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RACE, CLASS, AND THE REGULATION OF THE LEGAL PROFESSION IN THE PROGRESSIVE ERA: THE CASE OF THE 1908 CANONS

Alfred L. Brophy†

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INTRODUCTION

Early in the twentieth century, the American Bar Association sought to increase the requirements for admission to the bar, urged university training in law, and revised its Canons of Ethics. Together those actions acted to restrict access to the bar by immigrants; they also restricted the availability of legal services to the poor. They were designed to increase the status of the legal profession and to bring (or restore) order to the profession. As American society became more industrial, the nature of legal practice and legal questions was changing. The Canons of Ethics reflect the broader goals of elite lawyers to channel and limit legal change in order to reduce the threat of liability to industry and bring stability and certainty to their profession.

Those regulations are important in themselves, for they tell us a great deal about the relationship of the legal profession to politics in the early part of the twentieth century. That tells only part of the story, however, for beneath the grand statements about the nature of legal practice, made by the leaders of the elite bar, African American and women law-

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I also owe special debts to Susan Carle, whose work has taught me much about ethics regulation, and to Jerold Auerbach. His book *Unequal Justice* was one of the first I read when I entered college; it directed my interest towards legal history, and now, nearly twenty years later, I have had the pleasure of learning again from it.

yers served a host of clients, whom historians have largely ignored. So, as so often in American history, the bar has both a neatly stylized history and a much messier version that is full of contradictions. As novelist Ralph Ellison reminds us, there is a gap between the history as it is recorded and as it is actually lived. So while we might think that history is neutral, that it records “the patterns of men’s lives” and that “all things of importance are recorded,” the reality is quite different. “For actually it is only the known, the seen, the heard and only those events that the recorder regards as important that are put down, those lies his keepers keep their power by.”¹ As Ellison said in a lecture at Brown University in 1979, “we possess two basic versions of American history: one which is written and as neatly stylized as ancient myth, and the other unwritten and as chaotic and full of contradictions, changes of pace and surprises as life itself.”² This paper explores the two versions of the history of the American Bar Association, both the ways that the elite bar acted to preserve its image (and helped to maintain the profession as well) and how others—lawyers and clients—helped to develop an alternative jurisprudence.

I. THE 1908 CANONS AND THE NATURE OF THE REGULATION OF PROFESSIONS

The 1908 Canons of Professional Ethics (1908 Canons) comprised the first comprehensive code; they governed the profession for decades.³ The Canons are the product of several streams of thought. They were part of a larger movement of regulation in the Progressive era, the period roughly between the turn of the twentieth century and World War I. There was an increasing desire for status throughout the professions, which led to efforts across the spectrum of physicians, lawyers, and accountants to each differentiate themselves as a profession, and to establish professional standards. That in turn is related to Progressive-era desires to stabilize the legal profession and regulate class structure. The development of professional standards was one way that Progressive-era reformers dealt with rapid social and political change. We think of the Progressive era as one of vast regulation of business, including the devel-

¹ RALPH ELLISON, *INVISIBLE MAN* 439 (1952). See also Arthur G. LeFrancois, *Our Chosen Frequency: Norms, Race, and Transcendence in Ralph Ellison's Cadillac Flambe*, 26 OKLA. CITY U. L. REV. 1021 (2001) (discussing Ellison's theories of law, history, and equality).

² RALPH ELLISON, *Going to the Territory*, in *GOING TO THE TERRITORY* (Random House 1986), reprinted in *THE COLLECTED ESSAYS OF RALPH ELLISON* 591, 594 (John F. Callahan ed., 1995) [hereinafter ELLISON, *COLLECTED ESSAYS*].

³ *Canons of Professional Ethics* (1908), reprinted in *PROFESSIONAL RESPONSIBILITY: STANDARDS, RULES & STATUTES* 649-60 (John S. Dzienkowski ed., 2002) [hereinafter 1908 Canons] (setting forth Canons 1 to 32, which constituted the 1908 Canons).

opment of the antitrust laws and federal agencies such as the Federal Trade Commission and the Food and Drug Administration. Those regulations served many important, pro-consumer functions, such as establishing minimum standards for health. They also served to bring stability to the business environment. The 1908 Canons need to be viewed as part of a larger ethos of regulation, which sought to raise professional standards, to bring stability to the profession, and to protect the public. The Canons are part of the bar's desire to increase its status, and to control lower economic classes and those who did not fit the definition of elite classes. They are also part of a larger movement for regulation, such as antitrust, which helped to stabilize business.

The Canons should be seen as part of much larger questions of historiography: How do we evaluate the regulation of business in the Progressive era? And what was the nature of the complex relationship between law, politics, government, and business?⁴ There are a series of historical traditions (i.e., "ages") that provide a framework for thinking about regulation. During the Depression, historians wrote books about the evils of the corporation, such as Charles and Mary Beard's history of America.⁵ Then, in the wake of the New Deal and America's triumph in World War II, there was a re-emergence of confidence in government, which led to such studies as Eric Goldman's *Rendezvous with Destiny*.⁶ The 1960s era of "small is beautiful" and anti-business suspicion of government brought forth Gabriel Kolko's *The Triumph of Conservatism*.⁷ Kolko argued that the dominant theme of regulation in the Progressive era was protection of business. Government regulation served businesses' interests by stabilizing the business environment.⁸

Commentators on the 1908 Canons have made similar interpretations. They have interpreted the 1908 Canons, and legal ethics more generally, as designed to protect consumers and the integrity of the legal profession by raising standards of entrance, protecting the quality of legal services and protecting the integrity of the legal system. During the Depression and New Deal eras, there were attempts to understand the regulation of legal ethics as part of the protection of consumers and the

⁴ See MORTON KELLER, *REGULATING A NEW ECONOMY: PUBLIC POLICY AND ECONOMIC CHANGE IN AMERICA, 1900-1933* 2 (1990).

⁵ CHARLES AND MARY BEARD, *A BASIC HISTORY OF THE UNITED STATES* (1944).

⁶ ERIC F. GOLDMAN, *RENDEZVOUS WITH DESTINY: A HISTORY OF MODERN AMERICAN REFORM* (1956).

⁷ GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A RE-INTERPRETATION OF AMERICAN HISTORY, 1900-1936* (1963).

⁸ See DAVID F. NOBLE, *AMERICA BY DESIGN: SCIENCE, TECHNOLOGY, AND THE RISE OF CORPORATE CAPITALISM* (Oxford University Press 1979) (1977); JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1928* (1967).

legal profession itself.⁹ There was also concern that the legal profession was dominated by business interests.¹⁰ The rise of social science led to further understanding of the roles that self-interest plays in shaping decisions about ethics.¹¹ And in the post-World War II era, there was also a growing understanding of the ABA's history of racial intolerance and its elitist origins.¹²

Louis Brandeis's 1913 speech at Harvard's Phillip Brooks House, entitled *The Opportunity in the Law*, emphasized the danger threatening the public interest because of lawyers' alignment with business. The danger was particularly great because, as Theodore Roosevelt had said in 1905, at the start of the ABA's campaign for a code of professional ethics, lawyers helped businesses avoid government regulation. In essence, lawyers were assisting in lawbreaking.

Instead of holding a position of independence, between the wealthy and the people, prepared to curb the excesses of either, able lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people.¹³

There was a pernicious connection between talent and business interests.¹⁴ Brandeis's professional ideal was of independent lawyers, who

⁹ Walter Burgwyn Jones, *Canons of Professional Ethics, Their Genesis and History*, 7 NOTRE DAME LAW 483, 494 (1932).

¹⁰ See, e.g., Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1 (1934) (expressing concern over connections between business interests and lawyers).

¹¹ TALCOTT PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY PURE AND APPLIED* 185 (1949). I am indebted to Russell Pearce whose work reminded me of Parsons' work, which had strayed from my memory. See 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. SCH. ROUNDTABLE 381, 386 n. 39 (2001).

¹² See EDSON R. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK* (1953). More recently, law students have learned about the ABA's desire to prevent lawyers from being influenced by "graft, greed and gain, or other unworthy motive." See, e.g., *Report of the Committee on [the] Code of Professional Ethics*, 1906 A.B.A. REP. 600, reprinted in DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 113 (2d ed. 1995).

¹³ LOUIS D. BRANDEIS, *The Opportunity in the Law*, in *BUSINESS—A PROFESSION* 321 (Augustus M. Kelley 1971) (1914), reprinted in RHODE & LUBAN, *supra* note 11, at 38.

¹⁴ Brandeis continued:

Such questions as the regulation of trusts, the fixing of railway rates, the municipalization of public utilities, the relation between capital and labor, call for the exercise of legal ability of the highest order. Up to the present time the legal ability of a high order which has been expended on those questions has been almost wholly in opposition to the contentions of the people. The leaders of the Bar, without any preconceived intent on their part, and rather as an incident to their professional standing, have, with rare exceptions, been ranged on the side of the corporations, and the people have been represented, in the main, by men of very meager legal ability.

Id.

owed a duty to the common good, instead of a paramount duty to business clients. His vision was not, however, the dominant one.¹⁵ We continue to talk about these issues in terms of professional image¹⁶ and protection of professional ethics,¹⁷ as well as protection of clients and the public.¹⁸

The leading historical interpretation of the 1908 Canons is Jerold Auerbach's account in his 1976 book, *Unequal Justice: Lawyers and Social Change in Modern America*.¹⁹ Auerbach's book explores a huge theme: "the ominous gap between the services dispensed by the legal profession and equal justice."²⁰ His laboratory for that exploration is the legal profession in the first forty years of the twentieth century. He focuses particular attention on the ways elite lawyers tried to limit entrance to the profession by regulating law schools and other legal training and by regulating people already in the profession, which was done through the 1908 Canons.

The raft to which American lawyers clung in the rapidly changing society of the early twentieth century was the establishment of professional standards. Auerbach focuses on several standards in particular which had a disproportionate effect on urban lawyers. These lawyers had trouble establishing their practices and their clients. Their clients were people of little means who might lose the chance to have a lawyer without alternatives to the typical payment. The 1908 Canons made it more difficult for urban lawyers to establish their practices and made it more difficult for the clients to afford representation. Canon 10 prohibited lawyers from "acquiring an interest in litigation"; Canon 28 restricted "stirring up litigation"; and Canon 27 restricted advertising.²¹

¹⁵ See William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565 (1985). See also Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996).

¹⁶ Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

¹⁷ See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988) (discussing the idea that lawyers are independent from clients and the functions that perception serves); Robert L. Nelson & David M. Trubek, *Introduction: New Studies and New Paradigms in Studies of the Legal Profession to LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 1* (Robert L. Nelson et al. eds., 1992); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995).

¹⁸ AM. BAR ASS'N COMMITTEE ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM" (1986); John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021 (1982); Simon, *supra* note 15.

¹⁹ JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

²⁰ AUERBACH, *supra* note 19, at 13.

²¹ *Id.* at 42-43.

Auerbach reserves particular contempt for Canon 13's restrictions on the contingency fee, which he sees as necessary to provide a financial inducement for lawyers to take the cases of poor clients, particularly the victims of industrial accidents, who so frequently were left destitute.²²

Although the contingency fee was unquestionably legal, it was the subject of much scorn. Auerbach sees criticism of the contingency fee as central to the elite bar's hostility towards changes in the profession that subjected corporations to increased liability. He interprets the contingency fee as the road to legal access for poor tort victims, many of whom were victims of industry.²³ One of the proposed reforms of the contingency fee was court supervision of contingency fee contracts. Auerbach interprets such provisions as a one-sided attempt to limit their use rather than protect clients. He observes that "insistence upon court supervision of contingent fees to 'protect' clients from their lawyers was highly incongruous at a time when no other attorneys' fees were supervised and when no principle was more tenaciously cherished by corporation lawyers (and increasingly by the courts) than liberty of contract."²⁴ During debate over the 1908 Canons, the bar relented and allowed the fees—though it often made reference to the tendency of contingency fees to stir up litigation, as well as the need for continuing court supervision of contingency fee contracts.²⁵

Recently, other scholarship has tracked parts of Auerbach's interpretation.²⁶ Susan Carle's article in *Law and Social Inquiry*, for exam-

²² *Id.* at 44-45.

²³ *Id.* *Contra* Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231 (1998). Karsten's essay suggests an alternative vision of legal ethics and legal change from that of Auerbach. Karsten's essay builds upon his previous work, which focuses on the humanity of legal rules. Many legal historians have questioned the accuracy of his interpretation of the legal ethics movement of the nineteenth century. See Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161 (1999) (reviewing PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA* (1997)); Lawrence Friedman, *Losing One's Head: Judges and the Law in Nineteenth-Century American Legal History*, 24 LAW & SOC. INQUIRY 253 (1999) (reviewing PETER KARSTEN, *HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA* (1997)).

²⁴ AUERBACH, *supra* note 19, at 47.

²⁵ HENRY WYNANS JESSUP, *THE PROFESSIONAL IDEALS OF THE LAWYER: A STUDY OF LEGAL ETHICS* 169 (1925).

²⁶ Most recently, Susan Carle has given a renewed focus in Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 LAW & SOC. INQUIRY 1 (1999). See also David R. Papke, *The Legal Profession and Its Ethical Responsibilities: A History*, in *ETHICS AND THE LEGAL PROFESSION* 29, 36 (Michael Davis & Frederick A. Elliston eds., 1986) (contrasting elite and ethnic bars); John A. Matzko, "The Best Men of the Bar": *The Founding of the American Bar Association*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 75 (Gerard W. Gawalt ed., 1984) [hereinafter *THE NEW HIGH PRIESTS*]; Robert W. Gordon, "The Ideal and the Actual in the Law": *Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS*, *supra*, at 51.

ple, explores the troubled debate over whether the Canons should require that lawyers “do justice” in civil cases.²⁷ Carle looks at this long-forgotten debate and argues that a number of traditions clashed in the ultimate undoing of the duty to “do justice.” Her work seems generally in keeping with Auerbach’s finding that the 1908 Canons protected corporate interests, which, in this case, was the right of lawyers to vigorously advance their agendas for their clients, independent of a duty to do absolute justice.²⁸ Similarly, Robert Gordon’s work on the elite New York bar at the turn of the twentieth century found that the most common path of corporate law was a retreat from issues of legal science and law reform to the service of their clients.²⁹ Russell Pearce has shifted attention towards the ideological basis of the 1908 Canons, focusing on the imagery of lawyers as independent professionals who owe a duty to the republic generally.³⁰ Pearce’s work, which focuses on idealists like George Sharwood, and figures more closely associated with business interests, has attracted substantial attention. He has identified an important strain in the public thought leading to the 1908 Canons, for he is certainly correct that there were strong rhetorical appeals to ideas of “republicanism” in discussions of ethics. It is enormously difficult, however, to connect lawyers’ public pronouncements of the virtues of their profession and their lofty goals with the motivations behind the 1908 Canons. There has frequently been a conflict between public aspirations for law and the needs of clients. As was often said, “Law hath her seat in the bosom of God; her voice is the harmony of the world.”³¹ But usually, when lawyers were actually called upon to try their cases, they had to abandon such lofty goals. As was aptly asked by the fictional antislavery lawyer Edward Clayton in Harriet Beecher Stowe’s 1856 novel *Dred: A Tale of*

²⁷ Carle, *supra* note 26. See also CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 53–56 (1986).

²⁸ There was a certain asymmetry in the bar’s approach to vigorous advocacy. During the Red Scare after World War I, the bar urged limitations on zealous representation of communists. See Auerbach, *supra* note 19, at 102–05 (discussing ways that bar associations turned representation of clients into lack of patriotism). Compare Canon 15, *reprinted in* Dzienkowski, *supra* note 3, at 654 (revealing a limitation on zealous advocacy).

²⁹ Gordon, *supra* note 26.

³⁰ See Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *GEO. J. LEGAL ETHICS* 241 (1992). Allison Marston has made a similar interpretation of the 1887 Alabama code, locating its adoption in concern over professional standards and control of the profession amid rapidly fluctuating economic times in post-Civil War Alabama. See Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 *ALA. L. REV.* 471 (1998). See also Russell G. 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. SCH. ROUNDTABLE* 381 (2001).

³¹ See *Dred* (quoting Richard Hooker). For a full exploration of Hooker’s statement and its implications for nineteenth-century lawyers, see Robert W. Gordon, *The Path of the Lawyer*, 110 *HARV. L. REV.* 1013 (1997) (quoting Richard Hooker, *Of the Laws of Ecclesiastical Polity*, in 1 *WORKS OF RICHARD HOOKER* 197, 285 (John Keble ed., 7th ed. 1888)).

the Great Dismal Swamp, “Does not an advocate commit himself to one-sided views of his subject and habitually ignore all truth on the other side?”³²

Auerbach focuses on what he identifies as a conflict between corporate wealth and “justice.”³³ There has, of course, always been a conflict between law, property and wealth, and Americans’ ideas of justice. Abolitionists, for instance, felt a conflict between legal doctrine supporting slavery and notions of humanity.³⁴ Radical interpretations of law throughout American history have focused on the gap between the progressive radicals; ideal of “justice,” in the minds of progressive radicals, and formal law. Frequently, radicals have criticized the common law for its unfair results. The *United States Magazine and Democratic Review* provided one such critique in 1841.

[The common law] has been extolled, by its admirers, as the perfection of human reason; but to us it seems more like a negation of reason. How it has so long retained its ascendancy in the jurisprudence of civilized nations is, we confess, an occasion of wonder. Nothing but the grossest illusion on the part of its teachers, and the grossest inertness on the part of the people, could have enabled it to endure to so venerable an old age. Present

³² HARRIET BEECHER STOWE, *DRED: A TALE OF THE GREAT DISMAL SWAMP* (1856). Pearce has, nevertheless, opened up an important ground for exploration. Many antebellum orators explored the duties of lawyers to the community—and celebrated their role in bringing order to the community. See, e.g., DANIEL LORD, *ON THE EXTRA-PROFESSIONAL INFLUENCE OF THE PULPIT AND THE BAR, ORATION DELIVERED AT NEW HAVEN, BEFORE THE PHI BETA KAPPA SOCIETY, OF YALE COLLEGE, AT THEIR ANNIVERSARY MEETING (JULY 30, 1851)*. Those orations can help recover the role that lawyers thought they might occupy in the community, as well as the duties they believed they owed to the community. See Alfred L. Brophy, *The Rule of Law in Antebellum College Literary Addresses: The Case of William Greene*, 31 CUMB. L. REV. 231 (2001).

³³ See AUERBACH, *supra* note 19, at 12–13. Auerbach seeks, with Ralph Ellison, to infuse moral values into the legal arena. The Invisible Man asks “How the hell do you get love into politics or compassion into history?” Ellison, *supra* note 2, at 274. I think Auerbach wonders, “How do you get compassion into law?” That seems to be a question motivating the other great works of legal history published nearly simultaneously with *Unequal Justice*. See ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975); MORTON J. HOROWITZ, *TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977).

One might, however, contrast Auerbach’s position with PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982). Though published just a few years after Auerbach, Irons finds lawyers he thinks worthy of emulation. A comparison of Cover’s antislavery judges and Irons’ New Deal lawyers might suggest some of the ways that legal thought changed from the mid-nineteenth to the mid-twentieth century, or at least the ways that the law might be remade to service the community.

³⁴ See, e.g., Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe’s Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113 (1998) (discussing Stowe’s critique of slave law and her contrast between humanity and slave law).

it to an enlightened inhabitant of the Sandwich Islands, could he be made to comprehend its scope and meaning, and could he be instructed as to the social condition of the nations where it is recognized, he would be struck with astonishment, either at our stupidity or our slavishness. He would point to its uncertainty, to its abstruseness, to its inconsistencies, its fictions, its paltry details, and its general want of justice, as things which barbarians would hesitate to submit to, much less adopt, and of which a civilized people should be ashamed.³⁵

II. RECONSIDERING THE 1908 CANONS: REGULATION OF THE PROFESSION

Having discussed some historians' interpretations of the 1908 Canons, it is now possible to return to the 1908 Canons themselves and revisit what they tell us about the nature of class and race in the legal profession. The key elements of the 1908 Canons that limited the poor's access to the bar and to becoming lawyers are contingency fee contracts and the re-definition of professional ethics to prevent solicitation of clients and the stirring of litigation. A review of the ABA's debates over the writing of the 1908 Canons suggests the multiple strands that created them. ABA President Henry St. George Tucker, whose ancestors had been lawyers as far back as the early republic,³⁶ closed his 1905 Presidential Address with reference to President Theodore Roosevelt's address to Harvard alumni on the evils of lawyers' subservience to business interests and the ways that legal talent was perverted to evade regulation:

Every man of great wealth who runs his business with cynical contempt for those prohibitions of the law which by hired cunning he can escape or evade is a menace to our country, and the country is not to be excused if it does not develop a spirit which actively frowns on and discountenances him. The great profession of the law should be that whose members ought to take the lead in the creation of just such a spirit. We all know that, as things actually are, many of the most influential and

³⁵ *Edward Livingston and His Code*, 9 U.S. MAG. & DEMO. REV. 211, 211-12 (1841).

³⁶ The Tucker family is worthy of biography. Their shifting political positions illustrate both the changes in American attitudes and in the bar—and the family's desire to be at the forefront of the profession. One might begin the story with St. George Tucker, author of an American edition of *Blackstone's Commentaries*, (Philadelphia, 1803) which urged the gradual abolition of slavery, and continue on to proslavery writers and college professors Henry St. George Tucker and Nathan Beverly Tucker, and further continuing on to ABA president Henry St. George Tucker. But that is a story for another time.

most highly remunerated members of the Bar in every center of wealth make it their special task to work out bold and ingenious schemes by which their very wealthy clients, individual or corporate, can evade the laws which are made to regulate in the interest of the public the use of great wealth.³⁷

Such demonstrations of wealth purchasing exemptions from regulation brought law into contempt.³⁸ Tucker subtly converted Roosevelt's concern over business' capture of lawyers to a concern (mostly) over honesty.³⁹ The need for honesty was intimately connected with the status of the profession, for "if our profession is to receive the reward which is its just due, and is to accomplish the high aim for which it is destined," dishonest lawyers must be prosecuted.⁴⁰ Subsequent action by the ABA moved even further from Roosevelt's concern to concerns about the integrity of the profession. It moved toward emphasizing the image of the profession, rather than the regulation of business' misuse of lawyers.⁴¹

There were, in fact, multiple strands that came together to create the Canons. One strand was the desire to protect the public; a second was a desire to raise the status of the legal profession; and a third was a desire to maintain the elite bar's status and integrity. The debates of the American Bar Association in the years leading into the canons illustrate all those concerns, especially the concern with protecting (and increasing) the profession's image. Lawyers frequently told themselves that they were part of a sacred profession. They spared little effort in self-congratulation. Henry St. George Tucker was particularly strong in his presidential address to the ABA:

My closing appeal to the representatives of the American Bar Association, who stand forth clothed in priestly robes, as ministers at the altar of justice, is for the vindication of the claim that the profession of the law is the most ennobling and powerful for good of all the secular professions. With our loins girded and our lamps burning, our Association by keeping alive the fires of profes-

³⁷ Henry St. George Tucker, *Address of the President*, in REPORT OF THE TWENTY-EIGHTH ANNUAL MEETING OF THE AM. BAR ASS'N 299, 383 (1905) [hereinafter 1905 ABA REPORT] quoting Theodore Roosevelt. Before the Harvard Alumni at Cambridge (1904 or 05).

³⁸ *See id.*

³⁹ *See id.* at 387 ("I dare venture to assert that the real need of America today in the transaction of private business and in the moulding of a lofty, public sentiment is the high-toned, honorable, conscientious lawyer.").

⁴⁰ *Id.* at 387.

⁴¹ Susan Carle has provided a detailed history of how the ABA decided against finding a duty to do justice as part of its 1908 canons. *See* Carle, *supra* note 26. That decision was critical in departing from Roosevelt's plan.

sional purity upon her altars may, in working out her future destiny, add to her proud achievements in the history of our beloved country still richer trophies in the progress of our noble profession.⁴²

To preserve its image, the bar had to limit the appearance of materialism. Lucien Hugh Alexander emphasized the need to limit the appearance of money in solicitation of clients. "Our profession is 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 motives, and sooner or later the arch must fall."⁴³

The ABA was aware of the impact its proposed regulations, raising the educational standards for admission to the bar, had on who might enter the profession. Some members did not care. Lawrence Maxwell, chair of the ABA's legal education section, boldly dismissed consideration of the impact on the chances of poor men to enter the legal profession:

Are we to have one standard for poor men and another standard for rich men? . . . The state is not concerned with the fortune of the individual when it comes into conflict with the general good. The inquiry should be confined to the capacity of the applicant to serve the state. Law is not administered as private philanthropy, but as the supreme interest of the state. The office of a lawyer is not a private business, but a public trust.⁴⁴

Maxwell justified the proposal that law schools require a college education for entrance on the basis that colleges developed a moral sensibility among their students, which would lead to a moral tone in the legal profession.⁴⁵ Maxwell had a thinly disguised contempt for those of mod-

⁴² Tucker, *supra* note 37, at 389.

⁴³ Lucien Hugh Alexander, *Some Admission Requirements Considered Apart from Educational Standards*, in 1905 ABA REPORT, *supra* note 37, at 619, 620.

⁴⁴ Lawrence Maxwell, *Chairman's Address*, in 1905 ABA REPORT, *supra* note 33, at 582, 591 (1905). Professor Maxwell continued:

[T]he plea for the poor young man, while made in his name, is not made on his behalf or in his true interest. He does not wish to be handicapped in the race, and of all others can least afford to be, by inadequate preparation. Ordinarily, he is not. He asks no favors. If he has the right stuff in him, he finds ways and means to secure the proper education.

It is also said this if higher standards of general education are required it will tend to make the profession a place for the sons of rich men only. . . . The law is the last vocation in the world to attract a rich man. It is too laborious and wearing. If I were rich, I think I should look for an easier job.

Id. at 591-92.

⁴⁵ *Id.* at 590. Maxwell subtly linked education and exclusion with moral sensibility:

est backgrounds who attended evening law schools.⁴⁶ Similarly, Philadelphia lawyer Lucien Hugh Alexander said, while discussing the Massachusetts practice of allowing applicants to sit for the bar who had not completed a course of study at an approved law school, “[i]t is easy to comprehend how this system has unwittingly grown up in certain portions of America permeated with the spirit of freedom ever striving to accord equal rights to all and special privileges to none.”⁴⁷ It is easy to extrapolate from such statements that the advocacy of higher standards for admission were related to shoring up the walls around the legal profession, to limiting the rights of entry. For in a world where the profession’s status was in flux, it could secure its status by excluding others.

There were some defenders of the contingency fee. T.J. Walsh of Montana thought them particularly important in balancing out the power distribution between workers injured by industrial accident and their employers.⁴⁸ For Walsh, lawyers who took contingency fees, and thus ena-

I do not refer to the stealing of money, the subordination of witnesses, the forgery of records or other penitentiary forms of misconduct, but to the moral sensibility which does not stir up litigation, or defend against clear claims without justification, or give pernicious advice knowingly, or assist in illegal transactions, or abuse the confidence of the courts; in other words, to the quality which we summarize when we refer to a lawyer as an honorable practitioner.

Id.

⁴⁶ *Id.* at 593.

The large increase in the number of law schools during the past twenty-five years has not been wholly in the interest of the public or for the good of the cause. . . . Some of them are so far below anything approximating a standard as to justify us in calling them bogus schools. They are a public evil. . . . More often they are organized for the money that can be made through the fees . . . of clerks, officeholders, real estate brokers and detectives to whom they hold out, in true quack style, the prospect of attaining positions of eminence at the Bar or in politics if they devote a few hours in the evening to the so-called study of law.

Id.

⁴⁷ Lucien Hugh Alexander, *supra* note 43, at 635. Alexander feared that law would lose its claim as status as profession that required devoted study. Otherwise, “admission to the Bar will become a tail to some business kite, an advertisement wherewith to draw business to real estate, insurance, notarial or other office.” *Id.* at 644.

Alexander believed those standards guarded against commercialism:

Let us not wait until the profession is riddled and honeycombed with men fresh from the marts of trade, bringing with them ideals foreign to those of the law, but let us, ere it is too late, forever bar the portals to our professions against those who have not been trained in the environment of the law, and without which they can never catch its soul and spirit.

Id. at 644.

⁴⁸ See *Transactions of the Thirty-First Annual Meeting of the American Bar Association*, in REPORT OF THE THIRTY-FIRST ANNUAL MEETING OF THE AM. BAR ASS’N (1908) [hereinafter 1908 ABA REPORT]:

The enormous increase in the use of machinery and mechanical appliances in recent years has caused the rapid multiplication of the number of actions of this character. To the credit of those who have devoted themselves more or less to this line of professional work, it may be said that their success in compelling satisfaction in

bled the poor to have access to courts, were more ethical than those who only took cases for which they were guaranteed a fee.⁴⁹ Walsh decoded the arguments of those who thought contingency fees stirred litigation and led to baseless suits. There were many suits that were meritorious and that would never have been heard without the contingency fee.⁵⁰ It was, quite simply, a matter of the poor against corporations. Walsh did not want clients to wait upon gratuitous offers from busy lawyers to take their case for a fee.⁵¹ Another member of the committee, Edward B. Whitney of New York, also recognized the class-based nature of opposition to the fee: "The contingent fee is much the fairest to a poor client. I have noticed that the majority of its opponents have always been those whose clients are rich enough to pay whether they win or lose. Vast injustice would go unredressed if it were not for the contingent fee."⁵² Or, as the New York Bar Association report said, "It may be summarized in one statement: the poor man's fee."⁵³

Yet the majority continued to see the contingency fee, as well as advertising and attempts to stir litigation, as harmful to the image of the profession. One member of the canons committee summarized the need to eliminate greed in the profession:

Men are admitted to the bar and are tempted and yield to temptation. They become, for example, what are called, for convenience, 'shysters,' 'calaboose lawyers' and 'ambulance chasers.' They promote suits for personal

these cases has been such that it is now rare that one injured or deprived by death of a relative, from whom support was due, under circumstances creating a liability, does not take counsel as to his right to recover.

⁴⁹ *Id.*

. . . I am ready to contend that the lawyer who places his services at the disposal of those who have not a dollar to pay for them save out of the fruits of his labors, deserves better of the profession and of the public than he who refuses to prosecute save for those able to pay, whatever the outcome of the litigation.

⁵⁰ *See id.* at 65-66.

⁵¹ *Id.* at 67.

It is altogether quixotic to imagine that members of the Bar of high standing are going to come forward to offer gratuitously to prosecute such claims, even though their oath of office might seem to enjoin such a course. The ordinary person would be restrained by the most commendable considerations of delicacy from even suggesting to a busy lawyer that his duty enjoined such conduct or from intimating in the most delicate way that he would be pleased to have it observed.

⁵² AM. BAR ASS'N, MEMORANDUM FOR USE OF AMERICAN BAR ASSOCIATION'S COMMITTEE TO DRAFT CANONS OF PROFESSIONAL ETHICS (1908). This is the report referred to by in the Canon Drafting Committee's final report as the "Red Book." For the sake of clarity in citation, I have listed the ABA as the author; sometime it is referred to as edited by Lucien Hugh Alexander.

⁵³ *Id.* at 73.

injuries and promote them in such a way as to lead to scandal and perjury of the worst kind.⁵⁴

Contemporaneous with the 1908 Canons, there was substantial writing that equated the canons, and legal profession more generally, with preservation of established interests. Julius Henry Cohen's 1916 book, *The Law: Business or Profession*, explored the connections between the bar and business interests.⁵⁵ Other works, even from those inside the legal profession, emphasized inequality in the distribution of justice. Reginald Huber Smith's 1919 study, *Justice and the Poor*, for instance, cataloged the defects in the legal system, such as delay, court costs, and lawyers' fees, that led to a chasm between the ideal of "freedom and equality of justice" and the fact of "denial of justice."⁵⁶ Smith's study, financed by the Carnegie Foundation, aimed to promote legal aid societies. Smith aimed at the promotion of equal access to justice, which he argued was part of lawyers' moral and legal duty.⁵⁷ He also believed that legal aid societies might raise the reputation of lawyers and respect for law, which poor people viewed with disdain.⁵⁸ Others justified equal access on similar utilitarian grounds: that it assured democracy. Henry S. Pritchett, president of the Carnegie Foundation, wrote: "The very existence of free government depends upon making the machinery of justice so effective that the citizens of the democracy shall believe in its impartiality and fairness."⁵⁹ *Justice and the Poor* left untouched the question of whether justice was denied in part because of unjust rules from the outset, such as the freedom of contract, which refused to recognize the inherent imbalance in power between workers and employers.

⁵⁴ *Id.* at 43.

⁵⁵ See also JULIUS HENRY COHEN, *LAW AND ORDER IN INDUSTRY: FIVE YEARS' EXPERIENCE* (1916).

⁵⁶ REGINALD HUBER SMITH, *JUSTICE AND THE POOR: A STUDY OF THE PRESENT DENIAL OF JUSTICE TO THE POOR AND OF THE AGENCIES MAKING MORE EQUAL THEIR POSITION BEFORE THE LAW WITH PARTICULAR REFERENCE TO LEGAL AID WORK IN THE UNITED STATES* (1919).

⁵⁷ *Id.* at 229.

The last and greatest service which the legal aid organizations render is that in all their work they are relieving the bar of a heavy burden by performing for the bar its legal and ethical obligation to see that no one shall suffer injustice through inability, because of poverty, to obtain needed legal advice and assistance.

Id.

⁵⁸ Huber believed that the "legal aid societies strive to teach their clients not only that the law is fair, but that lawyers are not without honor and conscience." *Id.* at 229. The societies were swimming against a tide of opinion taught by "at least that part born in the lower social stratus," that "lawyers are a class who prey on the weak, who profit out of their misery, and who are so strongly entrenched that the state cannot curb them." Those attitudes, "taught from infancy" to the current generation was based on "intelligent criticism founded on facts." Those facts contributing to this opinion include "the contingency fee, the commercialization of the profession, and the lowering of standards!" *Id.* at 228.

⁵⁹ *Id.* at xiv.

Other evidence suggests the legal profession saw standards as a way of differentiating itself. The very first question in Henry Jessup's 1925 book, *The Professional Ideals of the Lawyer: A Study of Legal Ethics*, was "what is a profession"? His answer included the "subordination of pecuniary returns to efficient service."⁶⁰ Or, as Simeon Baldwin said in 1903, "Honor is the real touchstone for a lawyer's conduct. . . . This may make it improper to seek what it would be proper to accept unsought. . . . The ambulance-chaser does nothing *dishonest*, but none the less he *dishonors the profession*."⁶¹ It was the grimy search for money that seemed to concern Jessup the most. For instance, Jessup warned against solicitation of clients, because that was not "decent, nor consistent with the essential dignity of the profession." The profit motive was at the base of what was undignified.⁶² The New York County Lawyers' Association confronted a question about the ethics of a lawyer maintaining a financial interest in a company that investigated public service corporations' rates, when that company then funneled cases to the lawyer. The Committee concluded that such a company was "a device for systematically obtaining business for a lawyer, and for stirring up litigation for profit," which was improper.⁶³

The debate over the 1908 Canons and the debate over their adoption illustrate the legal profession in a state of flux. Although the Canons, ostensibly, were concerned with maintaining the integrity of the profession, their effect was to limit the law as a means of social change or of redistribution of power. They were, as one would expect of from the

⁶⁰ HENRY WYNANS JESSUP, *THE PROFESSIONAL IDEALS OF THE LAWYER: A STUDY OF LEGAL ETHICS* 1 (1925). Jessup cites *The Ethics of the Professions and of Business*, 101 ANNALS AM. ACAD. POL. & SOC. SCI. (1922).

⁶¹ THOMAS H. HUBBARD & SIMEON EBEN BALDWIN, *LEGAL ETHICS: LECTURES DELIVERED BEFORE THE STUDENTS OF THE LAW DEPARTMENT OF UNION UNIVERSITY*, quoted in JESSUP, *supra* note 60, at 4. See also Simeon E. Baldwin, *The New American Code of Legal Ethics*, 8 COLUM. L. REV. 541 (1908).

⁶² JESSUP, *supra* note 60, at 35 ("To avail oneself of indecent methods of soliciting business *per se* or *per alium* for pecuniary or other payment, is to lay up memories fatal to future self-respect."). Dignity was often tarnished by public displays in the pursuit of money. Jessup's interpretation of the rules of advertising produced the perverse result, however, that small town lawyers might advertise while those in larger cities could not. Because small town lawyers were known in their community, they *might* "carry a card" in the local newspaper, if they operated within the "limits of taste and decency implicit" in Canon 27 ("Advertising, Direct or Indirect"). *Id.* at 32. However, lawyers in cities could not advertise. *Id.* ("For a lawyer in a great city, unknown to the community, to publish the same card in a daily paper, or placard it in a subway car or bus, would be undignified apart from the ridicule and contempt it would excite.").

⁶³ JESSUP, *supra* note 60, at 168. Similarly, contingency fees had the "tendency to breed the twin evils of solicitation of employment and improper division of fees. It develops both in the lay and in the professional mind a conception of the practice of law as a business, not a profession, and tends to lower the essential standards of the Bar." *Id.* at 169.

legal profession, conservative.⁶⁴ But even the conservative elements of the Canons illustrate the limits of elite control over the bar. For beneath the grand statements of the ABA, there flowed a whole host of lawyers, who illustrate the deep divide about the nature and purpose of American law. Just as there were dominant trends of subordinating interests of “justice” to corporate power, there were many instances in which that model, if confronted, was overcome. Law was also becoming a means for social change.

III. THE REDEFINITION OF PUBLIC INTEREST LAW: THE CASE OF THE NAACP

With that background, we can turn to Susan Carle’s discussion of the role of the NAACP’s litigation experience in illuminating legal ethics. Carle’s work explores the relationship between ethics, class, and race and casts light on significant changes in twentieth century legal thought.⁶⁵ She starts with the anomaly that much of the NAACP’s early litigation appears to violate rules of ethics: they solicited clients and manufactured cases to test discriminatory laws. Yet the same people who violated those rules were leaders of the elite bar, who were closely allied with the very people who had formulated those rules. So we are left with the question: how do we explain that apparent conflict? How could the NAACP’s board members be both closely allied with the leaders of the bar and apparently be acting inconsistently with their ethical rules? Carle is not merely a historian, however, who identifies intriguing anomalies in the minds of long-dead actors. She is also an advocate for reform of contemporary legal ethics. So she wants to use the NAACP as a laboratory for understanding how legal ethics change? And why?⁶⁶

Carle’s work revolves around the question of how we should analyze lawyers’ class interests in the development of legal ethics rules. In brief, did class interests dominate the formulation (or modification) of

⁶⁴ It is inappropriate to view the Canons as one-dimensional. In permitting contingency fee contracts, for instance, they illustrate progressive concerns even within the elite’s bar.

⁶⁵ See Susan D. Carle, *From Buchanan to Button: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281, 282 (2002).

That transition reflects one aspect of an enormously complicated story that has preoccupied legal historians for many years—namely, accounting for the fundamental transformations in American jurisprudence and legal practice that occurred during the first several decades of the twentieth century. That story includes the shift from lawyers and judges’ adherence to the *a priori*, individualistic approach of late nineteenth-century jurisprudence to the consequentialism and group orientation of sociological jurisprudence and legal realism, changing approaches to procedural and jurisdictional bars to class actions and other nontraditional forms of litigation, and the replacement of notions of a consensual ‘public interest’ with ideas of interest group pluralism.

⁶⁶ See Susan Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 L. & HIST. REV. 97 (2002); Susan Carle, *supra* note 65, at 281.

rules regarding solicitation of clients and manufacturing of lawsuits, or were there other interests at stake in the formation of those rules? To figure out the apparent anomaly is difficult. Carle conducts an intensive study to get to key divisions between class and race in the formulation and execution of legal ethics.

Carle's first and perhaps most important finding is that NAACP lawyers were engaged in a creative, lawyer-like process of redefining the boundaries of acceptable behavior under the Canons. They interpreted their behavior as different from the (disdainful) behavior of others, who created lawsuits and solicited clients. They created a new category of public interest law. Yet it is questionable whether it is so surprising that the elite lawyers think that the NAACP was exempt from the ethics rules. Was not the NAACP doing something different from soliciting clients for profit and stirring litigation for their own economic benefit? That is difficult to determine. Carle points to an advisory opinion written by the American Bar Association, which said that it was improper to solicit members of the Armed Services to offer them assistance in receiving back pay, and another that stated that lawyers employed by an automobile club could not speak at the club's meeting to organize or raise money to challenge a new state law that would adversely affect the client.⁶⁷

David Wilkins asked a similar, though somewhat bolder question: legal elites simply did not feel constrained by the legal ethics rules.⁶⁸ Those elites may not have had much in the way of thinking about legal ethics other than that those rules did not apply to them. There might be two reasons why those rules did not apply. First, the legal elites were not constrained by any rules. That is Wilkins' point. This is an extremely difficult issue to determine with any precision. It involves getting into the motives of legal elites and sifting through documents and conversations to which scholars simply are not privy at this point.⁶⁹

⁶⁷ Carle, *supra* note 66, at 137.

⁶⁸ David Wilkins, *Class Not Race in Legal Ethics: Or Why Hierarchy Makes Strange Bedfellows*, 20 L. & HIST. REV. 147-51 (2002). One wonders whether the ethics opinions to which Carle refers, Carle, *supra* note 66, at 137, demonstrate that the bar refused to recognize the category of public interest litigation, or whether it might support Wilkins' point that the elite's bar believed it could act in whatever way it wanted. The data fit both interpretations.

⁶⁹ Wilkins' point is derived in large part from Jerold Auerbach's work. See Wilkins, *supra* note 68, at 148 (citing Auerbach). It makes sense to argue from such data that rules that restrict non-elite lawyers from making money might not be applied with equal force to elite lawyers. This is the bold form of Wilkins's point (what Carle calls the economic determinist argument). Still, as I indicated in sections I and II, the regulations served a purpose beyond exclusion of racial minorities and women. Given those alternative purposes, it is hard to sustain the bold argument that this is another in a series of cases where elite lawyers simply believe the ethics rules do not apply to them. *Id.* at 148. ("I cannot help thinking about a simpler . . . explanation for the paradox Carle describes: with few exceptions, elite lawyers never believe that the restrictions in the ethics codes apply to them.").

A less conspiratorial rationale may be that the NAACP lawyers saw what they were doing as public interest work, which *is* different from soliciting clients for money and stirring up litigation. Might there not be a more middle path? Beginning from the Wilkins-Auerbach position that elite lawyers were trying to restrict non-elite lawyers from misbehaving and soliciting clients for money? We can say that when lawyers do not solicit for money, they do not run afoul of the Canons. Perhaps some of the lessons of the NAACP's experience with the Canons are that even conservative lawyers can remake their understanding of ethics and that they can, in appropriate cases, draw distinctions between public interest litigation and the greedy drumming up of cases. If that is the case, it also suggests that there may be some content to lawyers' self-image as protectors of justice. One should not tell too optimistic a story, of course, because it was not long before legal ethics rules were used as a club against the NAACP's litigation efforts.

IV. AFRICAN AMERICAN LAWYERS AND THE RE-MAKING OF THE PROFESSION

Still, if one is looking for an understanding of the interplay of race and class on legal change, there are many more people who must be brought into the picture. The focus on white lawyers in the NAACP, while very important, ignores a critically important, grass-roots process of civil rights litigation that took place at the same time or earlier than what the white lawyers were doing. There were others, outside the mainstream, who were just as important, perhaps even *more* important, in the cause of civil rights litigation, who stirred litigation.

Some of my favorite stories come from African American lawyers, such as J.B. Stratford. He took a train from Kansas to Oklahoma (and thus was in interstate transit) for the express purpose of challenging Oklahoma's railroad segregation statute. He was forcibly removed from the first class car when the train crossed into Oklahoma and then arrested at the train's next stop. The Oklahoma Supreme Court denied his request for relief, citing a United States Circuit Court opinion that maintained there was no denial of equal protection because there were not enough African Americans traveling in luxury accommodations to make them economically feasible.⁷⁰ The same statute was successfully challenged in the United States Supreme Court by Edward McCabe. McCabe was not as bold as Stratford; he had failed to physically challenge the law, so McCabe—who was assisted by NAACP lawyers—was denied relief!⁷¹

⁷⁰ Stratford [sic] v. Midland Valley R. Co., 128 P. 98 (Okla. 1912).

⁷¹ McCabe v. Atchison, Topeka, and Santa Fe Ry. Co., 235 U.S. 151, 162–63 (1914). See also Carle, *supra* note 26, at 123 (discussing McCabe).

Another telling story is that of Roscoe Dunjee. He was a newspaper man from Oklahoma City and was on the board of the NAACP in the 1930s. His editorials in the *Oklahoma City Black Dispatch* from the 1910s until his death in the early 1960s articulate an alternative vision for law. Dunjee helped demonstrated that the world might be ordered differently from the way it was, and gave his readers the knowledge and courage to act to remake their world. One finds in his editorials the substance of what Ralph Ellison called in *Invisible Man* the "Great Constitutional Dream Book."⁷² Those of us who want to experience that book can do so by reading Dunjee's editorials. Dunjee is given credit for beginning *Sipuel v. Oklahoma*, which integrated the University of Oklahoma Law School.⁷³ Such decisions are generated by outsiders and by African Americans.

Focusing on the elite lawyers can warp our sense of their importance. If we look for the contributions of elites, we can find them, but we do not see the complete picture, which includes how others contributed to social change (or how other elites restrained legal change). It also causes us to misunderstand how the arrows of influence worked. If the elites are taking lessons from the people in the remote provinces, then that in itself tells us something about the nature of class and social change. The NAACP provided excellent legal help, but it is the people in places like Elaine County, Arkansas who were responsible for starting the changes.⁷⁴ The ideas of social change arose often from people outside the mainstream—and we need to talk about those, rather than focusing on legal elites. A process of focusing on legal mandarins may expand their contribution out of proportion to what they actually contributed to legal change. Kenneth Mack has recently demonstrated that process in stunning detail through Sadie T.M. Alexander, an important African American lawyer in the early and middle part of the twentieth century.⁷⁵ It is becoming increasingly possible to talk about elements of elite power structures, like the courts, as the vehicles for the advance of

⁷² ELLISON, *supra* note 1, at 280. See also Ralph Ellison, Roscoe Dunjee and the American Language, A Talk to the Black Perspective Conference in New York City (May 14, 1972), in ELLISON, COLLECTED ESSAYS, *supra* note 2, at 458–59 ("The whole concept of changing segregation through appeals to the Supreme Court was present in Oklahoma City when I was a boy, and was propagated through the columns of a weekly newspaper.").

⁷³ *Sipuel v. Oklahoma*, 332 U.S. 631 (1948); see MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961 61–63 (1994);

⁷⁴ GRIF STOCKLEY, BLOOD IN THEIR EYES: THE ELAINE RACE MASSACRES OF 1919 (2001); Carle, *Buchanan to Button*, *supra* note 65, at 289–92 (discussing *Moore v. Dempsey*, 261 U.S. 86 (1923), which arose out of the Arkansas prosecutions).

⁷⁵ See Kenneth Walter Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925–1960*, 87 CORNELL L. REV. 1405 (2002). Mack's work demonstrates the importance of looking outside of elite structures to see how lawyers functioned and developed a professional identity and served clients. He demonstrates the rich history of the legal profession and makes us

understand that important events took place outside of the American Bar Association meetings and the halls of elite law firms.

Others have been arguing that point for years; legal academics have just failed to pay much attention to them, perhaps because the people arguing this point were outside of the elite power structure. For example, B.C. Franklin tells us in his autobiography about the ways that African American lawyers represented their clients in court in Oklahoma in the 1920s and 1930s. Indeed, one is led to conclude from Franklin's story that courts were important sites of public integration during the era of Jim Crow. See BUCK COLBERT FRANKLIN, *MY LIFE AND AN ERA: THE AUTOBIOGRAPHY OF BUCK COLBERT FRANKLIN 192-218* (John Hope Franklin & John Whittington Franklin eds., 1997). Lawyers like Franklin sought justice through the courts, even though sometimes judges contorted the law to arrive at results that now seem patently unfair. Still, Franklin modeled how lawyers should behave. One thinks of his lawsuit against the *Tulsa World*, which had—in a laughably racist story—placed the phrase, “nigger” in Franklin's mouth. Franklin sued the *World*, claiming that the story was defamatory because his clients would not like him using the word. As he phrased it, “the word ‘nigger’ is detestable to the members of the negro race, and the use of the word in public as ascribed to have been used by the plaintiff, held him up to scorn, hatred, ridicule, and contempt of the members of the negro race, and tended to deprive him of the public confidence, resulting in substantial injury to him as a lawyer.” *Franklin v. World Publishing Co.*, 83 P.2d 401 (Okla. 1938).

The Oklahoma Supreme Court held that the misattribution was not defamatory:

The acts and words attributed to the plaintiff in his defense of his clients are such as are commonly used by the more illiterate Southern Negro. The word “nigger,” complained of, has been brought forward from the days of negro slavery and is today frequently used by both the white man and the negro in a friendly way without reflection or ill feeling. This practice, while not universal, is very common in the Southern state. At most, it is but an abbreviated or substituted form for the word “negro,” and we are unable to see how the use of the word as generally used when referring to the negro casts any insult or reflection whatsoever. Many books have been written portraying the acts, habits, and language of the negro and written in negro dialect. These books are found in the public libraries of both races and are read with interest and appreciation.

Id.

The reader may judge for herself whether that explanation is convincing. While it is possible, though doubtful, that the N-word for a time in the 1930s was used “in a friendly way without reflection or ill feeling,” in the 1920s the Oklahoma Court of Criminal Appeals overturned a conviction when the N-word was used to refer to a defendant. See *Hamilton v. State*, 259 P. 168, 171 (Okla. Ct. Crim. App. 1927) (overturning conviction for homicide when district attorney repeatedly referred to defendant as “nigger” and noting that “[a]ll persons accused of crime, whatever their race, color, or condition, should stand on exactly the same footing in a court of justice. . . . Particularly is this true where a negro charged with an offense against a white man is tried before a white court and an exclusively white jury, and where the death sentence, the extreme penalty known to the law, may be imposed.”). See also RANDALL KENNEDY, *NIGGER: THE STRANGE CAREER OF A TROUBLESOME WORD 56-112* (2002) (discussing shifting meanings of the word as used by judges, prosecutors, and jurors). The *Black Dispatch* recognized the powerful appeal such a term contained. See *Ballots Are Bullets! Shoot Early on Tuesday*, *BLACK DISPATCH* 1 (October 29, 1920).

In their frantic efforts to yank back into line the disgruntled Gore Democrats . . . the Democratic State Committee of Oklahoma has thrown out a horde of howling mongrels, who like the buzzards that they are, are roosting in every nook and corner of the state this week, with their leather lungs are shouting the old battle cry of ‘Nigger’.

Id. I am indebted to James Hirsch, who alerted me to Franklin's case.

In the aftermath of the Tulsa race riot, for instance, African Americans testified in court about the riot and employed lawyers in a valiant—but fruitless—effort to receive compensation from their insurance companies and the city. See Alfred L. Brophy, *The Tulsa Race Riot*

pluralism. So while Auerbach's story from the 1970s was anti-lawyer (and particularly anti-elite lawyer), the story that scholars are telling of the early part of the twenty-first century is of the ways that the legal system was re-made to accommodate the needs of non-elites.⁷⁶

Moreover, to the extent we focus on the elite lawyers, we need to realize that the NAACP lawyers were but a sub-set of the elite bar. The fact that some people, like Storey and Boston, were engaged in making the Canons does not mean that their views represented that of the entire elite bar. So we need to be careful in extrapolating from the ideas of the elites to take cognizance of the NAACP board and the rest of the elite bar. Perhaps the rest of the elite bar did not approve of the NAACP's actions—and, of course, a significant percentage did not. Hence the litigation that led to the decision in *Button*.⁷⁷

Here is a proposed version of the story behind the Canons to which this essay has led. The Canons were designed to protect class interests and stabilize a profession in flux. This was done by the profession with some sense of what they were accomplishing. The ideology motivating these actions was both a commitment to modest equal protection and the development of the legal profession. We can consider the movement towards canons as part of the progress of the legal profession towards self-regulation, higher standards of professionalism, and the exclusion of certain elements of the bar.⁷⁸ The redefinition of the NAACP's activities

of 1921 in the Oklahoma Supreme Court, 54 OKLA. L. REV. 67 (2001) (discussing riot litigation and the testimony of African Americans and whites in the Tulsa court regarding the riot). The riot litigation provides an important site for viewing the conflicting interpretations of whites and African Americans and as a way of resolving—even if through biased rules—the conflicting interpretations of the riot. What is perhaps heartening, if anything can be from the riot, is that the Oklahoma Supreme Court acknowledged the culpability of the white community in the destruction of the Greenwood community. Though these stories—and the insights one can draw from riots—are stories for another time. See Gretchen Sween, *Rituals, Riots, Rules, and Rights: The Astor Place Theater Riot of 1849 and the Evolving Limits of Free Speech*, 81 TEXAS L. REV. 679 (2002).

⁷⁶ See, e.g., WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980* 1 (2002) (arguing that “the law of New York—law proclaimed largely by state court judges rather than by legislators or federal officials—has been the principle instrument facilitating” the “attempt of . . . [people] of all colors, skins, faiths, and tongues to live together in a community”). It is, perhaps, significant, that Lawrence Friedman's *American Law in the Twentieth Century*, published the same year as Nelson's *Legalism Reformation*, had a similar theme. Already the assessments of Friedman's book are focusing on the ways that America was a creatively harmonized America, how law accommodated (maybe even led to) pluralism. See, e.g., Robert J. Cottrol, *Creative Uncertainty*, 81 TEXAS L. REV. 627 (2002) (reviewing Friedman); Alfred L. Brophy, *Law as a Character of Society: Legal Change in Twentieth-Century America*, 30 REV. AM. HIST. 631, 637–38 (2002) (expressing some skepticism about Friedman's story).

⁷⁷ NAACP v. Button, 371 U.S. 415 (1963).

⁷⁸ One thinks of Roscoe Pound's definition of a profession. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 9–10 (1953), quoted in John Dzienkowski, *The Regulation of the American Legal Profession and Its Reform*, 68 TEX. L. REV. 451 (1989)

as outside of the Canons tells us about the how the bar defined itself and others.

More specifically, if we're thinking about the role of class on civil rights, if we are trying to divine the causes of the shifts in jurisprudence from the individualism of the nineteenth century to legal realism, we can sometimes measure those changes by looking at legal ethics. But I think we want to focus most of our attention on legal doctrine. How did legal elites (mostly judges in this case) formulate rules that assisted the development of civil rights—or, perhaps more importantly, how did they hinder them?

And on the large critical issues, like how did class interests intersected and conflicted with race in driving social change, we need to consider places where we can test the influence that class interests have on racial equality. Elite corporate lawyers might very well have wanted to encourage equal treatment for African Americans because that it fits with their ideas about individualism. This was a time when the Republican Party is generally more supportive of civil rights for African Americans than was the Democratic Party.⁷⁹ The Republican-dominated corporate bar had an ideology at the time of freedom of contract and equal protection principles that support limited rights for African Americans.

Let me conclude with an example from the World War I era race riots: the first terrible riot in East St. Louis. It began in an atmosphere of racial and class conflict, as poor whites began to fear and resent non-unionized African American workers who were taking low-wage jobs in meat packing plants and factories. Here you have a classic case of business benefiting from granting rights to African American workers. It brings into relief some reasons why elite corporate interests might protect certain equal protection rights of African Americans. And it is through episodes like that in East St. Louis that we can see all of these factors coming together.⁸⁰

(identifying "spirit of public service," "pursuit of a learned art," and organization as three ideals of a profession).

⁷⁹ See generally DAVID KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* (1981). One must be wary of the motives—and remember that the NAACP advanced ideas of equality that few white politicians were willing to follow. See Randall Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622, 1654 (1986). See also *id.* at 1655 ("The intricacies of behavior and motivation are such that the dense factual predicate necessary for imposing persuasive judgments on judicial conduct will almost always be incomplete, thereby forcing judgements almost always to be provisional.").

⁸⁰ See generally ELLIOTT RUDWICK, *RACE RIOT AT EAST ST. LOUIS, JULY 2, 1917* (1964). Rudwick's volume presents the only comprehensive account of the riot currently available, though it is badly in need of revision. While pioneering in its time, it focuses little attention on the ideas motivating the African American resistance to violence in East St. Louis, which was critical to the origins of the riot. Moreover, we need a much more subtle interpretation of the factors of anti-union sentiments among the meat packing plants and metal factories as well.

Carle has gotten us thinking in critical ways about class, race, and legal change in ways that encourage a lot more attention. This, as Professor Carle reminds us, is not just a question of history: these questions will continue to perplex the legal profession.

We need a study, modeled on the work of labor historians, that understands the conflicting racism and class discrimination of the Progressive era, as well as responses of the African American community—and uses that understanding to depict the evolution of violence against the African American community, its response, the riot, and the aftermath. *See* ERIC ARNESEN, *BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY* (2001); RICK HALPERN, *DOWN ON THE KILLING FLOOR: BLACK AND WHITE WORKERS IN CHICAGO'S PACKINGHOUSES, 1904-54* (1997). In short, we need a comprehensive picture of the human actors on all sides of the conflict and how they interacted.

The crucible of riot led social scientists and politicians to advance interpretations of the riot. *See, e.g.*, REPORT OF THE SPECIAL COMMITTEE AUTHORIZED BY CONGRESS TO INVESTIGATE THE EAST ST. LOUIS RIOTS, 114 H.D. 1231 (65th Congress, 1918) (assigning blame to lax law enforcement, corrupt city politics, and anti-union actions by local employers). Yet we need to interpret those competing narratives to tease out the interplay of law, race, and class in leading to the breakdown of law in July 1917—and how that riot led both African Americans and whites to react differently in future conflicts.

