committee were Charles Joiner and Harrison Tweed. *Special Committees of the Association*, 87 A.B.A. REP. 44, 54 (1962).

281. *See Proceedings of the 1962 Midyear Meeting of the House of Delegates*, 48 A.B.A. J. 353, 362-63 (1962); John C. Satterfield, *The President's Page*, 48 A.B.A. J. 3 (1962). Instead of creating a Council of Legal Specialists and urging the creation of specialized legal societies, the 1962 proposal suggested the undertaking of minimal work to obtain a "certificate of proficiency" administered by an ABA Council on Certification with the advice and counsel of the various sections of the ABA. A certificate of proficiency would not limit the holder's ability to practice in other areas. *See Proceedings of the 1962 Midyear Meeting of the House of Delegates*, *supra*, at 362-63.

282. *See Specialization Proves Spicy Subject*, 19 J. MO. BAR 202 (1963) (reprinting article in LAW. ASS'N KAN. CTRY NEWSL.) (reporting vote in opposition to the ABA's proposal by the Lawyers Association of Kansas City); *Majority Oppose Specialization Certification*, N.J. L.J.,

is the change in its reasons for opposing formal recognition of specialization. Instead of challenging the proposal by extolling the virtues of the country lawyer²⁸³ and the seamless web of the law, opponents conceded the existence and inevitability of legal specialization.²⁸⁴ They premised their opposition primarily on the economic and professional consequences of the segmentation of the profession and secondarily on the limited judgment of specialists.²⁸⁵ A year later, after hearing so much opposition, the Committee concluded: “[T]he bar of the country either does not want specialization controlled or is not prepared to accept regulation at this time.”²⁸⁶

The debate between proponents and opponents of formal recognition of legal specialization was a staple of legal periodicals during the rest of the

Nov. 22, 1962, at 1 (noting opposition of New Jersey State Bar Association to ABA proposal).

283. The only “country lawyer” argument made in the two debates cited in note 282, *supra*, was the argument of Dean Frederick D. Lewis of the University of Kansas City Law School that country lawyers might resent specialists because their work might not qualify them as specialists. See *Specialization Proves Spicy Subject*, *supra* note 282, at 203. One member of the ABA Special Committee, Arch Cantrall, a self-styled “country lawyer,” claimed that appellation in arguing in favor of the Committee’s proposal, although he was once Chief Counsel of the Internal Revenue Service under President Eisenhower. See Arch M. Cantrall, *A Country Lawyer Looks at “Specialization”*, 48 A.B.A. J. 1117 (1962).

284. See Russell D. Niles, *Ethical Prerequisites to Certification of Special Proficiency*, 49 A.B.A. J. 83 (1963) (beginning opposition to proposal by stating: “It is not the purpose of this article to challenge the desirability, the necessity or even the inevitability of specialization in the legal profession.”); *Specialization Proves Spicy Subject*, *supra* note 282, at 203; *ABA Certification of “Special Proficiency”: Contra—Another Primrose Path*, N.J. L.J., Nov. 8, 1962, at 4 (beginning opposition to ABA proposal with the statement: “Specialization in legal practice is a fact.”). As Dean of New York University Law School, Niles made a similar statement in the school’s *Bulletin* in another argument against the ABA’s proposal. See Russell D. Niles, *Specialization v. General Education*, 2 N.Y.U. L. CENTER BULL. 2 (Winter 1962) (“[C]lients realize that specialization is important, because of the complexity of the law . . .”).

285. See *Specialization Proves Spicy Subject*, *supra* note 282, at 203 (noting that Frederick Lewis opposed certification proposal on grounds that “he was not convinced that specialists were equipped to handle general legal problems alone” and that “the public image of the lawyer as a man who could look at and analyze a legal problem would be changed to a man who could look at only certain types of legal problems”); *ABA Certification of “Special Proficiency”: Contra—Another Primrose Path*, *supra* note 284, at 4 (noting problems of “professional myopia” and the eclipse of professional control “by the self constituted ‘colleges’ of specialists,” and worrying that specialization would succeed “to the detriment of the larger perspective of the general practitioner and his freedom from the specialist’s pre-commitment to find a solution within the fenced boundaries of his own domain”).

Professor Joiner anticipated these arguments in Joiner, *Control It*, *supra* note 244, at 1108, 1170, but without apparent effect. Professor Richard Harnsberger also suggested that because approved law lists recognized legal specialists, the problem of fragmentation already existed. See Richard S. Harnsberger, *Publication of Specialties and Legal Ability Ratings in Law Lists*, 49 A.B.A. J. 33 (1963).

286. *Report of the Special Committee on Recognition and Regulation of Specialization in Law Practice*, 88 A.B.A. REP. 672, 672 (1963).

decade. Proponents continued to argue that because legal specialization was a fact of lawyerly life, competent lawyers were those who limited their practice, and that efficient use of legal services often required the use of lawyers with particular expertise in the law.²⁸⁷ Some opponents abandoned the traditional claim of the professional lawyer's knowledge of all of law, arguing instead that specialists lacked the judgment to properly serve the public role designed for lawyers by our political system.²⁸⁸

In the late 1960s, the ABA made one more effort to deal with the problem of specialization. The result was another setback for proponents of formal recognition of specialists. In 1965, the ABA Board of Governors created a Special Committee on Availability of Legal Services to study and make recommendations concerning the adequacy and availability of legal services.²⁸⁹ In 1967, the Special Committee concluded: "Recognition and regulation of specialization in the practice of law will measurably improve the availability of legal services to those who should be in need of them."²⁹⁰ The Special Committee recommended that the House of Delegates request the Board of Governors to "further consider the matter of recognition and regulation of voluntary specialists in the various fields of the practice of law for the benefit and protection of the public and of the Bar."²⁹¹ Although the Board of Governors amended the Special Committee's recommendation so that the House of Delegates would instead request the Board to renew its efforts to implement the ABA's 1954 resolutions,²⁹² the House of Delegates refused to vote in principle in favor of this recommendation and placed the issue back before the Board of Governors,²⁹³ which created the Special Committee on

287. See BARLOW F. CHRISTENSEN, SPECIALIZATION 3 (tent. draft 1967) ("There is little room for doubt that specialists can provide legal services superior in quality to those performed by generalists."); John P. Bracken, *Specialization in the Law: A Fact and Not a Theory*, 53 A.B.A. J. 325 (1967); Elliott E. Cheatham, *The Growing Need for Specialized Services*, 16 VAND. L. REV. 497 (1963); Gary N. Hagerman, Comment, *Legal Effects of Attorney Specialization*, 30 ALB. L. REV. 282 (1966); Elwin A. Andrus, *Legal Specialization*, WIS. B. BULL., Aug. 1969, at 9.

288. See, e.g., Willard H. Pedrick, *Collapsible Specialists*, 55 A.B.A. J. 324, 324-25 (1969).

289. See *Report of the Board of Governors*, 90 A.B.A. REP. 364, 365 (1965).

290. *Supplemental Report of the Special Committee on Availability of Legal Services: Report on Specialization*, 92 A.B.A. REP. 584, 584 (1967) [hereinafter *Report on Specialization*]; accord Chesterfield H. Smith, *Increased Availability of Legal Services Through Specialization*, Address at the National Conference of Bar Presidents (Aug. 6, 1966), in 40 FLA. B.J. 1219 (1966). Smith, later a President of the ABA, also served as Chairman of the Special Committee on Specialization.

291. See *Report on Specialization*, *supra* note 290, at 584.

292. See *Supplemental Report of the Board of Governors*, 92 A.B.A. REP. 372, 372-73 (1967).

293. See *Proceedings of the House of Delegates at the 1967 Annual Meeting*, 92 A.B.A. REP. 316, 336-38 (1967).

Specialization.²⁹⁴ After two years of study, the Special Committee on Specialization concluded in 1969 that the ABA should not promulgate a national plan of specialization until learning from experimental specialization programs conducted at the state and local level.²⁹⁵

D. *The End of the Beginning: 1970-Present*

The ABA's role since 1970 has been to strengthen the efforts of states to implement specialization programs. Through promulgating the *Model Code of Professional Responsibility* and *Model Rules of Professional Conduct*, by acting as a clearinghouse for information, and in creating a model specialization certification plan for states to adopt, the ABA has continued to view formal recognition of legal specialization as central to its mission to represent the views of the bar. One consequence of the ABA's efforts is the insistence by current leaders of the bar elite that specialization defines the lawyer as a professional.

California, in 1973,²⁹⁶ and Texas, in 1974,²⁹⁷ were the first two states to create programs certifying lawyers as specialists. These pilot programs each selected three fields for certification, fields of law in which the nonelite lawyer practiced. California chose workmen's compensation, criminal law, and taxation.²⁹⁸ Texas chose the fields of family law, criminal law, and labor law.²⁹⁹

Both programs were premised on the assumption that certification of specialists protected the public interest by ensuring the competence of lawyers.³⁰⁰ The image of the competent lawyer, just as Tweed had envi-

294. See *Report of the Board of Governors*, 93 A.B.A. REP. 136, 141-42 (1968).

295. See *Proceedings of the 1969 Midyear Meeting of the House of Delegates*, 94 A.B.A. REP. 115, 129-32 (1969).

296. See *Standards for Specialization Announced*, 48 CAL. ST. B.J. 80 (1973). The Ninth Circuit in 1976 rejected a constitutional challenge to the California plan. See *Brady v. State Bar*, 533 F.2d 502 (9th Cir. 1976). In 1982, California made its pilot program permanent. See *Board Adopts Permanent Specialization Program*, CAL. LAW., May 1982, at 43, 43-44. For background on the California plan, see generally Comm. on Specialization, State Bar of Cal., *Final Report*, 44 J. ST. B. CAL. 493 (1969) [hereinafter *Specialization Committee Report*].

297. Richard Wells, *Certification in Texas: Increasing Lawyer Competence and Aiding the Public in Lawyer Selection*, 30 BAYLOR L. REV. 689, 689 n.1 (1978). Wells was Executive Director of the Texas Board of Legal Specialization.

298. See *Specialization Committee Report*, *supra* note 296, at 511.

299. Wells, *supra* note 297, at 691.

300. Compare *Specialization Committee Report*, *supra* note 296, at 500 (concluding that "an increase in the number of competent specialists will improve the overall quality of the legal services rendered by lawyers to clients because specialists can maximize both their experience and their continuing legal education"); with Wells, *supra* note 297, at 689-90 ("The twin goals of the certification specialization programs are: (1) to increase lawyer competency through

sioned,³⁰¹ was not the lawyer who claimed to know all of law, but the lawyer whose knowledge was limited to specific areas of law.³⁰² As the Committee on Specialization of the State Bar of California stated: "Some degree of specialization is a necessity of modern law practice. The law that applies to our complex society is such that no single lawyer can perform all legal tasks required. . . . Thus, the 'seamless web' analogy may have to be abandoned, or at least modified."³⁰³

More generally, proponents of certification specialization programs reversed the argument that formal recognition of specialization would cause the fragmentation of the profession. Instead of specialization's causing fragmentation, the *failure* to formally recognize specialization would cause those lawyers already specializing in particular fields to develop "narrow and autonomous self-policing units."³⁰⁴ Such a result would benefit neither the profession nor the public. A related threat to the unity of the legal profession, but especially to the general practitioner, was the growth of group legal

continuing legal education, testing, peer review, and involvement in the field, and (2) to inform the public who the specially competent attorneys are in the particular field of law in which legal assistance is sought.")

This was the same reason used by Chief Justice Warren Burger in his quest to certify trial lawyers. See Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227 (1973). But see Michael S. Ariens, *A Uniform Rule Governing the Admission and Practice of Attorneys Before United States District Courts*, 35 *DEPAUL L. REV.* 649 (1986), in which I noted that empirical data on the incompetence of trial lawyers was lacking and proposed a uniform rule through which lawyers would be qualified to practice before all United States district courts.

301. See *supra* note 251 and accompanying text.

302. "If the assumption of omnicompetence is no longer valid—and there can no longer be any real doubt that it is not—why do lawyers continue to cling to it so tenaciously?" CHRISTENSEN, *supra* note 287, at 17. See also *id.* at 13-18. Proponents of bar-regulated plans of specialization regularly cited surveys indicating that lawyers viewed themselves as specialists. See, e.g., David R. Brink, *Specialization: A Changing Climate*, in *A MATTER OF COMPETENCE: MANDATORY CLE AND SPECIALIZATION* 26, 32-33 (1979).

303. *Specialization Committee Report*, *supra* note 296, at 499-500. Others agreed. See, e.g., CHRISTENSEN, *supra* note 287, at 18 ("Finally, and perhaps most importantly, lawyers may be loath to abandon the pose of omnicompetence in favor of specialization because of what specialization suggests about the law itself. First, and most obviously, it suggests that the 'seamless web' analogy might have to be abandoned, or at least modified. If specialization is possible and desirable, then clearly the law *does* have some seams."); cf. Stanley B. Kent, *Problems of Specialization*, 7 *L. OFF. ECON. & MGMT.* 385, 388 (1967) ("Specialization does not challenge the seamless web concept and fully recognizes the indivisibility of the law. At the same time, it is possible to mark out a certain specific area within the web, enumerate the skills it particularly demands, and require, for accreditation, evidence of mastery of these skills.").

304. *Specialization Committee Report*, *supra* note 296, at 501; accord Brink, *supra* note 302, at 41; Smith, *supra* note 290, at 1224. The same argument was made in 1955 in Joiner, *Control It*, *supra* note 244, at 1105.

services.³⁰⁵

During this time, the attack on formal legal specialization was based not on protecting the ideal of the country lawyer, but on economic grounds. In several articles, Marvin Mindes, a lawyer and sociologist, attacked formal specialization programs as attempts by the legal profession to increase its members' incomes by giving them the opportunity to claim greater status as experts.³⁰⁶ Antitrust attorney Jerome Hochberg made the same argument in a book edited by Ralph Nader and Mark Green:

Specialization, certification, [continuing legal education] and trial advocacy licensing all have a certain plausibility. They can assure clients that the lawyers who serve them have been trained and approved for the task. They can lead to greater lawyer efficiency, which in turn can result in cost savings passed on to clients. So much for theory. In fact, these programs construct new and formidable barriers to free and open competition in the market for legal services. They reduce the supply of lawyers in critical areas, which will, if the medical specialties provide any analogy, lead to *higher* fees charged, not lower ones.³⁰⁷

Because both critics and proponents were operating without the benefit of any empirical data, the response to the charge of rent seeking was the following syllogism: Specialization resulted in enhanced lawyer competence and greater facility with the particular law involved; knowing the law meant less time (and, thus, money) was spent on the legal problem; and therefore, specialization led to greater savings, not higher costs, for clients.

The two traditional arguments against legal specialization were based on knowledge and independence. The first argument was made only in a diluted fashion after the 1950s; the second argument disappeared during the 1970s. Specialists were no longer damned for their inward-looking or narrow-minded tendencies. Instead, specialization was equated with the issue of access: the value of specialists was premised on their public duty to provide access to prospective "consumers" then excluded from lawyering services.³⁰⁸ The use of specialists to serve this public function provided the answer to claims that advertising of specialties might somehow compromise the independence of

305. See CHRISTENSEN, *supra* note 287, at 21.

306. See Marvin W. Mindes, *Lawyer Specialty Certification: The Monopoly Game*, 61 A.B.A. J. 42 (1975); Marvin W. Mindes, *Proliferation, Specialization and Certification: The Splitting of the Bar*, 11 U. TOL. L. REV. 273 (1980).

307. Jerome Hochberg, *The Drive to Specialization*, in VERDICTS ON LAWYERS 118, 121 (Ralph Nader & Mark Green eds., 1976); accord Nicholas von Hoffman, *Specialization: Raising the Standards—and the Prices*, WASH. POST, Jan. 1, 1975, at C1.

308. Lester Brickman, *Legal Specialization: An Overview of Goals and Ethical Considerations*, in LEGAL SPECIALIZATION 5, 11-19 (1976).

lawyers. In this way, the specialist replaced the independent country lawyer.

The biggest development concerning efforts to promote specialization plans was the Supreme Court's holding in *Bates v. State Bar*³⁰⁹ that lawyer advertising, if neither false nor misleading, is entitled to at least some First Amendment protection. One immediate response to *Bates* was an amendment to the *Model Code of Professional Responsibility*.³¹⁰ In 1977, the ABA amended Disciplinary Rule 2-105 of the *Model Code*.³¹¹ A second response was to use the *Bates* decision to implement the new definition of the professional lawyer.

The constitutionally guaranteed right of lawyers practicing in legal clinics to advertise their services would not affect the large-firm lawyer; instead, *Bates*, as applied to "routine" legal services,³¹² offered clinics the opportunity to engage in unfair competition against the nonelite lawyer. Because the "false and misleading" limitation of the right to engage in commercial speech

309. 433 U.S. 350 (1977).

310. The ABA adopted the *Model Code* in 1969 as the successor to the *Canons of Professional Ethics*. See *Proceedings of the 1969 Annual Meeting of the House of Delegates*, 94 A.B.A. REP. 378, 389-92 (1969).

311. See *Supplemental Report of the Board of Governors Concerning Lawyer Advertising*, 102 A.B.A. REP. 591, 607 (1977). As amended, DR 2-105 stated:

- (A) A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice permitted under DR 2-101(B), except as follows:
- (1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.
 - (2) A lawyer who publicly discloses fields of law in which the lawyer or the law firm practices or states that his practice is limited to one or more fields of law shall do so by using the designations and definitions authorized and approved by [the agency having jurisdiction of the subject under state law].
 - (3) A lawyer who is certified as a specialist in a particular field of law or law practice by [the authority having jurisdiction under state law over the subject of specialization by lawyers] may hold himself out as such, but only in accordance with the rules prescribed by that authority.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105 (1980) (alterations in original).

Among other changes, the amendment eliminated from DR 2-105(A)(1) the permissibility of admiralty and trademark lawyers' noting their specialties on letterheads and shingles. DR 2-105(A)(2) was added to the rule in direct response to *Bates*, thus forbidding a lawyer from advertising any limitation in her practice without prior permission from bar regulators.

312. Justice Blackmun's opinion for the majority in *Bates* explicitly limited the right to advertise prices for legal services to "routine legal services." *Bates*, 433 U.S. at 367-68. Justice Powell severely criticized this view. *Id.* at 391-92 (Powell, J., concurring and dissenting). The ABA attempted to limit the effect of *Bates* by reading it as creating a constitutional right to advertise only in cases involving routine legal services. See *Advertising and the Future*, 63 A.B.A. J. 1045 (1977).

found in *Bates* would be ineffective to stop most advertisements, even when the lawyer truly was not an expert in the advertised field, only bar-regulated specialization plans would protect the nonelite members of the profession from legal clinics. Protecting the small practitioner was an explicit justification for acknowledging legal specialization when, in 1979, the ABA promulgated its *Model Plan of Specialization*.³¹³ Proponents of bar-regulated certification specialization programs argued that those programs would protect the nonelite lawyer from competition from below by giving him a formally recognized expertise with which to attract clients.³¹⁴ When combined with certification as a specialist, advertising by the nonelite lawyer was no longer the degradation of the profession into a business, but the enhancement of the legal profession. Formal recognition of nonelite lawyers as experts distinguished them from lawyers at legal clinics and created a greater unity between the nonelite and elite specialists.

The goals of the plan were all stated in terms that marked acceptance of the new understanding of lawyer professionalism: The Model Plan was an effort to increase public access to legal services, improve the quality of legal services, and maintain reasonable legal fees.³¹⁵ Advertising by lawyers recognized as specialists increased public access to legal services because it provided the prospective client important information to distinguish among the

313. See *Proceedings of the 1979 Annual Meeting of the House of Delegates*, 104 A.B.A. REP. 821, 846-47 (1979). The ABA's reasoning was as follows:

Those seeking specialized services now usually find them by going to large law firms that are known to be organized on a functionally specialized basis. . . .

Other lawyers, including sole practitioners, small firms and young and minority lawyers, in general do not and cannot now obtain specialized business through reputation, reference or mass advertising. They are thus at a competitive disadvantage—a disadvantage that can only increase in the future. They are losing ground rapidly to large firms and clinics.

But what at first seems a paradox is that many lawyers are now perceiving that the most direct action a bar can take to protect the small practitioner is to propose and secure adoption of a specialization plan in the state.

Report of the Standing Committee on Specialization, 104 A.B.A. REP. 978, 982 (1979); accord Brink, *supra* note 302, at 32. Brink was the Chairman of the Standing Committee on Specialization when the Model Plan was adopted. The same argument, couched in professionalism terms, was that unfair competition also harmed members of the public, for they would have no objective manner in which to select appropriately qualified attorneys. See *id.*

314.

[The Model Plan] may afford better means to sole and general practitioners, on whom so much of our American system of delivery of legal services depends, of competing on a fair basis with the large law firms and specialized legal clinics and service groups that now dominate the market for specialized legal services.

Report of the Standing Committee on Specialization, *supra* note 313, at 979.

315. STANDING COMM. ON PRACTICE, AMERICAN BAR ASS'N, HANDBOOK ON SPECIALIZATION 9 (1983); see also Roderick N. Petrey, *Introduction to LEGAL SPECIALIZATION*, *supra* note 308, at 1.

offers for her business. As a specialist, however, the lawyer remained an independent professional because advertising, and the resulting access, was undertaken for the benefit of the public, not simply to make money.³¹⁶ Certified specialists were by virtue of their certification *prima facie* competent practitioners who knew the law, at least the law in the areas in which they were certified. The traditional access of clients of large law firms to competent legal specialists was now provided to the individual in need of special legal services. Finally, although not empirically verified, the argument was that specialization offered efficiency, and thus lower prices, for the resolution of legal problems in our complex legal society.

In the decade that followed, most states either studied or voted on specialization plans, but at the end of 1990, only fifteen states had adopted any plan.³¹⁷ Why? I am not certain. It is possible that because *Bates* offered nonelite members of the profession not only a reason to embrace certification, but an opportunity to avoid the rigors of certification, nonelite practitioners concluded specialization certification was unnecessary. If nonelite practitioners did not find themselves in competition with legal clinics, much of the economic and ideological incentive to support certification disappeared. A second reason may be that, as noted by Professor Lynn LoPucki, specialization plans have been “based on a theory of lawyer specialization that bears little relationship to the complex, *de facto* pattern of specialization that pervades the profession.”³¹⁸ A third reason may be the fear by nonelite lawyers that certification of specialization would create hurdles that might exclude (most of) them from the status of “professional,” a status they could continue to claim as long as the profession was theoretically unified by professional licensure.³¹⁹

The Supreme Court’s decision in *Peel v. Attorney Registration and*

316. Justice Blackmun’s opinion in *Bates* is at odds with this statement. Blackmun wrote, “Since the belief that lawyers are somehow ‘above’ trade has become an anachronism, the historical foundation for the advertising restraint has crumbled.” *Bates v. State Bar*, 433 U.S. 350, 371-72 (1977).

317. See STANDING COMM. ON SPECIALIZATION, AMERICAN BAR ASS’N, STATUS REPORT ON STATE SPECIALIZATION PLANS (Dec. 1990). However, several states with large populations of attorneys, including California, Florida, and Texas, have adopted extensive specialization programs. See *id.*

318. LYNN M. LOPUCKI, THE DE FACTO PATTERN OF LAWYER SPECIALIZATION 2 (1990) (footnote omitted).

319. This may be so in spite of the ABA’s efforts to craft a model plan of certification of specialists in a way that limits testing requirements in favor of minimum standards of experience, continuing legal education requirements, and peer review. See *Model Plan of Specialization*, 104 A.B.A. REP. 983, 986-87 (1979) (listing the minimum standards of specialization as twenty-five percent of a lawyer’s full-time practice in the field for three years; ten hours per year of continuing legal education in the specialty; and five references from lawyers or judges).

Disciplinary Commission,³²⁰ holding that a state may not prohibit the nonmisleading advertising of an attorney's certification as a specialist by an unapproved certification board, effectively has ended the process of bar-controlled certification of specialists. Although the opinions³²¹ leave open the possibility that some claims of certification may be considered misleading or may be regulated by the state through required disclaimers, the Court's decision negates the exclusivity of the authority of bar associations to regulate claims to specialization through rules of ethics.³²² One interesting consequence of *Peel* may be that the question whether societies of legal specialists will fragment the bar will finally be answered; another possible consequence may be the recognition of a bar already fragmented economically, culturally, and ideologically.³²³

IV. CONCLUSION

The history of legal specialization is a history of the ways in which lawyers have viewed themselves. Two internally accepted measures of professionalism, knowledge and independence, have long been intertwined with the idea of legal specialization. For the profession to view legal specialization favorably, proponents of specialization needed to alter the profession's understanding of those two measures. Time and persistence allowed those advocates to succeed. Their success precipitated a new understanding of the lawyer's work and duty.

Today, legal specialization is an unexceptional aspect of the profession of law. It is so unexceptional that assertions of specialization and concentration are expected of lawyers. In Victoria Stewart's case, the claim to specialization was so ordinary that the court could quickly conclude that her career was harmed when she spent two years working outside her chosen specialty.³²⁴

320. 496 U.S. 91 (1990).

321. *Peel* was a 5-4 decision. Justice Marshall concurred in the judgment only.

322. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4 (1983) (amended 1989 & 1992), adopted in 1983, was substantially the same as amended DR 2-105 of the *Model Code of Professional Responsibility*. Like DR 2-105, it forbade lawyers from advertising a specialty other than patent or admiralty law except as permitted by a state certification program. *See id.* As written, Rule 7.4 became unenforceable as a result of *Peel*, but it has since been amended to require a disclaimer whenever a lawyer advertises an unapproved certification. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.4(c)(2) (1993). However, the amended version may also be unconstitutional.

323. *See* Edward O. Laumann & John P. Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 A.B.F. RES. J. 155. For examples of various areas of difference among lawyers, see generally JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982) (analyzing the results of sociological studies of Chicago lawyers' organizational, social, and ideological values).

324. *Stewart v. Jackson & Nash*, 976 F.2d 86, 88 (2d Cir. 1992). Of course, the court was

There is an irony in the *Stewart* case that may close the circle of this history of legal specialization. The first specialists were lawyers at large law firms, mainly located in New York. According to his biographer, the progenitor of many of those law firms was a lawyer named Walter S. Carter, known for his work with Paul D. Cravath and Charles Evans Hughes, among many others.³²⁵ What is not as well known is that Walter S. Carter was also credited by his biographer as the progenitor of the law firm of Jackson & Nash,³²⁶ the same Jackson & Nash that Victoria Stewart alleged damaged her career as a specialist in environmental law.

assuming, for purposes of the appeal, that Stewart's allegations were true.

325. See KOEGEL, *supra* note 20, at 1-12.

326. See *id.* at app. VIII.

