

4-1-2017

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Recommended Citation

Bryant G. Garth, *Notes on the Future of the Legal Profession in the United States: The Key Roles of Corporate Law Firms and Urban Law Schools*, 65 Buff. L. Rev. 287 (2017).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol65/iss2/2>

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Notes on the Future of the Legal Profession in the United States: The Key Roles of Corporate Law Firms and Urban Law Schools

BRYANT G. GARTH†

INTRODUCTION

Anxiety over the future of the U.S. legal profession comes in large part from the fear that law school enrollment will not return to the levels of the prosperous years before the “bubble” burst in 2010. The first year class, beginning in 2009, totaled 51,646, the largest ever.¹ The current class, beginning in 2016, is 37,107, which goes back to the 1973 level.² Commentators and scholars adduce a number of reasons why the “new normal” will be reduced law school attendance, which is tied to a decline in the attractiveness and prestige of the legal profession.³ Whether the doomsday scenarios are correct or not, the numbers are disappointing and consequential to law schools largely dependent on

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1. Section of Legal Educ. and Admissions to the Bar, *Enrollment and Degrees Awarded 1963–2012 Academic Years*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf (last visited Feb. 13, 2017).

2. *Id.*; Section of Legal Educ. and Admissions to the Bar, *2016 Standard 509 Information Report Data Overview*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2016_standard_509_data_overview.authcheckdam.pdf (last visited Feb. 13, 2017).

3. *E.g.*, Deborah Jones Merritt, *What Happened to the Class of 2010? Empirical Evidence of Structural Change in the Legal Profession*, 2015 MICH. ST. L. REV. 1043.

tuition. Low numbers have led to lay-offs, early retirements, and frozen salaries in many cases. Law schools able to do so have also redoubled efforts to find new sources of revenue—especially through increased foreign LL.M. enrollments—and there are also unresolved issues about how to absorb the increased numbers of LL.M. students. There is no doubt that the short-term adjustments have been painful, and they have been exacerbated by efforts to keep entering credentials as high as possible for *U.S. News* rankings purposes.

The question about the future numbers of law students is important, but more fundamental is the question of whether there is a major shift in the attractiveness of legal education or simply a relative decline, which may be short term, in the number of applicants and enrollees to law school. We do not have solid research yet to understand why the profession appears to be less attractive today than in the recent and perhaps longer term past. The Association of American Law Schools (AALS) has begun a research project, entitled “Before the J.D.,” which aims to explore the reasons for what the AALS sees as a long-term decline in law school applications going back to the period after World War II.⁴ The project focuses on the attitudes and choices that undergraduates make in deciding their career direction.⁵ The Law School Admission Council (LSAC) has also focused attention on this situation with a research report on the attitudes of undergraduates to law school.⁶

The reaction of the ABA Section on Legal Education is particularly notable. Reversing an antitrust-inspired policy not to restrict entry into the legal profession by limiting law

4. Barbara Elenbaas, *Jeff Allum: Before the JD*, ASS'N OF AM. L. SCHS., <https://www.aals.org/about/publications/newsletters/aals-news-fall-2016/jeff-allum-before-the-jd/> (last visited Jan. 30, 2017).

5. *Id.*

6. ANN GALLAGHER & PHIL HANDWERK, BEHIND THE DATA: COMPARING LAW SCHOOL APPLICANTS TO OTHER COLLEGE FRESHMEN (2012), <http://www.lsac.org/flipbooks/behindthedata/#/1/>.

school accreditation, the new approach of the Section on Legal Education takes a much tougher stance on schools with low bar passage stemming from low entry credentials.⁷ They must restrict attrition to lower than twenty percent on the one hand, and on the other hand, seventy-five percent of the graduates must pass the bar within two years of graduation.⁸ “Consumer choice” and a market-based approach to law school regulation may no longer be the mantra. The assumption of the ABA Section on Legal Education appears to be that students with relatively weak credentials are making bad choices to attend law school, and the solution is to penalize law schools that admit them.⁹ As evidenced by the most recent bar results in California, discussed below, the consequences may be quite severe if the rule goes into effect.

Yet loan defaults are still rare and most students, as reported in the data from the After the JD Project and the more recent NALP Foundation data, are, in retrospect, satisfied with their decision to attend law school.¹⁰ The prevailing narrative is very pessimistic about the future of law schools, but the data is far from clear.¹¹ This Symposium organized by the University at Buffalo School of Law focuses

7. Memorandum from the Hon. Rebecca White Berch & Barry A. Currier to Interested Persons and Entities (Mar. 25, 2016), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20160325_notice_and_comment_memo.authcheckdam.pdf.

8. *Id.*

9. *See id.*

10. Rebecca Sandefur, Bryant G. Garth & Joyce Sterling, *Financing Legal Education—The View Twelve Years out of Law School*, in *AFTER THE JD III: THIRD RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS* 79 (2014); Ronit Dinovitzer, Bryant G. Garth & Joyce S. Sterling, *Buyers’ Remorse? An Empirical Assessment of the Desirability of a Lawyer Career*, 63 *J. LEGAL EDUC.* 211 (2013). The NAPL Foundation data comes from surveys submitted by law schools which the Foundation then aggregates.

11. Michael Simcovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 *J. LEGAL STUD.* 249, 280 n.41 (2014).

on the future of law school in light of this uncertain context.

There is no way to divine the future of the legal profession or law schools, but I hope to use this opportunity to clarify some of the issues of the debate. I do not pretend to know whether law school applications will ever return to the levels of the period prior to 2010, whether the market for legal services at the individual or corporate level is shrinking or growing over time, and how that relates to law school applications. Nor do I have prescriptions to offer to attract people to law school. I do hope to clarify the debate through a historical and sociological perspective that is missing from most of the analyses.

In particular, I want to focus on the question of the relative attractiveness of legal careers to two basic groups that are separable but also overlap. The first is the group of individuals who choose to attend law school as a classic step in upward mobility. The second is those with very strong educational credentials who attend law school as a ticket into a career of high status and prospects for high pay. In contrast to the upward mobility project, we can call this the elite reproduction project. The upward mobility project is loosely connected with the role of urban law schools not high in the law school rankings. The elite reproduction project links to the large corporate law firms.

The history of the U.S. legal profession has blended together elites and strivers for upward mobility, but the combination has not always been free of tension.¹² Today, the issue is whether law is seen as playing either of these roles, and, if not, whether it will again in the future. My thesis is that if law is still central to the elite reproduction role and the upward mobility role, the position of law and lawyers in the United States will remain strong. There may be ebbs and flows in applications to law school and fluctuations in the

12. See generally LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* (3d ed. 2005).

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demand for legal services, but there is no long-term crisis.

The corporate law firm is the key to the elite reproduction role because of its historical position at the top of the legal profession and its close connection to economic and political power. The urban law school is the key to the upward mobility project because of its traditional position not only in providing access but also in situating graduates in the political and social ecology of our major cities. Neither institution is free from challenge, and there are challenges today. The challenges tend to come in a particular way. First, the elite position of the bar faces attack. Then the relatively elite schools and their supporters turn the attack on the lower status schools. Both sides need each other, but the relationship is not always peaceful.

This Article will separate each of these legal career strategies and institutional contexts and root them in the historical structure of the legal field and the fields of economic and state power. I use the term strategies consistent with Pierre Bourdieu's sociological approach.¹³ This approach looks not at whether rational actors choose to go to law school, but rather whether ambitious individuals seeking upward mobility or affirming elite status see law school as the natural choice (or at least one of them) for themselves and their circle of friends and acquaintances. The question is whether the choice of law school appears to be reasonable and possible for individuals from the perspective of their social world. It appears reasonable and possible not because of an ad hoc calculation of costs and benefits, but because a large number of individuals have internalized a view of the world in which lawyers occupy influential positions, garner respect, and prosper economically. The view comes from many sources, including the media, the legal profession, and such factors as seeing how their parents

13. These terms are explained in PIERRE BOURDIEU & LOÏC J.D. WACQUANT, *AN INVITATION TO REFLEXIVE SOCIOLOGY* 9–11 (1992).

and social world respond to individuals identified as lawyers. The view has a long history in the United States, but it is not inevitable.

Within the structural sociology inspired by Bourdieu, the field refers to a semi-autonomous space in which individuals compete for the rewards generated by the field. From that perspective, the question is whether the strategy of going to law school makes sense if one seeks to become a player in fields of economic or political power. The attractiveness of the law degree depends on individuals believing that the investment in law will continue to be rewarded in status or material rewards in those fields. The embeddedness of law graduates in economic and political power is a key part of that attraction. That embeddedness is part of a long history producing a legal field with particular characteristics that both endure and evolve. The corporate law firm late in the nineteenth century became the organization central to elite lawyer careers—the so-called “lawyer-statesperson” operating at the intersection of professional leadership, economic power, and state power.¹⁴ The institution of the corporate law firm is closely connected to elite law schools. The institution key to the upward mobility project is the urban law school accessible originally to those who were not welcome in the elite schools or the corporate law firms.¹⁵ The urban law school is a product of the boom in law schools late in the nineteenth and early in the twentieth century—despite the hostility of the institutions of the organized bar.¹⁶

Each of the career paths and the institutions associated with them have gains and losses in attractiveness in particular historical periods. This Article will discuss each

14. Yves Dezalay & Bryant Garth, *Law, Lawyers, and Empire*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: THE TWENTIETH CENTURY AND AFTER* (1920–) 718, 722–723 (Michael Grossberg & Christopher Tomlins eds., 2008).

15. Joyce Sterling, Ronit Dinovitzer & Bryant Garth, *The Changing Social Role of Urban Law Schools*, 36 SW. U. L. REV. 389, 389–422 (2007).

16. *Id.* at 390, 397.

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path and institution in historical perspective, showing how the law schools and the legal profession have weathered challenges in the past. The historical challenges to the corporate law firms within the fields of economic and state power are therefore quite instructive. As noted above, there is also a historical relationship between the criticisms of the corporate law firms and the mobility project. The threat to the hierarchy at the top unleashes attacks on access at the lower levels of the hierarchy. The relative elites seek to enhance the prestige of the legal profession's "upper" ranks by purging the "lower" ranks.

As noted at the outset, the stakes involved with law school enrollment are at one level simply the prosperity of law schools. The larger debate is the position of lawyers in the United States, which also relates to the strength of law. It is easy to see why leaders of the profession today believe that the decline in the attractiveness of the legal career threatens the "rule of law." There is also a more sociological way to describe the stakes. Success in responding to the current challenges involves a process of retooling and absorbing challenges—in other words, containing social change, whether progressive or reactionary—from outside the law and absorbing them into the fabric of the law. Absorbing into the fabric of law is also the reproduction with moderate change of both the institutions and hierarchies of the field.

This Article will proceed in four parts after this introduction. Part I will discuss the major concerns that characterize the current nervousness about the future of the legal profession. Part II will focus on the elite reproduction story and the challenges to corporate law firms over time. Part III will then focus on the urban law schools, their historical role, and the challenges they have faced historically and in the present. Finally, the Conclusion will again return to what the stakes are for the current challenge. It will highlight the importance of this competing but

symbiotic combination of corporate law firms tied to elite law schools and the upward mobility graduates of the urban law schools—a relative few of which will gain positions in corporate law firms.

I. A LITANY OF CONCERNS: THE CURRENT CRISIS

The concerns can be divided into issues about the expense of law school, the relative decline of corporate law jobs, and the relative attractiveness of positions competing with lawyers at the high end of corporate law and involving careers serving individuals.

With respect to law as an upward mobility career, there are multiple questions about the value of the law degree with respect to its cost. Some suggest that only those who get scholarships or can afford to pay should attend law schools.¹⁷ A similar contention is those who accumulate debt at the not unusual \$100,000–150,000 level should attend law school only if they are confident they will obtain employment at a corporate law firm, which is a way also to suggest that prospective lawyers should avoid the lower status law schools.¹⁸ The cost of law school, from this perspective, has simply gotten too high for the vast majority of students—those who will not be able to obtain admission to the elite law schools that can promise corporate law jobs to more than five to ten percent of their graduates.¹⁹ The new focus on bar passage reinforces this message. The argument is that those whose test-taking skills are relatively weak as evidenced by low LSAT scores should not be admitted to law schools in states where the bar exam is designed to make their entry extremely difficult, such as California.

A related concern is that the number of corporate law positions for new graduates is seen to be shrinking. NALP

17. *E.g.*, PAUL CAMPOS, DON'T GO TO LAW SCHOOL (UNLESS) 45, 96, 97 (2012).

18. *E.g.*, BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 157–58 (2012).

19. *See id.* at 140.

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statistics show that that the number of new positions has not returned to the level obtained prior to the 2009 crash.²⁰ There are also a number of individuals who suggest that the economic returns to small and solo practice are shrinking in relation to other careers.²¹ Further, non-traditional providers of legal services—through unbundling, outsourcing, artificial intelligence, e-discovery programs, and similar technological innovations—threaten the growth of the demand for legal services by lawyers.²² It is understandable that potential applicants hoping to move into professional positions as a way to improve their economic and social position are shying away from law school.

There are related concerns about the path of law as elite reproduction for the so-called best and brightest. If, as mentioned above, the corporate partner is the embodiment of the elite of the legal profession, the attractiveness and prosperity of that position—now including in-house lawyers as “lawyer-statespersons”²³—matters. Articles questioning the future of “Big Law” and the attractiveness of that position deter Ivy League and comparable graduates from law school. The concern that the decline in law school applicants has come disproportionately from the more elite undergraduates reflects this dynamic.²⁴ From August 2013,

20. “[F]or the Class of 2015 there were still more than 1,800 fewer entry-level jobs in large law firms than there were for the Class of 2008.” James G. Leipold & Judith N. Collins, *The Stories Behind the Numbers: Jobs for New Grads Over More Than Two Decades*, NALP BULL., (Dec. 2016), <http://www.nalp.org/1216research>.

21. *E.g.*, BENJAMIN H. BARTON, *GLASS HALF FULL: THE DECLINE AND REBIRTH OF THE LEGAL PROFESSION* 4, 47 (2015).

22. RICHARD SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013).

23. See Ben W. Heineman, Jr., *The General Counsel as Lawyer-Statesman: A Blue Paper*, HARV. L. SCH. PROGRAM ON THE LEGAL PROF. 5, 13 (2010), https://clp.law.harvard.edu/assets/General_Counsel_as_Lawyer-Statesman.pdf.

24. Catherine Rampell, *Law School Applications Decline, Especially from*

“Across the board, the number of people applying to matriculate in fall 2012 was 67,700, down about 17 percent from the number who applied to matriculate in fall 2008 (82,000). The average decline in applicants who graduated from the ‘elite’ schools was 28 percent.”²⁵

If we posit that many of the individuals fitting this group aspire to both wealth and an opportunity to become leaders in political or economic fields, the rise of positions competing with law relates to this concern. A very recent *New Yorker* article, for example, focuses on the “revolving door” between investment banks and leadership positions in the federal government.²⁶ The revolving door has long been identified with lawyers and has been a source of the attractiveness of elite law.²⁷ To the extent that investment bankers fill that role, the position of elite law may be endangered. Whatever the reasons for the attraction, there are numerous articles in the popular press suggesting that a high percentage of elite graduates go into investment banking or business consulting.²⁸

An article in the *Washington Monthly*, in 2014, noted, for example, “so many Harvard and Stanford students . . . both accept and abhor that being recruited by Wall Street or certain consulting firms has become a measure of how smart and talented they are.”²⁹ A similar article quotes students

Graduates of Elite Colleges, N.Y. TIMES (Aug. 23, 2013), https://economix.blogs.nytimes.com/2013/08/23/law-school-applicants-decline-especially-among-grads-of-elite-colleges/?_r=0.

25. *Id.*

26. Alec MacGillis, *The Democrats’ Fight over Finance*, NEW YORKER (Nov. 14, 2016), <http://www.newyorker.com/magazine/2016/11/14/the-democrats-fight-over-finance>.

27. *See id.*

28. *E.g.*, Aimee Groth, *Here’s Where Ivy League Students Go When They Graduate*, BUS. INSIDER (June 29, 2012), <http://www.businessinsider.com/heres-where-ivy-league-students-go-when-they-graduate-presentation-2012-6#-3>.

29. Amy J. Binder, *Why Are Harvard Grads Still Flocking to Wall Street?*, WASH. MONTHLY, Sept.–Oct. 2014, at 53, 56.

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saying, “Everyone treated finance as this elite profession that smart people did after they graduated, especially people who aren’t on another more structured path like medical school or law. . . . It seemed like anybody who’s just generically intelligent, skilled in the social sciences . . . the best of the best would go to Wall Street.”³⁰ An article on Yale College graduates from the class of 2014 shows the prominence of business consulting and investment banking.³¹ A fascinating anthropological study of Princeton undergraduates and investment banks suggests that the debate at Princeton today over investment banking is what it might have been for law a generation ago.³² The question is whether one should become an investment banker as the default career choice for the ambitious Ivy League undergraduate.³³

The concerns today are quite strong, therefore, ranging from the demand for lawyers, the income in relation to indebtedness, and the relative attractiveness of other elite careers. The particular manifestations of the crisis are somewhat different than in the past, but threats to the position of lawyers are not new. The profession is resilient; indeed, it is so resilient that we tend to ignore or downplay earlier threats. The legal field tends to absorb threats in ways that allow it to reproduce prevailing hierarchies and the key institutions. We see this especially in the challenges to the elite status of corporate lawyers closely tied to economic power and elite law schools.

30. Amanda Terkel, *America’s “Brain Drain”: Best and Brightest College Grads Head for Wall Street*, HUFFINGTON POST (Nov. 16, 2011), http://www.huffingtonpost.com/2011/11/15/brain-drain-college-grads-wall-street_n_1069424.html (internal quotations omitted).

31. Tyler Foggatt, *2014 Career Paths Revealed*, YALE DAILY NEWS (2014), <http://technology.yaledailynews.com/features/2014-careers/>.

32. See KAREN HO, *LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET*, 43–44 (2009).

33. See *id.*

II. THE CORPORATE LAW FIRM'S HISTORICAL ROLE AND ITS CHALLENGERS

The corporate law firm late in the nineteenth and early in the twentieth century came to embody the elite of the legal profession.³⁴ The firms were, at first, highly criticized as the hired guns of such robber barons as Andrew Carnegie, J.P. Morgan, and John D. Rockefeller. But leading lawyers such as Elihu Root, Philander Knox, John W. Davis, Henry Stimson, and others overcame much of this criticism by taking on the position of “lawyer-statesperson.” They identified themselves with public service, supporting local reforms, and moving back and forth into presidential administrations; and even helped to write the rules—notably antitrust—that regulated and, not incidentally, legitimated their giant corporate clients. That participation in writing the rules ensured that the new rules built a demand for their services that stimulated the need for more corporate lawyers like themselves. They were also leaders in developing the philanthropic activities of their clients, exemplified by the Carnegie Foundation’s investment in international law and the Peace Palace in The Hague, and by Elihu Root’s Nobel Peace Prize for work on international arbitration.³⁵

This model started on Wall Street but spread to the emerging cities of the U.S. continent. Law firm biographies of, for example, O’Melvany and Myers in Los Angeles,³⁶ and Baker and Botts in Dallas,³⁷ enumerate the number of

34. Dezalay & Garth, *supra* note 14, at 722–24.

35. Yves Dezalay & Bryant G. Garth, *Constructing a Transatlantic Marketplace of Disputes on the Symbolic Foundations of International Justice*, in *CONTRACTUAL KNOWLEDGE: ONE HUNDRED YEARS OF LEGAL EXPERIMENTATION IN GLOBAL MARKETS* 185, 189, 191–93 (Gregoire Mallard & Jerome Sgard eds., 2016).

36. *See generally* 1 WILLIAM WEBB CLARY, *HISTORY OF THE LAW FIRM OF O’MELVENY & MYERS, 1885–1965* (1966).

37. KENNETH J. LIPARTITO & JOSEPH PRATT, *BAKER & BOTTS IN THE DEVELOPMENT OF MODERN HOUSTON* 6 (2011).

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lawyers from those firms who became mayors and in other ways pillars of their local communities while also staying close to local and national economic power.

The appeal of the position of “lawyer-statesperson” is evident. It combined public service, high status, good pay if not extraordinary wealth, and connections to wealth and power more generally. And it meant that the key individuals creating the rules for governance were those who could profit from the demand for their services that the new rules created. This place at the intersection of private and public power allowed corporate lawyers, and those connected to them, to play a particularly strong and appealing social role. The importance of lawyers builds the importance of law as well. Of course, relatively few corporate lawyers became prominent “lawyer-statespersons,” but successful corporate lawyers were drawn to and rewarded for their community activities. The prominent “lawyer-statespersons” enhanced the reputation and attractiveness of the legal profession generally.

Within the sociology of organizations and professions, there is a thriving literature about this role. Neoinstitutional sociologists talk of professions as institution builders and recently have noted the particular role of professional service firms—law firms, paradigmatically—as keys to organizational innovation and adaptation both domestically and globally.³⁸

This historical appeal of law and legal education can be seen in various sources. As Auerbach noted in his history of the divided legal profession, the law review editors of Harvard, Yale, and Columbia as early as the 1920s overwhelmingly “entered private corporate practice upon graduation from law school.”³⁹ Historical accounts of

38. See, e.g., W. Richard Scott, *Lords of the Dance: Professionals as Institutional Agents*, 29 *ORG. STUD.* 219, 223–27 (2008).

39. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN*

government leaders support this pattern. Growing up in the late 1930s, for example, many of those who became the leaders in the 1960s and 1970s were inspired by the careers of Root and Stimson in particular. They were attracted to and connected to law and corporate law firms even if not all formally becoming lawyers.

Geoffrey Kabaservice's book, *The Guardians*,⁴⁰ helps make this point. It describes the careers of Cyrus Vance, Kingman Brewster, Elliot Richardson, John Lindsay, McGeorge Bundy, and Paul Moore.⁴¹ They were the leaders of what Kabaservice terms the liberal establishment.⁴² Vance, Brewster, Richardson, and Lindsay came from prominent families and went to law school as a kind of natural career to assert influence and get involved in social reform.⁴³ They supported each other and dominated major institutions—Yale College, the Ford Foundation, and politics including Mayor of New York City.⁴⁴ The institution that they would return to between positions was the corporate law firm, where they could rebuild their wealth and their staple of private and public connections.

We can hypothesize on the basis of this research that there was a very strong attraction of the ambitious, talented, and well-connected into the elite legal world revolving around corporate law firms, politics, and public service. The environment on the Ivy League campuses, most likely, resembled what is so well documented for Princeton today, except that the default career for the smart and ambitious

MODERN AMERICA 143 (1976).

40. GEOFFREY KABASERVICE, *THE GUARDIANS: KINGMAN BREWSTER, HIS CIRCLE, AND THE RISE OF THE LIBERAL ESTABLISHMENT* (2004).

41. *Id. passim*.

42. *Id.*

43. *Id.* at 14–43.

44. *Id.*

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was then corporate law rather than investment banking.⁴⁵ The attraction of law graduates into these corporate law firms was key to the continued status of lawyers, to the role of law in providing the language of solutions to social problems, and to building new demand out of those solutions.

Some highly suggestive interviews about the early careers of leading public interest lawyers support the persistence of this perspective into the 1960s. Charles Halpern, interviewed by Thomas Hilbink as part of a doctoral dissertation on public interest law, reported being relatively apolitical as an undergraduate at Harvard.⁴⁶ He then attended Yale Law School and went to work at Arnold and Porter after a federal clerkship.⁴⁷ He reported that “[h]e imagined a career of working at a law firm, doing pro bono work, and taking stints in government.”⁴⁸ His ambitions reveal that he had perfectly internalized the hierarchies and incentives that put U.S. corporate lawyers at the top of the legal field and brought economic rewards, respect, and influence over public policy. It was not a cost benefit analysis but rather following a well-worn path that seemed natural to those on a path to attaining or reproducing elite status. Another key individual profiled by Hilbink, Carlyle Hall Jr., graduated from Harvard Law School and, in 1969, went to work for O’Melveny and Myers in Los Angeles.⁴⁹ He was attracted to O’Melvany, he said, by Warren Christopher, the most important partner and one “who had long combined private lawyering with public service.”⁵⁰ Hall too was

45. See HO, *supra* note 32.

46. Thomas Miguel Hilbink, *Constructing Cause Lawyering: Professionalism, Politics, and Social Change in 1960s America*, 343 (Jan. 31, 2006) (unpublished Ph.D. dissertation, N.Y.U.), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417253.

47. *Id.*

48. *Id.* at 344.

49. *Id.* at 347–49.

50. See *id.* at 347–49.

following the internalized program of the elite lawyer.

This internalized elite track is not inevitable even if pretty well-established in the United States. The common sense of elite undergraduates can change in relation to many contingencies. Put in sociological terms, the strong position of corporate lawyers in the field of political and economic power can be challenged. Other career trajectories can become more attractive—at least in the short term. One era of challenge was the Depression and the New Deal. The courts and Wall Street lawyers were staunch opponents of the New Deal, in part because of the efforts of the New Deal to contain business and strengthen the regulatory state.⁵¹ There were populist attacks on the Wall Street establishment.⁵² The strength of this attack, if sustained, might have deterred elite undergraduates from corporate law—seen as the problem, not the potential source of solutions.

The story of the response to this challenge cannot be detailed here. It is told well by Ronen Shamir.⁵³ Legal Realism and the efforts of law professors at Harvard, Yale, and Columbia, in particular, to support the New Deal warded off the challenge and absorbed it.⁵⁴ Rather than weakening the influence of corporate law firms because of their opposition to increased state power and ties to oligarchic economic power, new corporate law firms close to the regulatory state rejuvenated the corporate law position.⁵⁵ The New Deal ended up producing more work for corporate lawyers, and the new institution of the Washington, D.C. law firm made a new generation excited about the prospects of

51. See RONEN SHAMIR, *MANAGING UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* 45–46, 67 (1995).

52. See *id.* at 66–67.

53. See generally *id.*

54. See *id.* at 132–33.

55. See *id.*

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practicing corporate law—in firms like Arnold, Fortas and Porter, which the Realists created.

Two aspects of this story are important. One is rebuilding and securing the position of elite corporate lawyers in and around the government—as natural public servants in leadership positions. This phenomenon is a key to attracting elite students into the law schools and then to corporate law. The other aspect is the demand for corporate legal services. From the positions in government, elite lawyers were able to ensure that lawyers participated fully and thrived from the New Deal and the activist state that continued after the 1930s, which then allowed the profession to grow to serve the new demand.⁵⁶ The process occurred naturally. Lawyers within the New Deal used their tools and influence to promote solutions to social problems that, of course, privileged law and the courts.⁵⁷ In contrast, although it cannot be developed here, governmental leaders in France and Great Britain in the same period built their welfare states to diminish the influence of the legal profession and the courts.⁵⁸ The ties of the legal profession to the corporate and propertied holders of wealth led reformers to find solutions that did not give a privileged role to lawyers and courts.⁵⁹ There was no set of entrepreneurial academics and lawyers to retool law and lawyers for the more activist state.⁶⁰

There were very similar challenges in the 1960s, which Hilbink's dissertation captures in the portrayal of the careers

56. *Id.* at 169–71.

57. *See id.*

58. *See generally* Yves Dezalay & Bryant G. Garth, *The Confrontation Between the Big Five and Big Law: Turf Battles and Ethical Debates as Contests for Professional Credibility*, 29 *LAW & SOC. INQUIRY* 615 (2004).

59. *See* SHAMIR, *supra* note 51, at 132–33.

60. *See generally id.*

of Halpern, Hall, and others.⁶¹ These individuals, as noted, were looking to become elite “lawyer-statespersons” in the mold of their mentors.⁶² In the era of the late 1960s, however, corporate law began to lose its appeal. It is telling that Halpern began to feel increasingly attracted to activism and disillusioned with his work for Arnold and Porter.⁶³ In the politicized world of the 1960s, the career for which he had prepared himself had depreciated in value through the attacks on law that served the status quo or, at best, very slow change.⁶⁴ The career lost some of its appeal for the so-called best and brightest. Again, however, entrepreneurialism within the profession led to a retooling that adjusted to the new political and social setting.

These lawyers absorbed the activism around them and developed a new elite solution. Working with others who shared his position, Halpern came up with a proposal for Ford Foundation funding of a Center for Law and Social Policy.⁶⁵ The same story occurred with Hall, who also became disillusioned with corporate practice, again reflecting the depreciation of the social status of that traditional path to the elite.⁶⁶ He joined with three others from O’Melveny and Myers to work on a proposal to the Ford Foundation for a Center for Law in the Public Interest.⁶⁷ Both Halpern and Hall’s group got funding for liberal public interest law firms by the Ford Foundation—led by McGeorge Bundy, who moved there from the White House.⁶⁸ Bundy and the Ford Foundation responded in part to these proposals because of

61. *See generally* Hilbink, *supra* note 46, at 342–50.

62. *See id.*

63. *Id.* at 345–46.

64. *See id.* at 332–42, 344–45.

65. AUERBACH, *supra* note 39, at 344–50.

66. *Id.* at 349–50.

67. *Id.*

68. *Id.* at 350, 354, 357, 376–77.

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their internalized commitment to the maintenance of the elite role of lawyers moderating social change while serving the state and business interests.⁶⁹ They created liberal public interest law firms, but they were not fundamentally opposed to the power of corporate law firms.⁷⁰ They ensured a close connection between corporate lawyers and public interest law firms by providing that board members must be respectable corporate lawyers.⁷¹

Civil rights and employment discrimination law, environmental law, and other new areas of regulation then attracted ambitious and well-connected lawyers into elite law, now expanded to include the leading public interest organizations as well as corporate law firms.⁷² From the point of view of the project of encouraging Ivy League and comparable graduates to attend law school, it did not matter whether they went to public interest law or corporate law—even though for individuals it could represent an agonizing personal choice. The point was the public interest law helped to retool corporate law, keep the attractiveness of law school for elite reproduction, and make it possible also for demand creation fueling law firm prosperity—with the obvious example of environmental law.

There are two more challenges that merit examination and lead to the place where we are today. The first was the challenge that is now represented in the dominance of investment banking in the imagination of undergraduates in the Ivy League. This phenomenon is also the challenge of the M.B.A. to the J.D. The M.B.A. gained prestige more or less equal to law in the 1980s, partly because of the deregulation and intensified business competition that began around that

69. *Id.* at 356–59.

70. *See id.* at 364–69.

71. *See id.*

72. *See id.*

time.⁷³ The second challenge is related to the changes in the economy. It was the challenge of the political right—inspired especially by neo-liberal economists—to the close relationship of corporate law firms to the regulatory state and relatively progressive law.

An interview that Yves Dezalay and I conducted in 2000 is indicative of the first challenge. We interviewed an individual who was then a partner of Goldman Sachs.⁷⁴ He was a graduate from a leading law school and business school. He had three summer jobs: McKinsey, Goldman Sachs, and Cravath.⁷⁵ He described the choice he ultimately made between Goldman Sachs and Cravath as follows:

I found the work at Goldman . . . more challenging and stimulating and more commercial and more rewarding, and I seemed to get more responsibility quicker than I perceived to get at Cravath. . . . And I liked the financial side as much as the legal side, because it seemed that the financial side was driving things. And I would say that I was struck at my summer at Cravath, working on a project with [another investment bank]. . . , and how I thought the guys at Cravath were much smarter than the guys at [the bank], but the guys at [the bank] were really calling the shots. And that was an eye opener for me, because I really had no exposure to investment banking growing up. In fact, I was very skeptical when I got to business school, and met all the investment banking analysts who were talking about how they were changing the world and running deals.⁷⁶

This individual's father was a corporate lawyer and perfectly understood the choice.⁷⁷ His mother worried that he was going into a trade rather than a profession.⁷⁸

This interview could be used to posit a shift in the career

73. See generally YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL FIELD 151–81 (1996).

74. Dezalay & Garth, *supra* note 58, at 630.

75. As one of the interviewees, some of the information included here is from my personal recollection of the interview.

76. Dezalay & Garth, *supra* note 58, at 630 (alterations in original).

77. *Id.* at 631.

78. *Id.*

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movement of those who earlier would simply have gone to the corporate law firm, but the interview has another dimension as well. The interviewee went on to note:

[O]ne thing which, you know, the U.S. [corporate law] firms basically understand: that we're staffed with very inexperienced people, who are bright, but inexperienced. You know, if I hire, let's say . . . [a lawyer at a top U.S. firm], he's probably the lawyer I've worked with the most over the years, and who's really, a, I think maybe the best lawyer I've ever worked with. If I hire [him] on a project, and I'm not involved, I know that [he] is there. And if one of my guys does something that they shouldn't, or is in over his head, I'm going to hear.⁷⁹

The tight links between the investment banks and the law firms allow for a division of labor in which the very junior investment bankers can draw on the expertise and experience of lawyers who know how to monitor the role the investment bankers are supposed to play. They conspire to “get the deal done” in the collective interests of an elite close to economic power.⁸⁰

There is another way that the rise of investment banks and also business consultants complement the corporate law firms. As demonstrated elsewhere, the model of the corporate law firm inspired the other elite professional service firms.⁸¹ It is not a coincidence that investment bankers now go in and out of government. Both competitors borrowed the partnership model, the commitment to public service, and the practice of hiring young talent primarily from the most elite of the undergraduate institutions and business schools—and also law schools. For a number of reasons, therefore, the challenge from these organizational competitors is not a zero-sum game for law firms. It is a division of labor as well. The rise of McKinsey and other business consultants in the 1980s went with a persistent downsizing of corporations that generated considerable work for corporate law firms, and the wave of mergers and

79. *Id.* (alterations in original).

80. *Id.* (quotations omitted).

81. *Id.* at 625.

acquisitions generated new legalized technologies of business warfare such as the poison pill.⁸²

The rise of these particular competitors, therefore, is not inconsistent with maintaining the prominence of corporate law firms and the demand for their services even though the talent is shared by the elite organizations. The division of labor means that the lawyers especially have a place as they get older and accumulate expertise and judgment—strengthening their opportunities also as corporate statespersons.⁸³ The mimicry of the corporate law firm model akin to the creation of the Washington law firm in the 1930s competes with and refurbishes the role of the corporate law firm generally in the fields of economic and political power.

This pattern of challenge and absorption can be found again with the recent challenge of the political right, which is well-documented in the works of Ann Southworth, Stephen Teles, and Amanda Hollis-Bruskey.⁸⁴ Teles has a section of an article entitled “Grassroots Without Elites: The Conservative Legal Movement Circa 1980,” which is especially germane to this story.⁸⁵ As in the 1930s and in the 1960s, an ascending political movement—this time on the right—found itself quite isolated from a legal establishment that was invested in serving prevailing power structures.⁸⁶ There was an attack on the role of elite law, the liberal political role of many in corporate law firms, and the way that liberals used courts as one part of their toolkit to promote liberal social policies. The grassroots of the right did

82. *Id.* at 628.

83. *See id.* at 635.

84. *See generally* AMANDA HOLLIS-BRUSKEY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015); ANN SOUTHWORTH, LAWYERS ON THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008); Steven M. Teles, *Transformative Bureaucracy: Regan’s Lawyers and the Dynamics of Political Investment*, 23 *STUD. AM. DEV.* 61 (2009).

85. Teles, *supra* note 84, at 63–66.

86. *See supra* note 84.

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not at first see a role for elite law in their movement. Not surprisingly, the initial policies of the Reagan administration were aimed at curtailing legal aid, public interest law, and the role of the courts. But the situation changed again through the entrepreneurialism of a new generation.

The activities of the Federalist Society, the entrepreneurialism of Edwin Meese and others, and the rise of conservative foundations supporting allied public interest law firms gain was transformative within the enduring model. The result was the rise of elite conservative public interest law and conservative activists as corporate lawyers in the second Reagan administration.⁸⁷ After that administration, there were many more conservative elite lawyers available to move into the elite legal academy and the conservative public interest law firms, there were respectable scholarly theories for lawyers on the right, and there were openings for conservative pro bono attorneys in large law firms. It was easy to find conservatives who were, as Southworth quotes one of them, “the next generation of Lloyd Cutlers and Joe Califanos who are prepared to run law firms and to assume major government positions.”⁸⁸ The mix of conservative partners in law firms and conservative public interest law firms created a role for elite corporate lawyers that helped to maintain their position in the legal field and in the field of state power.

Corporate law firms (now also corporate counsel) are currently well positioned in the state and economy even though there is a right and left establishment now—a divided elite. There is another dimension to this comeback as well. The Reagan era conservatives, as noted, wanted to get the courts out of the way from the executive and legislative branches. Legal doctrine was seen correctly as a reflection of

87. Teles, *supra* note 84, at 65.

88. SOUTHWORTH, *supra* note 84, at 39.

the close relationship between corporate lawyers and the regulatory state. Active courts were considered part of the problem rather than a solution. Now the situation is changed—once more reaffirming the position of elite corporate law.

An anecdote reveals the changed situation. At an event on the Supreme Court hosted at University of California, Irvine School of Law in the summer of 2015, one of the commentators responded to a question about whether the Supreme Court was getting too liberal or too conservative with activist jurisprudence. He stated that he asked his conservative friends if they would trade *Citizens United*⁸⁹ for the case striking down the Defense of Marriage Act,⁹⁰ and that he asked his liberal friends the option the other way. It seems, he noted, that both sides were content today with the active role of the Supreme Court. And indeed, nearly every major issue today comes before the Supreme Court—gay marriage, Obamacare, elections, campaign finance, and many more. This state of affairs is perfect for elite corporate law firms.

An article on the Supreme Court Bar published by Reuters examined who handled these major cases and found that it was a very small group of specialists mainly situated in large corporate law firms.⁹¹ “They are the elite of the elite: Although they account for far less than 1 percent of lawyers who filed appeals to the Supreme Court, these attorneys were involved in 43 percent of the cases the high court chose to decide from 2004 through 2012.”⁹² They provided

89. *Citizens United v. FEC*, 558 U.S. 310 (2009) (holding that under the First Amendment restrictions on corporate independent expenditures are unconstitutional).

90. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

91. Joan Biskupic et al., *The Echo Chamber: A Small Group of Lawyers and Its Outsized Influence at the U.S. Supreme Court*, REUTERS INVESTIGATES (Dec. 8, 2014, 10:30 AM), <http://www.reuters.com/investigates/special-report/scotus/>.

92. *Id.*

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a decided advantage for corporate America, and a growing insularity at the court. Some legal experts contend that the reliance on a small cluster of specialists, most working on behalf of businesses, has turned the Supreme Court into an echo chamber—a place where an elite group of jurists embraces an elite group of lawyers who reinforce narrow views of how the law should be construed.⁹³

Of course, the number of lawyers handling these cases is small as a portion of the corporate bar. But they make the case for the importance of the institution of the notable corporate lawyer, exemplified by the conservative-liberal alliance of Ted Olson and David Boies—both corporate lawyers—in the case against the Defense of Marriage Act.⁹⁴ And note that there is a place in this world also for the elite public interest lawyer and elite law professor advocate, even though the numbers of Supreme Court advocates are much fewer than are found in the corporate bar. The Supreme Court itself is also protected by both sides of the divided elite from nominations of lawyers such as Harriet Myers, condemned in large part for a non-elite pedigree.

From this perspective, the particular role of the corporate legal elite in the U.S. state and economy is again very strong. The pattern of elite lawyers brokering social change by using the courts and serving at the intersection of the state, the economy, and the academy is still with us. One would expect that the social prominence of this role will continue to attract a good portion of the best connected and best performing undergraduates into the law. The structural position of the corporate lawyer is still intact. As noted, that role is in part challenged by investment bankers and business consultants, but competition from those positions also reinforces the elite role of corporate law and potentially keeps corporate lawyers in a strong position to profit from any innovations in corporate behavior produced by the

93. *Id.*

94. Jesse McKinley, *Two Ideological Foes United to Overturn Proposition 8*, N.Y. TIMES (Jan. 10, 2010), <https://mobile.nytimes.com/2010/01/11/us/11/prop8.html>.

consultants or bankers.

The strong structural position of corporate law firms, and therefore elite law, does not necessarily mean increasing demand for legal services or increasing law school enrollments. Without the structural position, there would be a major crisis for the role of law and lawyers. But the demand for lawyer services—which fuels lawyer compensation and feeds back into the number of applications to law school—depends on much more than this structural position. As many have pointed out in recent years, technological innovation and the competition that commoditizes many services put constant pressure on the corporate law firms (and other service providers). Without new demand-creating innovations in the corporate market, we can expect demand to contract over time. But, historically, there have always been innovations—such as big businesses suing other big businesses in the 1980s⁹⁵—that brought increased demand. Such innovations have historically fueled the creation of demand that might otherwise have been unexpected. It is not surprising that in the Depression, and again as recently as 1990, conventional wisdom predicted a permanent relative decline in the demand for legal services that did not materialize.⁹⁶ There may be a permanent decline, but a projection of current trends oversimplifies the process of demand creation.

There is no doubt a crisis in the sense of a decline in the past several years in law school enrollments, and the decline in the enrollments of those from the most elite

95. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 33–37 (1996).

96. See Bryant G. Garth, *Crises, Crises Rhetoric, and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POL'Y REV. 503, 506 (2013); Richard H. Sander & E. Douglas Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 L. & SOC. INQUIRY 431 (1989).

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undergraduate institutions is an important part of the crisis story.⁹⁷ But if we look at the structural position of the corporate law firm—and big law generally—the situation looks much less troubling. Certainly there are other aspects to this story, but the position of the corporate law firm is one key dimension that so far remains strong

I also do not want to make a normative argument, but I want to note there are two aspects of this “success” story of corporate law for more than a century in attracting top talent and finding ways to re-adapt to maintain its strong position. One is that the strong role of law is maintained in part because of the social importance of leading lawyers, including especially lawyer-statespersons of the corporate law firms. Neither the New Deal, the rise of the left, nor the rise of the right—despite initial challenges—pushed aside the role of corporate lawyers and their connections to corporate and philanthropic power, elite law schools, elite positions in the judiciary, and key positions in state power. This success of law, however, is also success in containing the power of social movements by linking them to an evolving establishment that reproduces itself through the process of containment. At the end of the day, corporate lawyers and their clients survive potential threats to their position as social change movements are moderated and absorbed through elite reproduction. Elite law does not lead social change. It adapts to it and contains it.

III. ACCESS TO UPWARD MOBILITY, THE URBAN LAW SCHOOLS, AND THE CHALLENGE FROM RELATIVELY ELITE LAW

The story of law as an upward mobility career is related to the story of the demand for legal services in the United States. In countries where access to a legal career is limited, and especially where career paths are relatively rigid, there

97. Rampell, *supra* note 24.

is less innovation in fueling new demands for legal services.⁹⁸ The entrepreneurial ability of the U.S. law firm, as Lawrence Friedman has noted, stems in part from the relative openness of the legal profession.⁹⁹ Of course, that openness is relative. Minorities and women did not traditionally have access to legal careers, and corporate law firms were long the preserve of WASP elites.

The history is again important. Prior to the development of corporate law firms, the legal profession in the United States was already relatively open in terms of at least social class. Individuals did not even need a degree to become a lawyer. The law school only gradually became the chief means for gaining access to a legal career, and as law schools increased in importance, a growing number of urban law schools began to provide access to immigrants and others that the existing university law schools did not serve. Robert Stevens observed that the number of law students and law schools went from 1200 students and 21 schools in 1870 to 4500 students and 61 schools in 1890 to 22,000 students and 140 law schools in 1916.¹⁰⁰ The YMCA was one of the chief sources for the new law schools established over this period, establishing some nineteen schools by 1927.¹⁰¹ The combination of night classes and low tuition made these schools quite attractive to the children of immigrants in the major cities. From 1920 to 1940, largely because of these groups, the lawyer population increased by fifty percent to

98. See Yves Dezalay and Bryant Garth, *Hegemonic Battles, Professional Rivalries, and the International Division of Labor in the Market for the Import and Export of State-Governing Expertise*, 5 INT'L POL. SOC. 276, 281–85 (2011).

99. Friedman, *supra* note 12, at 484.

100. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 76 (1983).

101. Dorothy E. Finnegan, *Raising and Leveling the Bar: Standards, Access, and the YMCA Evening Law Schools, 1890–1940*, at 55 J. LEGAL EDUC. 208, 209 (2005).

181,000.¹⁰²

The increase was not without its critics, whose rhetoric is still quite familiar sounding. According to Jerold Auerbach, “[f]or years the tradition of virtually free access to the bar had troubled lawyers who watched uneasily while immigration and urbanization transformed the nation and their profession.”¹⁰³ Complaints included overcrowding in the profession and the poor ethics of the immigrant lawyers.¹⁰⁴ Auerbach noted further that “notions of the profession as an accessible democratizing institution which fostered social mobility became suspect once the origins of its newest members changed.”¹⁰⁵ The bar’s reaction was to try to raise academic standards including mandating college attendance. The attack on the immigrants, he noted, also deflected attention from the role of the bar in resisting social reform.¹⁰⁶ Criticism of the corporate law firms and the legal elite could be refocused on reforming the so-called lower ranks.

Professors of the university law schools—in part working through the AALS—allied with the ABA leadership against the urban law schools: “perhaps the strongest attraction of an alliance was the boost it would give their own efforts to beat back the night law schools, whose enrollments continued to climb.”¹⁰⁷ The Reed Report by the Carnegie Foundation, which came out in 1920, was part of this process of pushing back against the night law schools.¹⁰⁸ Reed

102. AM. BAR ASS’N, ABA NATIONAL LAWYER POPULATION SURVEY: HISTORICAL TREND IN TOTAL NATIONAL LAWYER POPULATION 1878–2016 (2016), http://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2016.authcheckdam.pdf.

103. AUERBACH, *supra* note 39, at 106.

104. *Id.* at 106–07.

105. *Id.* at 108.

106. *Id.* at 108–09.

107. *Id.* at 109.

108. *Id.* at 110.

recognized the access role of the night law schools, but he criticized them especially as “cheapened copies” of the university law schools, and he proposed that the profession simply be divided into two kinds of lawyer.¹⁰⁹ There would be probate, trial, and criminal work for those who went to the night schools, and business practice for those who went to the university schools—differentiation by the “economic status of the client.”¹¹⁰ In 1921, two pillars of the corporate legal elite, Elihu Root and William Howard Taft, used the Reed Report to try to raise standards sufficiently to stop the entrance of “incompetent practitioners” into the profession.¹¹¹ The requirement of at least two years of college was the main vehicle they used to try to restrict admission and diminish the enrollments of the urban law schools.¹¹²

The Depression of the 1930s accelerated the attack on the urban and night law schools.¹¹³ The economic crisis of the bar prompted calls to close down the night law schools on the basis of their low quality, the poor ethics of those seeking upward mobility through law, and an oversupply of lawyers.¹¹⁴ The method again was to try to upgrade the credentials required to attend law school and also to upgrade the requirements for law school accreditation.¹¹⁵ The night and urban law schools had enough support in the legal profession and the government generally to resist the attack. Indeed, the ranks of the profession continued to grow at a fairly steady pace, although it slowed after 1960 (until picking up again in the 1970s with the expansion of

109. *Id.* at 111 (quotations omitted).

110. *Id.*

111. *Id.* at 113 (quotations omitted).

112. SUSAN K. BOYD, THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR 21–27 (1995), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/1993_abas_first_section.pdf.

113. Garth, *supra* note 96, at 506–09.

114. AUERBACH, *supra* note 39, at 106–07.

115. *Id.*

opportunities to minorities and especially women).¹¹⁶

The “two-hemisphere” thesis of Heinz and Laumann, based on a study of Chicago lawyers, captures the division of the legal profession in the 1970s.¹¹⁷ Their book *Chicago Lawyers* highlights the higher status of the corporate law firms characterized by lawyers who attended elite schools, were largely WASP males, and represented only corporations rather than individuals.¹¹⁸ They note the lower earnings, prestige, and credentials of those who serve individuals.¹¹⁹ Their focus on the status differential is understandable, but it tends to downplay the achievement of the urban law schools in building up their own hemisphere.¹²⁰ The urban law schools, exemplified in Chicago by Loyola, DePaul, John Marshall, and Chicago-Kent, were already deeply embedded in urban government—at that time, the Daley Machine.¹²¹ They occupied key positions as state—not federal—prosecutors, public defenders, judges, and municipal lawyers.¹²² They were also litigators.¹²³ They made a virtue out of necessity and built strong self-help networks outside of the corporate bar.¹²⁴

The combination of judges, litigation, and democratic politics in Chicago, for one notable example, accounts in large part for the rise of the personal injury bar there (with parallel developments elsewhere). For example, bright graduates of Loyola in the 1950s would find a place in the

116. Sander & Williams, *supra* note 96, at 436.

117. *See generally* JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 182–93 (1982).

118. *Id.* at 182–93.

119. *Id.* at 127–34.

120. *See id.*

121. *Id.* at 11.

122. *Id.* at 274–77.

123. *Id.*

124. *Id.*

government or in small firms, since the corporate firms were not open to them.¹²⁵ Some of them did the work necessary to overturn—through judicial and governmental assistance—the limitations on what juries could award and what one needed to prove to win damages for personal injury. The biography of Philip Corboy, who was listed as one of the key “notables” in the network of the Chicago bar, illustrates exactly how the urban lawyers evolved over time.¹²⁶ While never achieving the status of the elite corporate lawyer, the elite of the personal injury bar—still mainly educated in the urban law schools—earn huge amounts of money and play a major role in politics at all levels.¹²⁷

Other research shows how the urban law schools, in particular the Catholic ones such as DePaul and Loyola, gained a foothold in the corporate law firms and gradually expanded the opportunities for the network of graduates from those schools in the corporate law firms.¹²⁸ The networks helped recruit and promote success in those firms for those without the elite credentials traditionally required.¹²⁹ Ted Seto of Loyola in Los Angeles has documented more recently the surprising number of Loyola and Southwestern graduates in the partnership ranks of the Los Angeles corporate law firms.¹³⁰ As discussed below, many of them did not begin their careers in those law firms.

The After the JD (AJD) cohort that began practice in 2000 showed this phenomenon of a relative openness among large law firms to graduates with top grades from the urban

125. Sara Parikh & Bryant Garth, *Philip Corboy and the Construction of the Plaintiffs' Personal Injury Bar*, 30 LAW & SOC. INQUIRY 269, 275–77 (2005).

126. *Id.* at 270–71.

127. *Id.*

128. *Id.* at 276; see Bryant Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469, 482–88 (1993).

129. *See id.* at 276–77.

130. Theodore P. Seto, *Where Do Partners Come From?*, 62 J. LEGAL EDUC. 242, 243–44, 253 (2012).

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law schools and, indeed, the non-elite law schools more generally.¹³¹ The potential urban law school advantage was the availability of critical masses within local corporate law firms of graduates from local law schools, which could increase the pressure on hiring committees to interview and hire graduates from their schools.¹³² The AJD project showed also that there was much greater recruitment from the elite and relatively elite law schools, but the process at the time was at least relatively open.¹³³

The Great Recession of 2009 brought a renewed effort to attack the upward mobility project of law schools by attacking the category of neither night law schools, nor urban law schools, but rather the more general category of lower-ranked law schools.¹³⁴ One strain of the critique is, as noted above, that the divide proposed by the Reed report should be formalized akin to some of the divisions one finds in Europe. In this case, the upward mobility project would primarily be represented by individuals who would attend two-year law schools, pay lower tuition, and be taught by faculty with little or no research agendas.¹³⁵ They would again do the probate, family law, criminal law, and civil practice contemplated by the Reed Report.¹³⁶ They would not represent large corporations and certainly would not gain access to corporate law firms. The two hemispheres of the 1960s would be strengthened, and yet, it is not clear if the two-year graduates would even continue to get the positions in local government as prosecutors or public defenders.

131. See RONIT DINOVIETZ ET AL., *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 19, 25–27 (2012) (showing employment by large law firms generally of top students from third and fourth tier law schools).

132. Sterling, Dinovitzer & Garth, *supra* note 15, at 407–08.

133. DINOVIETZ ET AL., *supra* note 131, at 42, 79.

134. See Garth, *supra* note 96, at 505; Rebecca Roiphe, *Tilting at Stratification: Against a Divide in Legal Education*, 16 *NEV. L.J.* 227, 230 (2015).

135. See TAMANAHA, *supra* note 18, at 20–21.

136. AUERBACH, *supra* note 39, at 111.

Unlike in the 1930s, the culprit now is not the ethics of the bar, but rather the costs of law school, the debt loads of those who attend law school and lack access to the corporate bar, and, more recently, the LSAT scores of applicants to lower-ranked law schools. As noted elsewhere, the most elite law schools today, in contrast to the 1920s and 1930s, are not active participants in this debate.¹³⁷ Law schools above the lower tiers, but not at the elite level, have led the charge, including: faculty from Washington University, St. Louis; Indiana University, Bloomington; University of Tennessee, and Vanderbilt.¹³⁸ They have been joined by the American Bar Association.

The ABA Section on Legal Education appears to have re-embraced the role from the 1930s against the urban law schools and lower-ranked schools more generally. The idea is that there are too many lawyers, particularly from lower-ranked schools.¹³⁹ Antitrust law as interpreted by the Justice Department in the 1980s prevents closing law schools in order to restrict competition, but the Section is promoting a crude tool which, in terms of predicted outcome, is designed to accomplish that exact agenda.¹⁴⁰ The proposal has two aspects. One is to require that seventy-five percent of the graduates of a law school pass the bar within two years.¹⁴¹ The other is to presumptively limit law school attrition that occurs other than through transfer to twenty percent.¹⁴² The

137. See Garth, *supra* note 96, at 515.

138. See BARTON, *supra* note 21, at 153–54; CAMPOS, *supra* note 17, at 67–78; Garth, *supra* note 96, at 515.

139. There is also within the ABA a Task Force on the Future of the Legal Profession and a Task Force on the Costs of Legal Education. See Am. Bar Ass'n, *Task Force on the Financing of Legal Education*, at 59 (June 17, 2015), www.americanbar.org/groups/legal_education/committees/about-task-force-on-the-financing-of-legal-education.html.

140. Memorandum from Rebecca White Berch & Barry A. Currier, *supra* note 7.

141. *Id.*

142. *Id.*

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proposed reform has gained widespread support among deans of leading law schools, and the legal press has even criticized it as not going far enough.¹⁴³ Deans of lower-ranked schools with high minority enrollments have understandably been critical, citing the potential impact on diversity. The rhetoric of the proponents from higher ranked schools is instructive.

An article in the ABA Journal quotes Deborah Merritt of Ohio State Law School:

While diversity is an important goal, minority law students deserve to attend law schools that will position them for successful legal careers, Merritt wrote in her letter supporting the change. “Maintaining the accreditation of law schools with poor bar passage rates, on the contrary, is a counterproductive way to diversify the profession,” Merritt wrote. “We owe minority students the best our education system has to offer—not programs with low success rates.”¹⁴⁴

Daniel Rodriguez and Craig Boise, Deans of Northwestern and Syracuse, have defended the new proposal as follows in the National Law Journal:

In this difficult economic climate for law graduates, the challenge for law schools is twofold. First, schools must commit to creative strategies to bring in able students who will thrive in law school, pass the bar, and move on to meaningful and successful careers. This is at least as important with regard to students of color as everyone else in the student community.

Second, they must develop mechanisms of student support and academic

143. *E.g.*, Daniel Rodriguez & Craig Boise, *A Tightened Bar Passage Standard Is Needed*, NAT'L L.J. (Sept. 19, 2016), <http://www.nationallawjournal.com/commentary/id=1202767658112/A-Tightened-Bar-Passage-Standard-is-Needed?mcode=1202615496053&curindex=1&slreturn=20170010134405>. *See also* Vikram Amar, *First Monday Musings by Dean Vik Amar: Thoughts on the ABA's Proposed Tightening on Bar Pass Standards*, ABOVE L. (Dec. 5, 2016), <http://abovethelaw.com/2016/12/first-monday-musings-by-dean-vik-amar-thoughts-on-the-abas-proposed-tightening-of-bar-pass-standards/>. *But see* Austen Parrish, *Dean's Desk: A Troubling Focus by the ABA on the Bar Exam*, IND. LAW. (Nov. 16, 2016), <http://www.theindianalawyer.com/deans-desk-a-troubling-focus-by-the-aba-on-the-bar-exam/PARAMS/article/42025>.

144. Karen Sloan, *Diversity, Consumer Groups at Odds over Tougher Bar-Pass Rule Proposed for Law Schools*, LAW (Aug. 2, 2016), <http://www.law.com/sites/almstaff/2016/08/02/diversity-consumer-groups-at-odds-over-tougher-bar-pass-rule-proposed-for-law-schools/>.

assistance to measurably increase the bar passage rates of students. That most law schools have been able to do precisely that over the long run indicates that a high bar-exam passage standard can be met. A law school that cannot or will not meet this criterion should not be permitted to continue to operate with the imprimatur of ABA accreditation.

The consequence of maintaining the status quo on this issue is distressing: students with a demonstrably small likelihood of success will continue to pay tuition to unscrupulous law schools. The ABA Section of Legal Education should be commended, not criticized, for its efforts to require greater accountability from the law schools it accredits.¹⁴⁵

The quotations focus on the issue of what the proposed bar passage standard will do for diversity, but the issue is more general. From the position of higher ranked schools, the question is about bringing in students with appropriately high credentials and also creating programs to pass the bar exam. Schools with low bar passage, high debt, and relatively low employment ten months after graduation are termed “unscrupulous.”¹⁴⁶ While not said explicitly, the suggestion is that they are undermining the prestige of law schools and the legal profession generally. The proposed deflected solution to the crisis—again as in the 1930s—is to purge a portion of the lower-ranked law schools.¹⁴⁷

The California law schools are especially at risk because of the relatively low cut score used in California. A bar exam score that fails in California may very well succeed in Illinois, Minnesota, or other states with different cut rates. The most recent bar results from the July 2016 examination make this concern more than academic.¹⁴⁸ Only five of the twenty-one ABA accredited law schools in California beat the seventy-five percent, although ten of the schools below that figure will certainly get seventy-five percent within two

145. Rodriguez & Bosie, *supra* note 143.

146. *See id.*

147. Garth, *supra* note 96, at 517.

148. Staci Zaretsky, *California Bar Exam Results by Law School (2016)*, ABOVE L. (Dec. 13, 2016, 1:15 PM), <http://abovethelaw.com/2016/12/california-bar-exam-results-by-law-school-2016/>.

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years; but seven schools were below fifty percent, and they will be challenged by the new standards if they go into effect.¹⁴⁹ The challenge the lower-ranked schools face is even greater. They are told that they need programs to improve bar passage. In the words of Rodriguez and Boise, “they must develop mechanisms of student support and academic assistance to measurably increase the bar passage rates of students. That most law schools have been able to do precisely that over the long run indicates that a high bar-exam passage standard can be met.”¹⁵⁰

Yet for lower-ranked schools, especially in California, there is no evidence that any law school has been able to consistently perform better on the bar exam than would have been predicted by their entering class credentials.¹⁵¹ All the schools have many more personnel dedicated to academic support than in the past, but the success of those programs over time is unclear. One reason for the lack of comparative success is that they are competing with each other in an arms race, but even so, if the programs were demonstrably effective, the Bar Examiners might then acknowledge that the pool of exams is better as a whole, which they have not done. The only way low-ranked access-oriented law schools can consistently improve bar passage is through attrition of low performing students, but the putative twenty percent cap also limits that strategy, which is tough on students in any event.¹⁵² In addition, attrition among the high performing students, who transfer to higher ranked law schools, also lowers the bar passage rate, since they are counted as part of the school to which they transfer.¹⁵³

149. *Id.*

150. Rodriguez & Boise, *supra* note 143.

151. David Frank, *Some Thoughts on the California Bar Exam*, FAC. LOUNGE (Dec. 14, 2016), <http://www.thefacultyounge.org/2016/12/some-thoughts-on-the-california-bar-exam-.html>.

152. Sloan, *supra* note 144.

153. *Id.*

The choice of the cut score on an exam, which, it is clear, does not test what makes a good lawyer, is taken as a given in most of this debate. There is the hope that a national bar examination might lessen the differential and at least allow people to use a score to move to another state where the score will pass. The critical problem now is that low ranked law schools and the urban schools that I have emphasized here face the challenge that, in today's world, they are admitting students with lower LSAT scores than in the past. We do not know if these individuals who make it through law school are doomed to be bad lawyers or should be denied admission. We know only that they will have a harder time on the bar exams, especially those with high cut rates. We also know that those attending the urban law schools today as in the past are more likely to be relatively poor, to speak English as a second language, and to be the first in a family to attend law school.¹⁵⁴

The question under today's conditions is whether the accreditation standards should make it impossible for many of these upwardly mobile students to attend law schools, such as the urban ones, that tend to lead to good, if not highly lucrative, careers.¹⁵⁵ One argument for denying them is that not enough of these students have law jobs ten months after graduation,¹⁵⁶ but that is a very poor indicator of the value of a law degree.¹⁵⁷ The second argument is that their debt is

154. Sterling, Dinovitzer & Garth, *supra* note 15, at 403–05.

155. *See generally id.* at 405–08, 411–14; Jane Yakovitz, *Marooned: An Empirical Investigation of Law School Graduates Who Fail the Bar Exam*, 60 J. LEGAL EDUC. 3 (2010).

156. Simkovic & McIntyre refer to statistics collected nine months after graduation. The ABA now collects these statistics ten months after graduation.

157. *See* Simkovic & McIntyre, *supra* note 11, at 23. The work of Simkovic and McIntyre makes a strong case for the career value of a law degree, which does not depend on first position; and Simkovic suggests also that the job alleged to be the preserve of those who cannot get jobs, solo practice, is actually more lucrative than the critics assert. Michael Simkovic, *A Few Problems with Coverage of the Solo Practitioner Income Debates*, BRIAN LEITER'S L. SCH. REP. (Aug. 11, 2016),

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too high, but again this is not an issue unique to law schools, and the general data suggest that the debt issue is overblown.¹⁵⁸ The cost is a major issue, but again there is a question of whether those seeking upward mobility should be stopped and denied access according to the proposition that law is “not for them.”

The preceding paragraphs do not pretend to resolve the debates about debt, the appropriate standards for admission to law school, and the vicissitudes of early careers for law school graduates. The point is that the current debate and recipes for reform are extremely one-sided, as in the 1930s. Those in the relatively higher status law schools have shaped the debate and the media reporting while ignoring or downplaying uncertainties and counter arguments. Every issue is resolved against the lower-ranked schools.

As in the 1930s, it appears that the prosperity of urban law schools committed to upward mobility is threatened. The threat comes especially from the relatively more elite law schools and their allies, who are themselves under a somewhat different threat. The elite law schools are challenged by a relative decline in what they see as the “best and brightest,” meaning those with the resources and background to bring elite credentials to their law school applications. That group, according to my argument here, is indeed essential to maintaining the important position of law in the United States. My argument is also that the urban law schools and, in general, the law schools that provide access to the disadvantaged are equally part of what is essential to keep generating new demands and new positions for law and lawyers.

Many within the elite circles of legal education are not very sympathetic to the urban law schools, characterized as

<http://leiterlawschool.typepad.com/leiter/2016/08/a-few-problems-with-coverage-of-the-solo-practitioner-income-debates.html>.

158. SANDY BAUM, *STUDENT DEBT: RHETORIC AND REALITIES OF HIGHER EDUCATION FINANCING* 4–7 (2016).

unscrupulous for taking on students with low application credentials. Nevertheless, as stated earlier, I believe the success of the urban law schools is vital to the success of the legal profession in the United States. Clearly the schools have played a major and complementary role to the more elite schools in the past. The argument today can be summarized as follows.

The first point is that without the urban law schools many relatively disadvantaged students, immigrants, and children of immigrants, simply will not go to law school and become lawyers. The urban schools are the major points of entry for this group of students, and their application credentials will be far from those of the elite schools. The credentials have fallen recently, but there is no reason to see that decline as inevitable.

Second, despite the attitude of many of the more elite legal educators, the legitimacy of the legal profession can be challenged if the claim for equal justice depends on elite corporate law on one side and elite public interest law on the other. The examples of Britain and France in the Depression suggest that during times of social ferment, a legal profession too identified with the elite establishment may lose influence and stature. Many of the lawyers that brought law to leftist movements in the 1960s, and to the right in the 1980s, came from lower-ranked law schools in touch with grassroots political movements.¹⁵⁹ Only later did the elite capitalize on and gain a strong position within these movements.

Third, a similar point is that the relative openness of the U.S. legal profession fosters innovation that redounds to the success of the profession as a whole—new demand creation. Examples from the past include litigation as a business strategy, corporate bankruptcy, corporate immigration, and the development of plaintiffs' personal injury and class

159. See generally SOUTHWORTH, *supra* note 84; Teles, *supra* note 84, at 3; Hilbink, *supra* note 46, at 265–67.

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action practice. Most of these start outside the corporate law context and then become mainstays of corporate law firm growth. These examples also move individuals with expertise—who often graduated from non-elite schools—in those practices into strong positions within corporate law firms.

More recently, borrowing from the qualitative interviews of the After the JD Project, we see careers made up out of linguistic, ethnic, and national origins experiences.¹⁶⁰ The impact of these examples is notable. One interviewee went to a relatively low-ranked law school, practiced intellectual property for a while, and then built a practice serving engineers from his Islamic community. He was very successful and accordingly, mosques began to ask him how to handle threatening requests from governmental entities. His work in all aspects brought Muslim Americans in touch with the law and the law in touch with their issues. The access issue in this respect is also a social control issue, which brings disputes and conflicts into the law.¹⁶¹

CONCLUSION: COMPLEMENTARY BROKERS AND THE FUTURE
OF THE LEGAL PROFESSION

The strong position of law in the United States puts lawyers in a position to participate in economic, social, and cultural movements and changes. My argument in this article is that this strong position depends on the success of corporate law firms, as the embodiment of the elite, and urban law schools, as the embodiment of the upward mobility project. The two sides are related. They fight as part of the legal field. Relatively elite law schools use the urban, as well

160. Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 *LAW & SOC'Y REV.* 1, 4–5 (2007); Bryant G. Garth & Joyce Sterling, *Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love*, 22 *GEO. J. LEGAL ETHICS* 1361 (2009).

161. Dinovitzer & Garth, *supra* note 160, at 4–5.

as other lower-ranked law schools, in order to enhance their relative prestige and promote “reforms,” which make existence of the urban law schools more precarious. Many graduates of the urban law schools, especially those who dominate the plaintiffs’ bar, thrive by challenging corporate law firms through mass torts and class actions.

Each side serves as a kind of broker connecting law to social movements, economic power, politics, and people. The combination also promotes an entrepreneurialism in the interests of the legal profession and both institutions. The success to date of the legal profession in the United States has depended on the success of both sides. If demand is going to be maintained or augmented in the future, it will come from this entrepreneurial and broker relationship. Challenges to either institution are challenges to the position of the legal profession.