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### Recommended Citation

Russell Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. Chi. L. School Roundtable 381 (2001)

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# LAWYERS AS AMERICA'S GOVERNING CLASS: THE FORMATION AND DISSOLUTION OF THE ORIGINAL UNDERSTANDING OF THE AMERICAN LAWYER'S ROLE

RUSSELL G. PEARCE†

## INTRODUCTION

The self-image of American lawyers has undergone a major transformation. As recently as the early 1960s, Erwin Smigel's renowned study of Wall Street lawyers declared them to be guardians of the law.<sup>1</sup> While serving their clients' interests, they maintained a higher commitment to the public good which permitted them to manage the relationship between law and power that was essential to the continued stability of, and rule of law in, a democratic society.<sup>2</sup> Twenty years later, a number of distinguished scholars reconsidered the role of elite lawyers at a conference at Stanford Law School.<sup>3</sup> They painted an entirely different picture. Far from being guardians of the law, most corporate lawyers were hired guns who provided their clients with little independent judgment or counsel. Concern for the public good was not important to their work.<sup>4</sup>

To explain this transformation, this article will examine how lawyers have

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1. Erwin O. Smigel, *The Wall Street Lawyer: Professional Organization Man?* (Indiana 1964).
2. *Id.*
3. Robert W. Gordon, *Introduction to Symposium on the Corporate Law Firm*, 37 *Stan L Rev* 271 (1985).
4. See, for example, Robert A. Kagan and Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 *Stan L Rev* 399 (1985); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 *Stan L Rev* 503 (1985).

historically understood their role<sup>5</sup> and why that understanding has changed since the 1960s.<sup>6</sup> In particular, the article will focus on the views of the legal elite—those influential members of the bar, bench and academy that have received the most attention from contemporaries and historians.<sup>7</sup> Whether the conduct of the legal elite has actually conformed to its own beliefs is beyond the scope of this article.<sup>8</sup>

5. This topic has received great attention in the legal literature. Commentators have variously described the original conception of the lawyer's role as that of (1) the advocate, see, for example, Monroe Freedman, *Understanding Lawyer's Ethics* 65-66 (Matthew Bender 1990) (identifying the advocacy role as the historical source of modern legal ethics); David Luban, *The Adversary System Excuse*, in David Luban, ed, *The Good Lawyer* 83, 84 (Rowman & Allanheld 1984) (same); (2) the gentleman, see Thomas L. Shaffer, *American Legal Ethics: Text, Readings, and Discussion Topics* xxiv (Matthew Bender 1985); or (3) the guild member, see Elliott A. Krause, *Death of the Guilds: Professions, States and the Advance of Capitalism, 1930 to the Present* 1-28 (Yale 1996). Others have suggested the individual lawyer-statesman as the original ideal. See, for example, Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* 12 (Belknap 1993); William H. Rehnquist, *The Lawyer-Statesman in American History*, 9 Harv J L & Public Pol 537 (1986). And others look to Tocqueville's conception of lawyers as America's aristocracy. See Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming America Society* (Farrar, Straus and Giroux 1994).

This article argues that the historically dominant ideology of the legal elite was neither the hired gun, gentlemen, guild, nor even the individual lawyer-statesman. The article identifies the dominant ideology as a governing class perspective grounded not in Tocqueville but in the political understandings of American lawyers. In doing so, it expands and elaborates upon my earlier work. See Russell G. Pearce, *The Lawyer and Public Service*, 9 Am U J Gender Soc Pol & L 171 (2001); Russell G. Pearce, *Law Day 2050: Post-Professionalism, Moral Leadership, and the Law-as-Business Paradigm*, 27 Fla St U L Rev 9 (1999); Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 NYU L Rev 1229 (1995); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 Geo J Legal Ethics 241 (1992).

6. See Part III below.

7. The article employs the generally accepted definitions of the legal elite. In the early nineteenth century, the elite included those lawyers and judges who through their work and ideas were acknowledged to have shaped the development of the law, the courts, and the legal academy, as well as prominent practitioners who represented the well to do. See, for example, Perry Miller, *The Life of the Mind in America* 99-121 (Harcourt, Brace & World 1965) (describing those who played a key role in "the rise of a profession") (capitalization omitted); George Sharswood, *An Essay on Professional Ethics* 75 (Fred B. Rothman & Co. 1993) (reprint of 5th ed 1884) (noting that lawyers who earned the greatest respect from their colleagues represented business interests). From the late nineteenth century through the present day, the elite has largely consisted of lawyers who represent big businesses, together with a small group of prominent academics and judges. See, for example, John A. Matzko, "The Best Men of the Bar": *The Founding of the American Bar Association*, in Gerard W. Gawalt, ed, *The New High Priests: Lawyers in Post-Civil War America* 75 (Greenwood Press 1984) (describing the elite founders of the American Bar Association); John P. Heinz and Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (Northwestern rev ed 1994) (identifying lawyers for corporations as having the most prestige and power in the legal profession); Michael J. Powell, *From Patrician to Professional Elite: The Transformation of the New York City Bar Association* 227 n 4 (Russell Sage Foundation 1988) (noting that "[p]rofessors and deans, or former deans, of New York's leading law schools . . . are the only lawyers other than the large-firm elite to have gained access to the office [of President of the City Bar] in the postwar period"); Ronen Shamir, *Managing Legal Uncertainty: Elite Lawyers in the New Deal* xi (Duke 1995) (describing the elite as "successful academics at elite institutions, influential policy makers, and wealthy corporate lawyers"). Although lawyers in government are not generally part of the elite, elite lawyers who engage in public service do not lose their elite status. See Smigel, *The Wall Street Lawyer* at 8-10 (cited in note 1).

8. See, for example, Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 1-13 (Oxford 1976) (describing the early twentieth-century elite as self-interested and bigoted); Marc Gal-

The legal elite's original and uniquely American<sup>9</sup> understanding of the lawyer's role was that lawyers were America's governing class. Leading lawyers, judges and scholars, including the first American legal ethicists, sought to explain how the common good, minority rights and the rule of law could coexist with majority rule by an electorate largely composed of self-interested voters. They decided that the answer was a governing class of lawyers. With their dedication to the common good and their placement in the center of commerce and governance, lawyers were ideally suited for political leadership.<sup>10</sup>

This perspective did not exclude the lawyer's role as representative of clients. It included and bounded it. One of the major components of the legal elite's conception of lawyering was that lawyers exert influence on their clients, in addition to the influence lawyers wielded through their political leadership and their function in interpreting the law for the public. When representing clients, advocacy and governance duties could often coexist but when they conflicted the legal elite believed that the governing class duty was paramount.<sup>11</sup>

During its period of dominance, the governing class idea did not go unchallenged. Some argued that lawyers should serve exclusively as advocates for their clients within the bounds of the law. Others questioned lawyers' commitment to the common good. They asserted that self-interested lawyers were not entitled to serve as the governing class. Despite these challenges, the legal elite maintained their vision of lawyers as the governing class through the 1960s.<sup>12</sup>

While most commentators have not directly discussed the subsequent collapse of the governing class ideology, they have sought to explain the end of American lawyers' commitment to serving the public good in the context of the decline of professionalism. They commonly have attributed this transformation to developments in several areas affecting the profession's view of itself, including changes in the legal services market, ethical rules governing the marketing of legal services, legal education, and the diversity of bar membership.<sup>13</sup>

This article suggests instead that other factors were at work. In American society as a whole, the sense of community obligation declined as the focus on individualism rose in the years following the 1960s. At the same time, the public

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anter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 Dick L Rev 549 (1996) (questioning the existence of "Golden Ages" of the legal profession); Shamir, *Managing Legal Uncertainty* at 13 (cited in note 7) (finding corporate lawyers' opposition to the New Deal grounded in their interest in protecting their "perceived autonomous domain").

9. Although other legal traditions envisioned lawyers as disinterested and as having some responsibility for governance, none were so ambitious as the American conception of the disinterested governing class. See, for example, Samuel Haber, *The Quest for Authority and Honor in the American Professions 1750-1900* 7-8 (Chicago 1991) (describing the English gentleman-lawyer); John Leubsdorf, *Man in his Original Dignity: Legal Ethics in France* ix-xi (Ashgate 2000) (describing the French bar). See also note 53.

10. See Part I.A below.

11. See *id.*

12. See Parts I.B. and II below.

13. See Part III.B below.

became skeptical of the expertise of elites generally, and leading members of the public, including lawyers, doubted whether lawyers were capable of perceiving and pursuing the public good. Two trends within the legal profession also contributed to this transformation during the post-1960s period. First, the growth of a large, distinct public interest bar led to a transfer of responsibility for the public good from elite lawyers to public interest lawyers and to a redefinition of the “public good” that conflicted with the interests of big business clients. Second, the related development of the idea of a pro bono duty offered those elite lawyers who still clung to a semblance of the governing class idea an opportunity to satisfy their community obligations through their pro bono work. Unlike the Wall Street lawyers of the early 1960s, who viewed themselves as servants of the public in all areas of their work, the elite came to view themselves as hired guns—lawyers devoted to their clients who served the public only in their limited and separate pro bono efforts.<sup>14</sup>

Although the rhetoric of the governing class lives on in hortatory appeals to pro bono responsibility and the “‘hazy aspirational world’ of the ‘Law Day Sermon,’”<sup>15</sup> it no longer rules the conscience of the legal elite. After more than 200 years, the elite lawyers’ allegiance to the idea that they are America’s governing class appears to have come to an end.

## I. THE FORMATION OF THE GOVERNING CLASS IDEA

### A. THE ORIGINAL CONCEPTION OF THE AMERICAN LAWYER’S ROLE

In the view of most historians, “the dominant ideological force behind the American Revolution” was republicanism.<sup>16</sup> William Treanor has observed that “[a]t the center of republican thought lay a belief in a common good and a conception of society as an organic whole. The state’s proper role consisted in large part of fostering virtue, of making the individual unselfishly devote himself to

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14. See Part III.C below.

15. Pearce, 27 Fla St U L Rev at 9 (cited in note 5), quoting Robert W. Gordon, *The Independence of Lawyers*, 68 BU L Rev 1, 13 (1988).

16. Pearce, 6 Geo J Legal Ethics at 251 (cited in note 5). See, for example, Gordon Wood, *Hellfire Politics*, NY Rev of Books 28 (Feb 28, 1985) (discussing the historical literature); Robert Shalhope, *Republicanism and Early American Historiography*, 39 Wm & Mary Q 334, 334-37 (1982) (same); William Michael Treanor, *Taking the Framers Seriously*, 55 U Chi L Rev 1016, 1032 (1988), reviewing Walter Berns, *Taking the Constitution Seriously* (Simon & Schuster 1987) (same). As I have written elsewhere, “[h]istorians have traced the roots of republicanism to ancient Rome, Renaissance Italy, and to English opposition thought.” Pearce, 6 Geo J Legal Ethics at 250 (cited in note 5) (footnotes omitted). See also Bernard Bailyn, *The Ideological Origins of the American Revolution* 22-93 (Belknap 1967) (finding sources in ancient Rome and English opposition thought); Gordon Wood, *The Creation of the American Republic 1776-1787* 46-90 (North Carolina 1969) (finding sources in English opposition thought); J.G.A. Pocock, *The Machiavellian Moment Revisited: A Study in History and Ideology*, 53 J Mod Hist 49 (1981) (finding source in Renaissance Italy).

the common good.”<sup>17</sup> Acting collectively through their representatives, the people would pursue the common good and protect individual liberty.<sup>18</sup> Republics compared favorably to monarchies like England, which “sacrific[ed] . . . the public good to the private greed of small ruling groups.”<sup>19</sup>

The civic virtue necessary to republican government required “equal, active, and independent citizens”<sup>20</sup> who were willing to be “disinterested”<sup>21</sup> and “to sacrifice . . . private interests for the good of the community.”<sup>22</sup> Republican idealists believed that all or most people were capable of civic virtue.<sup>23</sup> But others feared that persons “involved in the marketplace were usually overwhelmed by their interests and were incapable of disinterestedness.”<sup>24</sup> They preferred the “disinterested leadership” of the “landed gentry” who were free from the influence of the market<sup>25</sup> or of professionals who were not wholly reliant “on their work as a source of income.”<sup>26</sup> Other republican thinkers were hostile to wealth altogether on the grounds that it “encouraged greed in its possessors and enabled them to wield undue power.”<sup>27</sup>

In the period following the American Revolution, a number of political thinkers lost confidence in traditional republicanism’s promise that the people as a whole would rise above self-interest to virtue.<sup>28</sup> These thinkers came to believe that “the people were perverting their liberty” and their power with self-interested pursuits.<sup>29</sup> The unlimited power of legislatures led to a new form of tyranny where the majority pursued its self-interest at the expense of the common good and of individual rights, particularly property rights.<sup>30</sup> These circumstances forced many republican thinkers to reconsider how to maintain a republican form of government, a commitment to the common good, and respect for individual rights.

17. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L J 694, 699 (1985).

18. Treanor, 55 U Chi L Rev at 1033 (cited in note 16); Wood, *The Creation of the American Republic* at 60-63, 162-65 (cited in note 16); Gordon Wood, *The Radicalism of the American Revolution* 188-89 (Knopf 1991).

19. Wood, *The Creation of the American Republic* at 54 (cited in note 16).

20. Wood, *The Radicalism of the American Revolution* at 104 (cited in note 18). Wood also uses the terms “public virtue” and “civic virtue” interchangeably.

21. *Id.* at 105.

22. Wood, *The Creation of the American Republic* at 68 (cited in note 16).

23. *Id.* at 57-72, 164-65; Wood, *The Radicalism of the American Revolution* at 106 (cited in note 18).

24. Wood, *The Radicalism of the American Revolution* at 106 (cited in note 18).

25. *Id.* Wood also suggests that a liberal education could counteract the influence of commerce. *Id.* at 107.

26. *Id.*

27. Treanor, 94 Yale L J at 699 (cited in note 17); Wood, *The Creation of the American Republic* at 70 (cited in note 16).

28. See, for example, Wood, *The Radicalism of the American Revolution* at 104-06 (cited in note 18); Treanor, 94 Yale L J at 699-70 (cited in note 17).

29. Wood, *The Creation of the American Republic* at 403 (cited in note 16).

30. *Id.* at 403-09; Treanor, 55 U Chi L Rev at 1033 (cited in note 16).

Many of the framers of the Constitution sought the solution to this dilemma in a modified form of republicanism. While advocating a government of “limited powers subject to elaborate checks and balances . . . intended to limit majoritarian excesses,”<sup>31</sup> they sought a virtuous political elite. Building on the elitist strand of republicanism, which had preferred the political leadership of landed gentry and professionals,<sup>32</sup> they found in these two groups the capacity for disinterestedness “necessary to virtue and realization of the common good.”<sup>33</sup> Gordon Wood explains this preference: The “disinterested gentry . . . were supported by proprietary wealth and not involved in the interest-mongering of the market place,”<sup>34</sup> and similarly, “lawyers and other professionals [were] somehow free of the marketplace, [were] less selfish and interested and therefore better equipped for political leadership and disinterested decision-making than merchants and businessmen.”<sup>35</sup>

Federalist No. 35 went so far as to identify professionals as the most virtuous members of this emerging governing class. While even the landed gentry would seek to protect and promote its own financial interests,<sup>36</sup> lawyers and other members of the “learned professions . . . truly form[ed] no distinct interest in society.”<sup>37</sup> Such professionals “will feel a neutrality to the rivalships between the different branches of industry, be likely to prove an impartial arbiter between them, ready to promote either, so far as it shall appear to him conducive to the general interests of the society.”<sup>38</sup> Implicit in this distinction between professionals and other businesses was the “Business-Profession dichotomy,” which would become central to the governing class conception of the lawyer’s role.<sup>39</sup> What links Federalist No. 35 to the elite lawyers’ conception of their place in society is the fundamental belief that, in contrast to business persons who

31. Treanor, 55 U Chi L Rev at 1033-34 (cited in note 16).

32. Wood, *The Radicalism of the American Revolution* at 106-07 (cited in note 18).

33. Pearce, 6 Geo J Legal Ethics at 251 (cited in note 5). For further discussion of the development of modified republicanism, see id at 251-52; Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism* 170-83 (Chicago 1990).

34. Wood, *The Radicalism of the American Revolution* at 253 (cited in note 18).

35. Id at 254.

36. Federalist 35 (Alexander Hamilton), in Benjamin F. Wright, ed, *The Federalist* 257 (Belknap 1961).

37. Id at 256.

38. Id at 258.

39. Pearce, 70 NYU L Rev at 1230-31, 1241-42 (cited in note 5). See also Wood, *The Radicalism of the American Revolution* at 254 (cited in note 18) (observing that the perspective of Federalist No. 35 “reinforced a notion that has carried into our own time”). The influence of this idea has extended beyond the members of the legal profession. As Richard Abel has noted, sociologists, such as the eminent scholar Talcott Parsons, who propound “structural functional theories of the professions,” maintain that professions, “if protected from outside interference, . . . will use their expertise for the public good.” Richard L. Abel, *American Lawyers* 35 (Oxford 1989). In particular, Parsons describes lawyers as serving a vital role in capitalist society as “a kind of buffer between the illegitimate desires of . . . clients and the social interest.” Talcott Parsons, *The Law and Social Control*, in William M. Evan, ed, *Law and Sociology* 69 (Free Press 1962).

pursue their self-interest, professionals pursue the public good.<sup>40</sup>

Federalist No. 35's Business-Profession dichotomy thus provided the foundation for an ideology that propelled lawyers to political leadership from an earlier position of disarray.<sup>41</sup> America lacked its own published "reports or state precedents," much less "American lawbooks," institutions for legal education,<sup>42</sup> or a corps of legally trained judges.<sup>43</sup> Exacerbating this situation was the departure of the large number of lawyers who had been Tories.<sup>44</sup> Many of those who left were the best trained. Their departure left a "generation gap" in the profession.<sup>45</sup> And while many lawyers had been prominent Revolutionary leaders,<sup>46</sup> the Revolutionary ideology placed lawyers on the defensive. The egalitarianism of Revolutionary republicanism, together with antagonism to Tory lawyers and lawyer defenders of Tory property rights, exacerbated already existing public hostility toward lawyers.<sup>47</sup>

The modified Republicanism embodied in the Constitution and Federalist No. 35, together with the vital role American lawyers played in formal and informal governance, provided the ideological tools for transforming lawyers' "chaotic condition" to one "of political and intellectual domination."<sup>48</sup> Under the new Constitution, the American Republic was very much one of judicial law. Unlike the British tradition, which placed supreme authority in Parliament, the American Constitution stated "fundamental principles [in] explicit rules set out in statutelike form that might be interpreted and given force by the courts."<sup>49</sup> The emerging independent judiciary in the early nineteenth century imposed the common law<sup>50</sup> and protected the rule of law and individual rights from majority tyranny.<sup>51</sup> In partnership with judges, lawyers became the "*ex officio* interpreter[s] of our national credo."<sup>52</sup> Lawyers controlled the judicial branch and dominated the legislature and the executive.<sup>53</sup>

40. Pearce, 70 NYU L Rev at 1230-31, 1241-42 (cited in note 5).

41. Wood, *The Radicalism of the American Revolution* at 346 (cited in note 18). See Gordon, 68 BU L Rev at 14 (cited in note 15).

42. Miller, *The Life of the Mind in America* at 109 (cited in note 7).

43. *Id.* at 134.

44. *Id.* at 111 (noting bar leader's assertion "that the majority of Massachusetts barristers and attorneys had proved Tory or at least neutral"); Haber, *The Quest for Authority and Honor in the American Professions* at 78 (cited in note 9) (observing that "the majority of the New York and Philadelphia bar may have sided with the King"); Maxwell Bloomfield, *American Lawyers in a Changing Society 1776-1876* 139 (Harvard 1976) (noting research suggesting that "one-fourth of all prewar practitioners joined the Tory exodus").

45. Bloomfield, *American Lawyers in a Changing Society* at 139 (cited in note 44).

46. Haber, *The Quest for Authority and Honor in the American Professions* at 78 (cited in note 9).

47. Bloomfield, *American Lawyers in a Changing Society* at 39-43 (cited in note 44); Haber, *The Quest for Authority and Honor in the American Professions* at 77 (cited in note 9).

48. Miller, *The Life of the Mind in America* at 109 (cited in note 7).

49. Haber, *The Quest for Authority and Honor in the American Professions* at 68 (cited in note 9).

50. Miller, *The Life of the Mind in America* at 105-09 (cited in note 7).

51. Wood, *The Radicalism of the American Revolution* at 323 (cited in note 18).

52. Haber, *The Quest for Authority and Honor in the American Professions* at 68 (cited in note 9).

53. Lawrence M. Friedman, *A History of American Law* 110 (Simon & Schuster 2d ed 1985); Gordon,



While jurists like James Kent and Joseph Story played a leading role in this transformation, Miller attributes “the first comprehensive statement of the [lawyer’s] calling” to lawyer and law professor David Hoffman.<sup>54</sup> The son of a “prosperous [Baltimore] mercantile family,” Hoffman was born in 1784.<sup>55</sup> In contrast to his seven older brothers who entered “trade” as merchants, Hoffman entered the law to engage in a “learned profession.”<sup>56</sup> A scholarly and ambitious practitioner,<sup>57</sup> he received an appointment in 1814 as a Professor of Law at one of the nation’s earliest law schools, the fledgling University of Maryland.<sup>58</sup> He earned national attention three years later with publication of his famous treatise, *A Course of Legal Study*.<sup>59</sup> Joseph Story gave Hoffman’s work an excellent review,<sup>60</sup> and used it as the foundation for his curriculum at Harvard Law School.<sup>61</sup>

Hoffman’s exposition of lawyers as America’s governing class combined the vision of the professional’s commitment to the common good found in Federalist No. 35 with the view that lawyers were responsible for governance. Hoffman’s lawyers were practitioners of the science of justice.<sup>62</sup> Their “vocation is the protection of the injured and the innocent, the defence of the weak and the poor, the conservation of the rights and prosperity of the citizen, and the vigor-

68 BU L Rev at 15 (cited in note 15); Pearce, 6 Geo J Legal Ethics at 254-55 (cited in note 5). In advancing the conception of lawyers as a governing class, American lawyers far exceeded the status and authority that lawyers in England derived from their role as gentlemen and guild members. See, for example, Alexis de Tocqueville, *Democracy in America* 268 (Harper Perennial 1969) (contrasting the status of English and American lawyers); Haber, *The Quest for Authority and Honor in the American Professions* at 67 (cited in note 9) (noting that “the American lawyer ultimately achieved an importance in this country that far surpassed that of his counterpart in Britain”); Miller, *The Life of the Mind in America* at 113 (cited in note 7) (reporting David Hoffman’s claim that American lawyers held “a more exalted rank” than lawyers in other countries).

While the republican notion of disinterested leadership built on the English inheritance of the disinterested gentleman and guild traditions of autonomy and craft excellence, the governing class aspiration was uniquely American. See Haber, *The Quest for Authority and Honor in the American Professions* at 78 (cited in note 9); Wood, *The Radicalism of the American Revolution* at 254-55 (cited in note 18); Krause, *Death of the Guilds* at 3-6 (cited in note 5). But see Haber, *The Quest for Authority and Honor in the American Professions* at 78 (cited in note 9) (finding the origins of American lawyer’s role in the notion of the English lawyer-gentleman); Krause, *Death of the Guilds* at 29-32, 49-54 (cited in note 5) (describing the American bar as a surviving guild); Richard Posner, *Overcoming Law* 37-60 (Harvard 1995) (same).

54. Miller, *The Life of the Mind in America* at 113 (cited in note 7).

55. Maxwell Bloomfield, *David Hoffman and the Shaping of a Republican Legal Culture*, 38 Md L Rev 673, 674 (1979).

56. *Id.* at 674-75.

57. *Id.* at 676 (further describing Hoffman as “always insecure, vain, and neurotic—hungry for the deference and material comforts to which he believed intellectuals were automatically entitled”).

58. *Id.* at 678; Friedman, *A History of American Law* at 320-21 (cited in note 53).

59. Bloomfield, 38 Md L Rev at 678 (cited in note 55). See David Hoffman, *Course of Legal Study* (J. Neal 2d ed 1836).

60. Bloomfield, 38 Md L Rev at 679 (cited in note 55); Miller, *The Life of the Mind in America* at 127 (cited in note 7).

61. Bloomfield, 38 Md L Rev at 686 (cited in note 55).

62. Hoffman, 1 *Course of Legal Study* at 26-27 (cited in note 59). See Miller, *The Life of the Mind in America* at 159 (cited in note 7) (“credit[ing] Hoffman] for solidly propounding the large conception of American law as a science rather than a mere accretion”).

ous maintenance of the legitimate and wholesome powers of government.”<sup>63</sup> What enabled lawyers to fulfill their governing class role was that “great[ness] in law [required] great[ness] in every virtue”<sup>64</sup> and a “steady, and liberal understanding by which general consequences are regarded instead of particular, and general justice is distributed, without reference to private or partial inconvenience.”<sup>65</sup> Lawyers were “the most entrusted, the most honoured, and withal, the most efficient and useful body of men” in America.<sup>66</sup>

Hoffman applied the governing class ideal to the attorney-client relationship with a vengeance. Hoffman’s lawyer always put the public good above all else. In his fifty “Resolutions in Regard to Professional Deportment,”<sup>67</sup> the first well-known American code of ethics for lawyers,<sup>68</sup> Hoffman asserted that the virtuous lawyer should reject any distinction between personal and professional morality.<sup>69</sup> Hoffman noted that “[w]hat is morally wrong, cannot be professionally right.”<sup>70</sup> He urged lawyers not to pursue a claim or defense which “cannot, or rather ought not, to be sustained,”<sup>71</sup> not to plead the Statute of Limitation or “Infancy . . . against an honest demand,”<sup>72</sup> and not to use “ingenuity” to assist the guilty.<sup>73</sup> Hoffman counseled the lawyer to keep his “conscience” distinct from the client’s and to refuse to argue facts the lawyer finds doubtful or principles “wholly at variance with sound law.”<sup>74</sup> In offering an opinion to a client, lawyers “should act as *judges*, responsible to God and to man.”<sup>75</sup>

While Hoffman’s Resolutions continued to capture the imagination of the legal elite through the twentieth century,<sup>76</sup> their importance in shaping the field of American legal ethics was overshadowed by the work of George Sharswood, an author whose own governing class perspective afforded greater room for client advocacy.<sup>77</sup> A distinguished lawyer, judge, and scholar, George Sharswood was in 1854 the Dean of the University of Pennsylvania School of Law.<sup>78</sup> That year, he published his lectures on legal ethics as a book-length essay that would

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63. Hoffman, 1 *Course of Legal Study* at 26 (cited in note 59).

64. *Id.* at 26-27.

65. Miller, *The Life of the Mind in America* at 113 (cited in note 7) (quoting Hoffman).

66. *Id.* at 105 (quoting Hoffman).

67. Hoffman, 2 *Course of Legal Study* at 752-75 (cited in note 59).

68. Pearce, 6 *Geo J Legal Ethics* at 250 n 60 (cited in note 5).

69. Bloomfield, 38 *Md L Rev* at 684 (cited in note 55).

70. Hoffman, 2 *Course of Legal Study* at 765 (cited in note 59).

71. *Id.* at 754.

72. *Id.*

73. *Id.* at 755-56.

74. *Id.* at 755.

75. *Id.* at 764.

76. When the American Bar Association decided to create its first code of ethics, the drafting committee reviewed and published Hoffman’s Resolutions. Pearce, 6 *Geo J Legal Ethics* at 243 n 13 (cited in note 5).

77. *Id.* (describing Sharswood’s role as the father of modern legal ethics).

78. *Id.* at 248-49.

dominate the field of legal ethics for the next hundred years.<sup>79</sup>

While both Hoffman and Sharswood viewed lawyers as America's governing class, Sharswood provided a more comprehensive and elaborate explanation of that role. Like Federalist No. 35 and Hoffman, Sharswood viewed lawyers as uniquely capable of identifying and pursuing the public good. As I have written elsewhere, Sharswood described lawyers as "experts schooled in the science of law and capable of impartial, or in classic republic terms 'virtuous' legislation and jurisprudence."<sup>80</sup> Like Hoffman, Sharswood endorsed the notion that "no man can ever be a truly great lawyer, who is not in every sense of the word, a good man."<sup>81</sup> Indeed, Sharswood asserted that an invisible hand of reputation ensured that the most virtuous lawyers would be the most financially successful.<sup>82</sup>

Lawyers' virtue and expertise, together with the important role they played in governance, earned them their place as America's political leadership. Sharswood explained that lawyers, "more frequently than . . . any other profession, . . . fill the highest public stations."<sup>83</sup> Their governing class role extended as well to their work as private lawyers. When "providing counsel to clients, making arguments in court to judge and jury,"<sup>84</sup> and publishing "works of research and learning,"<sup>85</sup> private lawyers "diffuse[d] sound principles among the people"<sup>86</sup> and brought the law "home . . . to every man's fireside."<sup>87</sup>

As America's governing class, lawyers had an obligation to promote the rule of law and the protection of individual rights. They were to protect property and contract rights from the oppression of majority rule, promote respect for precedent and for the judicial branch, and oppose legislation that favored one class at the expense of another.<sup>88</sup> To do so, as I have noted elsewhere, they would have to use "the language of democracy and equality . . . to defend counter-

79. Bloomfield, 38 Md L Rev at 687 (cited in note 55); Pearce, 6 Geo J Legal Ethics at 243-47, 277-78 n 287 (cited in note 5). This article relies on the fifth edition of Sharswood's work. George Sharswood, *An Essay on Professional Ethics* (cited in note 7). As I have noted earlier, the drafters of the ABA Canons of Ethics reprinted this edition for distribution to the ABA membership. Pearce, 6 Geo J Legal Ethics at 243 n 13 (cited in note 5).

80. Pearce, 6 Geo J Legal Ethics at 255 (cited in note 5).

81. Sharswood, *An Essay on Professional Ethics* at 168 (cited in note 7). Sharswood further noted that "[t]here is, perhaps, no profession, after that of the sacred ministry, in which a high-toned morality is more imperatively necessary than that of the law." *Id.* at 55.

82. *Id.* at 75. He believed that "the real public—the business men of the community, who have important lawsuits, and are valuable clients—endorse the estimate of a man entertained by his associates of the Bar, unless indeed there be some glaring defect of popular qualities." *Id.*

83. *Id.* at 26. See also *id.* at 30-31. Sharswood observed that "[t]hey will continue to do so, at least so long as the profession holds the high and well-merited place it now does in the public confidence." *Id.* at 54. See Pearce, 6 Geo J Legal Ethics at 255 (cited in note 5).

84. Pearce, 6 Geo J Legal Ethics at 256 (cited in note 5).

85. Sharswood, *An Essay on Professional Ethics* at 30 (cited in note 7).

86. *Id.* at 54, 30.

87. *Id.* at 31.

88. Pearce, 6 Geo J Legal Ethics at 255 (cited in note 5).

majoritarian values.”<sup>89</sup> Their role was to explain “that a legal system that respected order and property would provide equal justice under law, and would protect the widow and orphan as well as the person of business.”<sup>90</sup>

In translating the governing class role into the attorney-client relationship, Sharswood blended the public good with client advocacy in a way that afforded more deference to client interests than Hoffman’s Resolutions. Sharswood rejected both the hired gun view that “all causes are to be taken by [a lawyer] indiscriminately, and conducted with a view to one single end, *success*”<sup>91</sup> and the opposite view, closer to Hoffman’s, that the lawyer should act like a judge and only assist clients with just causes.<sup>92</sup>

Sharswood distinguished between public affairs and client matters. In public office and on matters of public policy, the lawyer must always pursue the common good.<sup>93</sup> In representing private clients, the lawyer’s governing class obligations bounded, and in some cases reinforced, client advocacy. Although the lawyer generally owed the private client “warm zeal in the maintenance and defence of his rights,”<sup>94</sup> private prosecutors and plaintiff’s lawyers, who sought to use the coercive power of the state on behalf of their clients, were obligated to pursue “justice even to the extent of refusing to pursue lawful but immoral goals.”<sup>95</sup> When defending a client, the duties of advocacy and governance were often, but not always, identical. As the governing class, lawyers were “the bulwark of private rights against the assaults of power.”<sup>96</sup> The criminal defendant was always entitled to zealous representation in order to vindicate the defendant’s basic constitutional rights.<sup>97</sup> The civil defendant’s situation was similar in that a civil “defendant has a legal right to require that the plaintiff’s demand against him should be proved and proceeded according to law.”<sup>98</sup> Sharswood bounded these obligations with governing class duties to maintain the lawyer’s personal integrity and, in civil matters, to avoid frustrating legitimate property rights, and to limit defense against a “‘righteous claim’ . . . to assuring the defendant ‘a fair trial on the merits in open court.’”<sup>99</sup>

89. *Id.* at 256.

90. *Id.*

91. Sharswood, *An Essay on Professional Ethics* at 84 (cited in note 7).

92. *Id.* at 88.

93. Pearce, 6 *Geo J Legal Ethics* at 254-55 (cited in note 5).

94. Sharswood, *An Essay on Professional Ethics* at 78-79 (cited in note 7). Sharswood prescribed the “duties of loyalty, confidentiality, and competence which comprise much of the modern ethics of lawyering,” including the right of the guilty to confidentiality and zealous representation. Pearce, 6 *Geo J Legal Ethics* at 261-65 (cited in note 5).

95. Pearce, 6 *Geo J Legal Ethics* at 264 (cited in note 5).

96. Sharswood, *An Essay on Professional Ethics* at 53-54 (cited in note 7).

97. Pearce, 6 *Geo J Legal Ethics* at 265 (cited in note 5).

98. Sharswood, *An Essay on Professional Ethics* at 95-96 (cited in note 7). See Pearce, 6 *Geo J Legal Ethics* at 265 (cited in note 5).

99. Pearce, 6 *Geo J Legal Ethics* at 266 (cited in note 5), quoting Sharswood, *An Essay on Professional Ethics* at 98-99 (cited in note 7).

Lawyers like Sharswood and Hoffman were not the only ones to view lawyers as America's governing class. In his famous commentary on America in the 1830s, Alexis de Tocqueville found lawyers to be the managers of American democracy. They were responsible for promoting republican government and protecting minority and individual rights. Lawyers favored democratic government; a democracy, in contrast to an aristocracy or an oligarchy, empowered lawyers to serve as the "political upper class."<sup>100</sup> Yet their tastes and experience drew them toward the propertied classes and away from the masses.<sup>101</sup> Serving "as arbiters between the citizens," "directing the blind passions of the litigants toward the objective,"<sup>102</sup> and familiarizing juries with "the spirit of the law," lawyers promoted in "the whole people" an acceptance of counter-majoritarian values such as individual rights and rule of law.<sup>103</sup> Tocqueville concluded that "the American aristocracy is found . . . at the bar or the bench."<sup>104</sup>

## B. CHALLENGES TO THE GOVERNING CLASS IDEA

Although dominant among the legal elite, the republican notion of lawyers was not the only conception of the American lawyer's role. At the same time Hoffman and Sharswood propounded the governing class ideal, they responded to attacks from inside and outside the bar.

In the first half of the nineteenth century, legislatures asserted their authority to override bar and judicial regulation of admission to practice.<sup>105</sup> In so doing, they eased admission requirements dramatically. Lawrence Friedman notes that "[i]n 1800, fourteen out of the nineteen states or organized territories prescribed a definite period of preparation of the bar. In 1840, only eleven of thirty jurisdictions did so."<sup>106</sup> Indeed, "a few states eliminated *all* requirements for admission to the bar, except good moral character."<sup>107</sup>

Hostility from those who viewed lawyers as self-interested contributed significantly to these legislative changes.<sup>108</sup> America had a "venerable history" of

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100. Tocqueville, *Democracy in America* at 268 (cited in note 53).

101. *Id.* at 266.

102. *Id.* at 264.

103. *Id.* at 270.

104. *Id.* at 268.

105. Roscoe Pound, *The Lawyer From Antiquity to Modern Times* 223-37 (West 1953). Bloomfield takes issue with the views of Pound and other historians that the developments of the mid-nineteenth century led to a "decline in professional competence that allegedly accompanied the assaults of a militant democracy." Bloomfield, *American Lawyers in a Changing Society* at 136 (cited in note 44). Bloomfield argues that the hostility toward lawyers in this period did not represent a major change and that the "technical competence" of lawyers represented "no sharp break with the past." *Id.* at 137-38. This article need not resolve these differences. The focus of this piece is the ideology of lawyers and not their actual conduct.

106. Friedman, *A History of American Law* at 316 (cited in note 53).

107. *Id.* at 317.

108. Other reasons for these legislative developments were the absence of strong governmental regulation of occupations generally and the existence of easy "geographic[] and social mobility." *Id.* at 317.

“[a]nti-lawyer sentiment” which held lawyers to be no better than “scoundrel[s].”<sup>109</sup> Many rejected the notion that lawyers were entitled to serve as America’s enlightened political leadership. They viewed any notion of a disinterested elite as anti-democratic<sup>110</sup> and decried an independent judiciary as “*lawyers law*.”<sup>111</sup> One such commentator denounced lawyers as “the *unanointed* rulers of the land.”<sup>112</sup>

Even many “rank and file” lawyers viewed themselves in practical terms that denied the distinction between a business and a profession, the foundation of the lawyer’s governing class role.<sup>113</sup> An 1856 article by a lawyer in the *American Law Register* asserted that “[w]e are clever men of business, as a mass, and no more. It is our BUSINESS TALENTS, our PROMPTNESS, ACCURACY, and DILIGENCE, that commands success, respect and influence.”<sup>114</sup>

Another challenge to the governing class ideal arose from the lawyer’s advocacy role. Lawyers and non-lawyers observed that a lawyer’s pursuit of a client’s goals necessarily prevented lawyers from pursuing the common good. Some Christian commentators, including many participating in the nineteenth-century revivals, used arguments dating to the Puritans. They asserted that only one side in a dispute was in the right and that because lawyers would represent the wrong as well as the right, they were willing to promote evil.<sup>115</sup> They “portrayed the successful lawyer as nothing better than a sort of licensed knave, a minister of Satan.”<sup>116</sup>

Sharswood responded to these charges with a defense of the legal system.<sup>117</sup> He argued that the alternative to professional representation of clients by lawyers was to permit the “court or jury . . . arbitrary discretion to determine a cause according to their mere notion of justice.”<sup>118</sup> He maintained that a system of “justice according to law,” administered by experts in the law, was “[t]he only secure principle upon which the controversies of men can be decided, [even if] a

Bloomfield further suggests that these changes resulted from “the insistence of an ever expanding bourgeoisie upon increased legal services and an updated recruitment program geared to changing population trends and the rise of marginal social groups to positions of status and power.” Bloomfield, *American Lawyers in a Changing Society* at 138 (cited in note 44).

109. Haber, *The Quest for Authority and Honor in the American Professions* at 77 (cited in note 9).

110. Wood, *The Radicalism of the American Revolution* at 255 (cited in note 18).

111. *Id.* at 323; Miller, *The Life of the Mind in America* at 108 (cited in note 7). They also regarded “the law as an artificial imposition on their native intelligence and judges as agents of constraint.” Miller, *The Life of the Mind in America* at 102 (cited in note 7).

112. Miller, *The Life of the Mind in America* at 242 (cited in note 7), quoting John Neal, Address to Waverly College (1830).

113. Bloomfield, *American Lawyers in a Changing Society* at 151 (cited in note 44) (contrasting the “rank and file” perspective with the view of “scholarly jurists such as Kent, Story, and David Hoffman”).

114. *Id.* at 151, quoting *Office Duties*, 4 *Am L Register* 193 (1856).

115. Miller, *The Life of the Mind in America* at 104 (cited in note 7). See Pearce, 6 *Geo J Legal Ethics* at 249-50 (cited in note 5).

116. Miller, *The Life of the Mind in America* at 187 (cited in note 7).

117. Sharswood, *An Essay on Professional Ethics* at 81 (cited in note 7).

118. *Id.* at 82.

few particular cases or hardship and injustice aris[e].”<sup>119</sup>

Some lawyers who embraced the advocacy role questioned whether lawyers could be a disinterested governing class. Perhaps the most famous early nineteenth-century statement of the advocate’s credo was that of Lord Henry Brougham in 1820.<sup>120</sup> At the time, Brougham was the leader of those in the House of Lords who were defending Queen Caroline against King George IV’s charges of adultery.<sup>121</sup> He had learned that the King had secretly married a Roman Catholic before assuming the throne and therefore was ineligible to rule.<sup>122</sup> If revealed, this information would have created turmoil, potentially resulting in a civil war.<sup>123</sup>

Brougham wanted the King and his allies to know that he would reveal the King’s prior marriage if the matter was not settled satisfactorily for Queen Caroline.<sup>124</sup> On the floor of the House of Lords, Brougham declared that:

An advocate, in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and among them to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction he may bring upon others. Separating the duty of a patriot from that of advocate, he must go on, reckless of consequences: though it should be his unhappy lot to involve his country in confusion.<sup>125</sup>

Brougham’s advocate was not a member of the governing class in the American sense. He did not identify and pursue the common good. He knew and pursued only the interests of “one person in all the world, and that person is his client.”<sup>126</sup> According to Brougham, the advocate had a duty to ignore “hazards and costs to other persons,” even when they would result in “alarm,” “torments,” and “destruction.”<sup>127</sup> When forced to balance the interests of his country against that of his client, Brougham’s credo was clear. The advocate’s duty was not that “of a patriot.”<sup>128</sup> He should be willing to “involve his country in confusion” for his client’s sake.<sup>129</sup>

119. *Id.*

120. See, for example, Freedman, *Understanding Lawyers’ Ethics* at 65-66 (cited in note 5) (identifying Brougham’s statement as the “classic statement” of the advocate’s role); Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 *Yale L J* 1239, 1244 (1991) (asserting that Brougham’s statement reflects “[t]he legal profession’s basic narrative”).

121. David Mellinkoff, *The Conscience of a Lawyer* 188-89 (West 1973).

122. *Id.*; L. Ray Patterson, *Legal Ethics and the Lawyer’s Duty of Loyalty*, 29 *Emory L J* 909, 909-10 (1980).

123. Patterson, 29 *Emory L J* at 910 (cited in note 122).

124. *Id.*; Mellinkoff, *The Conscience of a Lawyer* at 188-89 (cited in note 121).

125. Sharswood, *An Essay on Professional Ethics* at 87 (cited in note 7) (quoting Brougham).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

Speaking for the legal elite, Sharswood and Hoffman rejected this view. Both circumscribed the advocate's role, though Hoffman far more than Sharswood, and both viewed the lawyer's identification with the client as a potential threat to the governing class role.<sup>130</sup> Sharswood expressly disagreed with Brougham. Acknowledging that many shared Brougham's perspective, Sharswood quoted with approval the words of Chief Justice Gibson of the Pennsylvania Supreme Court. Gibson asserted that "[i]t is a popular but gross mistake, . . . to suppose that a lawyer owes no fidelity to any one except his client, and that the latter is the keeper of his professional conscience."<sup>131</sup> Sharswood endorsed Gibson's conclusion that "[t]he high and honorable office of a counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience."<sup>132</sup>

## II. PROFESSIONALISM PRESERVES THE GOVERNING CLASS IDEOLOGY

After the civil war, the legal elite lost faith in the republican promise that individual lawyers and the invisible hand of reputation would ensure that lawyers would commit themselves to the common good. Rather than abandon the governing class idea, however, they turned to a new paradigm. Professionalism offered a formula for preserving lawyers' status as the governing class. Admitting that some individual lawyers failed to meet high standards, professionalism proposed that an organized bar would police itself in the interest of the common good. With a somewhat different definition of the good than republicanism, and despite instability inherent in professionalism, most of the legal elite maintained their faith in the professionalism paradigm through the 1960s.

### A. THE COLLAPSE OF THE REPUBLICAN PARADIGM

In the latter half of the nineteenth century, lawyers and non-lawyers questioned whether lawyers were fulfilling their governing class obligations. Robert Wiebe has noted that "[w]ith the exception of bankers, no group late in the nineteenth century stood in lower public repute."<sup>133</sup> The republican paradigm of individual lawyers "serv[ing] as guardians of the public good[] appeared power-

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130. Hoffman, 2 *Course of Legal Study* at 745 (cited in note 59) (warning lawyers to avoid having "the interests and feelings of the [lawyer] become in a measure identified with those of the [client]"); Sharswood, *An Essay on Professional Ethics* at 101 (cited in note 7) (quoting with approval Whewell's caution against a lawyer's immoral "mix[ing] up his character as an advocate with his character as a moral agent, using his moral influence for the advocate's purpose").

131. Sharswood, *An Essay on Professional Ethics* at 96-97 (cited in note 7), quoting *Rush v Cavenaugh*, 2 Barr 189.

132. *Id.*

133. Robert H. Wiebe, *The Search for Order: 1877-1920* 116 (Hill and Wang 1967).



less to prevent this decline.”<sup>134</sup>

The decline was often expressed as the forsaking of the distinction between a business and profession. John R. Dos Passos complained of the “transformation from a profession to a business.”<sup>135</sup> Robert Gordon notes “the extraordinary outpouring of rhetoric, from all the public pulpits of the ideal—bar association and law school commencement addresses, memorial speeches on colleagues, articles and books—on the theme of the profession’s ‘decline from a profession to a business.’”<sup>136</sup>

One threat was from the rank-and-file lawyers who did not possess the disinterestedness of the governing class. Supreme Court Justice David Brewer described this problem as follows:

A growing multitude is crowding in who are not fit to be lawyers, who disgrace the profession after they are in it, who in a scramble after livelihood are debasing the noblest of professions into the meanest of avocations, who instead of being leaders and looked up to for advice and guidance, are despised hangers-on of police courts.<sup>137</sup>

This problematic “multitude” had two components. One was the burgeoning number of immigrant lawyers. Members of the predominantly white Anglo-Saxon Protestant legal elite were horrified as “changing immigration and demographic patterns swelled . . . the profession with the foreign-born and their children.”<sup>138</sup> Their background alone disqualified them from the republican virtue necessary to provide political leadership. As a New York State Bar President observed: “men are seen in almost all our courts slovenly in dress, uncouth in manners and habits, ignorant even of the English language, jostling, crowding, vulgarizing the profession.”<sup>139</sup> One leading attorney noted that immigrants lacked “the incalculable advantage of having been brought up in the American family life,” and, therefore, “they ‘can hardly be taught the ethics of the profession as adequately as we desire.’”<sup>140</sup> The second problematic aspect of the multitude was their business-like behavior. A burgeoning plaintiff’s bar, including immigrants and children of immigrants, represented plaintiffs for contingency fees. Not only did personal injury work provide a lucrative career for the “upstart lawyer without connections,”<sup>141</sup> it also provided the foundation for larger

134. Pearce, 70 NYU L Rev at 1241 (cited in note 5).

135. Quoted in Auerbach, *Unequal Justice* at 33 (cited in note 8).

136. Robert Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies of New York City Lawyers, 1870-1910*, in Gerald W. Gawalt, ed, *The New High Priests: Lawyers in Post-Civil War America* 51, 61 (Greenwood 1984). See also Auerbach, *Unequal Justice* at 33 (cited in note 8); Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 158 (Alfred A. Knopf 1955).

137. Haber, *The Quest for Authority and Honor in the American Professions* at 228 (cited in note 9).

138. Auerbach, *Unequal Justice* at 5 (cited in note 8).

139. *Id.* at 51.

140. *Id.* at 100.

141. Haber, *The Quest for Authority and Honor in the American Professions* at 223 (cited in note 9).

enterprises. One such firm claimed to have offices in thirty-two cities, while another “maintain[ed] a hospital and a medical staff.”<sup>142</sup>

In the eyes of many in the legal elite, the lawyers who worked for contingency fees were “‘ambulance chaser[s]’ [who] drummed up business with an eye to ‘mere pelf.’”<sup>143</sup> As Samuel Haber notes, “[t]here was a whiff of class struggle surrounding the discussion of these injury cases, and lawyers who lived off such litigation were quickly cast as disreputable fomenters, ambulance chasers, and shysters.”<sup>144</sup> This new breed of lawyer certainly lacked the disinterested virtue necessary to sustain the governing class.

The elite also appeared to have forsaken the role of disinterested professionals. The work of lawyers for large corporations had begun to resemble business work. Commentators described newly emerging corporate law firms as “law factories.”<sup>145</sup> One referred to them as “a money-making mechanism, inelastic, rigorous, unsympathetic; into which the young man, just from his studies, fits . . . like a fresh adjusted cog into a well-oiled machine.”<sup>146</sup>

In these firms, lawyers were spending less time in the courtroom and more time “in the law office and the conference room.”<sup>147</sup> Lawyers “were now doing essentially business jobs, selling stocks and bonds, directing tactical maneuvers in intercorporate warfare, and brokering deals among security holders of bankrupt corporations.”<sup>148</sup> The Business-Profession dichotomy further eroded as lawyers joined “the boards of their major clients; and quite frequently left outside firm practice to become their principal client’s chief executive or general counsel.”<sup>149</sup>

Commentators viewed lawyers’ resemblance to business people as more than appearance. One prominent lawyer noted:

Our whole moral atmosphere is corrupted by a passion for sudden wealth. Can the lawyer escape the moral influence which has proved so fatal to tradesmen, to bankers, to all indeed in whom this passion is roused? His occupation brings him into daily contact with them. . . . [H]ow few are superior to the passion for mere wealth without the terrible sacrifice its gain may demand.<sup>150</sup>

Elite lawyers had become “captive[s]” of their clients,<sup>151</sup> not servants of the public good.

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142. Julius H. Cohen, *The Law: Business or Profession?* 183 (Banks Law 1916).

143. Haber, *The Quest for Authority and Honor in the American Professions* at 223 (cited in note 9).

144. *Id.* at 227.

145. Wiebe, *The Search for Order* at 294 (cited in note 133).

146. Auerbach, *Unequal Justice* at 31 (cited in note 8), quoting Charles F. Chamberlayne, *The Soul of the Profession*, 18 *Green Bag* 397 (1906).

147. Gordon, “*The Ideal and the Actual in the Law*” at 59 (cited in note 136).

148. *Id.* at 61.

149. *Id.*

150. Haber, *The Quest for Authority and Honor in the American Professions* at 223 (cited in note 9).

151. Hofstadter, *The Age of Reform* at 158 (cited in note 136).

While transactional lawyers became more like business people, corporate litigators found the hired gun role more appealing. Perhaps the best illustration of this shift was the view of David Dudley Field, one of the leading lawyers of the nineteenth century. In 1840, he rejected Lord Brougham's credo in favor of a governing class approach.<sup>152</sup> In response to Brougham, he asserted that "a more revolting doctrine scarcely ever fell from any man's lips. We think it unsound in theory and pernicious in practice."<sup>153</sup>

Almost thirty years later, Field found himself in the middle of Vanderbilt's attempt to take over the Erie Railroad, which Mark DeWolfe Howe described as a "corrupt comedy of . . . counter injunctions."<sup>154</sup> When Samuel Bowles, editor of the *Springfield Republican*, labeled Field "the king of pettifoggers," Field responded with a defense of his conduct.<sup>155</sup> He rejected Bowles's contention that lawyers had public duties. Instead, he argued that "the lawyer is responsible, not for his clients, not for their causes, but for the manner in which he conducts their causes."<sup>156</sup> Although he claimed that he did "not assent to the theory of Brougham that the lawyer should know nobody but his client,"<sup>157</sup> his formulation dramatically narrowed the lawyer's obligations to the public. Moreover, commentators viewed the "conduct" of Field and the other lawyers in the Erie matter to be scandalous.<sup>158</sup> When the legal elite organized the Association of the Bar of the City of New York,<sup>159</sup> it investigated "charges [filed] against Field with the Association's committee on grievances for his actions in the Erie litigation" as one of its first matters of business.<sup>160</sup>

Not surprisingly, when the English visitor Bryce compared the state of the American legal profession in 1885 to Toqueville's earlier observations, he reached a completely different conclusion. In his well-known study, Bryce noted that "the Bar counts for less as a guiding and restraining power, tempering the crudity or haste of democracy by its attachment to rule and precedent, than it did."<sup>161</sup> A few years later, Bryce attributed the decline of the governing class role

152. Miller, *The Life of the Mind in America* at 203-04 (cited in note 7).

153. Patterson, 29 *Emory L J* at 951 (cited in note 121) (quoting Field).

154. Mark DeWolfe Howe, *Book Review*, 60 *Harv L Rev* 838, 841 (1947).

155. Shaffer, *American Legal Ethics* at 319 (cited in note 5).

156. *Id.* at 321.

157. *Id.* at 327. Field continued: "I insist that [the lawyer] should defend his client *per fas* and not *per nefas*." *Id.*

158. George Martin, *Causes and Conflicts: The Centennial History of the Association of the Bar of the City of New York 1870-1970* 14-15 (Houghton Mifflin 1970); Haber, *The Quest for Authority and Honor in the American Professions* at 209-10 (cited in note 9).

159. Martin, *Causes and Conflicts* at 15 (cited in note 158); Matzko, "The Best Men of the Bar" at 80 (cited in note 7) (observing that the organizers of the City Bar sought to restore "the honor, integrity, and fame of the profession in its two manifestations of the Bench and Bar").

160. Martin, *Causes and Conflicts* at 91 (cited in note 158).

161. Louis Brandeis, *Business: A Profession* 333-34 (William S. Hein & Co 1996) (reprint of Hale, Cushman & Flint 1993) (quoting Bryce in a speech given by Brandeis in 1905, entitled "Opportunity in the Law," that is reprinted in its entirety in this book).

to the demise of the Business-Profession dichotomy. He explained that "[l]awyers are now to a greater extent than formerly business men, a part of the great organized system of industrial and financial enterprise. . . . And they do not seem to be so much of a distinct professional class."<sup>162</sup>

## B. THE RISE OF PROFESSIONALISM

Despite these challenges, the legal elite refused to abandon its governing class ambition. It needed to find a new rationale for the continuation of the governing class role that explained the failure of republicanism. It found this account in professionalism.

Professionalism's solution was a self-policing organized bar under the leadership of its "Best Men."<sup>163</sup> Professionalism retained a belief in the capacity for virtue of most lawyers and the general efficacy of the invisible hand of reputation.<sup>164</sup> Nonetheless, it recognized that these conditions were not adequate to ensure that lawyers worked in service of the public good. The legal elite created bar associations that would add regulation necessary to prevent the wrong people from becoming lawyers and to sanction those lawyers who behaved unethically.<sup>165</sup> The bar associations would control admissions to the bar in coordination with the judiciary<sup>166</sup> and would seek unauthorized practice statutes prohibiting other persons from practicing law.<sup>167</sup> The bar would also create ethical codes to educate lawyers on their duties and would discipline lawyers who failed to meet high ethical standards.<sup>168</sup>

The profession obtained the political and legal power necessary to accomplish these goals using the rhetoric of the governing class ideology's distinction between a business and a profession. Only a profession promoting the public good, and not profit, could obtain the agreement between society and the legal profession that was the essence of professionalism. In exchange for the legal profession's promise to regulate itself in the public interest, society agreed to permit the profession autonomy. The conditions that made this bargain acceptable were lawyers' esoteric knowledge, which made lay regulation difficult, and lawyers' altruistic commitment to place the interest of client and public above

162. Id at 334.

163. Matzko, "The Best Men of the Bar" at 82 (cited in note 7).

164. Pearce, 70 NYU L Rev at 1242, 1245 (cited in note 5).

165. Haber, *The Quest for Authority and Honor in the American Professions* at 211-13 (cited in note 9); Hofstadter, *The Age of Reform* at 157 (cited in note 136); Wiebe, *The Search for Order* at 117 (cited in note 133).

166. Wiebe, *The Search for Order* at 117 (cited in note 133).

167. Pearce, 70 NYU L Rev at 1238 (cited in note 5). For an overview of the unauthorized practice statutes, see Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan L Rev 1, 3-44 (1981).

168. Pearce, 70 NYU L Rev at 1240 (cited in note 5); Pearce, 6 Geo J Legal Ethics at 271 (cited in note 5).

their own.<sup>169</sup> To protect the distinction between a business and a profession, the bar made it taboo to seek to maximize profits through overtly commercial behavior or to serve the interests of business at the expense of the public good.<sup>170</sup>

While not all of the legal elite joined in this view,<sup>171</sup> most followed it in their continuing commitment to the governing class role. Speaking for the legal elite, the ABA made the commitment clear. The ABA Committee reporting on the drafting of an ethics code stated that “[o]ur profession is necessarily the keystone of the republican arch of government. Weaken this keystone by allowing it to be increasingly subject to the corroding and demoralizing influence of those who are controlled by graft, greed and gain, or other unworthy motive, and sooner or later the arch must fall.”<sup>172</sup> The drafters of the Canons of Ethics further urged the ABA members to read and emulate Hoffman and Sharswood.<sup>173</sup>

The 1908 Canons expressly endorsed the governing class role.<sup>174</sup> The Preamble stated that “[t]he future of the Republic, to a great extent, depends upon [lawyers’] maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.”<sup>175</sup> In promoting the lawyer’s public duties, the Canons expressly rejected the hired gun role. Canon 15 denounced as “a false claim, [the assertion] that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client’s cause.”<sup>176</sup> While quoting Sharswood’s statement that “[t]he lawyer owes ‘entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,’”<sup>177</sup> Canon 15 concluded that a lawyer “must obey his own conscience and not that of his client.”<sup>178</sup> Following client instructions was not an acceptable “excuse.”<sup>179</sup> As Canon 31 stated, “[t]he responsibility for advising as to questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer’s responsibility.”<sup>180</sup>

Perhaps the most famous exemplar of the governing class ideology at that

169. Pearce, 70 NYU L Rev at 1238-40 (cited in note 5).

170. Id at 1242-44.

171. For example, James B. Dill asserted that a “corporation lawyer was ‘a businessman, specializing along the lines of legal principles.’” Haber, *The Quest for Authority and Honor in the American Professions* at 235 (cited in note 9). This perspective led the rest of the elite to “cut [Dill] off” and refuse him “a position of honor or authority in a professional association.” Id.

172. Report of the Committee on Code of Professional Ethics, 29 ABA Reports 600-01 (1906).

173. Pearce, 6 Geo J Legal Ethics at 243 & n 13 (cited in note 5).

174. Susan Carle has explained that the committee rejected an even stronger conception of the “duty to do justice” that would probably have been closer to Hoffman’s perspective. Susan D. Carle, *Lawyers’ Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 L & Soc Inquiry 1 (1999).

175. ABA Canons, Preamble (1908).

176. ABA Canon 15.

177. Id. See Pearce, 6 Geo J Legal Ethics at 261 (cited in note 5).

178. ABA Canon 15.

179. ABA Canon 31.

180. Id.

time was Louis D. Brandeis, corporate lawyer and future Supreme Court Justice. Brandeis's vision illustrated how professionalism's conception of the governing class resembled that of republicanism while diverging in some important respects. Like the republicans, Brandeis found lawyers particularly suited to their responsibility as guardians of the rule of law and the common good. The study of law "[led] to the development of judgment"<sup>181</sup> and the practice of law made a lawyer "a good judge of men,"<sup>182</sup> "judicial in attitude and extremely tolerant."<sup>183</sup> Indeed, the work of the business lawyer involved issues of "diplomacy" and "statesmanship" of the highest order.<sup>184</sup>

Although offering a somewhat different formula than Sharswood for translating the governing class role into lawyer's work, Brandeis similarly identified legislative and policy debates as requiring exclusive commitment to the common good.<sup>185</sup> In the legislative arena, "the counsel selected to represent important private interests possesses usually ability of a high order, while the public is often inadequately represented or wholly unrepresented."<sup>186</sup> As a consequence, "[g]reat unfairness to the public is apt to result."<sup>187</sup> The "great opportunity in the law"<sup>188</sup> was for a lawyer to act in the public arena as the "people's lawyer" balancing the interests of "the wealthy and the people"<sup>189</sup> in favor of the common good.

Brandeis also factored the common good into courtroom representation, but found that the fairness of the process permitted zealous client advocacy. Brandeis urged the lawyer to represent the client "fairly and well"<sup>190</sup> because "the lawyers on the two sides are usually reasonably well matched [and] the judge or jury may ordinarily be trusted to make such a decision as justice demands."<sup>191</sup>

For Brandeis and other members of the legal elite, client counseling provided an important opportunity for promoting the common good. In one instance, Brandeis represented United Shoe in a dispute with its employees.<sup>192</sup>

181. Brandeis, *Business* at 331 (cited in note 161).

182. *Id.* at 332.

183. *Id.* at 333. He commented that the lawyer's "profession rests upon the postulate that no contested question can be properly decided until both sides are heard. His experience teaches him that nearly every question has two sides; and very often he finds—after decision of judge or jury—that both he and his opponent were in the wrong." *Id.*

184. *Id.* at 335. Brandeis noted that "[t]he relations between rival railroad systems are like the relations between neighboring kingdoms. The relations of the great trusts to the consumers or to their employees is like that of feudal lords to the commoners or dependents." *Id.*

185. Pearce, 6 *Geo J Legal Ethics* at 254-55 (cited in note 5).

186. Brandeis, *Business* at 340 (cited in note 161).

187. *Id.* at 340.

188. *Id.* at 342.

189. *Id.* at 337.

190. *Id.* at 340.

191. *Id.*

192. Brandeis, *Business* at 5-9 (cited in note 161); David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 *Vand L Rev* 717, 722 (1988).

Brandeis investigated the employees' complaints that they needed annual, rather than seasonal, employment. He determined that these claims were legitimate and worked with his client to revamp the plants' manufacturing schedule in a manner Brandeis believed to be in the best interest of both his client and the employees.<sup>193</sup> Another way in which Brandeis incorporated the public good into client representation was as a "counsel for the situation,"<sup>194</sup> where Brandeis would represent parties with actual or potential conflicting interests in an effort to pursue a strategy which would best benefit all of them.<sup>195</sup>

Although critics in the bar agreed with Brandeis that lawyers should consider the common good in client counseling, they found lawyering for the situation to be unacceptable. At the confirmation hearings for Brandeis's appointment to the Supreme Court, bar leaders argued that Brandeis had acted unethically in representing conflicting interests.<sup>196</sup> For this and other perceived ethical defects, ABA President Elihu Root strongly opposed the Brandeis nomination.<sup>197</sup> Nonetheless, for Root, "law was not a business . . . [O]ne did not just give the customer what he wanted, but what was needed."<sup>198</sup> While Root may have believed that Brandeis strayed too far from client loyalty in seeking the good of the situation, he urged corporate lawyers to resist financial temptation and to maintain the disinterested independence of a proper governing class lawyer in urging clients to do what was right.<sup>199</sup> Root maintained that "[a]bout half the practice of a decent lawyer, . . . consists in telling would-be clients that they are damned fools and should stop."<sup>200</sup>

While this commitment to the common good united the perspectives of republicanism and professionalism, they emphasized different aspects of a disinterested commitment to the common good. Republicanism feared that the less wealthy majority would encroach on the wealthy minority and underscored the importance of protecting the rights of that minority.<sup>201</sup> In contrast, professionalism stressed "hold[ing] a position of independence, between the wealthy and the people, prepared to curb the excess of either."<sup>202</sup> In the time of professionalism,

193. Brandeis, *Business* at 5-9 (cited in note 161).

194. Clyde Spillinger notes that although many commentators assert that Brandeis used this phrase in testimony during "hearings on his nomination to the U.S. Supreme Court," the phrase was actually attributed to Brandeis during the testimony of a former adversary, Sherman Whipple. Clyde Spillinger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 *Yale L.J.* 1445, 1504-05 (1996).

195. *Id.* at 1502-11; Geoffrey C. Hazard, Jr., *Ethics in the Practice of Law* 58-61 (Yale 1978).

196. Auerbach, *Unequal Justice* at 71-72 (cited in note 8).

197. *Id.*

198. Haber, *The Quest for Authority and Honor in the American Professions* at 225 (cited in note 9). Root has claimed that "the lawyer's profession demands of him something more than the ordinary public duties of citizenship. He has a duty to the law." Elihu Root, *Some Duties of American Lawyers to American Law*, 14 *Yale L.J.* 63, 65 (1904).

199. Haber, *The Quest for Authority and Honor in the American Professions* at 225 (cited in note 9).

200. *Id.*

201. See text at notes 29-34.

202. Brandeis, *Business* at 337 (cited in note 161).

this required redressing the “excess” power of big business.<sup>203</sup> Brandeis excoriated lawyers who failed their duty to the public good by “allow[ing] themselves to become adjuncts of great corporations and . . . neglect[ing] the obligation to use their powers for the protection of the people.”<sup>204</sup>

This exhortation illustrated another difference between professionalism and republicanism. Republicanism was confident of lawyers’ governing class role, even in the face of public challenges.<sup>205</sup> In contrast, professionalism responded to a concern that lawyers were not fulfilling their responsibilities to the public good. From its inception, professionalism had to explain why some lawyers failed to uphold their governing class responsibilities. Brandeis and other advocates of professionalism often found themselves in the position of criticizing the conduct of lawyers of their time and urging a return to the higher standards of the past.<sup>206</sup> These pleas imparted a mixed message. They acknowledged both lawyers’ failings and lawyers’ capacity to serve as a governing class capable of promoting the public good.

### C. PROFESSIONALISM ASCENDANT

Although these conflicting sentiments made professionalism a less stable ideology than republicanism, it proved remarkably resilient and powerful. From the late nineteenth century through the 1960s, professionalism provided the legal elite with the basis for maintaining allegiance to the governing class role and to the Business-Profession dichotomy upon which it relied.

Professionalism explained both why the legal elite deserved to be the governing class and why its financial success was legitimate. The classic account of this view came from bar leader and former Harvard Law School Dean Roscoe Pound. According to Pound, the “primary purpose” of the lawyer’s work was the “[p]ursuit of the learned art in the spirit of a public service.”<sup>207</sup> Pound explained that “[g]aining a livelihood is incidental [to a profession], whereas in a

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203. *Id.* For further discussion of the progressive approach to professionalism, see Luban, 41 *Vand L Rev* at 723-26 (cited in note 192); William Simon, *Babbitt v Brandeis: The Decline of the Professional Ideal*, 37 *Stan L Rev* 565, 565-71 (1985).

204. Brandeis, *Business* at 337 (cited in note 161). Brandeis exhorted the “American Bar . . . to stand again as it did in the past, ready to protect the interests of the people.” *Id.* at 337. He feared that “[f]here will come a revolt of the people against the capitalists, unless the aspirations of the people are given some adequate legal expression.” *Id.* at 339.

205. See Part I.B.

206. Brandeis, *Business* at 342 (cited in note 161) (acknowledging that the “bar does not now hold the position which it formerly did as a brake upon democracy”). See also Harlan F. Stone, *The Public Influence of the Bar*, 48 *Harv L Rev* 1, 7-10 (1934) (beseeching lawyers to return to service as “guardian of public interests”); Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in Robert L. Nelson, et al, eds, *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* 152-53 (Cornell 1992) (describing numerous bar leaders who advocated professionalism and denounced “the commercialization of practice”).

207. Pound, *The Lawyer From Antiquity to Modern Times* at 5 (cited in note 105).



business or trade it is the entire purpose.”<sup>208</sup>

This account, coupled with the invisible hand of reputation, explained how the elite could be both financially prosperous and devoted to the public good. As Pound noted, the elite did gain their livelihoods through their work as lawyers. But that was not their “primary purpose.” They earned their livelihood by pursuing achievement and service. The invisible hand of reputation ensured that the most professional lawyers made the most money.<sup>209</sup>

Rayman Solomon has documented how, despite periodic challenges to the bar’s governing class capacity, “the bar’s understanding of the meaning and responsibilities of being a legal professional remained relatively unchanged” until 1960.<sup>210</sup> When challenges to the bar’s governing class capacity arose, professionalism provided a defense. For example, the perception that the “overcrowding” of the bar during the Depression led to “excessive competition” and unethical conduct<sup>211</sup> resulted in efforts to strengthen the bar and to tighten admission requirements.<sup>212</sup> Even critics of the bar, such as Justice Harlan Fiske Stone, did not suggest the abandonment of the governing class role. Stone believed that the behavior of lawyers as business servants and profit maximizers contributed to the occurrence of the Depression.<sup>213</sup> His response was to call for the bar to recommit itself to serving as “guardian of public interests” and to account for “the way in which our professional activities affect the welfare of society as a whole.”<sup>214</sup>

A few critics did challenge fundamental aspects of the governing class role. Karl Llewellyn, for example, asserted that lawyers were businessmen.<sup>215</sup> He argued that as a general matter lawyers “working for business men toward business ends” have “a business point of view—toward the work to be done, toward the value of the work to the community, indeed, toward the way in which to do the work.”<sup>216</sup> Another critic denied the lawyer’s governing class responsibility and asserted that the lawyer has “no other master” than the client.<sup>217</sup> In Charles Curtis’s view, the lawyer’s obligation was to dedicate his virtue to the client’s good and not to the public good.<sup>218</sup> The lawyer must “treat outsiders as if they

208. *Id.*

209. Pearce, 70 NYU L Rev at 1245 (cited in note 5).

210. Solomon, *Five Crises or One* at 168 (cited in note 206).

211. *Id.* at 156-57.

212. *Id.* at 158-59; Abel, *American Lawyers* at 7, 72 (cited in note 39).

213. Gordon, 68 BU L Rev at 3-4 (cited in note 15).

214. Stone, 38 Harv L Rev at 10 (cited in note 206).

215. *Id.*

216. Karl Llewellyn, *The Bar Specializes—With What Results*, 167 Annals 177, 177 (1933).

217. Charles P. Curtis, *The Ethics of Advocacy*, 4 Stan L Rev 3, 3 (1951).

218. *Id.* at 5-6. Curtis was equivocal with regard to lawyer’s capacity for independent judgment. At one point, he “doubted . . . whether there is such a thing as intellectual impartiality, an equilibrium of judgment.” *Id.* at 13. Later, he suggested that lawyers need to obtain some “detachment” from the client. *Id.* at 18-23.

were barbarians and enemies.”<sup>219</sup> Curtis went so far as to assert “that one of the functions of a lawyer is to lie for his client.”<sup>220</sup> While lying to the court was not permissible, Curtis believed that it was permissible to mislead the court.<sup>221</sup>

In preserving their loyalty to the governing class perspective, the bar elite effectively ignored these challenges. In 1958, the Joint Conference on Professional Responsibility of the American Bar Association and the Association of American Law Schools issued a report on the lawyer's role.<sup>222</sup> The Report expressly stated that “[t]he lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.”<sup>223</sup> Like Brandeis and his republican forebears, the Report extended this obligation to law reform, government service, and private practice.<sup>224</sup> As the Report noted, “[p]rivate practice is a form of public service when it is conducted with appreciation of, and a respect for, the larger framework of government of which it forms a part, including under the term government . . . voluntary forms of self-regulation.”<sup>225</sup> As the “natural architect” of “the great bulk of human relations,”<sup>226</sup> the lawyer as counselor must “preserve a sufficient detachment from his client's interests so that he remains capable of a sound and objective appraisal of the propriety of what his client proposes to do.”<sup>227</sup> Even while serving as an advocate, the lawyer's “zeal [should] promote[] a wise and informed decision of the case[, and not] muddy the headwaters [and] distort[] and obscure [the] true nature” of the “controversy.”<sup>228</sup>

In the early 1960s, Erwin Smigel's landmark study of Wall Street lawyers confirmed the view of the legal elite as America's governing class. Beginning in the late 1950s, Smigel undertook to study the “large law firm in American society,”<sup>229</sup> including in his research interviews of a “representative” sample<sup>230</sup> of 188 lawyers of the “approximately 1700”<sup>231</sup> in eighteen of the twenty large New York firms.<sup>232</sup> Based on his study of how these lawyers described themselves, Smigel concluded that the legal elite fit Tocqueville's description of “the lawyer

219. *Id.* at 5.

220. *Id.* at 9.

221. *Id.* at 9-10.

222. *Professional Responsibility: Report of the Joint Conference*, 44 ABA J 1159, 1159 (Dec 1958).

223. *Id.* at 1162.

224. *Id.* at 1162, 1217-18. This role included shaping the public's perceptions of the justice system. *Id.* at 1162, 1216.

225. *Id.* at 1162.

226. *Id.* at 1161.

227. *Id.*

228. *Id.*

229. Smigel, *The Wall Street Lawyer* at 1 (cited in note 1) (capitalization omitted).

230. *Id.* at 31.

231. *Id.*

232. *Id.* at 29.

in America as the aristocracy of this country.”<sup>233</sup> They served as “spokesm[e]n for big business,”<sup>234</sup> leaders of government,<sup>235</sup> molders of international relations,<sup>236</sup> and pillars of “charit[able] and cultural affairs.”<sup>237</sup> While promoting the interests of business clients, the legal elite protected the public good by serving as a “buffer between the illegitimate desires of . . . clients and the social interest.”<sup>238</sup> Their independence derived from two sources. First, “they . . . ‘represent’ the law and must therefore separate themselves from the client.”<sup>239</sup> Second, the commodity they sold was “[i]ndependent legal opinion.”<sup>240</sup> Smigel observed that “client[s] desire that a firm maintain its autonomy” so that they can obtain the best advice.<sup>241</sup> Moreover, as the large firms grew older, they increased their number of clients and moved away from fundamentally relying on one or a few clients.<sup>242</sup> This shift “strengthened . . . a firm’s ability to retain its independence” because “no one client provid[es] enough income to materially or consciously influence the law office’s legal opinion.”<sup>243</sup>

Smigel observed that the governing class role pervaded the work of elite lawyers. He found that working in the “public interest,”<sup>244</sup> elite lawyers “serve . . . as the conscience of big business.”<sup>245</sup> They brought to their role their “duty to society” and “many relevant social, economic and philosophic considerations,” as well their capacity to “predict[] legal consequences.”<sup>246</sup> Elite lawyers advised their clients “upon not only what is permissible but also what is desirable.”<sup>247</sup> Smigel noted that “[l]awyers often use their positions as advisors to guide their clients into what they believe to be proper and moral legal positions.”<sup>248</sup> They served this role in transactions and in litigation.<sup>249</sup>

The elite lawyer’s shaping of corporate conduct had important conse-

233. *Id.* at 12. The Wall Street lawyers were among “only a handful of lawyers [who] fit this description.” *Id.*

234. *Id.* at 4 (italics and capitalization omitted).

235. *Id.* at 8-10.

236. *Id.* at 11-12.

237. *Id.* at 10-11.

238. *Id.* at 342, quoting Talcott Parsons, *The Law and Social Control*, in William M. Evan, ed., *Law and Sociology* 69 (Free Press 1962).

239. *Id.* at 344.

240. *Id.* at 343.

241. *Id.*

242. *Id.* at 344.

243. *Id.*

244. *Id.* at 6 (quoting Justice Charles Edward Wyzanski, Jr.).

245. *Id.* at 5 (joining in Martin Mayer’s observation).

246. *Id.* at 6 (quoting Justice Charles Edward Wyzanski, Jr.).

247. *Id.* at 5-6 (quoting Justice Charles Edward Wyzanski, Jr.). Smigel noted that “[t]he lawyer . . . as the conscience of the businessman is saying: ‘So far as the law goes, you can do this—but you must not.’” *Id.*

248. *Id.* For example, the process of drafting an “opinion letter . . . in itself tends to induce the client to take conservative business positions and perhaps increase his economic conscience in terms of a broader distribution of profits.” *Id.*

249. *Id.* at 6-8.

quences for social stability. Like Brandeis, Smigel found that elite lawyers “give our society continuity.”<sup>250</sup> Applying “cautious use of societal brakes,”<sup>251</sup> they “provide[] the liberal with time and opportunity to seek change in a relatively stable society” and thwart “[t]he revolutionary” by “not allow[ing] the seeds of deep discontent to flower.”<sup>252</sup> No wonder Smigel concluded that “[t]he important role [elite lawyers] play in our society makes what happens to them of general concern.”<sup>253</sup>

### III. THE COLLAPSE OF THE GOVERNING CLASS IDEA

In the years following publication of Smigel’s book, the governing class idea lost its vitality. While it still retained the lip service of bar leaders, it no longer influenced how the legal elite viewed their role. In contrast to the late nineteenth century, when the elite coupled their fears of the decline of the legal profession with a new formula for preserving the Business-Profession dichotomy, the twentieth-century elite fixated on the decline and unsuccessfully demanded adherence to professionalism. In explaining the demise of the governing class conception, leaders of the profession relied on changes in the legal services market, bar rules, legal education, and the diversity of the legal profession. This article instead suggests that other factors were more significant. Two were societal factors—the loss of faith in elites and the shift from communitarianism to individualism. Two related specifically to lawyers—the development of a public interest bar and of the idea of a pro bono duty.

#### A. FROM GOVERNING CLASS TO HIRED GUN

In 1985, contributors to a landmark Stanford Law Review *Symposium on the Corporate Law Firm*,<sup>254</sup> found elite lawyers serving a very different role than that identified by Smigel. Writing in this symposium, Deborah Rhode noted that the rhetoric that law practice was public service “appears increasingly removed from the enterprise it purports to describe.”<sup>255</sup> Elite lawyers had abandoned the governing class ideal in favor of Lord Brougham’s adversarial model. Two papers, in particular, offered evidence to support this conclusion.

Robert L. Nelson expressly contradicted Smigel’s conception of the governing class elite lawyer.<sup>256</sup> Rather than “play a mediating role with respect to client

250. *Id.* at 342.

251. *Id.* One illustration of this dynamic is Smigel’s observation that “the lawyer tells his client there is no law preventing a certain behavior; nevertheless, if he does ‘such-and-such,’ his action will ensure that the law is enacted.” *Id.* at 6.

252. *Id.* at 342.

253. *Id.* at 13-14.

254. See note 3.

255. Deborah Rhode, *Ethical Perspectives in Legal Practice*, 37 *Stan L Rev* 589, 592 (1985).

256. Nelson, 37 *Stan L Rev* 503 (cited in note 4). Nelson interviewed 224 lawyers at four elite Chi-

demands,” Nelson concluded that lawyers “are more likely to press for the maximum advantage of their clients in order to attract future business.”<sup>257</sup> Where Smigel found that elite lawyers, while sharing many values with their clients, maintained an independent perspective on the public good, Nelson concluded that elite lawyers “show such a strong identification with the interests of clients . . . that it is unrealistic to think of corporate lawyers as neutral professionals who are detached from the substantive interests of their clients.”<sup>258</sup>

While “[m]ore than three-quarters of the sample [of elite Chicago lawyers] responded that it was appropriate to act as the conscience of a client when the opportunity presented itself,”<sup>259</sup> they also reported that they did not do so. At most, only 2.4% of the lawyers related giving advice regarding the “public interest.”<sup>260</sup> Three-quarters of the sample also reported that they had not had a serious conflict with a client during their entire career.<sup>261</sup> Based on his data, Nelson concluded that “[t]he notion that lawyers struggle with clients over fundamental questions of the common good is simply wrong.”<sup>262</sup> Instead, he found that they served as hired guns for their clients. Nelson observed that “in general, large-firm lawyers strive to maximize the substantive interests of their clients within the boundaries of legal ethics.”<sup>263</sup>

Robert Kagan and Robert Eli Rosen reached a similar conclusion.<sup>264</sup> They reported on the responses of a “non-random sample” of fourteen partner and six associate acquaintances.<sup>265</sup> They found that “the experience of our small cadre of corporate lawyer respondents is that the influential and independent counselor role is now an exceptional rather than a common aspect of large firm practice.”<sup>266</sup> Clients did not want lawyers to fulfill this role<sup>267</sup> and lawyers did not

Chicago law firms. *Id.* at 509. He sought to explore “two themes . . . First, to what extent are lawyers in large firms merely the instruments of their clients, and to what extent do they attempt to modify the clients’ behavior. Second, what impact does the advice and advocacy of the large firm have on society’s allocation of scarce resources.” *Id.* at 511.

257. *Id.* at 544.

258. *Id.* at 526-27. See also Glendon, *A Nation Under Lawyers* at 75 (cited in note 5) (relying on Nelson’s findings). Nelson’s conclusions accorded with those of Edward O. Laumann and John P. Heinz who found, a few years earlier than Nelson, that elite Chicago lawyers were more subject to client control than non-elite lawyers. Heinz and Laumann, *Chicago Lawyers* (cited in note 8).

259. Nelson, 37 *Stan L. Rev.* at 532 (cited in note 4).

260. *Id.* at 533.

261. *Id.* at 536. See also Glendon, *A Nation Under Lawyers* at 75 (cited in note 5) (relying on this finding as reported in Nelson’s book based on this study). One lawyer observed that “[m]y work [big case litigation] doesn’t raise questions of conscience, it’s just a fight over which big corporation is going to get a bigger chunk of the pie.” Nelson, 37 *Stan L. Rev.* at 537 (cited in note 4).

262. Nelson, 37 *Stan L. Rev.* at 538 (cited in note 4).

263. *Id.* For example, one firm partner reported that when an associate told him that “the only difference between us and the small-time crook and dirty litigator is that they try and do the same thing by dishonesty that we try and do by cleverness,’ [he] had to agree with him.” *Id.* at 538 n. 69.

264. Kagan and Rosen, 37 *Stan L. Rev.* at 399 (cited in note 4).

265. *Id.* at 431.

266. *Id.* at 435.

267. *Id.* at 423-27, 439.

believe the role to be appropriate.<sup>268</sup> In effect, elite lawyers had become hired guns subject to client control and having no responsibility for the public good.<sup>269</sup> Only one of the twenty lawyers surveyed disagreed with this characterization.<sup>270</sup>

Other commentators confirmed this shift in perception. While acknowledging that some lawyers continued to employ the rhetoric of the governing class vision,<sup>271</sup> they described Lord Brougham's hired gun as the "dominant"<sup>272</sup> conception of the lawyer's role.<sup>273</sup> Whether they favored<sup>274</sup> this approach or opposed it,<sup>275</sup> commentators agreed that most lawyers understood themselves this way.<sup>276</sup> Murray Schwartz, and later David Luban, described this "standard conception of the lawyer's role" as having two basic principles.<sup>277</sup> First, the "partisanship principle" provided that, within the bounds of the law, the lawyer must act as an extreme partisan on the client's behalf.<sup>278</sup> Second, the "nonaccountability principle" provided that the lawyer was not morally accountable for her conduct so long as she was acting as the client's partisan.<sup>279</sup> Luban concluded that although other conceptions of the lawyer's role existed, "[t]he true haven of the standard conception . . . is large-firm practice."<sup>280</sup>

In becoming hired guns, elite lawyers abandoned the traditional governing

268. Id at 435 (noting that "contemporary corporate lawyers often seem to reject even the *aspiration* to serve as molders of corporate and public policy"). One partner wrote that "[c]orporate executives are supposed to make decisions, not lawyers. . . . Lawyers acting in a legal capacity should, it seems to me, be making evaluations without business responsibility." Id.

269. Id at 436 (asserting that elite lawyers "enshrine[d] client control while abdicating responsibility for the social and economic impact of his client's actions (and of his own actions in carrying out his client's decisions)"). In direct contrast to Smigel's lawyers of an earlier generation, those that Kagan and Rosen studied advised only regarding "legal consequences, and not upon . . . autonomous evaluation of social consequences, political wisdom, or good business practices." Id at 436-37.

270. Id at 431. Nonetheless, many were proud of incidents where they "had 'done the world some good.'" Id at 432.

271. See, for example, Rhode, 37 Stan L Rev at 592 (cited in note 255). Accordingly, Charles Wolfram described the hired gun conception as the "dominant, although hardly universal, professional ethic." Charles Wolfram, *Modern Legal Ethics* 580 (West 1986).

272. Wolfram, *Modern Legal Ethics* at 580 (cited in note 271).

273. See note 125 and accompanying text.

274. See, for example, Freedman, *Understanding Lawyers' Ethics* (cited in note 5); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am Bar Found Research J 613.

275. See, for example, David Luban, *Lawyers and Justice: An Ethical Study* xx (Princeton 1988); Rhode, 37 Stan L Rev at 594 (cited in note 255).

276. Richard Abel observed that "[l]awyers are hired guns: they know they are, their clients demand that they be, and the public sees them that way." Abel, *American Lawyers* at 247 (cited in note 39). But see Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 Wis L Rev 1529 (asserting that lawyers have a more pluralistic understanding of their rule which includes governing class values).

277. Luban, *Lawyers and Justice* xx, 10 (cited in note 275); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Cal L Rev 669, 671-73 (1978).

278. Luban, *Lawyers and Justice* at xx, 10 (cited in note 275).

279. Id. See also Rhode, 37 Stan L Rev at 602 (cited in note 255).

280. David Luban, *Partisanship, Betrayal, and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 Colum L Rev 1004, 1016 (1990).

class ideology. They were no longer acting as a disinterested political leadership capable of discerning and pursuing the common good.<sup>281</sup> Instead, they were advocates of *private interests*. They had violated professionalism's taboo on acting as a servant of big business and could no longer claim the special tie to the public good which distinguished them from those in business.<sup>282</sup>

Although the legal elite's consensus on the governing class role had evaporated, lawyers continued to debate the connection between their work and the public good. Many sought to revive the governing class ideal through public admonishments and educational programs aimed at reviving commitment to professionalism. Some asserted very thin conceptions of the governing class based on the hired gun role. Under these approaches, lawyers served as the governing class in their capacity as advocates of private interests in an adversarial system which itself determined the public good.<sup>283</sup> Others proposed commitments to the common good independent of the Business-Profession dichotomy. Some of these commentators asserted that lawyers' obligation to the common good was the same as that of all other people and that the importance of lawyers' work to the governance of society made them a public-interested governing class.<sup>284</sup> Whether a new consensus would emerge, and the direction it would take, was far from clear.

## B. THE BAR'S EXPLANATIONS FOR THE COLLAPSE

Leaders of the bench and bar agreed that professionalism had failed to preserve the distinction between a business and a profession. In 1984, Chief Justice Burger observed that "the standards and traditions of the bar" no longer "restrain[ed] members of the profession from practices and customs common and acceptable in the rough-and-tumble of the marketplace."<sup>285</sup> Commentators described the fate of professionalism using "apocalyptic" language.<sup>286</sup> As I have noted elsewhere, they "asserted that lawyers, their ethics, and their professionalism were 'lost,' 'betrayed,' in 'decline,' in 'crisis,' facing 'demise,' near 'death,' and in need of 'redemption.'"<sup>287</sup> In the words of one bar leader, "the legal profession is 'on the way into a black hole of pure commercialism from which there is no

281. See Parts I and II.

282. Pearce, 70 NYU L Rev at 1243-44, 1253-54 (cited in note 5).

283. See Rhode, 37 Stan L Rev at 594-617 (cited in note 255) (describing and questioning such arguments).

284. See, for example, Pearce, 70 NYU L Rev at 1262-63, 1265-76 (cited in note 5); Thomas L. Shaffer, *Lawyer Professionalism as Moral Argument*, 26 Gonzaga L Rev 393, 403-04 (1990-91).

285. Warren E. Burger, *The State of Justice*, 70 ABA J 62, 63 (Apr 1984). Burger noted that "[h]istorically, honorable lawyers complied with traditions of the bar and refrained from doing all that the laws or the Constitution allowed them to do. Specifically, they did not advertise, they did not solicit . . . they considered our profession as one dedicated to public service." Id.

286. Pearce, 70 NYU L Rev at 1257 (cited in note 5) (listing the various terms used to describe the fate of the profession).

287. Id (footnotes omitted).

return.”<sup>288</sup>

The behavior of law firms appeared to resemble the behavior of other businesses. *The New York Times* observed that “a new era had dawned, one in which the practice of law has ceased to be a gentlemanly profession and instead has become an extremely competitive business.”<sup>289</sup> Law firms devised entrepreneurial strategies for marketing their services and “hawked their wares” to the public.<sup>290</sup> Compensation plans rewarded lawyers for the profits they generated, not their professional contribution, and dissuaded lawyers from public service.<sup>291</sup> To pursue their business goals, law firms adopted “the forms of businesses. They added managers, business plans, marketing directors, and financially driven strategies to maximize efficiency in making profits.”<sup>292</sup>

Commentators have attributed the hired gun behavior described above to elite lawyers’ pursuit of financial self-interest, which caused them to promote private interests at the expense of the public good. When a client asked for advice, the lawyer explained how to maximize material self-interest and ignored the public good because advising clients to avoid “antisocial” conduct would undermine “the marketing program.”<sup>293</sup> Commentators also noted that quite a few elite lawyers went beyond the bounds of the law in promoting their clients’ financial interests and that some of them were implicated in well-publicized scandals.<sup>294</sup>

These commentators have offered a variety of explanations for why so many elite lawyers have abandoned commitment to the common good. Some attributed this transformation to changes in the demand side of the market for legal services. The growth of in-house counsel and the related decision of large corporate clients to shift from employing a single firm to a multiplicity of firms both caused the firms to compete for business and undermined the long-term relationship of mutual trust between lawyer and client that made it possible to counsel effectively on the public’s interests.<sup>295</sup> Other factors “unleash[ing] the entrepreneurial inclinations of American lawyers” included “[t]he deregulation of finance and business, the internationalization of economic exchange, [and]

288. *Id.* (quoting “[a] president of the Colorado Bar”).

289. Tamar Lewin, *A Gentlemanly Profession Enters a Tough New Era*, *NY Times*, § 3 at 1 (Jan 16, 1983).

290. Pearce, 70 *NYU L Rev* at 1253 (cited in note 5).

291. *Id.* at 1251-53.

292. *Id.* at 1252.

293. Sol M. Linowitz and Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* 4 (Charles Scribner’s Sons 1994). These authors also note that “[n]obody ever lost a client by doing exactly what the fellow wanted, but much lucrative legal work has been sacrificed by lawyers who regretfully told prospective clients that this was something they were not willing to do.” *Id.* at 18-19.

294. Pearce, 70 *NYU L Rev* at 1254 (cited in note 5).

295. Marc Galanter and Thomas Palay, *The Transformation of the Big Law Firm*, in Robert L. Nelson, et al, eds, *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* 48 (Cornell 1992); American Bar Association Commission on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* 9 (American Bar Association 1986); Glendon, *A Nation Under Lawyers* at 34 (cited in note 5); Linowitz and Mayer, *The Betrayed Profession* at 38-39 (cited in note 293).



the rise of litigation among corporate actors.”<sup>296</sup>

Commentators have also cited changes in the regulation of lawyer marketing as a contributing factor. According to this view, the Bates decision prohibiting bans on lawyer advertising released the constraints on entrepreneurial behavior. One bar leader complained that “[w]e now condone advertising and solicitation of clients, activities that were formerly unethical and unprofessional.”<sup>297</sup> Another observed that “[m]uch of the perceived commercialism of the legal profession has been directly attributed to attorney advertising.”<sup>298</sup>

Another contributing factor was the shifting culture of the bar. Commentators have suggested that in the past the relatively homogenous bar leadership of predominantly white, Protestant, and male lawyers had sustained an ethos of *noblesse oblige* professionalism. Jewish elite lawyer Sol Linowitz observed that “the socialization of the bar was that of an all-male, all-white, mostly Protestant club. . . . The maintenance of camaraderie when the comrades encompass a wider variety of mankind is more difficult.”<sup>299</sup> Timothy Terrell and James Wildman similarly noted that the shift from a “close-knit community of colleagues” to a diverse bar has caused “[w]hat was understood or assumed concerning appropriate behavior” to degenerate into “standards that . . . are vague, lack serious moral force, and are constantly being challenged or rethought.”<sup>300</sup>

In addition to diversity, commentators ascribed increased disregard for the common good by lawyers to changes in legal education. Sol Linowitz blamed law schools for teaching “that ethical behavior is far less important than political belief”<sup>301</sup> and for “fail[ing] to relate law school education to any aspect of practice.”<sup>302</sup> Anthony Kronman faulted the influence of the “law and economics” and “critical legal studies” movements for promoting a scientific approach to law that disdained the virtue of practical wisdom necessary to the lawyer-statesman ideal.<sup>303</sup>

While these analyses have captured the imagination of the bar’s elite, they fail to prove a causal link between their claims and the changed perception of the lawyer’s role. Similar behavior occurred in the past without rejection of the

296. Robert L. Nelson and David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, in Robert L. Nelson, et al, eds, *Lawyers’ Ideals/Lawyers’ Practices: Transformations in the American Legal Profession* 1, 13 (Cornell 1992).

297. John J. Yanas, *The President’s Message*, 62 NY St B J 3, 3 (May 1990).

298. Edward D. Re, *The Causes of Dissatisfaction with the Legal Profession*, 68 St John’s L Rev 85, 98 (1994).

299. Linowitz and Mayer, *The Betrayed Profession* at 56 (cited in note 293).

300. Timothy P. Terrell and James H. Wildman, *Rethinking “Professionalism,”* 41 Emory L J 403, 412 (1992). Anthony Kronman concluded that “[a]s membership of these firms has become more diverse, the loose consensus that once existed among the lawyers working in them regarding the most appropriate patterns for living has begun to fray and, in certain respects, has broken down completely.” Kronman, *The Lost Lawyer* at 293 (cited in note 5).

301. Linowitz and Mayer, *The Betrayed Profession* at 119 (cited in note 293).

302. Id at 125.

303. Kronman, *The Lost Lawyer* at 166-67 (cited in note 5).

Business-Profession dichotomy. Elite lawyers had historically made a lot of money and considered themselves servants of the public good. They explained their large profits not as the rewards of business conduct but as “incidental” to their professionalism and the deserved reward of the invisible hand of reputation.<sup>304</sup> Elite lawyers also had openly marketed their services. David Hoffman, whose early work helped define the governing class role, placed advertisements in the *National Intelligencer*, which boasted a testimonial from John Marshall, then the sitting Chief Justice of the United States.<sup>305</sup>

The Business-Profession dichotomy also survived previous changes in the market for legal services. The shifts in demand, such as the growth of in-house counsel and the diversification of outside counsel, began before the demise of the governing class ideal. Indeed, Erwin Smigel credited these developments with strengthening the elite lawyer’s ability to provide independent counsel to corporations.<sup>306</sup> Even when elite lawyers developed entrepreneurial strategies to take advantage of changes in the legal services market in the late nineteenth and early twentieth centuries,<sup>307</sup> the Business-Profession dichotomy continued to command the elite’s allegiance. Many of those who helped create and promote the ideology of professionalism also built the modern corporate law firms, or “law factories,” to better serve the needs of newly emergent big business interests.<sup>308</sup> In regard to lawyers’ business behavior, what appears most different at the end of the twentieth century is not the type of changes or kinds of conduct, but the elite’s perception of that conduct.

Also unconvincing are the explanations drawing on law school training. Elite law school training has never been practice-oriented.<sup>309</sup> This is not a new phenomenon. Similarly, as Kronman concedes, the scientific approach to legal education is not new to law and economics or to critical legal studies. Langdell’s scientific approach has dominated law teaching for more than a century, such that even its critics generally adopt its disdain for teaching virtue.<sup>310</sup> Kronman

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304. Pearce, 70 NYU L Rev at 1245 (cited in note 5).

305. Geoffrey C. Hazard, Jr., et al, *Why Lawyers Should Be Allowed To Advertise: A Market Analysis of Legal Services*, 58 NYU L Rev 1084, 1085 n 2 (1985).

306. Smigel, *The Wall Street Lawyer* at 344 (cited in note 1).

307. Elite law firms moved to adopt the “Cravath system” of specialization and teamwork in creating the framework for the modern large law firm. Auerbach, *Unequal Justice* at 23-25 (cited in note 8).

308. See Part II.

309. The premise of elite legal education was that the student could not properly learn how to be a lawyer through practice as the apprenticeship system promised. Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* 17-23, 112 (North Carolina 1983); Haber, *Authority and Honor in the American Professions* at 221-22 (cited in note 9). Indeed, in the second half of the nineteenth century and the early twentieth century, elite institutions excluded practical training from the curriculum. Alfred Z. Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States with Some Account of Conditions in England and Canada* 260, 284, 378-439 (Carnegie Foundation Bulletin 1921). Not surprisingly, tensions arose between legal academics who preferred theoretical approaches to the study of law and practitioners who favored more vocational training. *Id.* at 260; Auerbach, *Unequal Justice* at 84-94, 166-67 (cited in note 8).

310. Kronman, *The Lost Lawyer* at 210 (cited in note 5); Russell Pearce, *Teaching Ethics Seriously: Legal*

acknowledges that his model teacher of practical wisdom, Karl Llewellyn, was “a supremely talented but isolated thinker who had no followers in the conventional sense” and who did not develop “an organized school of thought.”<sup>311</sup>

Similarly, the explanations based on diversity are not persuasive. While the idea that the homogeneity of the elite correlates with the ease of maintaining a consensus is appealing,<sup>312</sup> the historical record reveals that the Business-Profession dichotomy survived two major increases in the diversity of the profession. In the early nineteenth century, unprecedented numbers of working and middle-income men joined a profession that had previously been an upper class preserve.<sup>313</sup> In the late nineteenth and early twentieth centuries, large numbers of white Catholic and Jewish men entered a largely white Protestant male legal establishment.<sup>314</sup> While both of these periods coincided with challenges to the legal elite,<sup>315</sup> the Business-Profession dichotomy survived.

Moreover, the alleged threat of increased diversity of the legal profession appears highly exaggerated. Among the elite, the increase has been quite limited. As Deborah Rhode notes in a book published only one year ago: “Women and minorities remain overrepresented at the bottom and underrepresented at the top of professional status and reward structures.”<sup>316</sup> Moreover, individuals from underrepresented groups have often demonstrated a commitment to the public good.<sup>317</sup> For example, Thurgood Marshall, an African American who was one of the most influential lawyers of the twentieth century, devoted his career as a public interest lawyer, government servant, and judge to the pursuit of justice.<sup>318</sup>

*Ethics as the Most Important Course in Law School*, 29 Loy U Chi L J 719, 728-32 (1998).

311. Kronman, *The Lost Lawyer* at 210 (cited in note 5).

312. See, for example, Smigel, *The Wall Street Lawyer* at 252 (cited in note 1).

313. See, for example, Gary Nash, *The Philadelphia Bench and Bar, 1800-1861*, 7 Comp Stud Soc & Hist 203 (1965) (describing increased class diversity in the Philadelphia Bar).

314. See Abel, *American Lawyers* at 85-87 (cited in note 39).

315. See, for example, Burton J. Bledstein, *The Culture of Professionalism 185-86* (W.W. Norton & Co. 1976) (as the states removed barriers to entry into legal practice, “[t]he homogeneity of the older elite group dissolved as white, Protestant, middle-class sons from families of small businessmen, clerks, tradesmen, and artisans began entering the profession in significant numbers”); Auerbach, *Unequal Justice* at 50 (cited in note 8) (suggesting that “[t]he ethical crusade that produced the Canons concealed class and ethnic hostility” toward Jewish and Catholic lawyers).

316. Deborah L. Rhode, *In the Interests of Justice* 38-39 (Oxford 2000).

317. Numerous articles and essays describe women and African-American lawyers with strong commitments to the common good. See, for example, Judith Kilpatrick, *(Extra)Ordinary Men: African-American Lawyers and Civil Rights in Arkansas Before 1950*, 53 Ark L Rev 299 (2000); Paul Finkelman, *Not Only the Judges' Robes Were Black: African-American Lawyers as Social Engineers*, 47 Stan L Rev 161 (1994), reviewing J. Clay Smith, Jr., *Emancipation: The Making of the Black Lawyer, 1844-1944* (Pennsylvania 1993); Steven H. Hobbs, *From the Shoulders of Houston: A Vision for Social and Economic Justice*, 32 How L J 505 (1989); J. Clay Smith, *Black Women Lawyers: 125 Years at the Bar; 100 Years in the Legal Academy*, 40 How L J 365 (1997); Richard F. Hamm, *Mobilizing Legal Talent for a Cause: The National Woman's Party and the Campaign to Make Jury Service for Women a Federal Right*, 9 Am U J Gender Soc Pol & L 97 (2001); Martha F. Davis, *Our Better Half: A Public Interest Lawyer Reflects on Pro Bono Lawyering and Social Change Litigation*, 9 Am U J Gender Soc Pol & L 119 (2001).

318. See, for example, James M. Altman, *Modern Litigators and Lawyer-Statesmen*, 103 Yale L J 1031,

At best, therefore, arguments based on the market for legal services, bar rules, legal education, and diversity are not dispositive.<sup>319</sup> Perhaps future analysis will reveal that these changes were so different in character and influence than past events that they indeed caused the demise of the governing class role. Absent such evidence, however, they appear more likely to be symptoms and not causes.

### C. WHY THE GOVERNING CLASS IDEOLOGY COLLAPSED

This section proposes a different account of the decline of the governing class conception. It suggests that four related factors are responsible for this shift: (i) growing distrust of disinterested expertise, (ii) a surge in individualism, (iii) emergence of the public interest bar, and (iv) the development of a pro bono ethical duty. While this article's analysis of these factors is preliminary, they appear to offer a far more satisfactory explanation of the transformation of the legal elite's self-image.

#### 1. The Egalitarian Anti-Expert Impulse

The democratic and egalitarian influence emanating from the 1960s rejected both the need, and rationale, for lawyers' governing class role. The very existence of a governing class was anathema to a democratic and egalitarian perspective. As Louis Menand notes, "disillusionment about professionalism [represents] a democratic upsurge."<sup>320</sup> Beyond "[q]uestioning authority" itself,<sup>321</sup> contemporary culture rejected the belief that lawyers had a special capability for perceiving and pursuing the common good that justified the governing class role.<sup>322</sup> It considered claims of disinterestedness and "expertise [to be] an in-

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1071 n 173 (1994) (describing Marshall as an "exemplar[] of the lawyer-statesman ideal"), discussing Kronman, *The Lost Lawyer* (cited in note 5); Robert W. Gordon, *Is Law Still a Profession? Was It Ever One? And Does It Matter?* 23 (unpublished manuscript) (on file with author) (noting that Marshall, along with two other outsiders, did "more to live out [professional] values than anyone in the blue-chip firms"); Denis F. McLaughlin, *Address to the Class of 1996: On Becoming a Lawyer*, 26 Seton Hall L Rev 505, 510 (1996) (urging incoming law students to emulate Thurgood Marshall); Jon M. Sands and Jane L. McClellan, *Book Review: Juan Williams, Thurgood Marshall: American Revolutionary*, 23 Champion 83, 83 (1999) (describing Marshall as "the greatest lawyer in the twentieth century").

319. Another set of commentators have argued that, in the late twentieth century, lawyers' pursuit of judicially activist solutions to social problems undermined the public's trust in lawyers' function as the governing class. Glendon, *A Nation Under Lawyers* at 1-7 (cited in note 5); Paul Carrington, *Stewards of Democracy* 5 (Westview 1999); Hazard, 100 Yale L J at 1278 (cited in note 120). This article, however, focuses on how elite lawyers perceive themselves and not on how others perceive them. Nonetheless, this argument also appears questionable in light of historical precedent. During the administration of Franklin Roosevelt, for example, elite lawyers promoted judicial activism as part of their attack on the New Deal. Auerbach, *Unequal Justice* at 192-95 (cited in note 8); Solomon, *Five Crises or One* at 160 (cited in note 206).

320. Louis Menand, *The Thrashing of Professionalism*, NY Times Magazine 41 (Mar 5, 1995).

321. *Id.*

322. See also Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneur-*

galitarian sham.”<sup>323</sup> The late twentieth-century view was “that disinterestedness itself is a myth, the beard behind which elites conceal their contempt for the people. Everyone is now understood to be self-interested.”<sup>324</sup>

Although the legal elite rejected similar arguments in the nineteenth century, it appears to have accepted them in the late twentieth century.<sup>325</sup> The acceptance of this view changed the very nature of the dialogue on challenges to the Business-Profession dichotomy. In the past, leaders of the elite sought to correct the neglect of the public good by admonishing their colleagues for failing to be “as disinterested as they ought to be”<sup>326</sup> and appealing to them to return to the governing class ideal.<sup>327</sup> These entreaties had little impact on lawyers who understood themselves to be self-interested. They were more comfortable with the role of hired gun. It provided them with a rationale for pursuing their own self-interest and for pursuing the self-interest of their clients.

## 2. The Decline of Communitarianism and Rise of Individualism

The large firm lawyer was not alone in losing sight of his responsibilities to the larger community. Commentators have noted the increased individualism characterizing American society since the 1960s. Some commentators have described this shift away from communal responsibility as the acceleration of an existing trend.<sup>328</sup> For example, Robert H. Wiebe observes that the individualistic and majoritarian impulses of American democracy “separated around 1920” and were “at war” by the 1960s.<sup>329</sup> Others describe the shift as a reversal of a twentieth-century trend toward community engagement.<sup>330</sup> According to Robert Putnam, since the 1960s “we have been pulled apart from one another and from

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*rial Government*, 75 NYU L Rev 1121, 1196 (noting that “Americans are much more skeptical of claims that professionals deserve autonomy because of their specialized knowledge and ethos”).

323. Menand, NY Times Magazine at 41 (cited in note 320).

324. Id. See Charles Derber, et al, *Power in the Highest Degree: Professionals and the Rise of a New Mandarin Order* 225 (Oxford 1990) (noting that “[a] new generation of sociologists in the 1960s and 1970s broke with Parsons and asserted that professionals’ claims about their altruism and abilities were ruses to consolidate power and evade public accountability”).

325. This is especially true of lawyers entering the profession after the 1960s. Menand, NY Times Magazine at 43 (cited in note 320) (observing that “[n]o one feels [this skepticism] more keenly than the newly minted professional, who knows perfectly well how much his or her desire to become . . . a lawyer was motivated by disinterested devotion to ‘the law’ and how much by a panicky desire to be financially secure in insecure times”).

326. Id.

327. Pearce, 70 NYU L Rev at 1244 (cited in note 5). See also note 206 and accompanying text.

328. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press 1991); Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (Chicago 1995).

329. Wiebe, *Self-Rule* at 223 (cited in note 328).

330. Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* 27 (Simon & Schuster 2000). See also Robert N. Bellah, et al, *Habits of the Heart: Individualism and Commitment in American Life* (California updated ed 1996).

our communities.”<sup>331</sup> Putnam cites “sharp, steady declines in club meetings, visits with friends, committee service, church attendance, philanthropic generosity, card games, and electoral turnout” as indicators of the decline in civic engagement.<sup>332</sup> Similarly, Robert N. Bellah, Richard Madsen, William M. Sullivan and Steven Tipton find that “[a]mong [the knowledge and power] elite the crisis of civic membership is expressed in the loss of civic consciousness, of a sense of obligation to the rest of society.”<sup>333</sup>

As communal obligations collapsed, so did the governing class ideal premised on lawyers’ commitment to the common good. Reflecting the perspective of their fellow Americans, lawyers now defined themselves less as responsible members of a larger society and more as individuals seeking self-fulfillment. For the first time, the balance between public good and client advocacy shifted almost entirely to the client.<sup>334</sup> The hired gun’s devotion to vindicating the particular interests of the individual client—whether a person or a corporate entity—comported perfectly with the dominant ethos of individualism.

### 3. The Development of the Public Interest Bar

Although the governing class conception relied on the elite to protect the public interest, a new segment of the bar emerged in the 1960s to claim that role and redefine the public good. Building on the models of the small groups of lawyers who had dedicated themselves to the NAACP and the ACLU beginning early in the twentieth century,<sup>335</sup> the “new public interest lawyer[s]”<sup>336</sup> comprised a “large and diverse group of practitioners engaged in a broad range of activities”<sup>337</sup> based in newly created legal services offices, legal defense funds, and advocacy groups which promoted interests “underrepresent[ed] in the legal-political process.”<sup>338</sup> In contrast to the governing class understanding of the common good as balancing competing interests in society,<sup>339</sup> public interest lawyers followed the model of the NAACP’s Charles Hamilton Houston and Thurgood Marshall in identifying themselves as advocates promoting particular visions of social justice.<sup>340</sup> Public interest lawyers engaged in “aiding the poor;

331. Putnam, *Bowling Alone* at 27 (cited in note 330).

332. *Id.* at 185. See also Bellah, *Habits of the Heart* at xvi (cited in note 330).

333. Bellah, *Habits of the Heart* at xii (cited in note 330).

334. See Part III.A.

335. See, for example, Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973* 29 (Yale 1993).

336. Robert Borosage, et al, *Research Project, The New Public Interest Lawyers*, 79 *Yale L J* 1069, 1145 (1970).

337. *Id.*

338. *Id.* at 1072.

339. See notes 184-88, 202 and accompanying text.

340. Howard Ball, *A Defiant Life: Thurgood Marshall and the Persistence of Racism in America* 29-33 (Crown 1998); Genna Rae McNeil, *Groundwork: Charles Hamilton Houston and the Struggle for Civil Rights* 84-85, 216-18 (Pennsylvania 1983). See also Julius L. Chambers, *Thurgood Marshall's Legacy*, 44 *Stan L Rev* 1249, 1249

representing political and cultural dissidents and new radical movements; furthering substantive but neglected interests common to all classes and races, such as environmental quality and consumer protection<sup>341</sup>; and promoting civil rights and civil liberties. Although a right-wing public interest bar would later emerge, the “new public interest lawyers” sought to advance a left-of-center agenda.

The creation of the public interest bar undermined the governing class perspective in two significant ways. First, the use of the term “public interest” to describe the work of public interest lawyers indicated that these lawyers, and not big business lawyers, were responsible for the public good. This view became dominant in the legal community. For example, when commentators described the public interest work of big firms, they only mentioned the pro bono work that was either in direct support of public interest lawyers or the same kind of work as that done by public interest lawyers, not representation of business clients.<sup>342</sup> Similarly, when commentators gauged entering law students’ commitment to the public good, they referred to the number of students who planned to pursue careers in public interest law.<sup>343</sup> When many students instead chose big firm practice, commentators described this as a failure of commitment to the public good.<sup>344</sup>

Second, as the idea of the “public interest” came to be associated with full-time public interest lawyers, their causes redefined the public good for the legal elite. Prior to the 1960s, most elite lawyers’ conceptions of the public good were generally similar to those of their business clients. With some notable exceptions, elite lawyers were relatively conservative. While Brandeis advocated more progressive policies than those of big business,<sup>345</sup> the position of the legal elite was probably better reflected by the organized bar’s joining with business to battle Franklin Roosevelt’s New Deal.<sup>346</sup> Nonetheless, even Brandeis’s more progressive views were sufficiently close to those of his business clients that he

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(1992).

341. Hobbs, 32 How L J at 505 (cited in note 317).

342. See generally Davis, 9 Am U J Gender Soc Pol & L 119 (cited in note 317) (describing how big firm lawyers support the NOW Legal Defense and Education Fund). See also John E. Robson, *Private Lawyers and Public Interest*, 56 ABA J 332, 334 (1970) (observing that “[i]nvolvement in legal problems of the poor and in environmental issues is replacing participation in a bar association’s corporate law section, and aspiration to lead the local legal aid program ranks with ambition to head the local bar association”); *Today’s News: Update*, NY L J at 1 (June 15, 1999) (reporting honorary award for large law firm that accepted numerous referrals from a legal services program over a twenty year period).

343. See Robert Granfield, *Making Elite Lawyers: Visions of Law at Harvard and Beyond* 7-8, 36-50 (Routledge 1992); Robert M. Stover, *Making It and Breaking It: The Fate of Public Interest Commitment During Law School* 3 (Illinois 1989).

344. See note 349 and accompanying text.

345. See note 204 and accompanying text.

346. Auerbach, *Unequal Justice* at 192-95 (cited in note 8); Solomon, *Five Crises or One* at 160-62 (cited in note 206). See also John Austin Matzko, *The Early Years of the American Bar Association 1878-1928* 148-225 (UMI Dissertation Information Service 1987) (1984 dissertation, University of Virginia) (describing the diverse and conservative views of American Bar Association leaders during the period from 1878 to 1914).

could advise them on the public implications of their conduct.<sup>347</sup> According to Smigel's account, the counseling of elite lawyers represented an enlightened conservatism aimed not at radical reform but at stability.<sup>348</sup>

Following the 1960s, the predominantly left-of-center public interest bar defined the public good to reflect its values. For the most part, the elite embraced this understanding.<sup>349</sup> But this development placed big business lawyers in a quandary when counseling their predominantly right-of-center big business clients. Encouraging clients to seek a public good at great variance with the client's own conceptions of their interests or the good would only alienate the client. Elite lawyers apparently resolved this dilemma by abandoning their commitment to the governing class role in favor of the hired gun perspective. Not surprisingly, Robert Nelson's survey of elite lawyers in the mid-1980s found both that they were "more liberal than the corporate elites whom they represent[ed]"<sup>350</sup> and that they sought to promote only the client's interests, even on issues of law reform.<sup>351</sup> As a result, Nelson concluded that lawyers were no longer aspiring to serve the governing class function Smigel described "as a buffer between the 'illegitimate' desires of clients and the social interest."<sup>352</sup>

#### 4. The Rise of the Pro Bono Duty

Another factor facilitating the demise of the traditional governing class conception was ironically a product of that notion. The governing class ideal had long included the belief that providing free legal services to those who could not afford them was one component of the lawyer's duty to promote the public good.<sup>353</sup> During the 1970s, lawyers began to focus on supplying free legal services as a separate ethical duty and to refer to this obligation as the lawyer's pro bono duty.<sup>354</sup> The 1970 ABA Code of Professional Responsibility included an

347. See notes 192-95 and accompanying text. While Progressives wanted to reform government and large corporations, they did not harbor a class antagonism toward business. Hofstadter, *The Age of Reform* at 5 (cited in note 136). Indeed, the Progressive Movement had the support of many wealthy businessmen. *Id.* at 144-46.

348. See notes 244-252 and accompanying text.

349. See Granfield, *Making Elite Lawyers* at 206-07 (cited in note 343); Stover, *Making It and Breaking It* at 3-4, 120 (cited in note 343).

350. Nelson, 37 *Stan L Rev* at 527 (cited in note 4).

351. *Id.* at 526-27.

352. *Id.* at 525.

353. See, for example, Hoffman, 2 *Course of Legal Study* at 758 (cited in note 59) (asserting in Resolution XVIII that "I shall never close my ear or heart, because my client's means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given"); Sharswood, *An Essay on Professional Ethics* at 151 (cited in note 7) (stating that "[i]t is to be hoped, that the time will never come, at this or any other Bar in this country, when a poor man with an honest cause, though without a fee, cannot obtain the services of honorable counsel, in the prosecution or defence of his rights").

354. See, for example, Bryan A. Garner, *pro bono publico*, in *A Dictionary of Modern Legal Usage* 695 (Oxford 2d ed 1995) (finding that common use of the terms "pro bono" or "pro bono publico" began in the



aspirational ethical consideration that called on lawyers to “find time to participate in serving the disadvantaged.”<sup>355</sup> The 1983 ABA Model Rules used for the first time the term “pro bono” to describe this obligation.<sup>356</sup> Increasing the number of lawyers’ pro bono hours became a major goal of efforts to revive professionalism.<sup>357</sup> Bar associations established pro bono campaigns and debated whether to make pro bono service mandatory.<sup>358</sup> As part of these efforts, the ABA in 1993 voted to establish a benchmark of “at least (50) hours of pro bono publico legal services per year.”<sup>359</sup>

The pro bono duty thus provided elite lawyers with an opportunity to consider themselves in compliance with their public obligations while at the same time abandoning the governing class role. By defining a narrow sphere of public interest practice separate from the lawyer’s remunerative representation of big business, pro bono permitted lawyers to compartmentalize their public service obligations and avoid the governing class tension of mediating between client interests and the public good. While representing paying clients, elite lawyers could be hired guns. They would fulfill their public interest obligation through pro bono work, often involving assistance to full-time public interest lawyers. While discarding the governing class view that all legal work was public service, pro bono now offered a new, albeit thin, conception of the lawyer’s public service role, which at least arguably preserved the Business-Profession dichotomy and the ideology of professionalism.

The pro bono idea, together with the three other factors described in this section, offer powerful explanations for the demise of the governing class role. Lawyers, like others in society, have come to doubt that they or anyone else can rise above self-interest. They understand their responsibilities in terms of individual and not communal obligation. The hired gun conception of the lawyer’s role is far more compatible with these perspectives than the governing class ideal of disinterested commitment to the common good. Trends within the legal profession support this shift. The redefinition of the public good as inconsistent with representation of business interests, the compartmentalization of public service obligations into the work of the public interest bar, and the development of the pro bono duty encouraged elite lawyers to exclude consideration of the public good from their representation of clients.

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1970s).

355. ABA Model Code of Professional Responsibility Canon 2, EC 2-25 (Foundation 1994).

356. ABA Model Rules of Professional Conduct Rule 6.1 (Foundation 1994) (the title of Rule 6.1 is “Voluntary Pro Bono Publico Service”).

357. ABA Commission on Professionalism, *In the Spirit of Public Service* at 47 (cited in note 295).

358. Geoffrey C. Hazard, Jr., et al, *The Law and Ethics of Lawyering* 1100-01 (Foundation 3d ed 1999).

359. ABA Model Rules of Professional Conduct Rule 6.1 (Foundation 1994).

## CONCLUSION

Born in the American democratic experiment, the traditional conception of lawyers as America's governing class remained dominant among the legal elite until the late twentieth century. The belief persisted that lawyers were above self-interest. They were able to identify and pursue the public good when serving in government positions, as civic leaders, and as representatives of clients. Until the late twentieth century, elite lawyers balanced the governing class role with client representation and treated the governing class obligation as the dominant ideal. In the late twentieth century, however, the balance shifted to the hired gun conception. The bar's efforts to attribute this move to changes in the market for legal services, changes in bar rules, increased diversity of the profession, and deficiencies in legal education are unpersuasive. Instead, this article suggests that lawyers shared in societal trends toward distrust of disinterested elites and away from communal obligation. Combined with changes in the legal profession, which redefined and compartmentalized the common good, these influences helped convert lawyers to see themselves as only hired guns.

A number of unanswered questions remain. Will the legal elite again establish a consensus adopting a governing class role? Perhaps the legal elite will embrace a thin conception of the governing class based either on the service to the adversary system as hired guns or on service to the community in their pro bono activities. The elite might also restore a thick governing class conception by abandoning the Business-Profession dichotomy. Lawyers could locate their obligation to the common good in a responsibility all occupations share in maintaining it. Lawyers may therefore find their particular governing class role in the application of this general obligation to their participation in administering justice and maintaining societal stability. Another option might be the revival of the original governing class conception. Absent any current indications of this possibility, this last option appears the least likely.

Further open questions relate to the societal impact of lawyers abandoning the original governing class role. The creators of this conception considered it necessary for the protection of the rule of law and the common good. This article has not examined the validity of this perspective, much less whether lawyers ever actually served as America's governing class or whether we need them to do so today. However, these inquiries are quite relevant to a reconsideration of the role of the legal elite, or of lawyers in general, in a democratic society.<sup>360</sup>

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360. I have made a preliminary effort to address this inquiry in my 1997 Baker & MacKenzie Lecture at Loyola University of Chicago School of Law on "Democracy and Professionalism."

