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Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism

by SAMUEL J. LEVINE*

Since the earliest years of the twentieth century, prominent segments of the legal community have accepted and adopted the assertion that “[t]he law is no longer a learned profession, it has become a business.”¹ In response, the past century saw repeated and sustained professionalism movements, aimed at promoting an ideal of professionalism in legal practice. Each of these movements, in turn, was confronted by various forms of criticism and opposition, on both descriptive and normative grounds.² The prevailing division among leaders of the practicing bar and the legal academy alike has produced, in the words of one scholar, a

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1. George F. Shelton, *Law as a Business*, 10 YALE L.J. 275, 275 (1900). See also JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* *passim* (1916); RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 158-63 & 160 n.6 (1956) (citing sources); George W. Bristol, *The Passing of the Legal Profession*, 22 YALE L.J. 590 (1912-13); Robert Reat Platt, *The Decadence of Law as a Profession and its Growth as a Business*, 12 YALE L.J. 441 (1903). As Professor Laura Kalman has observed, this assertion gained popularity at the end of the nineteenth century, and “lawyers have been repeating such wails of woe ever since.” Laura Kalman, *Professing Law: Elite Law School Professors in the Twentieth Century*, in *LOOKING BACK AT LAW’S CENTURY* 338 (Austin Sarat, et al. eds., 2002).

2. See e.g., Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995); Samuel J. Levine, *Faith in Legal Professionalism: Believers and Heretics*, 61 MD. L. REV. 217 (2002); Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

“perennial debate.”³

To many of its critics, early-twentieth-century legal professionalism was characterized by—if not premised upon—numerous vices, including anti-Semitism, nativism, classism, economic protectionism, and general elitism.⁴ This article considers the discourse and underlying attitudes of early twentieth century legal professionalism through a close analysis of Julius Henry Cohen’s 1916 book, aptly titled *The Law: Business or Profession?*⁵ Specifically, the article suggests that, although Cohen

3. Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1130 & n.66 (2000).

4. See, e.g., JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); RICHARD L. ABEL, *AMERICAN LAWYERS* (1989); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* (1983).

5. See COHEN, *supra* note 1. Though apparently not the first to articulate what Professor Russell Pearce has coined “the business-profession dichotomy,” see Pearce, *supra* note 2, Cohen’s book may well represent the first attempt at a full-length consideration of the issue, consisting of 319 pages of text, followed by nearly 100 pages of appendices, bibliography, and index. A 1926 revised edition of the book, which includes an additional Postscript and extended appendices, totals 513 pages.

As a result, the book has been cited in numerous scholarly works as a somewhat standard reference to the abiding nature of the business/profession debate. See, e.g., Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1027 n.119 (1994); Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in The United States*, 7 GEO. J. LEGAL ETHICS 911, 919 n.57 (1994); Green, *supra* note 3, at 1130 & nn.66-69; Steven H. Hobbs, *Ethics in the Age of Entrepreneurship*, 39 5. TEX. L. REV. 599, 603 (1998); Robert F. Housman, *The Ethical Obligations of a Lawyer in Political Campaign*, 26 U. MEM. L. REV. 3, 71 n.307 (1995); Erik M. Jensen, Book Review, 1990 COLUM. BUS. L. REV. 133, 160; 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, 255 n. 194 (1998); Nina Keilin, Note, *Client Outreach 101: Solicitation of Elderly Clients by Seminar Under the Model Rules of Professional Conduct*, 62 FORDHAM L. REV. 1547, 1560 n.96 (1994); Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 LAW & SOC’Y REV. 713, 722 n. 17 (1999); Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U. L. REV. 723, 730 n.34 (1994); 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 397 n.142 (2001); Pearce, *supra* note 2, at 1242 n.55; Elizabeth Phillips, Note, *Injunctions Pending Arbitration: Do the Courts Really Have Jurisdiction?*, 1991 J. DISPL. RESOL. 381, 385 n.44; W. Wesley Pue, *Locating Hurst*, 18 LAW & HIST. REV. 187, 191 n.9 (2000); Milton C. Regan, *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 GEO. J. LEGAL ETHICS 1, 3 & n.9 (1999); S.S. Samuelson & L. Fahey, *Strategic Planning for Law Firms: The Application of Management Theory*, 52 U. PITT. L. REV. 435, 437 n.18 (1991); Ted Schneyer, *Policymakers and the Perils of Professionalism: The ABA’s Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363, 369 n.44 (1993); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 22 n.130 (1991); Jeffrey W. Stempel, *Theralaw and the Law-Business Paradigm*, 5 PSYCHOL. PUB. POL’Y & L. 849, 855 n.22 (1999); Detlev F. Vagts, *Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 GEO. J. LEGAL ETHICS 677, 679 n.7 (2000); Eli Ward, *An Unlikely Knight in Economic Armor: Law and Economics in Defense of Professional Ideals*, 31 SETON HALL L. REV. 1042, 1088 n.162 (2001).

Nevertheless, as I have noted elsewhere, Cohen’s book has rarely, if ever, been engaged in a substantive or substantial manner. See Samuel J. Levine, *Professionalism Without*

shared and relied upon many of the concerns of his contemporaries over the commercialization of legal practice, he offered a unique vision of professionalism, one that eschews notions of bias and self-interest in favor of intellectual honesty and a sincere concern for the good of society.

Part one of the article contrasts Cohen's rhetoric and underlying approach to professionalism against the often anti-Semitic, nativist, and classist attitudes expressed by leaders of the organized bar in discussions of professional misconduct and bar admissions standards. The second part considers Cohen's support for stricter standards in legal education and prevention of the unauthorized practice of law, in spite of his rejection of the kind of economic protectionism that often accompanied calls by others for higher standards. The third section examines Cohen's ability to promote law as a profession and not a business without engaging in elitism popular among segments of the legal community. The article concludes with the suggestion that, although Cohen's unique approach may have resulted largely from various ways in which his personal life and experiences differed from those of the typical member of the elite legal establishment, a more interesting and more important lesson may be found in Cohen's ability to maintain his own rhetorical integrity and intellectual independence while allying himself with many who shared his goals, if not his sensibilities and sensitivities.

PROFESSIONAL MISCONDUCT AND BAR ADMISSIONS

Anti-Semitism and Nativism

In his groundbreaking study of elite lawyers in the twentieth century, Jerold Auerbach develops the thesis that in the early part of the century, "[a]lthough lawyers spoke the language of professionalism, their vocabulary often masked hostility toward those who threatened the hegemony of Anglo-Saxon Protestant culture."⁶ Specifically, citing the rhetoric of leaders of the organized bar who called for stricter educational and admissions

Parochialism: Julius Henry Cohen, Rabbi Nachman of Breslov, and the Stories of Two Sons, 71 *FORDHAM L. REV.* 1339, 1340-41 n.8 (2003). In fact, the only sustained study of Cohen's work appears to be found in Gerald Fetner, *Public Power and Professional Responsibility: Julius Henry Cohen and the Origins of Public Authority*, 21 *AM. J. LEG. HIST.* 15 (1977), which briefly notes Cohen's opposition to the commercialization of legal practice, *see id.* at 22 (citing only an address by Cohen); *see id.* at 22 n. 19 (quoting Julius Henry Cohen, *Watchman, What of the Night?*, Jan.17, 1928, at 27) (address before the Cincinnati Bar Association without any reference to Cohen's book on the subject).

In addition, most references to Cohen's book appear in the context of a discussion of the contemporary expression of business/profession dichotomy, indicating—tacitly or expressly—that Cohen's views may be closely associated with one side of the current debate. As suggested by this article, however, properly understood in the context of the early twentieth century and in contrast to much of early twentieth century professionalism, Cohen articulated a more subtle and complex vision of professionalism, not susceptible to simple analogy to one of the current views.

6. AUERBACH, *supra* note 4, at 99.

standards,⁷ Auerbach argues that “[p]rofessionalism and xenophobia were mutually reinforcing,” finding expression in “anti-urbanism, anti-Semitism, and nativism.”⁸ While some have disputed Auerbach’s assessment of both the prevalence and influence of these attitudes,⁹ there appears to be broad historical support for the finding that “wherever one looks in the literature of the period, the establishment expressed concern about the background of those who were alleged to be demeaning the bar.”¹⁰

Auerbach’s documentation of anti-Semitic and nativist rhetoric underlying early twentieth-century calls for professionalism provides a helpful setting for a consideration of Julius Cohen’s unique approach. In support of the thesis captured in his title, that law had become a business rather than a profession, Cohen dedicated most of the first half of his book to a critique of the standards of training and education required for admission to the bar in the United States.¹¹ Nevertheless, a careful reading of Cohen’s extensive argument reveals an apparent absence of any form of bias, on the basis of class, ethnicity, or country of origin. Instead, in formulating both the substance and language of his argument, Cohen consistently relied on an intellectually honest analysis of the issues rather than vituperation and innuendo. Strikingly, Cohen maintained his own rhetorical integrity while concomitantly allying himself with and relying on leaders of the legal establishment whose public statements reflect the kind of prejudice decried by Auerbach and others.

One of the most prominent figures in Cohen’s book is Charles A. Boston, who was, at the time the book was published, Chairman of the Standing Committee on Professional Ethics of the New York County Lawyers’ Association.¹² Though referenced at a number of points throughout the book, Boston first appears in the book’s opening pages as one of two individuals to whom Cohen “make[s] acknowledgment for inspiration and leadership in work that makes the natural occasion for this

7. *Id.* at 48-53; 98-101; 106-29

8. *Id.*

9. See, e.g., JOHN W. JOHNSON, *AMERICAN LEGAL CULTURE, 1908-1940* 72 n.56 (1981) (stating that “[a]lthough Auerbach . . . clearly demonstrate[s] that certain influential bar association leader and law school deans held racist and nativist views, the conspiracy thesis [he] suggest[s] is open to criticism”); Stephen Botein, *Review Essay: Professional History Reconsidered*, 21 *AM. J. LEG. HIST.* 60, 72-73 (1977) (arguing that “the anti-Semitic emphasis of nativist rhetoric in the modern legal profession is apt to give a distorted picture of social and economic realities” and describing “the problematic relationship of such ‘literary’ evidence as bar association rhetoric to the realities of group behavior”); Paul L. Murphy, *Book Review*, 64 *J. OF AM. HIST.* 497 (1977) (criticizing Auerbach for “intellectual reductionism” resulting from “deriv[ing] his findings from a selective picking over of the record to set forth the contentious brief which he expects will win him his case”).

10. STEVENS, *supra* note 4, at 101.

11. See generally COHEN, *supra* note 1, at 1-172.

12. See *id.* at xvi. For an extensive discussion of Boston and his work with both the New York County Lawyers’ Association and the National Association for the Advancement of Colored People, see Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 *LAW & HIST. REV.* 97 (2002).

book.”¹³ Elsewhere in the book, Cohen describes the unique circumstances of his close relationship with Boston, as part of “a group of lawyers, who met socially . . . to discuss among themselves the practical questions that come under their observation, where the application of principles of ethics to actual situations becomes necessary or advisable.”¹⁴ “The Group,” as Cohen refers to it, was self-consciously elitist in its membership, which was “small in number” and the identity of which was “to be kept entirely private and confidential.”¹⁵ Indeed, writing with apparent pride, Cohen notes that while the Group “has been together for eight solid years[,] . . . [t]he identity of its membership is still known to but a few.”¹⁶ Based on the projects that Boston initiated with the Group and then expanded upon in working with other organizations, Cohen considers Boston “largely responsible for the development in this country of a new and vital interest in the ethical relationship of the lawyer to his client, to the court and to the public.”¹⁷

In a footnote, Cohen cites numerous speeches and articles by Boston on the subject of legal ethics, including a piece in the May 1908 issue of *The Green Bag*.¹⁸ In the piece, like Cohen, Boston decries a decline in legal practice from an “honorable profession” to a “trade.”¹⁹ Unlike Cohen, however, Boston resorts to language that betrays not only the kind of “masked hostility” described by Auerbach²⁰ but an open animosity toward groups that, in Boston’s view, possessed characteristics unworthy of lawyers and were responsible in part for the “deterioration” of the bar.²¹

For example, Boston nostalgically recalls the days when Alabama “was a homogenous community, where the law was an honorable profession, and not a trade, and where the practices of many races and of

13. *Id.* at xviii. Boston’s prominence both in relation to Cohen and more generally in the area of professional ethics and regulation is further illustrated in Henry W. Jessup’s Foreword to the revised edition of Cohen’s book. See Henry W. Jessup, *Foreword* to JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* (rev’d 1924). Boston’s name and work are mentioned at the start of the second paragraph of the Foreword; in fact, Boston’s is the only name other than Cohen’s to appear at all in the Foreword. See *id.* at i.

14. COHEN, *supra* note 1, at 159 (quoting Charles A. Boston, *Address on the Proposed Code of Professional Ethics*, delivered before New York County Lawyers’ Association, Oct. 6, 1910, at 30).

15. *Id.* at 160. In a footnote, Cohen lists the names of some members of the Group, who were “not fearful of signing their names” to one of the Group’s proposals, *id.* at 161, including Everett V. Abbott, Albert Sprague Bard, Charles A. Boston, Stewart Chaplin, Julius Henry Cohen, Joseph E. Corrigan, Abraham L. Gutman, Henry W. Jessup, Laurence Arnold Tanzer, and Edmond E. Wise. See *id.* at 161 n. Cohen later identified additional members of the Group, including Paul Fuller, Dean George W. Kirchwey, and Professors Nathan Abbot and Ralph W. Gifford. See JULIUS HENRY COHEN, *THEY BUILT BETTER THAN THEY KNEW* 37 (1946).

16. COHEN, *supra* note 1, at 160.

17. *Id.* at xvii.

18. Charles A. Boston, *A Code of Legal Ethics*, 20 *GREEN BAG* 224 (1908), cited in COHEN, *supra* note 1, at xvii, n.

19. Boston, *supra* note 18, at 226.

20. See *supra* text accompanying notes 6-8.

commercial craft had not destroyed notions of ethical standards.”²² Likewise, in an analysis of conditions in “the largest cities,” Boston declares that in New York, “many men select the practice of law as a business and some are, I fancy, ignorant of ethical standards; success as they define it is the only standard that they know.”²³ Again, Boston regrets that “the Bar is too numerous and too heterogeneous for any central influence.”²⁴ Finally, in listing “forces working for deterioration,” Boston includes “the ambitious and intellectual capacity of Oriental immigrants, with no apparent conception of English or Teutonic ideals.”²⁵

As is clear from similar remarks expressed by others in different contexts, these statements are indicative not only of nativism but of an openly anti-Semitic attitude that was not uncommon among leaders of the organized bar. Just a few years after the appearance of Boston’s article, Walter George Smith, in the Annual Address of the Chairman of the Section on Legal Education of the American Bar Association, echoed Boston’s sentiments in describing the “misfortune” resulting from “the mixed character of our population and the steady influx of races that have none of the traditions that centuries have handed on to those who have inherited our ancient ideals of private and public honor.”²⁶ Using many of the same code words through which Boston referred to Jewish lawyers, Smith speaks of “ambitious youth” and voices regret for “not [having] succeeded in keeping undesirable men from the bar by the intellectual test—at least not in the larger cities.”²⁷ In sum, according to Smith, “it is the universal observation that a class of practitioners have come to the bar

21. Boston, *supra* note 18, at 228.

22. *Id.* at 226. As is clear from the context of these statements, Boston and others used the term “races” as a reference to individuals of various religious, ethnic, and national origins other than their own, rather than to African-Americans. It is unlikely that Boston would have been concerned about the admission of African-Americans to the bar, if only because at that time, “overt discrimination caused the profession to include almost no blacks.” George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. OF LEGAL EDUC. 103, 109 (2003). As one scholar explains,

[t]he racist statements do not specifically focus on blacks, but instead focus on Jews and other ethnic minorities. This does not mean that blacks were despised any less than ethnic minorities, as the ABA’s prohibition of black members indicates. It suggests only that ethnic-minority lawyers were a specific focus because there were more of them.

Id. at 110-11.

In fact, the “tiny number of black lawyers in the country” in 1900 numbered only 730, representing .5 percent of the profession at a time when African-Americans comprised 11.6 percent of the population in the United States. ABEL, *supra* note 4, at 99. There was little change ten years later, when African-Americans comprised 11.1 percent of the total population and the number of African-American lawyers remained a very low 795, representing .7 percent of the profession. *Id.* at 99-100.

23. Boston, *supra* note 18, at 227.

24. *Id.*

25. *Id.* at 228.

26. Walter George Smith, *Annual Address of the Chairman of the Section on Legal Education of the American Bar Association*, 3 AM. L. SCHOOL REV. 367, 373-74 (1913).

27. *Id.* at 370.

... who are totally lacking in the high professional feeling that has been our tradition, whose objects are purely commercial, but who never fail in any intellectual tests that may be applied to them.”²⁸

Two years later, again addressing the ABA, Smith apparently found it unnecessary to cover his anti-Semitism with even the thinnest of veils, dispensing with code words and plainly stating that: “We have in the Eastern cities many representatives of the most ancient race of which we have knowledge coming up to be admitted to the practice of the law. They are gifted with a marvelous intellectual ability and great power of concentration. They exercise extreme self-denial in overcoming their environment of poverty. Frequently it has been my lot to see men of that character who are surprised when informed that they have done anything wrong.”²⁹

Moving from anti-Semitism to an apparently broader form of nativism, Smith adds that “those who come to the bar without the incalculable advantage of having been brought up in the American family life can hardly be taught the ethics of the profession as adequately as we desire.”³⁰ Finally, Smith connects these attacks to a more general “truism among us who practice in the larger cities . . . that there has come a change in the tone of the profession, a lowering of the standards, a commercializing.”³¹

Although he agreed with the assessment—which forms the basis of his book—that commercialization of legal practice had reduced law from a profession to a business, Cohen’s rhetoric did not betray the biased sensibilities exhibited by his friend and colleague Boston, by Smith, and by many others in the legal establishment.³² In fact, Cohen’s approach presents a striking and telling contrast when juxtaposed against one of the

28. *Id.* at 370-71.

29. *Joint Meeting of Bar Examiners and the Section on Legal Education of the American Bar Association—1915*, 4 AM. L. SCHOOL REV. 31, 32 (1915) (remarks of Walter George Smith).

30. *Id.*

31. *Id.* The aim of these lengthy quotations in the text is not simply to reiterate the phenomenon, already documented extensively by others, of nativist and anti-Semitic rhetoric among leaders of the organized bar in the early twentieth century. *See, e.g.*, AUERBACH, *supra* note 4, at 99-101; STEVENS, *supra* note 4, at 100-101, 176. Indeed, in a review of Auerbach’s book, one scholar wrote: “Of Auerbach’s insistent discussion of anti-Semitism in the profession, too much can be and probably has already been made.” Botein, *supra* note 9, at 71. Rather, the quotations from Smith provide a context through which it may be clearly established that the seemingly opaque rhetoric of friends and allies of Cohen, such as Boston, was indeed unmistakably anti-Semitic in its meaning and intent.

32. Boston’s open expressions of anti-Semitic sentiments are particularly striking in light of his close relationship with Cohen and the extensive references to his work in Cohen’s book, including a citation to the very piece containing anti-Semitic remarks. Yet, Boston was not the only example of a prominent lawyer who was cited by Cohen despite also engaging in nativist rhetoric.

For example, Cohen repeatedly relies on an address by George Wickersham, former Attorney General of the United States who served as President of the Association of the Bar of New York and head of the firm Cadwalader, Wickersham & Taft. *See* COHEN, *supra* note 1, at 257, 264, 271 (quoting George W. Wickersham, *Address on “Bar Associations—Their History and Their Functions,”* NEW YORK LAW JOURNAL, Nov. 25, 1914). While Cohen clearly valued Wickersham as a powerful ally in their shared opposition to the

most infamous examples of anti-Semitic rhetoric among leaders of the organized bar. In an address to the Section of Legal Education and Admissions to the Bar, presented at the 1929 annual meeting of the American Bar Association, Henry S. Drinker, who was “long regarded as the bar’s leading authority on lawyers’ ethics,”³³ matched and surpassed many of his predecessors in producing a particularly virulent combination of classist, nativist, and blatantly anti-Semitic language.

Drinker first repeats almost verbatim some of the charges and code words uttered by Smith and Boston, describing “these fellows, that came up out of the gutter and were catapulted into the law, [who] have done the worst things and did not know they were doing wrong.”³⁴ As Drinker saw it, “[t]hey were merely following the methods their fathers had been using in selling shoe strings and other merchandise, that is the competitive methods they use in business down in the slums.”³⁵ Drinker concludes that those “who did not associate with the American boys [] were not apt to realize they were doing anything wrong.”³⁶

Like Smith, Drinker moves from code words to open expressions of anti-Semitism, recalling that during his service on the grievance committee in Philadelphia, “of the men who came before us who had been guilty of professional abuses, an extraordinarily large proportion were Russian Jew boys.”³⁷ Drinker then proceeds with a lengthy depiction of “the

commercialization of legal practice, Cohen would not seem to have approved of Wickersham’s later remarks regarding “a pestiferous horde” of aspiring lawyers whose spoken English “is of the most imperfect character” and who lack “the faintest comprehension of the nature of our institutions, or their history and development.” See AUERBACH, *supra* note 4, at 121.

Likewise, Cohen quotes from an influential 1876 address delivered by Lewis L. Delafield, chairman of the Committee on Admission to the Association of the Bar of the City of New York, who, in a call for higher standards of admission to practice, offered an early critique of the “mistaken analogy between the profession of law and trade.” See COHEN, *supra*, at 114. Drawing in part on Delafield’s arguments, Cohen identified higher standards of admission to the bar as one of the central aspects of his vision of law as a profession rather than a business. See *id.* at 112-41. Yet, in addition to his delineation of the trade/profession dichotomy, Delafield’s influence on the bar may have also extended to his use of the kind of nativist rhetoric that Cohen appears to have studiously avoided. In the same 1876 address, using language that would later become a standard component of the anti-immigrant sentiment expressed by Boston, Wickersham, and many others, Delafield describes “the introduction to the bar of a mass of persons . . . with barely the rudiments of English grammar, sometimes without being able to pronounce the language.” Lewis L. Delafield, *The Conditions of Admission to the Bar*, 7 THE PENN MONTHLY 960, 964 (1876).

33. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 3 (2d ed., 2002). For a discussion of Drinker’s views and rhetoric, see Alfred W. Putnam, Mr. Drinker’s Desk (unpublished essay on file with author).

34. Remarks of Henry S. Drinker, *Proceedings of the Section of Legal Education and Admissions to the Bar*, REPORT OF THE FIFTY-SECOND ANNUAL MEETING OF THE A.B.A. 622 (1929). At the conclusion of his remarks, Drinker repeated the reference to those who “came right up out of the gutter into the Bar, and did not realize what they were doing, that they were doing wrong.” *Id.* at 624.

35. *Id.* at 622.

36. *Id.* at 623.

37. *Id.*

Russian Jews, and the other foreign Jews too, who come over to this country . . . all afire with a tremendous ambition that somebody in their family shall make good.”³⁸ According to Drinker, “if they have four or five boys and two or three girls, . . . they pick out the one that is the smartest, and they all make a sacrifice to let that boy get an education.”³⁹ Therefore, Drinker continues, “with the tremendous pressure back of him to succeed, [the boy] has to make good; the whole family have been sacrificing themselves so he can.”⁴⁰ As a result, Drinker laments, “he comes to the Bar with no environment at all except that out of which he came . . . he has not had a chance to absorb the American ideals.”⁴¹ In response, Drinker asserts that “the moral of this . . . is to give these foreign boys who are being admitted in droves to the Bar in Philadelphia, and I am sure in New York, a chance to absorb American ideals.”⁴² Drinker concludes his remarks with the declaration that “[i]f such a boy had a chance to mix with American boys and to absorb the American boy’s idea of fair play, at least he would have known when he was doing wrong.”⁴³

It is difficult to assess the accuracy—or, if accurate, the implications—of Drinker’s statistics or his sociological analysis. However, to the extent that a substantial proportion of lawyers facing professional discipline in Philadelphia may have in fact been immigrants, whatever the reason, it is likely that a similar phenomenon occurred in New York. As Chairman of the Committee on Unlawful Practice of the Law of the New York County Lawyers’ Association, Cohen undoubtedly would have been familiar with these circumstances. Yet, in the course of numerous and varied scenarios of disbarment documented in detail throughout his book, Cohen does not mention class, religion, or national origin. Moreover, although in a different context, Cohen does make reference to the professional abuses of Russian immigrant lawyers, his analysis of the causes of this behavior is decidedly and tellingly different from Drinker’s.

Unlike Drinker’s portrait of Russian immigrants, which may fairly be characterized as impressionistic and anecdotal at best, Cohen offers his own perspective only after careful consideration of the Russian legal system that immigrants experienced prior to their arrival in the United States. Cohen briefly discusses Russian immigrant lawyers in the context of a broad and extensive survey documenting the international prevalence of the notion of the lawyer as an officer of the court.⁴⁴ Quoting a study of the

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 623-24.

43. *Id.* at 624.

44. See COHEN, *supra* note 1, at 44-98. The countries surveyed include China, Japan, Greece, Rome, France, Spain, Italy, Russia, Germany, Austria-Hungary, and England. Cohen concludes that, with the exception of China, “the idea that the Bar is a profession and not a business . . . is embedded in the laws of all the lands.” *Id.* at 99.

Russian legal system, Cohen describes the Russian bar of the late nineteenth century as “animated by a rapacious commercial, mercenary spirit.”⁴⁵ Specifically, Cohen cites a number of fraudulent practices among lawyers, including the use of “dishonest means for raising the price of a fee” and demanding “a large sum for secret purposes—that is to say, for ‘greasing the palm’ of influential officials.”⁴⁶ In short, “[t]he old belief that litigation and criminal procedure are a kind of difficult game, in which victory must always be on the side of the most dexterous player, irrespective of justice and equity, and that bribery and back-door influence are indispensable for success, is still deeply rooted in the popular mind.”⁴⁷ As a result of these circumstances, “among the people, especially the uneducated mercantile classes,” there arose “a blind, childish faith in the omnipotence of the most celebrated advocates, and some of these, dexterously using this faith for their own ends, have succeeded in amassing large fortunes in an incredibly short space of time.”⁴⁸

It is against this backdrop that Cohen suggests, “[w]e begin now to understand why the Russian immigrant, coming during the eighties and nineties direct from their atmosphere of trickery, bribery, professional misconduct, judicial dishonor, and barter and sale of justice for money, upon arrival in America looked for a similar kind of administration of justice.”⁴⁹ Cohen concludes that “[t]he Russian immigrant of 1890, 1900, or 1910, who drew upon his home experience for ideals of our profession was certain to think of us all as purchasable and purchasable for any kind of service.”⁵⁰

A close look at Cohen’s and Drinker’s statements reveals that, again, Cohen did not disagree in principle with many of the claims of those who advanced a nativist brand of professionalism. Indeed, the substance of Cohen’s analysis anticipates—and precedes by thirteen years—Drinker’s concern that Russian immigrant lawyers may exhibit a tendency to engage in professional misconduct as a direct result of their exposure to the mores of Russian legal practice rather than American ideals. At the same time, however, any similarity in substance only highlights further the difference in discourse and the corresponding underlying attitude reflected in Cohen’s approach to professionalism. In sharp contrast to Drinker’s reliance on anti-Semitic stereotypes and speculation, Cohen makes no reference to religion and avoids anti-immigrant rhetoric; instead, Cohen offers a nuanced and largely sympathetic portrait of Russian immigrants in an attempt to understand the immigrant experience and its relationship to the practice of law.⁵¹

45. *Id.* at 73 (quoting SIR DONALD MACKENZIE WALLACE, RUSSIA 569 (1881)).

46. *Id.* (quoting WALLACE, *supra* note 45).

47. *Id.* at 73-74 (quoting WALLACE, *supra* note 45).

48. *Id.* at 74 (quoting WALLACE, *supra* note 45).

49. *Id.*

50. *Id.*

51. In fact, Cohen pictures the Russian experience as a model for potential progress in the American bar, quoting a 1915 study finding that “on the whole the professional standing of

It is possible to suggest that Cohen's resistance to anti-Semitic and nativist statements—and his apparent rejection of the sentiments underlying their expression—resulted from a conscious recognition by Cohen of his own Jewish heritage and a corresponding unwillingness to appeal to prejudice in support of his own arguments. Yet, such a hypothesis, though certainly plausible, may fail to recognize fully the complex variety of Jewish identity, in particular as manifested in New York in the early part of the twentieth century.

First, it is not clear to what extent Cohen in fact valued either his Jewish heritage or any connection to the broader Jewish community.⁵²

the lawyers in Russia is higher than it is here." *Id.* at 75 (quoting a study by Dr. Isaac A. Hourwich, a member of the New York Bar). Thus, Cohen concludes that "[i]n thirty-five years" since the earlier study, "the Bar in Russia has lifted its head out of the mire and muck of despotism, bureaucracy, chicanery, and adultery." *Id.* Turning to the state of the American bar, Cohen asserts that "[t]he task bulks large before us, but most assuredly not so large as it bulked before the young Russian Bar thirty years ago. And the Russian lawyers took their lives in their hands, for the honor of their profession." *Id.* at 216.

As a similar indication of his attitude toward Russian immigrants, Cohen later dedicated a chapter of his memoirs, *see* COHEN, *supra* note 15, at 201-14, to a portrait of Morris Hilquist, whom he described in positive terms as a "Jewish shirtmaker from Riga who rose to leadership at the Bar." *Id.* at 214.

52. On some level, the focus of Cohen's legal work, involving "the new immigrant groups, unionism, the use of arbitration in industrial pursuits, and public service as counsel to various administrative agencies," was similar to that of many leading Jewish lawyers at the time, *see* ANDREW L. KAUFMAN, CARDOZO 99 (1998), and may have grown out of a sense of Jewish values and responsibility to Jewish communal needs. Nevertheless, of the many organizations in which Cohen held membership and positions of prominence, none was officially or expressly related to the Jewish community. *See J.H. Cohen Dies; Ex-Counsel to Port Authority*, N.Y. HERALD TRIBUNE, Oct. 7, 1950, at 12; *Julius Cohen, 77, Lawyer 53 Years*, N.Y. TIMES, Oct. 7, 1950, at 19; *Necrological: Julius Henry Cohen*, NEW YORK LAW JOURNAL, Oct. 18, 1950. In fact, some of these organizations, such as the American Bar Association and the Association of the Bar of the City of New York, were at times openly antagonistic toward Jewish lawyers. *See AUERBACH, supra* note 4, at 63.

To the extent that Cohen's attitude toward his Jewish heritage may be gleaned from his later writings, it may best be characterized as ambivalent. In his 1946 book—a memoir of sorts—Cohen describes repeated instances of working with members of the Jewish community. In addition, he exhibits a knowledge of certain areas of Jewish law, *see* COHEN, *supra* note 15, at 167, including references to works that are printed in Hebrew, *see id.* at 352-53 n.3, which he cited in an argument before the United States Supreme Court. *See id.* at 171.

On the other hand, Cohen writes that "Father always thought that he had made a mistake in adopting [the] name, Cohen, instead of [the] name, Garnot[, and h]e thought I should not repeat the error." *Id.* at 15. In addition, though he does not mention Jewish religious observance, Cohen writes with great relish of the "first devilled pigs' feet" he ate, *id.* at 23, and his "first taste of roast suckling pig." *Id.* at 109. While these passages may seem inconsequential, Cohen was clearly self-conscious about the implications of having eaten these foods, as in the same chapter containing the latter reference, Cohen relates the story of a breakfast between Governor Al Smith and Judge Joseph Proskauer at which, Cohen notes, despite serving as Chairman of the American Jewish Committee, the Judge ordered ham and eggs. *See id.* at 125 and n.*.

Moreover, on the first page of his memoirs, Cohen adopts the position of Dr. Felix Adler, founder of the Society for Ethical Culture, that "all peoples" are "God's Chosen People," *Foreword to id.*, an apparent rejection of the notion of any unique role for the Jewish nation. Indeed, Cohen apparently felt a more committed allegiance to the Society for Ethical Culture than to his Jewish heritage. It is striking that in the opening of his 1916 book, Cohen

Second, as historians of the legal profession have documented, among more successful and established Jewish lawyers it was not uncommon “to espouse and exemplify the same professional values favored by elite Protestants,” apparently including, at times, nativist attitudes directed at Jewish immigrants.⁵³ Indeed, Auerbach quotes the remarks of one “successful Jewish immigrant lawyer” who, in 1929, referred to attorneys who “could not speak the King’s English correctly” and who “by character, by background, by environment, by education were unfitted to be lawyers.”⁵⁴

acknowledges Dr. Adler alongside his acknowledgment of the influence of Charles Boston. See COHEN, *supra* note 1, at xviii. In fact, it seems that Cohen may have considered Adler’s influence of greater significance, as he emphasizes that Boston’s work grew out of Adler’s initial suggestion that ethics must be more carefully examined and incorporated into professional life. See *id.* at xvi, 158.

Although Adler was a descendant and relative of important leaders of the Jewish community, including his father, whom many expected him to succeed as rabbi of Temple Emanuel in New York, see HORACE L. FREISS, FELIX ADLER AND ETHICAL CULTURE: MEMORIES AND STUDIES 16-20, 36-38 (Fannia Weingartner ed., 1981), in founding the Society for Ethical Culture, Adler consciously broke away from Jewish religious thought and tradition. As Adler himself later put it, his “continued intellectual development . . . led me to separation from the Hebrew religion, the religion in which I was born, and to the service of which as a Jewish minister it was expected that I should devote my life. . . . [T]he separation was decided on by me, and became irremediable.” FELIX ADLER, AN ETHICAL PHILOSOPHY OF LIFE PRESENTED IN ITS MAIN OUTLINES 13, 26 (1918)

53. Botein, *supra* note 9, at 71-72. Indeed, it appears that it was not uncommon for statements directed against Jewish lawyers to be couched in terms of remarks allegedly conveyed by other Jewish lawyers.

For example, in an address at the 1928 annual meeting of the Pennsylvania Bar Association, one speaker stated:

[A]t the suggestion of an eminent Jewish member of the Philadelphia judiciary a dinner of Jewish members of the Philadelphia Bar was held recently and attended by over four hundred members. [It was] stressed . . . that in the interest of the Jewish members of the Philadelphia Bar, the profession as a whole, and the public, the ambition of unworthy young men to enter the profession would be discouraged.

Walter C. Douglas, Jr., *Pennsylvania’s New Requirements for Bar Admission*, 14 A.B.A. J. 669, 673 (Jan. 1928).

Similarly, Drinker prefaced his remarks, see *supra* text accompanying notes 34-43, with the following statement: “I have known so many splendid Jewish lawyers and judges and had such admiration for them, I could not see why such a large proportion [of lawyers who had been guilty of professional abuses] were this way. I asked some of my good friends among the Jewish lawyers why this was, and they told me. . . .” *Id.* at 623.

Although on some level these claims seem to smack of an attempt to defuse charges of anti-Semitism through a defense akin to the insistence that “some of my best friends are Jewish,” they do seem to carry a ring of truth, particularly in light of the documented attitudes that existed among some Jewish lawyers at the time.

54. AUERBACH, *supra* note 4, at 49 & 315 n. 18 (quoting Isidor J. Kresel, *Ambulance Chasing, Its Evils and Remedies Therefore*, 52 NEW YORK STATE BAR ASSOCIATION, PROCEEDINGS 337-39 (1929)). Auerbach quotes further from Kresel’s unpublished autobiography, which describes America as “my passion and my religion,” *id.* at 315 n. 18 (quoting ISIDOR J. KRESEL, AUTOBIOGRAPHY (unpublished 1955)), and which is, according to Auerbach, “filled with invective against radicals and immigrants less assimilated than he was.” *Id.*

In a somewhat related example, one scholar recently noted the “irony” of Judge Benjamin Cardozo, who was Jewish, “railing upon an ‘unscrupulous minority’ of lawyers.” See Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation—Who Should Control Lawyer Regulation, Courts, Legislatures or the Market?*, 37 GA. L. REV. 1167, 1195 n.94

In light of the presence of these attitudes even among some Jewish lawyers, the absence of such nativist rhetoric on the part of Cohen, who was born in the United States and enjoyed positions of prominence among the elite legal establishment,⁵⁵ would appear to take on an even greater significance. Ultimately, though perhaps influenced in part by his own religious background, Cohen's approach to issues of ethnicity and national origin appears to be based in profound and fundamental aspects of his unique and more inclusive vision of professionalism.

(2003) (quoting *Karlin v. Culkin*, 162 N.E. 487, 488 (N.Y. 1928)).

The phenomenon of bias against some segments of the Jewish population on the part of more "Americanized" segments is dramatically portrayed in the landmark 1947 movie "Gentlemen's Agreement." In the movie, a magazine reporter investigating anti-Semitism determines that, because he is not Jewish, in order to discover the true nature of anti-Semitism, he must identify himself as Jewish and experience the reactions of others. As the movie develops, the reporter is shocked at the extent and depth of anti-Semitic feelings among those who otherwise seem to embody enlightened sophistication. In addition, in one powerful scene, he is horrified by a conversation in which another employee at the magazine reveals to him that she is Jewish and then proceeds to make a derogatory remark about Jewish immigrants.

Descriptions of the founding of the Society for Ethical Culture indicate that, although many of the founders were Jewish, they were members of more established and successful segments of the Jewish community and had minimal association with or concern for the immigrant classes:

The German-Jewish congregation of Temple Emanu-El were the successful immigrants who had made their place in business, finance, and the professions. A vast gulf separated them from the immigrants of impoverished Jewish refugees who flooded America from middle Europe in the latter decades of the nineteenth and early part of the twentieth centuries. Financially and socially the congregation of Temple Emanu-El constituted a German-Jewish establishment. Not for them the swelter of West Side slums, the sweatshops, the struggles of the dignity of labor, the experimentation with left-wing radicalism. The names that appeared on the roster of the first Ethical Society . . . included Seligman, Sutro, Price, Morgenthau, and Bamberger.

HOWARD B. RADEST, *TOWARD COMMON GROUND: THE STORY OF THE ETHICAL SOCIETIES IN THE UNITED STATES* 20 (1969).

55. According to the criteria delineated by Professor Robert Gordon, Cohen would seem to qualify among the "superelite" of lawyers who entered practice in New York City between 1860 and 1910, on the basis of his "reputation among contemporaries as a leader of the bar" and his officership—or at least positions of leadership—in the Association of the Bar of the City of New York. 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: LAWYERS IN POST-CIVIL WAR AMERICA* 67 n.6 (Gerard W. Gawalt ed., 1984).

Nevertheless, unlike many of the other members of the legal elite, Cohen's vision of professionalism remained sympathetic to lawyers whom Gordon has elsewhere termed "the bottom of the hierarchy," typified as a "solo [or] small-firm practitioner[]" who was "a self-made son of 'an immigrant from Eastern Europe with little or no formal education,' the graduate of a low-prestige (often night or part-time) law school, and more likely Jewish than Protestant." Robert W. Gordon, *The Legal Profession*, in *LOOKING BACK AT LAW'S CENTURY* 314 (Austin Sarat et al., eds. 2002) (quoting JEROME CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* 3 (1962)). Indeed, it is specifically his reaction to many of these qualities that distinguished Cohen's form of professionalism from that of much of the legal establishment.

Classism

Another way Cohen distinguished his own vision of professionalism from that of many leading members of the early twentieth century bar was through his refusal to adopt classist rhetoric and attitudes. A prime example of such classism is found in the remarks delivered by Franklin M. Danaher at a 1911 ABA meeting.⁵⁶ Calling for stricter bar admission standards, Danaher observed the “curious fact in New York City” that educational standards required “all doctors to take four years in an approved medical school, dentists two years in a dental college, and horse doctors two years in a veterinary college,” but that the legislature was reluctant to impose similar educational standards for lawyers.⁵⁷ As a result, according to Danaher, a “festerling sore in the moral and economic profession in New York began to spread from the gutter.”⁵⁸

While Drinker and others attributed a rise in professional misconduct to the increasing presence of Jewish and other immigrant lawyers, Danaher spoke of “an economic question,” asserting that “[t]wo-thirds of the fraud and villainy among members of the bar comes from poverty.”⁵⁹ Thus, Danaher plainly declared that “[y]ou are not going to reach the best result in its full fruition unless you make it economically impossible for the great mass of young men to come to the [legal] profession.”⁶⁰ He concluded with the “economic argument” that “you can produce a moral and intelligent bar, by raising the standard, not only of education, but along economic lines, so that every Tom, Dick, and Harry cannot come to the bar.”⁶¹

The difference in discourse between Danaher and Cohen is instructive, again in part because of the many substantive similarities in their ideas. Like Danaher, Cohen expressed deep concern over admissions standards that he saw as an inadequate assessment of the applicant’s qualifications to practice law. Cohen relies on several reports of the ABA and other bar associations in surveying the loose standards of admission that prevailed in many states in the late nineteenth and early twentieth centuries.⁶² Moreover, though he references a 1914 report of the Minnesota Bar Association rather than Danaher’s remarks, Cohen’s findings about admission to the bar are identical to Danaher’s, emphasizing that “as much or more preliminary education is required for those who seek a license to practice medicine, dentistry, horse-doctoring, or nursing, than is required to secure a license to practice law.”⁶³

56. *Meeting of the Section of Legal Education of the American Bar Association—1911*, 3 AM. L. SCHOOL REV. 26 (1911) (remarks of Franklin M. Danaher).

57. *Id.* at 35.

58. *Id.* at 34.

59. *Id.* at 35.

60. *Id.*

61. *Id.*

62. See COHEN, *supra* note 1, at 112-141.

63. *Id.* at 129-30.

In fact, Cohen's criticism of the standards for bar admission is, in many ways, considerably harsher than Danaher's. Cohen sarcastically writes that unlike a lawyer's client, "the horses and mules of the Commonwealth of Minnesota . . . are not to be subject to the ministration of a person who had merely *studied* veterinary medicine for three years."⁶⁴ Unlike the lawyer, he observes, the horse-doctor must demonstrate having completed such studies "*efficiently and successfully*."⁶⁵ Highlighting this apparent anomaly, Cohen concludes that the closest parallel to the qualifications of the lawyer is found in the requirements of the horse-shoer, who must merely complete three years of training, without any obligation to demonstrate the attainment of even a minimal level of proficiency.⁶⁶

Nevertheless, despite the striking similarities between Cohen's and Danaher's views regarding bar admission standards, it is notable that, just as Cohen did not share the nativist and anti-Semitic attitudes of Boston and Drinker, he betrayed none of the classist attitudes of Danaher. Indeed, in sharp contrast to the economic arguments set forth by Danaher, Cohen insists in the conclusion to his book that "[i]n our country we shall never permit the bar to become recruited from the ranks of the sons of the wealthy alone."⁶⁷ Ultimately, Cohen emphasizes the ability of individuals to succeed regardless of their economic background, observing that "the passage through the universities and the law schools of poor men's sons shows clearly that these obstacles are overcome in our day as they were overcome in the past by men of real merit."⁶⁸

In an attempt to ascertain the genesis of Cohen's approach to the relationship of class to professionalism, it again seems plausible—and, in fact, in this case rather convincing—to attribute Cohen's attitudes to the influence of his own experience. Unlike many of the leaders of the bar who were products of the upper classes and elite law schools, Cohen was the son of a tailor, attended night school at both public high school and New York University Law School,⁶⁹ and, like those he described, overcame these

64. *Id.* at 130-131 (emphasis in original).

65. *Id.* at 130 (emphasis in original).

66. *Id.*

67. *Id.* at 317.

68. *Id.* Cohen thus declares that

the American law schools must never justify [Sir John] Fortescue's description of the Inns of Court of his day:

Nowe by reason of this charges, the children onely of Noble men doe studie the Lawes in those Innes. For the poore and common sort of the people, are not able to bear so great charges for the exhibition of their children. And Marchaunt men can seldome finde in their hearts to hinder their marchandise with so great yearly expenses.

Id.

69. Cohen's memoirs are infused with a sense of fondness in describing his modest economic upbringing. Cohen pictures in rich detail his father's tailor shop and the neighborhood in which he was raised, *see* COHEN, *supra* note 15, at 108-11, his education at the Thirtieth Street Evening High School *see id.* at 4, the bookkeeping course he took at the First Street Night School, *see id.* at 8, and the difficulties he encountered looking for legal work while in

obstacles to success through the merit of his academic achievements.⁷⁰

LEGAL EDUCATION, UNAUTHORIZED PRACTICE OF LAW, AND ECONOMIC PROTECTIONISM

Legal Education and Evening Law Schools

Indeed, the broader issue of evening law schools represents another central aspect of early twentieth century professionalism. In this area as well, Cohen's attitude diverged from those of many leaders of the elite bar with whom he was often associated and many of whose general views on legal education he shared and cited in his book. New York University, the law school Cohen attended, was one of a number of large urban law schools that offered instruction at night and were not members of the American Association of Law Schools.⁷¹ The prevalence of such schools produced continuous hostility on the part of both the faculty of elite law schools and the members of the elite legal establishment, whose attacks against night law schools were grounded in concerns over: the ethnic and class origins of night school students; the quality of education at the night schools;⁷² and economic competition between night schools and the elite law schools.⁷³ As in his discussions of professional misconduct, Cohen

law school. *See id.* at 6-7. He recalls that "[w]e never had a piano in my home and we never had any lessons in music . . . quite simply [because] we could not afford it." *Id.* at 62. In fact, he writes that "[t]he first time our family really had a bathroom was when we moved to 13 St. Marks Place—after I went to work at 55 William Street in 1894 and helped out in the family budget from the fifteen dollars a week." *Id.* at 238-39.

70. Cohen's record in the first year of law school, consisting of three grades of "A" and two grades of "B," earned him a tie for Second Honorable Mention. An identical set of grades in his second year earned Cohen a tie for First Honorable Mention. *See* School of Law Records of Admissions and Grades, 1891-1896, Record Group 22, Box 6 (New York University Archives, New York University Libraries). Finally, in his third year of law school, Cohen was awarded the Second Prize in the class, a ranking above Honorable Mention. *See* School of Law Prizes and Honors, 1885-1926, Record Group 22, Box 1, Folder 3 (New York University Archives, New York University Libraries).

71. *See* Harry First, *Competition in the Legal Education Industry* (1), 53 N.Y.U. L. REV. 311, 348 n.212 (1978).

72. These attacks were premised in part on the assumption that, due to their ethnic and class origins, the students who comprised the student body at the evening schools contributed to the supposed inferiority in the quality of education. The validity of such assumptions is belied by contemporaneous admissions policies adopted by elite law schools in an effort to limit the percentage of many of these same ethnic groups among the student population, notwithstanding admittedly superior academic qualifications. For example, in 1923, Dean Swan of Yale argued that too much emphasis on the grades of applicants in admission decisions would result in an increase in "foreign" students instead of those of "old American parentage," leading to an "inferior student body, ethically and socially." Yale Minutes, Dec. 20, 1923, cited in John Henry Schlegel, *American Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, 472 n. 69 (1979).

73. *See* STEVENS, *supra* note 4, Ch. 6; JOSEPH T. TINNELLY, PART-TIME LEGAL EDUCATION: A STUDY OF THE PROBLEMS OF EVENING LAW SCHOOLS, Ch. 1 (1957); First, *supra* note 71, at 348-49 & n.216; George B. Shepherd & William G. Shepherd, *Scholarly Restraints?* ABA

agrees with and relies on some of the criticisms and concerns that others leveled against night schools. Nevertheless, the significant differences in both the substance and rhetoric of Cohen's arguments again reflect the unique nature of his approach.

First, it seems highly unlikely that Cohen would have shared the views of Henry Drinker, for example, regarding the economic and ethnic composition of the student body at night schools. As part of his purported portrait of the Jewish immigrant law student,⁷⁴ alongside his nativist and anti-Semitic depiction of numerous other alleged defects in both character and education, Drinker adds disparagingly that "the boy comes on, works in a sweat shop or somewhere in the daytime and then studies law at odd times mostly."⁷⁵ The absence of expressions of class or ethnic bias throughout Cohen's book, combined with his insistence on the ability of "poor men's sons" to achieve success in law school, demonstrates that Cohen would have agreed with neither the substance of nor the rhetoric used to espouse such negative attitudes toward night schools.⁷⁶

Accreditation and Legal Education, 19 CARDOZO L. REV. 2091, 2114-2119 (1998). Stevens describes the attack on night schools as "a confusing mixture of public interest, economic opportunism . . . ethnic prejudice," and "'professional pride'" that "had its roots in the 'culture of professionalism' of the late nineteenth century." STEVENS, *supra*, at 101.

74. See *supra* text accompanying notes 34-43.

75. Drinker, *supra* note 34, at 623. In his 1914 address as president of the AALS, Harry S. Richards likewise appealed to nativist and anti-Semitic sentiments as part of an attack on night law schools. See Harry S. Richards, *Address of the President: Progress in Legal Education*, AALS PROCEEDINGS 60 (1915). Richards declares that "[i]f you examine the class rolls of the night schools in our great cities, you will encounter a very large proportion of foreign names[, including e]migrants and sons of emigrants." *Id.* at 63. In a more pointed and apparently more directly anti-Semitic remark, Richards employs his own selection of code words, in place of terms such as "intellectual ability" and "ambition" favored by others. See *supra* text accompanying notes 22-31. Richards describes "a host of shrewd young men, imperfectly educated, crammed so they can pass the bar examination, all deeply impressed with the philosophy of getting on, but viewing the Code of Ethics with uncomprehending eyes." Richards, *supra*, at 63. Similar to later assertions by Drinker, see *supra* text accompanying notes 34-43, Richards concludes that "[i]t is this class of lawyers that cause the Grievance Committees of Bar Associations the most trouble." Richards, *supra*, at 63.

76. Notwithstanding the attitudes of Drinker and others, class prejudice of this kind was far from universal among leaders of the organized bar, including some of whom Cohen considered to be his friends and allies. For example, in the course of his description of the work of the "Group," see *supra* text accompanying notes 14-16, Cohen discusses Everett V. Abbot, one of Cohen's primary mentors both in law school and in practice. See COHEN, *supra* note 15, at 1-14. Cohen writes that Abbot's book, *JUSTICE AND THE MODERN LAW* (1913), "was an outcome of papers presented by [Abbot] and dissected by his colleagues in the Group, tempered somewhat by their criticisms." COHEN, *supra* note 1, at 161. Though not quoted by Cohen, in the introduction to this book, Abbot emphasizes that "[i]n our country . . . [w]e have no hereditary or privileged classes, and the molecular movement of individuals in the mass permits the railsplitter to become president, and, more than that, permits him to become an educated gentleman." ABBOTT, *supra*, at ix.

Similar views were shared by George Wickersham, whose work was also cited by Cohen and who was one of the leaders of the elite legal establishment. In contrast to the nativist remarks he expressed in other contexts, see *supra* note 32, Wickersham insisted that because "[u]niversities and colleges abound in the United States[, n]o young man of intelligence, sincerely desirous of making his way, need go without a college education for lack of means."

Second, although Cohen considered the decline in the quality of law schools to be one of the primary causes of the broader decline of the law as a profession, unlike many of the leaders of the bar, he did single out—or even mention—night law schools as representative of the problems of legal education. As part of the chapter of his book describing a “thirty years’ war for preparedness” among lawyers,⁷⁷ Cohen laments the low standards that prevailed for many years in most law schools, including an absence of any requirement of college education as a prerequisite for admission.⁷⁸ Although he notes the changes that had occurred over time, quoting Henry Bates’s 1914 study finding that “all or nearly all of the university law schools of the country are now, or within two years will be, requiring at least two years of college work,”⁷⁹ Cohen also cites the study’s documentation of a proliferation of “proprietary schools run for profit . . . which grant diplomas on low standards of admission and work.”⁸⁰

Significantly, however, despite borrowing extensively from two paragraphs of Bates’s study, at times quoting verbatim, Cohen omits from his discussion the section of these same paragraphs specifically addressing the problems of night schools:

Many of these schools are night schools. By this it is not intended to say that all night schools are bad; but obviously under ordinary conditions at least, a school conducted upon the night basis, whose students and faculty are engaged in other work during the larger portion of their working hours, can not hope to and in fact does not do as much work or as good work as the better day schools are accomplishing.⁸¹

Here again, Cohen’s personal experiences appear to have greatly informed his perspective, leading to views that differed substantially from those of most of the leaders of the bar. It seems that, as a successful product of New York University’s evening division, Cohen simply could not have agreed with such negative assessments of the level of education at

George W. Wickersham, *The Moral Character of Candidates for the Bar*, 9 A.B.A. J. 617, 619 (1923). Moreover, Wickersham allows that for “the exceptional man, who has the intellectual capacity, but for some reason cannot avail himself of the opportunity [of education], provisions may readily be made that he shall demonstrate that, while he has not been able to attend college, he has acquired by other methods the education he would have received had he attended college.” *Id.*

While Wickersham’s comments were presented as part of a defense of higher educational standards for admission to the bar, others insisted that these restrictions were themselves a form of class legislation. In the impassioned words of one Mississippi judge, such restrictions “create by law a favored class of those who have the good luck to be born well off financially” and represent “the fruits of undemocratic propaganda gotten out by the endowed colleges to limit those who enter the learned or ‘genteel’ profession to the sons and daughters of the rich.” Geo. H. Ethridge, *Unjust Standards for Law Practice*, 2 Miss. L.J. 276, 277 (1929).

77. COHEN, *supra* note 1, at 125-41.

78. *See id.* at 135-38.

79. *Id.* at 138 (quoting Henry M. Bates, *Recent Progress in Legal Education*, Chapter X, UNITED STATES BUREAU OF EDUCATION REPORT, 1914, at 227).

80. *Id.*

81. Bates, *supra* note 79, at 227.

night law schools.⁸² In fact, in a 1920 article offering a strong defense of evening law schools, Maurice Wormser relies on a 1912 letter that Cohen wrote to Dean Ashley of NYU to support the proposition that many evening students “had attained the utmost professional success [and i]f not for the existence of evening law schools, these men would not be practicing law to-day.”⁸³

With respect to the influence of the NYU experience in particular, it may be notable that the establishment of the evening division was the result of the 1895 merger that consolidated the University with the Metropolis Law School, an evening school that had higher standards of admission and study than the day division of the University’s law school.⁸⁴ Moreover, as Wormser observed, among the two divisions at NYU Law School, “the evening students are, on the whole, ahead of the day students,” as evidenced by Harvard Law School’s policy granting preferential standing to students of the night school over those in the day department.⁸⁵

82. Indeed, Cohen would later offer highly positive reflections on his own years of education at a night law school, finding beneficial many of the same aspects of the experience that Drinker and Bates disparaged. Specifically, according to Cohen, evening law students

knew first hand the subjects of *notes*, *bills*, and *sales* and other legal situations in the business world. Moreover, they met people of all kinds, races and previous conditions of servitude, and, hence, while not realizing it, were getting educated in the school of life—an education quite as essential for their vocation as Greek or Latin.

COHEN, *supra* note 15, at 5 (emphasis in original).

In contrast, Cohen offers a rather negative depiction of a law clerk at the first firm where he worked, whom he identifies only as “H.” *Id.* at 9. H, who “came from Harvard,” was “a little too highhat and collegiate for me” and “looked down on a male stenographer or typist who had no comparable pedigree.” *Id.*

83. I. Maurice Wormser, *The Problem of Evening Law Schools*, 4 AM. L. SCHOOL REV. 544, 546 (1920) (citing letter of Julius Henry Cohen, Esq., to Dean Ashley, dated Oct. 8, 1912).

84. See LESLIE JAY TOMPKINS, *THE NEW YORK UNIVERSITY LAW SCHOOL: PAST AND PRESENT* 40-41 (1904).

85. Wormser, *supra* note 83, at 546. Nevertheless, the standards for admission to NYU Law School would not fully have satisfied Cohen’s criteria; even after the standards were raised in 1900, the only educational prerequisite was a high school graduation. See TOMPKINS, *supra* note 84, at 47.

It may also be worth noting that Cohen expresses some ambivalence toward the primacy of formal education. In his survey of the state of the bar in countries throughout the world, Cohen acknowledges that the high educational standards of the German bar “give the lawyers and judges a more thorough and more scientific knowledge of the law than we get in our own country.” COHEN, *supra* note 1, at 79. However, Cohen quotes the finding that, “[o]n the other hand, the German system excludes necessarily a great deal of talent which would more than make up for the defects of education by native shrewdness and experience.” *Id.* (quoting ERNEST FREUND, *THE COUNSELOR* 135). In addition, at the close the chapter of the book addressing legal education, Cohen quotes the observation of the Warden of Sing Sing that:

The most dangerous man is not the criminal who comes up from the crowd. It is the educated criminal who, because of his education and his craft, and the misuse of his opportunities for good who is the real menace to society. The most monstrous and most contemptible man I have ever met, either in prison or out, is a college graduate.

Id. at 141 (quoting NEW YORK TRIBUNE, Dec. 13, 1915).

Finally, Cohen seems similarly sympathetic to concerns over the economic competition that “proprietary schools run for profit” posed to law schools affiliated with universities.⁸⁶ In this area too, however, Cohen articulates his own view in a way that reflects more broadly his unique notion of professionalism. Cohen again quotes Bates, who asserted that:

Unless this tendency is checked, much of the good that the better university schools are attempting to accomplish, at the loss in students and money to themselves, will be offset by the schools run mainly for revenues only. This is no idle speculation, but a real condition, which must be grappled with vigorously and promptly.⁸⁷

Clearly, Cohen found compelling Bates’s argument for the importance of ensuring the economic survival of “better” law schools.

Nevertheless, Cohen’s perspective may be distinguished from Bates’s on the basis of at least two salient features of his analysis. First, Cohen again makes no reference to night schools, even though they seem to be among the chief targets of this area of Bates’s study. Second, Cohen’s objections to the economic challenges presented by schools with lower educational standards are not grounded merely in a call for economic protectionism, with the intent of preserving the viability of more elite schools. Rather, in Cohen’s framework, the significance of this issue seems largely to lie in its relevance to his central thesis that law has become more a business than a profession. For Cohen, the increased economic competition among law schools in pursuit of profit represents yet another manifestation of the commercialization of the law. Thus, he rhetorically asks in concluding his analysis, “[w]hy” should such economic competition be opposed “if ours is a Business—and not a Profession?”⁸⁸

Suppression of Unauthorized Practice of Law

Cohen’s dedication to his unique form of professionalism, characterized by his insistence on independent thinking, intellectual honesty, and analytical rigor, was expressed in a similar approach to the issue of economic competition between lawyers and nonlawyers. To many critics of the early twentieth century professionalism, one of the main motives behind calls for higher standards in both legal education and bar admission, as well as increased legislation prohibiting the unauthorized practice of law, was the attempt to control the level of competition facing lawyers.⁸⁹ Indeed, it would seem that, as a basic matter of economics, as

86. COHEN, *supra* note 1, at 138.

87. *Id.* at 138-39 (quoting Bates, *supra* note 79, at 228).

88. *Id.*

89. See e.g., Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773, 782 (citing view of “harsh critics” that “‘professionalization’ represents little more than the efforts of certain occupational groups such as doctors and lawyers to enlarge their power, income, and status through monopolistic processes”).

For a similar critique of the motives behind contemporary laws prohibiting the unauthorized practice of law, see, e.g., Deborah L. Rhode, *The Delivery of Legal Services by Non-lawyers*, 4 GEO. J. LEGAL ETHICS 209 (1990).

one scholar put it, “[r]estricting entry would be an eminently rational additional strategy to raise lawyer incomes.”⁹⁰

In fact, Cohen plainly concedes that “some of the enthusiasm of my brethren in all these movements [to raise restrictions on the practice of law] is due to an impulse to make competition easier for those who have paid and still pay the heavy price of education, of training, and observance of the ethical code of conduct governing the profession.”⁹¹ For Cohen, however, the notion of restricting law school and bar admission in pursuit of the economic benefit that would result from limitations on competition was anathema. The very premise of Cohen’s book is the insistence that legal practice is a profession and not primarily a commercial enterprise. Thus, it would seem the height of hypocrisy, in Cohen’s view, for leaders of the legal professional to devise methods of excluding others from the practice of law for the purpose of increasing revenue among lawyers.⁹² Indeed, at one point in his book, Cohen sets forth the radical proposal that “[t]he State ought to pay [lawyers] a salary,” accompanied by the utopian vision that “[j]ust as we are abolishing fees for marshals, for sheriffs, for county clerks, for district attorneys, and courts . . . some day we will abolish the fee system for lawyers.”⁹³

Therefore, consistent with the idealism he expresses throughout the book, Cohen offers an alternative rationale for stricter standards of education and admission, one that is characteristically both more nuanced and more justifiable than a purely economic motive. Cohen insists that “the main impulse behind these activities of the Bar is, I sincerely hope—I *know*—to preserve and keep clean,—in the interest of the community,—a profession whose existence is primarily for the benefit of the community.”⁹⁴ Ultimately, then, according to Cohen it is the community—rather than lawyers—that chiefly benefits from increased regulation of the practice of law. Emphasizing the potential liability to clients that must be averted through proper “preparedness” among lawyers,⁹⁵ Cohen quotes an address

90. First, *supra* note 71, at 319.

91. COHEN, *supra* note 1, at 258.

92. Cohen takes great offense at a newspaper headline describing the efforts of the grievance committee of the Queens County Bar Association to prevent notaries from engaging the unlicensed practice of law. *See id.* at 262-63. To Cohen, the headline, which declares that “Lawyers See Trade Theft,” is “as misleading as it is unjust.” *Id.* at 262 (quoting THE NEW YORK TRIBUTE, Nov. 29, 1915).

93. *Id.* at 215 (emphasis in original). He further suggests that “[t]he State will accept the principle that the ‘lawyer is an officer of the court,’ as it has accepted it in the case of the judge, the district attorney, and the sheriff.” *Id.*

94. *Id.* at 258. Cohen’s willingness to characterize his aspirations, initially expressed in terms of hope, as a description of fact, expressed in terms of knowledge, may represent a phenomenon of faith in legal professionalism that has arguably repeated itself among leaders of different professionalism movements. *See* Atkinson, *supra* note 2; Levine, *supra* note 2; Pearce, *supra* note 2. Indeed, elsewhere Cohen explicitly propounds such a faith, encouraging his readers to “always, let us hope, with an undiminished faith in the profession—confidence that this great sleeping giant will presently awake, break his lilliputian bonds and assert his fine strength.” COHEN *supra* note 1, at 111.

95. COHEN, *supra* note 1, at 12541.

by ex-President William H. Taft describing “[t]he danger to society of the misuse of power which a lawyer’s profession enables him to exercise,” including the possibility that the lawyer will “lead [the client] into great pecuniary loss and subject him and his family to suffering and want.”⁹⁶

To explain the ostensibly self-interested eagerness of lawyers to provide resources for enforcement of stricter standards, Cohen suggests a similarly noble motivation: “As we are witnesses of unprofessional practice, as we know its consequences, as we know the value of preliminary training, so, because of our nearness to the fact, the community calls on us for initiative, for guardianship, and for zeal.”⁹⁷ As Cohen sees it, “the lay members of the community call upon us to discipline, to educate.”⁹⁸ In short, “the community’s interest is above our own.”⁹⁹

Despite his idealism, however, Cohen is neither naïve nor disingenuous, recognizing and openly acknowledging that “it is a common notion abroad in the land that in the movement to restrain the unlawful practice of the law the lawyers are influenced only by a sordid motive to conserve for themselves the returns from professional employment.”¹⁰⁰ In an effort to combat this apparently widespread and longstanding perception, Cohen offers a suitably practical and well-documented—albeit perhaps counter-intuitive—response, positing that, contrary to the basic assumption underlying accusations of economic protectionism, stricter regulations on legal practice are likely to result in a decrease in business for lawyers.

Cohen finds support for his argument in sources ranging from an 1829 New Hampshire Superior Court opinion¹⁰¹ to a 1915 law journal article.¹⁰² The New Hampshire court refused “to give any countenance to those, who, without the necessary qualifications, undertake to advise as counsel and to commence suits in their neighborhood.”¹⁰³ In an early illustration of what would become an abiding skepticism among the American public toward lawyers and their motives, the court noted the “suppos[ition] that the members of the bar were opposed to the interference of such persons in such matters, because it might tend to injure the business of the profession.”¹⁰⁴ According to the court, however, “nothing can be further

96. *Id.* at 128 (quoting William H. Taft, *The Social Importance of Proper Standards of Admission to the Bar*, REPORTS OF AMERICAN BAR ASSOCIATION, Vol. XXXVIII, p. 924). Likewise, Cohen cites an opinion by the Supreme Judicial Court of Massachusetts upholding educational requirements for bar admission on the basis of “the need of protecting the public against incompetence.” *Id.* at 289 (quoting *In re Bergeron*, 220 Mass. 472 (1915)).

97. *Id.* at 258-59.

98. *Id.* at 259.

99. *Id.*

100. *Id.* at 262.

101. *See id.* at 263 (quoting *Bean v. Quimby*, 5 N.H. 94, 1828 WL 567, at *3 (1829)).

102. *Id.* at 281 (quoting Alexander H. Robbins, *The Missouri Idea of Suppressing the Unlawful Practice of Law*, CENT. L. J., July 3, 1915, at 5).

103. *Bean*, *supra* note 101, at *3, *quoted in* COHEN, *supra* note 1, at 263.

104. *Id.* *quoted in* COHEN, *supra* note 1, at 263.

from the truth than such a supposition.”¹⁰⁵ Instead, anticipating by nearly ninety years Cohen’s economic analysis, the court found that “[w]hen those, who are not qualified to act as counsel engage in the practice of law, their blunders are much more likely to increase, than their interference to diminish, the business and emoluments of the profession.”¹⁰⁶

Ultimately adopting the more positive view of lawyers that Cohen would later develop at length, the court concluded that:

it is from much better, much higher, much more honorable motives, that the bar withhold all countenance from ignorant intruders. It is to preserve to the administration of justice some degree of order and regularity, and some degree of purity, that they do this; and this case is a strong illustration of the soundness and utility of the principle, upon which they act.¹⁰⁷

Turning to a more contemporaneous application of such an approach, Cohen dedicates an entire chapter of his book¹⁰⁸ to an examination of a 1915 Missouri statute prohibiting the “unlawful practice of law.”¹⁰⁹ As he gratefully acknowledges, Cohen borrows heavily from both the title and the substance of a “very excellent and most readable”¹¹⁰ description and analysis of the statute presented by Alexander H. Robbins, the editor of the *Central Law Journal*.¹¹¹ As Robbins describes it, the statute included “far-reaching provisions regulating the practice of law and restricting the ‘practice of the law’ and the doing of ‘law business’ to those licensed by the state as being competent to transact such business.”¹¹²

Not surprisingly, the legislation faced opposition on the grounds that it provided economic protectionism for the benefit of those licensed to practice law. As Robbins puts it, “[o]bjection has been made to [the statute] by those who have heretofore profited from this branch of the practice of law, that it was passed solely in the interest of lawyers.”¹¹³ Cohen relies on Robbins’ response to these claims in support of his own understanding of the motivation and purpose behind such restrictions.

Consistent with his own economic analysis, Cohen cites Robbins’ “suggest[ion] that the lawyer’s business has been helped rather than hindered by the incompetent intermeddling by laymen in technical application of the principles of law even to such apparently simple forms as deeds and wills.”¹¹⁴ Moreover, as empirical—if circumstantial—evidence

105. *Id.* quoted in COHEN, *supra* note 1, at 263.

106. *Id.* quoted in COHEN, *supra* note 1, at 263.

107. *Id.* quoted in COHEN, *supra* note 1, at 263.

108. See COHEN, *supra* note 1, at 277-285, “The Missouri Idea of Suppressing the Unlawful Practice of Law.”

109. Missouri Sessions Acts (1915), p.99, quoted in COHEN, *supra* note 1, at 277.

110. COHEN, *supra* note 1, at 277.

111. See Robbins, *supra* note 102.

112. *Id.* at 9.

113. Robbins, *supra* note 102, at 5.

114. COHEN, *supra* note 1, at 281. To be accurate, a close reading and juxtaposition of the sources reveals that Cohen’s paraphrase of Robbins’ statement appears more assertive in tone than Robbins’ actual words. Robbins offered a more equivocally formulated suggestion

indicating the validity of this suggestion, Cohen quotes Robbins' observation that "the great majority of the lawyers of the state took very little interest in this legislation."¹¹⁵

Finally, near the close of the chapter, Cohen quotes at length Robbins' conclusion that such provisions

will be regarded by students of sociological jurisprudence as being only a further evidence of the growing tendency of society to protect itself from fraud and incompetency on the part of those who hold themselves out as being skillful in the practice of the various trades and professions and viewed in this light are to be regarded as a very proper exercise of the police power of the state and not as being in the interest of any trade or profession.¹¹⁶

Of course, notwithstanding the existence of arguments and supporting evidence to the contrary, many observers have retained a skeptical view of the aims of the legal establishment's efforts to place broader restrictions on the practice of law. As one scholar has put it, "[a]lthough the ABA asserted that tough bar exams and accreditation were necessary for consumer protection, the calls for consumer protection came only when many new minority lawyers were beginning to compete effectively with the ABA's members."¹¹⁷

Nevertheless, regardless of the true motivation behind the actions of the organized bar, again it seems unlikely that Cohen was driven by any such combination of ethnic bias and economic self-interest. As demonstrated by the rhetoric and attitudes presented throughout his book, Cohen consistently avoids, eschews, and rises above such cynical yet prevalent and influential positions. Rather, Cohen expresses and maintains an apparently genuine concern for the professional nature of legal practice. Thus, in sharp contrast to a manipulative use of the ostensibly noble goal of protecting consumers, Cohen's vision of professionalism would clearly include a sincere insistence on serving the public by placing the needs of the community above the lawyer's own business interests.¹¹⁸

that "it may be questioned whether" such actions by nonlawyers decreased business among lawyers. Robbins, *supra* note 102, at 5.

115. COHEN, *supra* note 1, at 281 (quoting Robbins, *supra* note 102, at 5).

116. COHEN, *supra* note 1, at 285 (quoting Robbins, *supra* note 102, at 9).

117. Shepherd, *supra* note 22, at 110.

118. Cohen apparently applied this approach in his work with the New York County Lawyers' Association Committee on Unlawful Practice of the Law. In an opinion that Cohen quotes at length in his book, the Committee considered the practice of title companies performing a number of services "formerly performed by lawyers." COHEN, *supra* note 1, at 273. The Committee's decisions is prefaced with the declaration that:

no consideration of the economic effect upon the Bar should influence our judgment. To the extent that these things are in the interests of and benefit the community, the Bar should raise no objection. It is only when the community is clearly injured that we have, as lawyers, the right to protest.

Id. at 272.

ELITISM TOWARD NONLAWYERS AND LAWYERS

Elitism Toward Nonlawyers

Perhaps most unique to Cohen's articulation of professionalism was his ability vigorously to promote an ideal of legal practice as a noble profession while concomitantly avoiding an attack on the inherent dignity of trade and business enterprises.¹¹⁹ As articulated in the title of one of his chapters, Cohen viewed his project as an attempt to "apply[] ethics to daily life in one profession."¹²⁰ This title, as developed at length in the chapter, implicitly pictures legal practice as but one of many professions¹²¹—indeed, one of many vocations, "*each* [of which]—business, industry, the professions—must solve its own ethical problems."¹²² Cohen's willingness to group together the ethical obligations of business and the professions alike stems from an apparent recognition of the potential nobility and virtue of various pursuits.

Likewise, Cohen quotes a judicial opinion that highlights the need for preparation among lawyers through an analogy to those engaged in a number of other vocations, including "pharmacists . . . many branches of the civil service. . . . teachers in the public schools," and, perhaps most significantly, the decidedly trade-like occupation of plumbers.¹²³ Like Cohen, rather than focusing on the differences between each of these jobs and legal practice, the court emphasizes their similarities, concluding that, in each field or endeavor, "[t]he ignorant cannot undertake a handicraft without training."¹²⁴

To the extent that the court does characterize the practice of law as

119. See generally Levine, *supra* note 5.

120. COHEN, *supra* note 1, at 157-71.

121. Elsewhere, Cohen more explicitly minimizes any differences between ethical challenges facing legal practice and those facing other professions, writing that "[o]urs is a profession (advertising, medicine, law, credits, whatever our vocation). We are all in a boat. The sins of one of us are the sins of all of us. Come, gentlemen, let us clean house." *Id.* at 109 (emphasis in original).

122. *Id.* at 158 (emphasis in original).

123. *Id.* at 287 (quoting *In re Bergeron*, 220 Mass. 472 (1915)). In contrast to the apparent respect Cohen accords plumbers and, in another context in the book, shoemakers, see Levine, *supra* note 5, it is not uncommon for proponents of legal professionalism to promote the virtue of lawyers though an opposing and often negative portrait of "trade." See, e.g., Wickersham, *supra* note 76, at 620 (posing the rhetorical question: "Is a license to practice law of no higher import than a license to exercise the vocation of a plumber or a miner?"). For an example of such an approach by a leading contemporary scholar, see Anthony T. Kronman, *Legal Professionalism*, 27 FLA. ST. U. L. REV. 1, 4-5 (1999) (contrasting the "moral experience of law practice" and the lawyer's "contribution to the good of society as a whole" against the "preoccupation with self-interest" of the brewer and baker). See also Anthony T. Kronman, *Chapman University School of Law Groundbreaking Ceremony*, 1 CHAP. L. REV. 1, 3-4 (1998); Anthony T. Kronman, *Professionalism*, 2 J. INST. STUD. LEGAL ETHICS 89, 91 (1999); Anthony T. Kronman, *Fault in Legal Ethics*, 110 DICK L. REV. 489, 496-97 (1996).

124. COHEN, *supra* note 1, at 287 (quoting *In re Bergeron*, 220 Mass. 472 (1915)).

“a profession” and “not a craft, not trade, not commerce,”¹²⁵ it draws this distinction largely on the basis of the unique role of the lawyer, rather than through a comparative judgment regarding the relative value of different occupations. Specifically, the court declares that lawyers “are not . . . hired servants of their clients[, but] are independent officers of the court, owing a duty as well to the public as to private interests.”¹²⁶ Further, the court assumes that “[n]o one not possessing a considerable degree of general education and intelligence can perform this kind of service.”¹²⁷ Thus, the court’s view of law as a profession is premised upon a practical consideration of “[e]lemental conditions and essential facts as to the practice of law.”¹²⁸ Similarly, despite embracing the fundamental contrast between law and business that serves as the basis for both his book’s title and much of its substance, Cohen looks beyond elitist or simplistic platitudes and assumptions in describing his vision of the unique qualities of the legal profession.

Cohen’s approach may best be exemplified in his careful consideration of the issue of advertising by lawyers, the subject of one of the central chapters of his book¹²⁹ and a topic that appears repeatedly throughout the work. Cohen opens the chapter with the assertion that “[i]n mercantile life the advertiser is king.”¹³⁰ In contrast, Cohen observes, “[f]or two thousand years ‘blowing one’s own trumpet’ was not for the lawyer or the doctor.”¹³¹ In light of these two principles, Cohen undertakes the task of addressing a basic question: “[s]hall the lawyer of to-day advertise his qualities as the merchant offers his wares?”¹³² Or, as Cohen alternatively puts it, “[i]s there good reason for the ancient and persistent condemnation of this practice?”¹³³ Although the suggestive wording of these questions seems to telegraph their answers, Cohen’s discussion is characterized by the open-minded analysis and intellectual honesty he employs in pursuit of a satisfying and convincing resolution of the issues.

Much of the chapter draws from case law and the reports of various state bar associations documenting the “sordid practices”¹³⁴ of advertising and solicitation of business by attorneys.¹³⁵ On a descriptive level, Cohen notes that such practices are “condemned by professional canons of ethics, penal codes, Bar associations and the courts”¹³⁶ and that “every

125. *Id.* at 288 (quoting *In re Bergeron*, 220 Mass. 472 (1915)).

126. *Id.* at 289 (quoting *In re Bergeron*, 220 Mass. 472 (1915)).

127. *Id.* (quoting *In re Bergeron*, 220 Mass. 472 (1915)).

128. *Id.* (quoting *In re Bergeron*, 220 Mass. 472 (1915)).

129. *See id.* at 173-200.

130. *Id.* at 173.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 189.

135. *See id.* at 173-195, 199-200.

136. *Id.* at 190.

ethics committee in the land is making these standards [prohibiting advertising] more explicit and more definite, and seeking by law to extend the field of their application.”¹³⁷

Nevertheless, Cohen is determined to offer a normative justification for the traditional, yet somewhat perplexing, distinction between lawyers and others engaged in the pursuit of retaining clients. As Cohen plainly observes, “none of these practices [of advertising or solicitation] would offend our sense of propriety if they had been carried on by a business man seeking business.”¹³⁸ Therefore, he asks, “[w]hy do we instinctively recoil at these things when the business is the practice of law?”¹³⁹ To arrive at a truly principled solution to these questions, Cohen suggests, “let us examine the matter as though there were no existing provisions of law or ethical code condemning it.”¹⁴⁰

Cohen’s response is founded upon a noble—almost idealistic—conception of the role of the lawyer, yet grounded in a practical and realistic assessment of the demands of legal practice and representation. Cohen posits a fundamental distinction between the “[s]hoe-man,” who “ha[s] shoes to sell” and “may praise [his] product,”¹⁴¹ and the lawyer, who not only sells “knowledge” and “[s]ervices,” but also takes an “oath of ‘fealty.’”¹⁴² Only the lawyer “pledged to give loyalty to his clients, to preserve inviolate his client’s sacred confidences, to forget self in service for another.”¹⁴³ Rhetorically, Cohen asks, “[c]an such fealty or service be bought and sold?”¹⁴⁴

Thus, according to Cohen, prohibitions on advertising and solicitation by lawyers are based not in a tenuous and elitist notion that lawyers are inherently more dignified than others and therefore should not publicize their services.¹⁴⁵ Indeed, Cohen’s worldview incorporated a

137. *Id.*

138. *Id.* at 189.

139. *Id.* (emphasis in original).

140. *Id.* at 190.

141. *Id.* at 196.

142. *Id.* at 196-97 (quoting GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed. 1907), AMERICAN BAR ASSOCIATION REPORTS 58 (1907)).

143. *Id.* at 197.

144. *Id.* At a number of points in the book, Cohen utilizes stories as a device to dramatically illustrate the principles he is propounding. See Levine, *supra* note 5.

To help demonstrate the inherent conflict between loyalty and the pursuit of material gain, the latter of which he sees as embodied in advertising, Cohen relates

the legend—I hope a true as well as a “moral story”—of a rich woman, much sought after, who remained single, until, in a railroad accident, she found in the eyes of the railroad official who rushed to her aid the self-sacrificing loyalty she had long sought. Out of it came the bond.

COHEN, *supra* note 1, at 197.

145. Some scholars have suggested that “[t]he apparently excessive preoccupation in all professions with the question of advertising can be attributed to its symbolic importance in elevating a profession above the business world.” Moore, *supra* note 89, at 775. Nevertheless, the prevailing contemporary view, reflected in both the opinions of the United

recognition that “[e]very office has its own essential dignity.”¹⁴⁶ Rather, he explains, because “[t]he basis of the relationship between lawyer and client is one of unselfish devotion, of disinterested loyalty to the client’s interest, above and beyond his own,”¹⁴⁷ conduct such as advertising and solicitation is inconsistent with the professional obligations of the lawyer.¹⁴⁸

States Supreme Court, *see, e.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988), and the work of legal scholars, *see, e.g.*, Geoffrey C. Hazard, Jr., et al., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983), rejects “the assertion that advertising will diminish the attorney’s reputation in the community.” *Bates*, 433 U.S. at 369. *See also* Note, *Advertising Solicitation and the Profession’s Duty to Make Legal Counsel Available*, 81 YALE L.J. 1181, 1189 (1972) (rejecting the “most amorphous argument offered in favor of the current restrictions [on advertising] . . . that they are necessary to preserve the dignity of the legal profession”).

To be sure, Cohen does quote some who describe advertising or solicitation as an affront to the “dignity of the legal profession,” *id.* at 152 (quoting Alfred Hemenway, *The American Lawyer*, Vol. XXVIII, AMERICAN BAR ASSOCIATION REPORTS 387 (1905)), or as “grossly undignified.” *Id.* at 194 (quoting *In the Matter of Neuman*, 169 App. Div. 638 (1915)). It appears, however, that although Cohen cites these descriptions in support of this own opposition to advertising and solicitation, he may not agree fully with the characterizations contained therein. Indeed, it is after quoting the latter of these two descriptions that Cohen continues to pursue a more convincing rationale for the prohibitions on advertising and solicitation, thereby implicitly rejecting the simplistic argument that these practices are beneath the dignity of lawyers.

Similarly, Cohen cites references to “fee splitting” between lawyers and others as “detract[ing] from the essential dignity of the profession,” *id.* at 222 (quoting New York County Lawyers’ Association, Committee on Professional Ethics, Q. 47—II (a)). *See id.* at 349. Here again, though, upon further consideration, Cohen offers a more practical, more noble, and perhaps more justifiable objection to such a business relationship, grounded in protecting the public from unethical practices. Emphasizing that “the lay agent does not share in the professional responsibility” of the lawyer, *id.* at 227, Cohen quotes at length from an opinion of the Supreme Court of Nebraska voiding a contract between a lawyer and a nonlawyer who have embarked upon a joint business venture involving the practice of law:

[I]t was the policy of the legislature to fix a high standard of professional ethics to govern the conduct of attorneys in their relations with clients and courts, and to protect litigants and courts of justice from the imposition of shysters, charlatans, and mountebanks. It seems to us that the contract in issue is but a thinly veiled subterfuge by which the plaintiff, who, it is conceded, was not a member of the bar . . . for the purpose of authorizing him to engage in the practice of law, undertook to break into the conduct of proceedings of a court of record, to which he was not a party, by attempting to form a limited partnership with one who had complied with the provisions of the law and was entitled to the emoluments of the profession.

Id. at 229-30 (quoting *Langdon v. Conlin*, 93 N.W. 388).

Indeed, in the final lines of the “Postscript” to the 1924 revised edition of his book, Cohen emphasizes that the notion of the “essential dignity of the office” of lawyer requires “not pomposity, or pretense, but only that a lawyer, by reason of his responsibilities and his duties should never relax into professional habits which tend to render him less fit to fulfill them.” COHEN, *supra* note 13, at 352.

146. COHEN, *supra* note 1, at 313.

147. *Id.* at 197.

148. Likewise, Cohen would clearly have rejected the assertion—which he does not even acknowledge—that rules against advertising and solicitation by lawyers were motivated by economic protectionism. *See, e.g.*, Freedman & Smith, *supra* note 33, at 4 (stating that these rules “were designed to make competition from nonestablished lawyers more difficult”).

As the chapter comes to a close, Cohen employs an extended metaphor to depict the unique role of the lawyer and to chide those lawyers who engage in advertising. Cohen concludes that:

in the case of the lawyer, advertising of one's own willingness to be trusted as a man of unselfish devotion—for 10% of the amount involved—frosts the rose before it has a chance to bloom. It nips in the bud the flower that grows only in warm atmosphere. Take it out of the nursery and stick it in the snow, lawyer-advertiser, and see what becomes of it.¹⁴⁹

While Cohen's poetic imagery reflects his admiration for the high ethical standards required of a lawyer, the same passage demonstrates the earnestness with which he confronts the challenges and temptations posed to the lawyer by the lure of monetary profit. For Cohen, the goals of advertising are inherently, fundamentally, and inextricably in conflict with the lawyer's duty of undivided loyalty; for this reason, above all other considerations, Cohen unequivocally supports continuation and extension of the ban on advertising for lawyers.

Elitism Toward Lawyers

Finally, similar to his view of lawyers vis-à-vis other occupations—and once again, unlike many leaders of the early-twentieth-century bar—Cohen did not adopt an elitist perspective in the way he viewed different segments of the legal profession. In a chapter addressing solicitation of business by lawyers and its relationship to the issue of business enterprises between lawyers and nonlawyers, Cohen states categorically that “if it were a crime of the negligence lawyer to hire a clerk to go out and chase ambulances for negligence cases, it was equally wrong for another, perhaps better educated, lawyer to sit in his office and let a title company with a fine sounding name *tout* for professional employment for him.”¹⁵⁰ Yet, as Cohen observes, “the Bar Associations had begun to bring discipline proceedings against the little ambulance chasers and when the officer arrested these offenders *in flagrante delicto* they squalled: ‘Mister, why don’t you go after the Big Boys? They’re worser than we are.’”¹⁵¹

Despite the condescending tone of the quotation, through his insistence upon an intellectually honest consideration of the issues, Cohen arrives at a sincerely sympathetic attitude toward less prominent and less powerful lawyers. Using the geography of lower Manhattan as a metaphor, he concludes that “[o]f course, a discrimination between Broadway, corner of Cedar Street, and Broadway, corner of Duane Street, could not last. The distinction was not a distinction in principle. Touting for business by a lawyers’ title or trust company was just as bad as touting for business by a lawyers’ collection agency.”¹⁵²

149. COHEN, *supra* note 1, at 199.

150. *Id.* at 271 (emphasis in original).

151. *Id.*

152. *Id.* at 272.

Indeed, in Cohen's view, the more prestigious law firms were not deserving of any special privileges or dispensations. On the contrary, to Cohen, the increasing number of large law firms serving the interests of business clients represented one of most dangerous symptoms of the commercialization of the practice of law. Cohen relies heavily on Woodrow Wilson's 1910 address to the American Bar Association lamenting the loss to society resulting from lawyers' abandonment of their role as "statesmen."¹⁵³ Specifically, lawyers were "being drawn into modern business instead of standing outside of it."¹⁵⁴ Cohen quotes Wilson's indictment of the lawyer's changing role:

Has not the lawyer allowed himself to become part of the industrial development, has he not been sucked into the channels of business, has he not changed his connections and become part of the mercantile structure rather than part of the general social structure of our commonwealths as he used to be?¹⁵⁵

In addition, as Cohen further observes, such a change affected more than the way lawyers were perceived, both by themselves and by society. For Cohen, the increasing alliance between lawyers and business threatened to have a more practical and detrimental effect on the ethical conduct of lawyers as well. Noting the often inherently contradictory demands of the business client, Cohen articulates some of the emerging ethical conflicts and challenges confronting the business lawyer:

You, business man, ask for loyal devotion to a single client's interest; you ask the lawyer to avoid dragging you into court; you want him disbarred if he does anything below the high standards of his own profession, and you want all this in an atmosphere—which, mind you, you help to create—where it is all "hustle, bustle, rustle, tussle, for a dollar more for me."¹⁵⁶

Turning to the changing structure and atmosphere of the law firm, Cohen writes that "[i]t is significant of the development of the Bar of our generation that the successful lawyers—the men who have attained supremacy—are men who combine business skill with the professional training of the law."¹⁵⁷ Cohen invites his reader to "[w]alk into a modern law office and you will think you are in the executive office of a large business institution."¹⁵⁸

Cohen surveys the law firm's "[d]epartmentaliz[ation] into as many braches of the law as are practiced by the firm,"¹⁵⁹ including "a long list of senior or junior partners, each with his own particular specialty, a manag-

153. *Id.* at 31 (quoting Woodrow Wilson, Vol. XXXV, A.B.A. REPORTS, at 419). The longing for a return to the lawyer-statesman ideal is yet another recurring theme that serves as a central characteristic common among repeated incarnations of the call for a renewed legal professionalism. *See, e.g.,* ANTHONY T. KRONMAN, *THE LOST LAWYER: FALLING IDEALS OF THE LEGAL PROFESSION* (1993).

154. COHEN, *supra* note 1 at 31 (quoting Woodrow Wilson, Vol. XXXV, A.B.A. REPORTS, at 419).

155. *Id.* at 32 (quoting Woodrow Wilson, Vol. XXXV, A.B.A. REPORTS, at 419).

156. *Id.* at 242.

157. *Id.* at 211.

158. *Id.*

159. *Id.*

ing clerk, with a score of assistants, typewriters, telephone operators, secretaries, bookkeepers, cashiers, a comprehensive library.”¹⁶⁰ “[I]n a word,” as Cohen sees it, “the lawyer’s office is an office for the transaction of modern business.”¹⁶¹ Again illustrating his point through the metaphor of lower Manhattan, Cohen concludes that “[l]iving in such an atmosphere, with his office window closer to the Stock Exchange than it is to Trinity Church . . . the modern New York lawyer catches the atmosphere he breathes and fast loses the larger perspective of this profession.”¹⁶²

Of the many examples he offers to demonstrate the commercialization of legal practice, Cohen concludes that “[t]he practice of the law in bankruptcy is to-day the best and most comprehensive illustration of what becomes of the Law when it is treated as a Business instead of as a Profession.”¹⁶³ Indeed, Cohen reserves some of his most stinging language for bankruptcy lawyers, whom he likens to “mosquitoes” in a “swamp”¹⁶⁴ and whose work he characterizes as “general, organized systematic prostitution of the Commercial Bar.”¹⁶⁵

Significantly, however, when Cohen was writing his book, leading law firms were increasingly engaged in the growing and somewhat euphemistically named field of “corporate reorganization.”¹⁶⁶ In fact, ironically, one of the most prominent figures in the field was George Wickersham,¹⁶⁷ whose views on the commercialization of law Cohen valued and cited extensively.¹⁶⁸ Although on some level, the practices of

160. *Id.*

161. *Id.*

162. *Id.* at 212.

163. *Id.* at 241.

164. *Id.* at 239, 240.

165. *Id.* at 241.

166. As Professor Robert Gordon has noted, corporate reorganization represented “the largest and most time-consuming practice of eminent New York counsel after 1880 and the one that involved the most money.” Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 101 (Gerald L. Geison ed., 1983).

Gordon further observes that “[t]he same few firms did almost all of this work.” *Id.* The list of New York law firms involved in reorganization in this period includes virtually all of the major elite firms of the time, including Cravath, Swaine & Moore; Sullivan & Cromwell; Cadwalader, Wickersham & Taft; Davis Polk & Wardwell; Kelley Drye & Warren; and Coudert Brothers. See Leonard M. Rosen & Jane Lee Vris, *A History of the Bankruptcy Bar in the Second Circuit*, in *THE DEVELOPMENT OF BANKRUPTCY & REORGANIZATION LAW IN THE COURTS OF THE SECOND CIRCUIT OF THE UNITED STATES* 177 (1995). A recent study found that “[o]f the fifty largest firms in the New York City areas, forty-nine have a bankruptcy department or claim to have bankruptcy practice.” *Id.* at 156.

167. In his 1938 history of Cadwalader, Wickersham & Taft, Henry Taft quotes from the memorial to Wickersham stating that he “participated in many corporate reorganizations, frequently appearing in the federal courts in distant parts of the country.” HENRY W. TAFT, *A CENTURY AND A HALF AT THE NEW YORK BAR: THE ANNALS OF A LAW FIRM AND SKETCHES OF ITS MEMBERS* 189 (1938).

168. In criticizing the changing and increasingly commercialized function of the lawyer, Cohen borrows heavily from Wickersham’s address to the Chicago Bar Association. In light

Wickersham and the large law firms differed from the practices of the bankruptcy lawyers Cohen describes,¹⁶⁹ the distinction between the “two bankruptcy bars”¹⁷⁰ may have been one of semantics more than of substance. If so, Cohen’s focus on the work of bankruptcy lawyers may represent his most sustained, if indirect, criticism of corporate practice among large law firms.

In any event, Cohen’s open criticism of law firms and segments of legal practice that were emerging as among the most prominent and the most powerful of the legal establishment represents a final manifestation of his unique form of legal professionalism. Moreover, to the extent that

of the pivotal role Wickersham played in the emergence of Cadwalader, Wickersham and Taft as a leading commercial law firm, it is somewhat striking to read of Wickersham’s concern over “the commercialization of those relations of life which hitherto have called for the especial guidance and service of him to whom, more than to any other, unless it be the family doctor, ‘all hearts were opened, and from whom no secrets were hid.’” See COHEN, *supra* note 1, at 264 (quoting George Wickersham, *Address on “Bar Associations—Their History and Their Functions*, N.Y. L. J., Nov. 25, 1914). The recently compiled official history of the Cadwalader firm states that, in 1914, when Wickersham succeeded John Cadwalader as head of the firm, “Cadwalader, Wickersham & Taft was secure in its place as one of the leading law firms in New York, and it was considered an important member of the ‘financial bar’ for its substantial number of financial and institutional clients.” DEBORAH S. GARDNER, *CADWALADER, WICKERSHAM & TAFT: A BICENTENNIAL HISTORY, 1792-1992* 15 (1994). Consisting of eight partners, fifteen associates, and additional staff of twenty-nine, *see id.*, the firm certainly qualified one of the large and leading Wall Street firms. See Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915*, in *LAWYERS IN POST-CIVIL WAR AMERICA* 17-19 (Gerard W. Gawalt ed., 1984).

Moreover, writing of Wickersham in particular, Henry Taft states, in his 1938 history of the firm, that “his facility was especially applied to the solution of problems which were presented to lawyers through the enterprise of businessmen” and that “[h]e was skilled in drafting every form of instrument made necessary by the intricacies and complications of modern business life.” TAFT, *supra* note 167, at 188 (internal quotations omitted).

Similarly—if inherently anachronistic—in light of the size and volume of cases routinely handled by contemporary incorporated law firms, it seems somewhat anomalous for Wickersham to ask: “[w]hat is to become of the old time relation of mutual confidence and esteem between counsel and client, if the most sacred and solemn act of life shall be dealt in as merchandise, and formulated by the employees of incorporated commercial companies, instead of by the trusted adviser and friend of a lifetime.” *Id.* at 271 (quoting Wickersham, *supra*).

169. In the words of Professor David Skeel:

If we compare Cravath[, Swaine & Moore] and its peers [in railroad receivership] to their insolvency cousin, the general contrast should not be more stark. The general bankruptcy bar was fledgling in every respect at the turn of the century. The bar did not even exist until 1898, and the first bankruptcy lawyers were hardly the cream of the profession.

The receivership bar, by contrast, was well established; and its members had always been drawn from the pinnacle of the New York bar.

DAVID SKEEL, JR., *DEBT’S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 69 (2001).

Cohen appears to allude to this distinction in his acknowledging that “[c]ommercial law practice requires high skill and training and many high-minded men are practicing in bankruptcy to-day.” COHEN, *supra* note 1, at 241. Nevertheless, though he insists that “[i]t is not my purpose to deprecate their work,” he does not refrain from adding that “they know the difficulties as well as I do.” *Id.*

170. See SKEEL, *supra* note 169, at 69-70.

his criticism apparently may have applied to some lawyers he cited and to others whom he viewed as friends and allies in the battle against the commercialization of the law, through his unyielding devotion to ethics and principle, Cohen once again demonstrated an intellectual honesty characterized by an uncompromising independence of vision and analysis.

CONCLUSION

As historians have long recognized, any attempt to evaluate the conduct of those who have lived earlier through the lens of contemporary sensibilities presents a challenging—if not precarious—proposition. The Talmud reflects this difficulty in considering the Biblical reference to Noah as “righteous . . . in his generation.”¹⁷¹ Commenting on the apparent superfluity and ambiguity inherent in the phrase “in his generation,” the Talmud offers alternative interpretations.¹⁷² Some understand the verse as highlighting Noah’s ability to maintain his righteousness despite the wickedness of the generation in which he lived.¹⁷³ Conversely, others explain that Noah was righteous only relative to the wickedness that surrounded him, but that his character would not have been particularly noteworthy in an age of greater moral sensitivity.¹⁷⁴ Among the many notable aspects of this debate,¹⁷⁵ it may be instructive that, even according to the latter position, the Torah does not hesitate to praise Noah as “righteous,” albeit in a relative sense.

In light of the changes that have transpired in the legal profession in the course of the twentieth century—corresponding to broader changes in American society as a whole—the rhetoric of the leaders of early-twentieth-century professionalism strikes a discordant and disturbing chord. On some level, it seems unfair to expect the organized bar to have overcome completely the anti-Semitism, nativism, classism, economic protectionism, and elitism that were so endemic to the society in which it functioned. Indeed, to the extent that many of these leaders recognized and combated the ethical problems that confronted the legal profession in the early part of the century, perhaps like Noah, they too should be the subject of praise, if only in relative terms.

Yet, despite the possible appeal of such a position, it may be difficult to maintain in the face of the contemporaneous work of Julius Henry Cohen. Cohen embraced and promoted professionalism, yet expressed his views through a mode of discourse largely free of the vices that plagued the rhetoric of so many of his friends and associates among the legal

171. *Genesis* 6:9.

172. See TALMUD BAVLI, *Tractate Sanhedrin* 108a.

173. *Id.* See *Genesis* 6:5-7.

174. See TALMUD BAVLI, *supra* note 172.

175. See 2 ELIYAHU DESSLER, MICTAV M’ELIYAHU 156-59 (Aryeh Carmell & Chaim Friedlander eds., 1963); YOSEPH YOZEL HURWITZ, MADREGAT HA-ADAM 5-7 (4th ed. 1976).

elite.¹⁷⁶ Ultimately, Cohen's articulation of his alternative vision of professionalism may serve as an indictment of the early twentieth century legal establishment and its failure to adopt a mode of discourse that would have served the goals of the professionalism movement while maintaining its rhetorical integrity.

176. To the extent that Cohen's rhetoric was not entirely free of such attitudes, perhaps he would serve as a more apt analogy to Noah, as someone who was not particularly righteous by current standards but whose work is deserving of praise when evaluated relative to the society in which he lived.