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JEWISH LAWYERS AND THE U.S. LEGAL PROFESSION: THE END OF THE AFFAIR?

*Eli Wald**

I. INTRODUCTION

Scholars of the legal profession have long puzzled over the apparent affinity between Jewish lawyers and the law, in and outside of the United States.¹ This article advances a new explanation to account for the overrepresentation of Jewish lawyers in the U.S. legal profession in the twentieth century: the Confluence of Circumstances theory. Instead of looking to particular features of American law or to attributes of Jewish lawyers, the theory shows that a confluence of circumstances operating outside and within the profession including evolving practice realities, professional ideologies, competition, discrimination, and the cost of legal education coalesced to account for the affinity. Moreover, tracking the same conditions in the twenty-first century the theory predicts the end of the affair explaining why the practice of law no longer represents a particularly attractive proposition for Jews.

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¹ Marc Galanter, *A Vocation for Law? American Jewish Lawyers and their Antecedents*, 26 *FORDHAM URB. L. J.* 1125 (1999); JEROLD S. AUERBACH, *RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION* ix (1990) (describing "the astonishing success story of Jewish lawyers, as they erased the stigma of professional ostracism") [hereinafter, AUERBACH, *RABBIS AND LAWYERS*]; Russell G. Pearce, *The Jewish Lawyer's Question*, 27 *TEX. TECH L. REV.* 1259, 1261-63 (1996). See also, ALAN M. DERSHOWITZ, *THE VANISHING AMERICAN JEW: IN SEARCH OF JEWISH IDENTITY FOR THE NEXT CENTURY* (1997); ROBERT H. MNOOKIN, *THE JEWISH AMERICAN PARADOX: EMBRACING CHOICE IN A CHANGING WORLD* (2018).

The Confluence of Circumstances theory does more than explain the affinity between Jewish lawyers and the U.S. legal profession. Exploring the success story of Jewish lawyers overcoming discrimination and gradually coming to occupy positions of power and influence in the legal profession, the theory illuminates the conditions under which law, legal practice and elite institutions such as large law firms and law schools can play a positive role in the ongoing quest of the profession to become more just, inclusive and equal for lawyers from previously excluded groups. The Confluence of Circumstances theory also sheds a light on the relationship between lawyers' professional and personal identity. Documenting the ways in which facets of Jewish lawyers' personal identity informed and shaped the formation of their professional identity and exercise of professional judgment, the theory helps discredit the myth of universal professionalism and lends support to accounts of professional identity that build on and synthesize aspects of lawyers' personal identity as an alternative to the dominant bleached out professionalism paradigm.

The article is organized as follows. Part I summarizes the existing accounts of the relationship between Jewish lawyers and the law and finds them to be incomplete. Part II first advances a new explanation for the affinity – the Confluence of Circumstances theory, pursuant to which the affinity between Jewish lawyers and the U.S. legal profession is explained by a complex interplay of circumstances that took place throughout the twentieth century. Following the changed practice realities and circumstances of the U.S. legal profession in the twenty-first century, Part II then predicts the end of the affair between Jewish lawyers and the law. Finally, it explores the consequences of the theory to highlight the capacity of law practice to serve as a vehicle of social change and play a positive role in the profession's quest for greater equality, as well as its insights for our understanding of the interplay between professional and personal identity. Part III offers an outline of how the theory can be deployed to examine the ability of other minority groups to replicate the success story of Jewish lawyers, that is, the possibility that law and law practice can serve a role in advancing equality and reducing discrimination in the legal profession.

II. THE JEWISH VOCATION FOR LAW²

The existing literature offers several insights as to the affinity between Jewish lawyers and American law, the first having to do with the nature and particulars of American law, the others focusing on the identity and qualities of Jewish lawyers. To begin with, some have advanced an “American Exceptionalist” explanation,³ the so-called Puritan Forebears theory, pursuant to which “American law . . . has a special resonance for Jews because, in some fundamental way, it is Jewish,” in that “Jewish legality was carried to America by Puritans or other early Americans.”⁴ For example, Saul Touster has argued that the Puritans imported to American law the Jewish “idea[s] that the social body is created by a covenant which is not merely a social contract but a compact in the service of some high ideal,”⁵ and “that the good, the true, the righteous, even the beautiful, can be achieved by law, and particularly by statutes and codes.”⁶ The Puritan Forebears theory, however, fails for at least three reasons. Firstly, as Galanter points out, it does not explain the well-documented affinity between Jewish lawyers and the law outside of the United States.⁷ Next, locating the draw of American law in its Jewish roots, it assumes Jewish lawyers are Jewish in meaningful ways; that is, that they are intimately familiar with and interested in the Jewishness of American law and their own Jewish identity, doubtful imposing assumptions.⁸ Finally, as Stone has argued:

[T]his synthesis of Jewish and American law was entirely invented. The myth of a unitary Judeo-American tradition, like the myth of a unitary Judeo-Christian tradition, was not the result of the fortunate discovery that Torah and Constitution are similar traditions but rather the result of a sustained effort by

² Galanter, *supra* note 1.

³ *Id.* at 1126.

⁴ *Id.*

⁵ Saul Touster, *The View from the Hilltop*, 33 *BUFF. L. REV.* 571, 575 (1984).

⁶ *Id.* at 576.

⁷ Galanter, *supra* note 1, at 1126 n.5.

⁸ *Id.* at 1127, 1131. See also Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 *CARDOZO L. REV.* 1577, 1579-83 (1993).

American Jews to obliterate the vast actual differences between the two legal systems.⁹

Moreover, to the extent that American law and law practice have deep religious underpinnings, these cornerstones have been described as distinctively Christian as opposed to Jewish or Judo-Christian.¹⁰

If not the particulars of American law, what then explains the affinity of Jews to the law? Galanter explores five alternative explanations. First, the “Carry-Over” theory suggests that Judaism as a legalistic religion prepares Jews for a life in the law.¹¹ As Rabbi Lord Jonathan Sacks explains, “[w]hen God reveals himself to humans He does so in the form of law.”¹² Jews “are charged with being interpreters of the law,” the Torah.¹³ “[F]undamental to Judaism is education, and fundamental to Jewish education is instruction in [the] Torah.”¹⁴ Indeed, because Jewish law carries-over to secular legal traditions, it is a “[s]mall wonder, then, that there are so many Jewish lawyers.”¹⁵

The “Carry-Over” theory, however, does not withstand scrutiny. To begin with, for the observant, Jewish law prepares all Jews for life, not for the practice of law. In fact, lawyers are generally absent from the traditional Jewish inquisitorial legal system, and their minimal role receives negative treatment, reflecting the primacy of the role of judges.¹⁶ Thus, a grounding in the Jewish legal tradition may

⁹ Suzanne Last Stone, *Spinoza’s Identity and Philosophy: Jewish or Otherwise?* 25 CARDOZO L. REV. 579, 581 (2003); see generally AUERBACH, RABBIS AND LAWYERS, *supra* note 1; Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993).

¹⁰ See, e.g., HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983); MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1930, Routledge Classics ed., 2001).

¹¹ Galanter, *supra* note 1, at 1127 (notably, the “Carry-Over” theory implies an affinity between Jews and all legal system, not American law in particular). See also Monroe E. Price, *Text and Intellect*, 33 BUFF. L. REV. 562, 565, 570-71 (1984).

¹² Lord Jonathan Sacks, *Why Are There So Many Jewish Lawyers?* ORTHODOX UNION, <https://www.ou.org/torah/parsha/rabbi-sacks-on-parsha/why-are-there-so-many-jewish-lawyers/> (last visited Feb. 16, 2020).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ I SAMUEL J. LEVINE, JEWISH LAW AND AMERICAN LAW: A COMPARATIVE STUDY, 231 (2018).

explain the affinity between Jews and inquisitorial legal systems,¹⁷ but not the special relationship between American Jews and the adversarial, lawyer-centric legal system in the United States. Moreover, Jewish law rejects some of the basic tenants of American law, like its “Standard Conception” – its commitment to the role-morality of lawyers as hired guns who act as partisan advocates on behalf of clients and profess non-accountability to the objectives they help clients bring about,¹⁸ instead adopting a common morality, grounded in religious Jewish morality.¹⁹ Even a weaker version of the “Carry-Over” theory, pursuant to which Jews’ familiarity with and love of Jewish law as a code prepares them and perhaps even gives them a competitive advantage in the study of American law assumes a lot, namely, that Jewish lawyers have a religious upbringing and knowledge of Jewish law, yet “few of the high achievers enjoyed intense exposure to a Jewish legal endowment.”²⁰

Second, the “Prophetic Trope” account emphasizes universalistic Jewish legalism descended from the prophetic tradition and committed to social justice as the source of the affinity between Jews and American law.²¹ Yet as Galanter notes, it is “hard to recognize more than a superficial resemblance to the prophets in the comfortable and prosperous Jewish judges and lawyers that flour[] in America.”²² The Prophetic Trope has been used and at most helps explain the careers of leading individual Jewish lawyers and judges, like Justice Louis Brandeis,²³ but not the practice of ordinary Jewish lawyers. After all, the vast majority of Jewish lawyers were not and are not prophets-preachers who pursue lives committed to social justice.

¹⁷ Galanter, *supra* note 1, at 1126 n.5 (describing the affinity between Jews and inquisitorial legal systems).

¹⁸ William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998) (relabeling the “Standard Conception” as the “Dominant View”); Stephen L. Pepper, *The Lawyer’s Amoral Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

¹⁹ LEVINE, *supra* note 16, at 233.

²⁰ Galanter, *supra* note 1, at 1127.

²¹ *Id.* at 1128-31.

²² *Id.*, at 1131.

²³ Russell G. Pearce *et al*, *A Challenge to Bleached Out Professional Identity: How Jewish was Justice Louis D. Brandeis?* 33 TOURO L. REV. 335 (2017). See generally, Samuel J. Levine, *Foreword, Symposium: Louis D. Brandeis – An Interdisciplinary Retrospective*, 33 TOURO. L. REV. 1 (2017).

Third, Galanter attempts to advance an alternative Jewish tradition, that of the Tzaddik, one who is the “prototype of the inspired technician, the inventive doer and, in the setting of living among nations, the discerning advisor to power and the devoted intermediary on behalf of the Jews.”²⁴ Lawyer-Tzaddiks, according to Galanter, are “people of extraordinary competence, inspired organizers and administrators, idealistic, creative lawyers who see law in its social context, as a malleable instrument to put to the service of moral vision.”²⁵ While “[t]hey are loyal to their fellow Jews,”²⁶ they are also “comfortable with and committed to working with the powers that be.”²⁷ Indeed, Lawyer-Tzaddiks “embrace large responsibilities that reach beyond the Jews to the general population and beyond the technically legal to politics in the broadest sense. They are people who, in Weber’s phrase, have a ‘calling for politics.’”²⁸ Like the Prophetic Trope, however, the Tzaddik model may raise more questions than answers. Putting aside whether Galanter’s description of the Tzaddik is theologically accurate, the model assumes that Jewish lawyers are loyal, “devoted intermediaries” committed to the Jewish community, as well as “idealists” who embrace “large responsibilities” and have a “calling for politics.”²⁹ This is certainly a lofty admirable model, reminiscent perhaps of the lawyer-statesman ideal (with a Jewish twist),³⁰ but it is unclear whether it describes actual Jewish lawyers let alone a majority of them.³¹

²⁴ Galanter, *supra* note 1, at 1136.

²⁵ *Id.* at 1144.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ On the lawyer-statesman ideal, see Robert W. Gordon, *Lawyers as the “American Aristocracy”: A Nineteenth-Century Ideal that May Still Be Relevant*, 20 STAN. LAWYER, Fall 1985, at 4-7; Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988) [hereinafter Gordon, *The Independence of Lawyers*]; Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 235, 265-66 (1990); Robert W. Gordon, *The Citizen Lawyer – A Brief Informal history of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1176 (2009); Robert W. Gordon, *The Return of the Lawyer-Statesman?* 69 STAN. L. REV. 1731 (2017) [hereinafter, Gordon, *The Return of the Lawyer-Statesman?*]; ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

³¹ As Sanford Levinson explains, analysis of the interplay between personal and professional identity requires attention to context and the details of one’s personal identity: “I want to initiate a discussion about the implications of the professional project by looking specifically at some of the problems that arise in identifying oneself (or in being identified) as a ‘Jewish lawyer.’” Levinson, *supra* note 8, at 1579. However, “the questions to be

Fourth, while not all Jewish lawyers are Tzaddiks, arguably they have a special commitment to Tzedek, justice, and to using the law, Jewish law and perhaps American law as well, as means of Tikun Olam, making the world a better place. This account, however, fares no better than its predecessors. It assumes Jewish faith as a significant aspect of Jewish lawyers' personal and professional lives, that is, it is persuasive only to the extent it applies to the observants who follow Jewish law and its mandate to pursue justice. Yet, as we have seen, many and a growing percentage of Jewish lawyers are not observant enough to be familiar with and attracted to the concepts of Tzedek and Tikun Olam. Moreover, the observants are required to pursue justice in every aspect of their lives, not necessarily in the practice of law. Finally, to the extent that some observant Jews may be attracted to American law as a means of pursuing their commitment to justice, they might soon discover that notwithstanding grand rhetorical statements,³² American law in general is not particularly committed to justice.³³

Fifth and finally, the "Ambience Theory" asserts that Jewish life fosters a series of linkages between Jews and American law,

considered below can also arise if one is interested in determining what it might mean to be a 'Christian lawyer;' indeed, one might substitute almost any similar adjective before the word 'lawyer' and find oneself faced with similar problems of analysis." *Id.* Indeed, some of the Lawyer-Tzaddik qualities and commitments that Galanter attributes to Jewish lawyers have been advanced by scholars exploring the personal and professional identities of other lawyers. For example, David Wilkins has advanced a thesis exploring the commitment of black lawyers to the black community. See David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981, 1992 (1993) ("successful black [lawyers] have a duty to consider the interests of other blacks when performing their . . . roles"); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?* 63 GEO. WASH. L. REV. 1030 (1995).

³² The American Bar Association Model Rules of Professional Conduct, for example, proclaim that "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice," MODEL RULES PROF'L CONDUCT PMBL. cmt. 1 (2020) (emphasis added) but focus most of their attention on responsibilities to clients leaving the notions of public citizenship and commitment to justice neglected and underexplored. See Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323 (2009) (examining the few "special responsibilities" of lawyers as "public citizens").

³³ ROBIN L. WEST, *TEACHING LAW – JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* 1–42 (2014) (criticizing American legal education and law practice as insufficiently committed to Justice); TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015) (advancing an account of justice in contemporary America in which, regrettably, lawyers play a minimal role); Eli Wald, *The Contextual Problem of Law Schools*, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 281, 323-24 (2018) (calling on law schools to systematically introduce, engage and socialize law students to different conceptions of justice).

including the love of logic, “a certain subtlety of mind which comes from [habitually] dealing with abstract questions, and a zest for debate.”³⁴ As advocates of this theory concede, however, it too depends on a Jewish upbringing and a thick Jewish identity and affiliation, which is increasingly doubtful in the face of a high rate of secularism and assimilation.³⁵

In sum, the affinity between Jewish lawyers and American law cannot be sufficiently explained in terms of the uniqueness of the latter or attributes of the former. Neither the Puritan Forebears account on the one hand nor theories of Jewish personal and professional identity on the other hand account for the well-documented affinity of Jews and the legal profession in the United States. Indeed, even a combination of Jewish identity theories, conceiving of Jewish lawyers as guardians of Jewish law, as prophets and Tzaddiks, as servants of justice and as products of Jewish life do not appear to explain the affinity between Jewish lawyers and American law because they all assume a thick Jewish identity that no longer describes a majority of Jewish lawyers. Yet if the affinity cannot be explained in reference to Jewish lawyers or the exceptionalism of American law, what accounts for it?

III. THE CONFLUENCE OF CIRCUMSTANCES THEORY

The affinity between Jews and the U.S. legal system in the twentieth century might be explained by a Confluence of Circumstances theory. Pursuant to the Confluence of Circumstances account, American Jews have no special relationship with, or an inherent attraction to, American law or the U.S. legal system *per se*. Rather, certain circumstances made the practice of law a relatively attractive vocation for American Jews, first as members of an excluded and discriminated against ethnoreligious group in the first half of the century, and later as part of the legal elite in the second half of the era. Given a host of circumstances applicable for a while, Jews as a minority group were at the right place and the right time and made the most of the opportunities the practice of law afforded them to seek

³⁴ Galanter, *supra* note 1, at 1127-28 (quoting Jeffrey Morris, *The American Jewish Judge: An Appraisal on the Occasion of the Bicentennial* in 38:2-4 JEWISH SOCIAL STUDIES 220-21 (1976)).

³⁵ Galanter, *supra* note 1, at 1128. For a definition (and rejection) of the notion of lawyers’ thick professional identity, *see*, Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1 (2003).

socioeconomic advancement, enhanced status, and greater equality.³⁶ Subsequently, having entered the profession in significant numbers, Jewish lawyers were able to take advantage of the confluence of circumstances to become part of its elite. Part A describes the circumstances throughout the twentieth century that gave rise to the love affair between American Jews and American law. Part B shows that as these circumstances changed in the twenty-first century, so did the relationship between Jews and the law.

A. Confluence of Circumstances: Explaining the Love Affair Between American Jews and the U.S. Legal System in the Twentieth Century

The existing literature tends to take for granted or assume an affinity between Jewish lawyers and American law, focusing its efforts on exploring the reasons for the affinity rather than defining it.³⁷ For purposes of this article, the definition of affinity between Jews and the U.S. legal system includes at least two components. In the first half of the twentieth century, compared with their percentage in the population, Jews were overrepresented as members of the U.S. legal profession. In the second half of the twentieth century, compared with their percentage in the U.S. legal profession, Jews were overrepresented in prestigious positions of power and influence, such as partners of large law firms and law professors.

This definition of the meaning of the affinity claim is subject to two caveats. First, the love affair of Jews and American law is to an extent a story of New York City Jews and the practice of law in that city, not of the country as a whole. Consider the following statistics regarding the overrepresentation of Jewish lawyers compared to the percentage of Jews in the City's population. In 1885, there were about 5,000 lawyers in New York City, of whom about 400 were Jewish.³⁸ Yet by 1960, the New York City Bar was slightly over 60% Jewish,

³⁶ Studying the rise and fall of large Jewish law firms in the second half of the twentieth century, I described these firms as “Being at the Right Place at the Right Time – and Making the Most of It.” See, Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1842 (2008) [hereinafter, Wald, *The Rise and Fall of the WASP and Jewish Law Firms*]. Here, I attempt to generalize the claim, developing a full confluence of circumstances account applicable to the relationship of Jewish lawyers and the U.S. legal system.

³⁷ See, e.g., Galanter, *supra* note 1, at 1125.

³⁸ HENRY W. TAFT, LEGAL MISCELLANIES: SIX DECADES OF CHANGES AND PROGRESS 77 (1941).

significantly higher than their percentage in the City's population.³⁹ With regard to overrepresentation in positions of power and influence, before 1945, there were essentially no large elite Jewish law firms in New York City,⁴⁰ and every member of the elite club was a large White-Anglo-Saxon-Protestant ("WASP") law firm. Most Jewish lawyers were concentrated in the lower spheres of the city's bar as solo practitioners and members of small law firms.⁴¹ By the mid-1960s, however, this reality had changed significantly. Growing much faster than the WASP firms, the Jewish firms had caught up with the WASP firms, attained elite status, and accounted for six of the twenty largest law firms in New York City.⁴²

While the affinity between Jews and the U.S. legal profession has been most pronounced in New York City, this love story cannot be thought of as a local affair. Irrespective of Jewish lawyers, the story of New York City and its bar is a microcosm of the U.S. and its legal profession. The City has long featured one of the largest legal communities in the country, both in terms of the number of lawyers and of its share of the market for legal services nationally and globally. Indeed, Wall Street was at one time home to all large elite American law firms, such that the story of large Wall Street law firms was the story of large U.S. law firms. In this sense, the affinity of Jewish lawyers and New York City's bar tells a national success story. Moreover, the overrepresentation of Jewish lawyers in the profession and later in positions of power and influence, for example, as partners of large law firms and as law professors, was certainly not limited to New York City.⁴³

Second, to an extent the love affair of Jews with the U.S. legal profession was but a subset of the overrepresentation of Jews in the

³⁹ JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 18-19* (1966).

⁴⁰ In 1950, Weil, Gotshal was the largest Jewish law firm with a total of 19 attorneys; Kaye, Scholer had 18; Paul, Weiss had 17; Proskauer, Rose had 15; Stroock, Stroock & Lavan had 13; Fried, Frank had 12; and the Rosenman firm had 7. *MARTINDALEHUBBELL LAW DIRECTORY* (1950).

⁴¹ CARLIN, *supra* note 39, at 19-28.

⁴² *Growth of 20 Law Firms—1963-1981*, N.Y.L.J., at 3 (Mar. 16, 1981); *National Law Firm Survey*, NAT'L L.J., at 14 (Sept. 18, 1978).

⁴³ See, e.g., Eli Wald, *The Other Legal Profession and the Orthodox View of the Bar: The Rise of Colorado's Elite Law Firms*, 80 U. COLO. L. REV. 605 (2009). See generally, AUERBACH, RABBIS AND LAWYERS, *supra* note 1.

professional world in the United States in the twentieth century.⁴⁴ As Thomas Shaffer has observed, “Jews have advanced into the professions more rapidly than any other late immigrant group. In 1970, seventy percent of American Jewish males were in ‘professional, technical, managerial, and administrative careers.’”⁴⁵ Yet, context matters,⁴⁶ rendering it important to understand the specifics of the Jewish experience with the legal profession even if Jews also succeeded in other professions. Furthermore, as we shall see, some of the circumstances that shaped and informed the affinity of Jews and the legal profession were unique to law practice even if they had parallel counterparts in other contexts.

1. *The quest for socioeconomic advancement and elevated status*

In America law is king,⁴⁷ and lawyers are high priests of a civic-religion,⁴⁸ an aristocracy,⁴⁹ members of a highly paid, well-regarded governing class.⁵⁰ Unsurprisingly, the majority of American lawyers in the eighteenth and nineteenth centuries were upper- and

⁴⁴ YURI SLEZKINE, *THE JEWISH CENTURY* (2004). Slezkine’s claim that Jews have excelled as “service nomads” is consistent with the Confluence of Circumstances theory, which focuses on the conditions and circumstances that have allowed Jews to succeed as lawyers, providers of legal services.

⁴⁵ Thomas L. Shaffer, *The Legal Ethics of Belonging*, 49 OHIO ST. L. J. 703, 713 (1988) (citing RAPHAEL PATAI, *THE JEWISH MIND* 497 (1977)). See also, Sherwin B. Nuland, *My Son, the Doctor—the Saga of Jews and Medicine*, THE NEW REPUBLIC, at 27-34 (Sept. 5, 2005) (studying the affinity between Jews and medicine).

⁴⁶ David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 473, 476, 515-519 (1990); David B. Wilkins, *Who Should Regulate Lawyers?* 105 HARV. L. REV. 799, 814-19 (1992); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145. See generally, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, 9-31 (1992); K. N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* 122-23 (1930, Oceana Publications, Inc.; 10th ed., 1981).

⁴⁷ THOMAS PAINE, *COMMON SENSE* 29 (London 1776) (observing “that in America The Law Is King”).

⁴⁸ Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1879-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 53 (Gerald W. Gawalt ed., 1984) (exploring the elevated role and status of lawyers in American society).

⁴⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 301-11 (Arthur Goldhammer trans., Library of Am. 2004) (1835) (discussing the status of lawyers as America’s aristocracy)

⁵⁰ Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381 (2001).

aspiring middle-class Protestants.⁵¹ At the turn of the twentieth century, however, waves of immigrants, Jewish and otherwise, aspiring to prove themselves as American and seeking elevated economic, social and cultural status, out of backbreaking blue-collar jobs and into the middle class flocked to law schools. Thus, the unique role of law and of lawyers in American society and culture made the practice of law a particularly attractive proposition for Jews attempting to climb up the socioeconomic ladder, leading in the years between 1890 and 1910 to an immense growth in part-time and nighttime law schools that graduated an increasing number of lawyers born abroad or to foreign-born parents.⁵²

That this new cohort of lawyers seeking to join the governing class and an elevated status graduated from part-time and nighttime law schools revealed more than their poor, working-class backgrounds. Against the backdrop of a changing legal profession infused with waves of immigrants “[o]ld-style practitioners . . . cooperate[d] with [corporate lawyers] in a united front to preserve the legal profession . . . as an Anglo-Saxon Protestant enclave.”⁵³ As documented by Karabel, elite institutions imposed discriminatory admission restrictions on the number of less-desirable candidates, resulting in the misleadingly “natural” correlation between top educational credentials and indicia of elite status.⁵⁴ Bar associations and newly promulgated attorney regulations entrenched and solidified the profession’s stratification.⁵⁵ Gradually, the New York City bar grew increasingly stratified: in the top hemisphere, large corporate elite law firms served large corporate clients, employing the “Best Men” of the era, WASP attorneys. In the bottom hemisphere, Jewish lawyers and others labored as solo practitioners and in small law firms, representing individuals and small businesses.⁵⁶

⁵¹ JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 249-55, 313-19 (1950).

⁵² JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 95-96 (1976) [hereinafter, AUERBACH, *UNEQUAL JUSTICE*].

⁵³ *Id.* at 52.

⁵⁴ *See generally* JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE AND PRINCETON* (2005).

⁵⁵ *See* MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* 141-44 (1988) (discussing the development of bar rules that raised standards at the expense of non-elites); TAFT, *supra* note 38, at 81-82.

⁵⁶ Commenting on the interplay between legal education, social standing and ethnic descent, Carlin observed that: “If eastern European Jewish lawyers are generally at the lowest levels of the New York City bar, it is partly because their degrees are from night law schools.”

It is therefore important not to sugarcoat or exaggerate the extent of the love affair between Jews and U.S. legal profession in the first half of the twentieth century. While Jews looked to law and law practice as means of seeking an elevated status and upward socioeconomic mobility in American society, the legal profession, and, in particular its elite, did not welcome Jewish lawyers to their midst with open arms but rather with explicit disdain and discrimination. Entry into the profession was hard, working during the day and attending law school part-time or at night, only to be followed, as lawyers, with hard exclusionary competitive practice realities and a likely future occupying the lower ranks of the profession. Yet, significant challenges and hardships notwithstanding, Jews flocked to the legal profession, successfully transitioning from blue-collar, physical labor occupations to membership in a respected white-collar intellectual legal profession, complete with its, by now, established markers of elite social, cultural and economic status.

Entry into a resentful bar did not end Jewish lawyers' quest for elevated status. Once admitted into the profession, Jewish lawyers set out to join or establish themselves as members of the elite. This, to be sure, was no easy task as the elite bar's discrimination against Jewish lawyers was common knowledge.⁵⁷ In 1960, "Jewish lawyers [were] less likely than their non-Jewish colleagues to gain access to [the] high-status position[s]" with the large WASP firms.⁵⁸ Constituting 60% of the New York City bar, Jewish lawyers were overrepresented in individual practice and small firms, and significantly underrepresented in large law firms.⁵⁹ On the other hand, Protestant attorneys, who constituted only about 18% of the bar, accounted for 43% of the large law firm pool, and only 9% of the individual practitioner pool.⁶⁰ In the face of explicit, pervasive discrimination, however, Jews continued to flock to law schools, enter the profession and attempt to rise through its ranks, aided by shifting circumstances in the second half of the twentieth century.

CARLIN, *supra* note 39, at 22. Years later John Heinz documented and coined the term the "two hemispheres" of the legal profession. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982).

⁵⁷ Note, *The Jewish Law Student and New York Jobs: Discriminatory Effects in Law Firm Hiring Practice*, 73 YALE L. J. 625, 635 (1964) ("Gentiles were more successful than Jews in getting good jobs, and in getting the jobs of their choice.").

⁵⁸ CARLIN, *supra* note 39, at 22.

⁵⁹ *Id.* at 19, 28.

⁶⁰ *Id.*

2. *The rise of competitive meritocracy in law practice and in legal education*

The relationship between the large law firms and law schools, forged in their embrace of “WASP meritocracy,”⁶¹ was a mutual, self-fulfilling prophecy of elite status: “[b]y the 1900’s the leading law schools produced lawyers for the leading firms; the firms in turn made the schools prosperous by donations.”⁶² The Cravath System conferred elite status on law schools from which it recruited its students, and in turn, the law schools conferred elite status on the large firms by identifying them as hosts of preferred jobs for elite graduates.⁶³ A career with the corporate WASP firms became the “holy grail” of law practice,⁶⁴ leading WASP graduates of elite law schools to flock to large law firms.⁶⁵ Jewish candidates, however, were routinely denied admission to elite law schools, and were thus unable to satisfy the seemingly meritocratic recruitment standards of the elite law firms.⁶⁶

⁶¹ Eli Wald, *Glass-ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes and the Future of Women Lawyers at Large Law Firms*, 78 *FORDHAM L. REV.* 2245, 2268-71 (2010) (describing WASP meritocracy as a professional ideology that “inherently built and relied on Protestant values and white-shoe ethos.” It “entailed, on the one hand, strong academic credentials, hard work, and increased specialization of the firm’s lawyers and, on the other hand, reflected the powerful interplay of professional, socioeconomic, and cultural networks—and the dominance of the WASP infrastructure in the upper spheres of the American business world.” Further, “while the ideology was truly committed to aspects of professional excellence and merit, it inherently incorporated elitist characteristics of white-shoe culture and Protestant dogma.” *Id.* at 2268-69) [hereinafter Wald, *Glass-ceilings and Dead Ends*].

⁶² Magali Sarfatti Larson, *On the Nostalgic View of Lawyers’ Role: Comment on Kagan and Rosen’s “On the Social Significance of Large Law Firm Practice,”* 37 *STAN. L. REV.* 445, 448 (1985) (quoting Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise*, in *PROFESSIONS AND THE PROFESSIONAL IDEOLOGIES IN AMERICA* 70 (G. Geison ed., 1983)).

⁶³ Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 *IND. L. J.* 433, 433 (1989) (exploring the “increasingly close connection between the large corporate law firms and the law schools”). For example, “Between 1918 and 1929, 81 percent of a sample of nearly three hundred law review graduates from Harvard, Yale, and Columbia chose employment in private practice immediately upon graduation.” AUERBACH, *UNEQUAL JUSTICE*, *supra* note 52, at 143.

⁶⁴ *See Id.* at 144. For other lawyers, the holy grail was out of reach. Effective discrimination by the WASP firms against Jewish lawyers was a driving force behind the success of the Jewish firm.

⁶⁵ *See* Jerold S. Auerbach & Eugene Bardach, “Born to an Era of Insecurity”: *Career Patterns of Law Review Editors, 1918-1941*, 17 *AM. J. LEGAL HISTORY* 3, 5 (1973).

⁶⁶ Prior to 1945, quotas were common practice. *See* 1 U.S. IMMIGRATION COMM’N, *THE CHILDREN OF IMMIGRANTS IN SCHOOLS*, S. DOC. NO. 61-749, at 154-56, 160 (3d Sess. 1911)

WASP meritocracy dominated through the first half of the twentieth century, when it gradually began to erode and was eventually replaced with competitive meritocracy. This ideological shift reflected and shaped practice realities experienced by large law firms and elite law schools.⁶⁷ In the 1960s and 1970s, large law firms experienced exponential growth as the result of increased demand for legal services by large corporate clients,⁶⁸ significant growth in the body of statutory and administrative laws regulating the conduct of entity clients, and the increased complexity of the law.⁶⁹ Traditional practice realities of a gentlemanly, anticompetitive legal environment began to crumble. The “old ways,” in which compensation was scarcely discussed,⁷⁰ lateral hiring was taboo,⁷¹ competition for clients was considered discourteous,⁷² and the starting salary of associates was informally agreed upon,⁷³ were all gone. In the 1980s and 1990s large law firms continued to experience increased competition: “firm breakups, lateral hiring, . . . [retention of] contract attorneys, temporary attorneys, senior associates, staff attorneys, and other new categories of attorneys” have all become common practice realities.⁷⁴ As large law firms continued to grow in numbers and in size, competition among them reached unprecedented levels.

(documenting the number of Jewish students enrolled in law schools); 5 U.S. IMMIGRATION COMM’N, THE CHILDREN OF IMMIGRANTS IN SCHOOLS, S. DOC. NO. 61-749, at 776-89 (3d Sess. 1911) (documenting number of Jewish students enrolled in law schools); Bureau of Jewish Soc. Research, Professional Tendencies Among Jewish Students in Colleges, Universities, and Professional Schools, in 22 THE AMERICAN JEWISH YEAR BOOK 383, 383-93 (Harry Schneiderman ed., 1920) (surveying professional tendencies among Jewish students in higher education); see also HEYWOOD BROUN & GEORGE BRITT, CHRISTIANS ONLY: A STUDY IN PREJUDICE 161-74 (1931) (providing anecdotal evidence of prejudice in hiring in the legal profession).

⁶⁷ Wald, *Glass-ceilings and Dead Ends*, *supra* note 61, at 2269.

⁶⁸ See Larson, *supra* note 62, at 448 (“It is well known that the large law firm was born . . . in a period of institutional reorganization dominated by the rise of the giant business corporation.”); Milton C. Regan, Jr., *Taking Law Firms Seriously*, 16 GEO. J. LEGAL ETHICS 155, 155 (2002).

⁶⁹ Robert L. Nelson, *Of Tournaments and Transformations: Explaining the Growth of Large Law Firms*, 1992 WIS. L. REV. 733, 736-37 (book review).

⁷⁰ Often, an associate did not know what to expect upon making partner. See ERWIN O. SMIGEL, THE WALL STREET LAWYER 92 (1964).

⁷¹ See PAUL HOFFMAN, LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS 60-61 (1973) (noting the rarity of lateral movement by individual lawyers and that there were no “open breaks”).

⁷² *Id.* at 72 (“In the blue-chip bar client shifts are rare.”).

⁷³ SMIGEL, *supra* note 70, at 57-59.

⁷⁴ Fern S. Sussman, *The Large Law Firm Structure – An Historic Opportunity*, 57 FORDHAM L. REV. 969, 970 (1989).

Such intense competition ushered in an era of competitive meritocracy, in which large law firms were driven to hire and retain the best meritorious lawyers, irrespective of their personal identities. Moreover, having secured their position as the elite of the legal profession, large law firms had no reason to rely on and adhere to WASP meritocracy. Instead, matching realities to rhetoric, elite law firm began to gradually open their doors to all meritorious lawyers.

The same competitive meritocracy realities took place in elite legal education. After 1945, elite law schools began to drop their discriminatory admission quotas and admit students previously excluded, including Jewish candidates.⁷⁵ In turn, given the symbiotic relationship between elite law firms and elite legal education, Jewish law students who excelled at elite law schools began to satisfy, in greater numbers, the formal recruiting standards of the Cravath System. Over time, WASP law firms began to hire and promote Jewish lawyers to the coveted position of partner.

Once again, however, it is important not to overlook the challenges faced by Jewish lawyers breaking into the elite circles of the legal profession. Overt discrimination was still the norm at large law firms, and the majority of Jewish law school graduates meeting the recruitment criteria of elite firms were nonetheless rejected, while others became essentially token Jewish associates.⁷⁶ Among the new crops of Jewish graduates of elite law school, those who were able to pass for WASPs or cover their ethnoreligious identity, for example, relatively prosperous Jews of German decent as opposed to the lower class eastern-European Jews, found admission to the WASP firms easier.⁷⁷ Moreover, many of those who were hired as associates were

⁷⁵ After 1945, law schools began to drop discriminatory quotas. See RICHARD L. ABEL, *AMERICAN LAWYERS* 85-87, 109 (1989) (exploring admission quotas as barriers to entering the profession); HAROLD S. WECHSLER, *THE QUALIFIED STUDENT: A HISTORY OF SELECTIVE COLLEGE ADMISSION IN AMERICA* 168-73 (1977) (discussing selective admission at Columbia's professional schools); Jerold S. Auerbach, *From Rags to Robes: The Legal Profession, Social Mobility and the American Jewish Experience*, 66 *AM. JEWISH HIST. Q.* 249, 278-81 (1976) (discussing how prevailing admissions criteria had benefited Jewish law students and reversed professional discrimination); Marcia Graham Synnott, *Anti-Semitism and American Universities: Did Quotas Follow the Jews?*, in *ANTI-SEMITISM IN AMERICAN HISTORY* 233, 258-59 (David A. Gerber ed., 1986) (summarizing rising Jewish enrollment in top law schools and the subsequent decrease in Jewish enrollment in elite law schools by 1946 due to adverse reactions by the elite bar).

⁷⁶ AUERBACH, *UNEQUAL JUSTICE*, *supra* note 52, at 143.

⁷⁷ *Id.* at 97-99 (discussing the elite bar's critique that night law schools bring down high standards of the profession); CARLIN, *supra* note 39, at 38 n.23; ROBERT STEVENS, *LAW SCHOOLS: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 74-79 (1983)

not subsequently promoted to partnership. Nonetheless, the rise of competitive meritocracy in law practice and in legal education in the second half of the twentieth century fueled the continued commitment of Jews to seek in the law a path to elevated professional, economic and cultural status.

3. *The low cost of legal education*

Notably, at the same time that elite law schools were abandoning discriminatory admission quota, and doors were beginning to open for Jewish lawyers at elite large law firms, the cost of legal education was being subsidized post World War II by the G.I. Bill, making legal education an even more attractive proposition for Jewish veterans.⁷⁸ The significance of the relative low cost of legal education in the second half of the twentieth century should not be under-stated: in the absence of subsidies, Jewish veterans, confronted with the reality of prevailing discrimination post-graduation and the resulting difficulty of securing well-paid prestigious positions might have been deterred from attending law schools. Yet, the low cost of legal education was exactly part of the confluence of circumstances that facilitated the affinity between Jews and the U.S. legal profession.

4. *The Consequences of Discrimination or the “Economics of Discrimination” Thesis in Practice*

Economics Nobel Laureate Gary S. Becker coined the term “economics of discrimination,” exploring the economic rationale for and consequences of discrimination.⁷⁹ Becker’s thesis, simply put, is that discrimination is irrational and inefficient and thus will be, over time, eradicated by well-functioning competitive markets without a

(discussing role and expansion of part-time law schools). *See generally*, KENJI YOSHINO, COVERING – THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006) (exploring the related phenomena of covering and passing).

⁷⁸ Eli Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?* 76 UMKC L. REV. 885, 929-30 (2008) [hereinafter Wald, *Is the Jewish Law Firm Generic?*]; James P. White, Remark, *Rethinking the Program of Legal Education: A New Program for the New Millennium*, 36 TULSA L.J. 397, 404 (2000) (“In the aftermath of World War II veterans temporarily swelled the ranks of law students. The G.I. Bill made legal education possible for many who previously would not have had the resources to attend a professional school.”).

⁷⁹ GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (2d ed. 1971).

need for anti-discrimination regulatory intervention. A taste for discrimination is inefficient, argued Becker, because it leads discriminating firms to exclude talent. Over time, competitive non-discriminating firms that do not exclude talent will outperform discriminatory firms, which will be driven out of the marketplace.⁸⁰

In the second half of the twentieth century, the market for elite legal services demonstrated Becker's thesis, in that the discriminatory hiring and promotion patterns of large WASP law firms inadvertently opened doors for Jewish lawyers and law firms. To begin with, Jewish law firms rose and grew quickly, recruiting elite Jewish graduates excluded and not promoted by the WASP firms. Unlike the WASP firms' adherence to Protestant values and discriminatory elite culture, the Jewish firms did not exhibit a deep hidden commitment to Jewish values or culture.⁸¹ Not only did they purport to subscribe to principles of professionalism based on merit, the Jewish law firms circa 1950 had no reason to invoke Jewish values and culture. Unlike the WASP firms, which implicitly relied on Protestant values and the white-shoe ethos to help secure their claim to elite professional status, the Jewish firms had reason to distance themselves from Jewish identity in an era when anti-Semitism and ethnic discrimination were still widely accepted. Thus, the large Jewish law firms were Jewish by discriminatory and exclusionary default. Not only did discriminatory hiring and promotion practices at WASP firms help define a "by default" religious identity for the Jewish firms, the religious and cultural identity of the WASP firms contributed to the rise and success of the Jewish firms, who recruited and prompted talented Jewish lawyers overlooked by the WASP firms.

Next, the discriminatory practices and culture of WASP firms led to the emergence of protected "Jewish" pockets of practice. The existence of "Jewish" pockets of practice in areas such as litigation, corporate takeovers, bankruptcy and commercial real estate, allowed individual Jewish attorneys to develop strong reputations in their respective practice areas, free of competition by WASP lawyers at the elite firms. The success of individual Jewish attorneys, in turn, lent visibility to their law firms and enabled the rapid growth of Jewish

⁸⁰ *Id.* Deborah Rhode has called this approach the "no-problem problem," to capture the belief of some that since the problem of discrimination is self-correcting, it is not a (long term) problem at all. Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 *YALE L. J.* 1731 (1991).

⁸¹ Wald, *Is the Jewish Law Firm Generic?*, *supra* note 78, at 892-97.

firms.⁸² Importantly, once Jewish law firms proved their abilities in the protected areas, they used their access to large entity clients to crossover and compete with the WASP firms for the provision of corporate legal services in the mainstream arenas of corporate law. Put differently, WASP law firms' discriminatory culture kept them out of competing in areas of practice they deemed beneath them, allowing Jewish lawyers and law firms to prove their excellence to large entity clients in these protected pockets of practice. Once they demonstrated their worth and merit, Jewish law firms were then able to overcome discrimination and bias by entity clients and began to represent them in mainstream business law areas once dominated by the WASP firms.

The economics of discrimination thesis does not belittle discrimination or its devastating effects on the discriminated against. A generation of Jewish lawyers post World War II experienced explicit systematic discrimination at the hands of elite WASP law firms, resulting in Jewish graduates of elite law schools unable to find positions they qualified for. Not all of these graduates were hired by Jewish law firms and not all of the discriminated upon who were hired but not promoted by WASP firms were laterally picked up by the Jewish firms. Nonetheless, the consequences of the discriminatory conduct and culture of the WASP elite firms did allow large Jewish law firms to grow faster than the former and establish themselves as part of the elite.

5. *The individualistic nature of law practice and the visibility of success*

As Jews were seeking socioeconomic advancement out of blue-collar jobs and immigrant status in the first half of the twentieth century, and elevated professional status in the second half of the century against a background of the rise of competitive meritocracy, the low cost of legal education, and declining yet still robust

⁸² Notable examples include Milton Handler who became a prominent authority on takeover law and helped build Kaye, Scholer. Jules Berman achieved similar success as a real estate attorney at Kaye, Scholer. In 1947, another Kaye, Scholer attorney "successfully mediated a threatened strike at a New Jersey factory" and his success led to additional mediation cases: "we can trace a whole school of clients from that one case," a partner at Kaye Scholer noted. Ira Millstein had a similar impact on Weil, Gotshal. Martin Lipton and Joseph Flom were the personification of reputed anti-takeover lawyers, and their legendary battles in the 1970s helped establish Wachtell, Lipton and Skadden, Arps, respectively, as elite firms. Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 36, at 1843.

discrimination, two more circumstances made law practice an appealing proposition: its individualistic nature and its high visibility of success.

Historically, the constitutive unit of law practice in the U.S. has been, and to some extent continues to be, the individual lawyer.⁸³ This is not only because the paradigm for law practice has been for many years the solo practitioner,⁸⁴ but because U.S. lawyers have long valued their individualism and have considered their independence a core aspect of their exercise of professional judgment.⁸⁵ This individual independence is inherent to the practice of law in the U.S. because lawyers are not understood to be technocrats but rather masters of esoteric intellectual knowledge who exercise practical wisdom as representative of clients, officers of the legal system and public citizens.⁸⁶ Thus, any intrusion on lawyers' individualistic independence is an assault on the very nature of the practice of law as an intellectual vocation.⁸⁷ This means, for example, that lawyers have invoked their individualism and independence of professional judgment not only to secure self-regulation and resist regulatory interference in the name of what it means to be a lawyer, but also to resist firm-wide centralized decision making on the ground that it usurps the exercise of independent professional judgment by individual firm partners.⁸⁸

⁸³ The American Bar Association Model Rules of Professional Conduct, for example, continue to regulate lawyers as if they practice as individuals, notwithstanding repeated scholarly calls to acknowledge that the majority of U.S. lawyers practice in law firms and add regulations at the firm level. See, e.g., Ted Schneyer, *Professional Discipline for Law Firms?* 77 CORNELL L. REV. 1 (1992); Elizabeth Chambliss & David Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335 (2003).

⁸⁴ Schneyer has noted that “[w]hile as late as 1951, sixty percent of the bar practiced alone, two-thirds now work in law firms and other organizations.” Schneyer, *supra* note 83, at 4 (1991) (citing ABEL, *supra* note 75, at 179, 300, and BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S 13 (1985)). From 2010 to 2011, the Bureau of Labor Statistics found that only “[a]pproximately 26 percent of lawyers were self-employed” and that number over-states the number of lawyers in solo practice because it also includes partners in law firms. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 259 (2010).

⁸⁵ Gordon, *The Independence of Lawyers*, *supra* note 30.

⁸⁶ See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 4 (1975); MODEL RULES PROF’L CONDUCT PMBL. cmt. 1 (2020).

⁸⁷ Wasserstrom, *supra* note 86.

⁸⁸ Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawyer Regulation*, 21 GEO. J. LEGAL ETHICS 95, 96 (2008); Milton C. Regan, Jr., *Risky Business*, 94 GEO. L. J. 1957, 1962-64 (2006).

This characteristic of U.S. law practice has been an important circumstance explaining the affinity of Jewish lawyers and American law. When Jewish lawyers entered law practice in the first half of the twentieth century, into the lower strata of the profession, law was predominantly a sole practice, and one could practice it successfully as an individual practitioner. This means that once admitted to the practice of law, Jewish lawyers could hit the ground running, relatively uninhibited by discriminatory and exclusionary WASP networks, so inherent in other professional realms.

In the second half of the twentieth century, when Jewish lawyers began entering elite large law firms, the inherent nature of law practice as an individualistic independent affair meant that these attorneys were able to prove themselves and excel as individuals, overcoming bias and discriminatory attitudes, even in the context of working for growing large law firms, where teamwork was beginning to emerge as a key building block.⁸⁹

Relatedly, the practice of law featured the possibility of high “visibility of individual success,”⁹⁰ that is, the individualistic nature of law practice allowed talented attorneys to showcase their skills and merit and aided in the overcoming of discriminatory attitudes. The large Wall Street firms were still relatively small, providing superstar attorneys a floor on which to demonstrate their skills and exercise of professional judgment. For example, in 1945, after the split of the Root, Clark firm into Cleary, Gottlieb and Dewey, Ballantine, Leo Gottlieb built on his stellar visible individual reputation to become the first Jewish named partner in a major WASP Wall Street firm. Other examples of high visibility opening doors at elite WASP firms include Eustace Seligman at Sullivan & Cromwell; Ed Weisl at Simpson, Thacher; Louis Loeb at Lord, Day & Lord; and Floyd Abrams at (the Catholic law firms) Cahill, Gordon.⁹¹

⁸⁹ David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 *FORDHAM L. REV.* 2067 (2010) (describing the changing attitudes of entity clients over time, from hiring law firms, to hiring individual lawyers within firms, and back to hiring law firms).

⁹⁰ The concept of visibility is invoked here following Erving Goffman’s use, in the sense of how well or how badly public performance communicates information about the quality of individual attorneys and of Jewish law firms. See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 48-51 (1963). Of course, Goffman explored the visibility of stigma and thus the negative consequences of visibility, whereas here visibility had positive consequences for Jewish law firms; Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 36, at 1843.

⁹¹ GOFFMAN, *supra* note 90, at 96-104.

6. Stereotypes and the “flip side of bias”⁹²

Beginning in the 1960s and continuing throughout the 1970s and 1980s the prevailing Cravath-style ideology of professionalism – WASP meritocracy – simultaneously featuring formal meritocracy alongside implicit reliance on Protestant values and the white-shoe ethos, was eroding, slowly and gradually displaced by a more explicitly competitive and meritocratic ideology.⁹³ Under this emerging business-minded ideology, the same prejudices, stereotypes and bias that fueled and helped sustain effective discrimination against Jewish attorneys under the old ideology now made Jewish attorneys desirable under the new model.⁹⁴ That is, the paradigm shift in the underlying ideology of large law firms that replaced the prevailing white-shoe ethos with a more explicitly business-oriented notion of professionalism rendered the loathed “qualities” of Jewish lawyers under the old model—smarts, wealth maximizing, manipulative on behalf of clients, and instrumental, not to say conniving—positive attributes of lawyering under the new one. The very same stereotypes that fueled prejudice against Jewish lawyers were now perceived as desirable qualities.⁹⁵

Today, stereotyping is acknowledged to be an egregious form of implicit bias,⁹⁶ and the commercialization of stereotypes by both

⁹² Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 36, at 1844-47; Wald, *Is the Jewish Law Firm Generic?*, *supra* note 78, at 929-33.

⁹³ Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1996). On the new increasingly competitive practice realities and market inspired ideology of the profession, see RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 185-211 (1999); MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2006).

⁹⁴ See also GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 191-192 (1954). (In his classic *The Nature of Prejudice*, Allport defines a stereotype as “an exaggerated belief associated with a category. Its function is to justify (rationalize) our conduct in relation to that category. . . . A stereotype is not identical with a category; it is rather a fixed idea that accompanies the category.” Allport explained that a stereotype may be positive or negative. *Id.* at 191 (Allport characterized stereotypes as favorable and unfavorable), justifying categorical acceptance in the case of the former and justifying categorical rejection in the case of the latter). *Id.* at 192.

⁹⁵ While positive stereotyping might entail beneficial consequences, as was the case for Jewish attorneys and law firms, whether stereotyping is ever desirable is very much in dispute. See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); See Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283 (2007).

⁹⁶ Russell G. Pearce et al., *Difference Blindness Vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407 (2015) [hereinafter, Pearce, *Difference Blindness Vs. Bias Awareness*].

stereotyping institutions and the stereotyped, is recognized as a complicated controversial phenomenon.⁹⁷ The flip side of bias that benefitted Jewish lawyers' entry into positions of power and influence in the 1960s and 1970s does not belittle the harm inherent in stereotyping and implicit bias in the workplace. Yet, the combined effect of the offensive "Jews are smart" and "Jews are manipulative wealth maximizers" stereotypes in an era of growing appreciation for smarts, the prudent exercise of professional judgment, increased competition and an expanding emphasis on the financial bottom line all led to the flip side of bias producing more favorable conditions for Jewish lawyers rising through the ranks of the legal profession.

Notably, this flip side of bias phenomenon rendering the practice of law attractive for Jewish lawyers in the second half of the twentieth century took place in the context of a unique confluence of circumstances. It was a function of the rise of a new professional ideology – competitive meritocracy, against a backdrop of changing practice realities – more explicitly competitive, profit maximizing, client-centered practice thought of a service, at a time where stereotyping was still commonplace, and operating on a particular set of stereotypes applicable to Jews but not to other previously excluded groups entering the legal profession and rising through its ranks.

7. *The promise of law and of civil rights*

As previously closed doors were beginning to open for some Jewish graduates of elite law schools in private practice at Wall Street law firms and elsewhere, others found their calling in the public sphere and the emerging civil rights movement. For members of an excluded group, a career committed to the New Deal, the administrative state and to civil rights reform captured the promise of law as an embodiment of a structure of objective merit standards, equality and justice.⁹⁸ In particular, the allure of civil rights as an integral aspect of the changing law and legal profession was a draw for some Jewish lawyers.⁹⁹

⁹⁷ Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013); Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333 (2016).

⁹⁸ Ronen Shamir, *Professionalism and Monopoly of Expertise: Lawyers and Administrative Law, 1933-1937*, 27 LAW & SOC'Y REV. 361 (1993); RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* (1995).

⁹⁹ *Jewish Lawyers in the Civil Rights Movement*, CTR. FOR JEWISH HISTORY (Sept. 19, 2007), <https://www.cjh.org/culture/media-archive/jewish-lawyers-in-the-civil-rights-move>.

To be sure, the point here is not to suggest that all or even many Jewish lawyers were attracted to pursue a career in public law practice committed to advancing justice and greater equality through civil rights, nor is it to suggest an alliance or straightforward affinity between Jews and other excluded groups in and outside of the law.¹⁰⁰ Nonetheless, for some Jewish lawyers the practice of law represented more than the pursuit of elevated socioeconomic and cultural status. It was a way of proving themselves to be American through the secular civic religion of law, doing well while doing right, while advancing the interests of justice and greater equality for all. During the heyday of the civil rights era, law thus proved to be especially attractive to some Jewish lawyers.

8. *The confluence of circumstances theory: law practice as an attractive proposition for Jewish lawyers in the twentieth century*

In the first half of the twentieth century, the practice of law, although unwelcoming and discriminatory, was a relatively attractive pursuit for Jewish males, seeking a path to elevated socioeconomic and cultural status in the U.S. In the second half of the twentieth century, a law career emerged as an avenue not only for class mobility but for positions of power and influence in the profession and into the elite ranks of American society. The low cost of legal education and the gradual decline of explicit ethnoreligious discrimination by elite law schools and large law firms, combined with the rise of competitive meritocracy, the consequences of the economics of discrimination, the individualistic, independent and visible nature of the practice of law at the time, the flip side of bias effect – the positive consequences of negative Jewish stereotypes, and the allure of the law as a beacon of justice for all, all made law practice relatively attractive, alongside other professional arenas. Law benefitted from strong cultural and social status and promised, for the hardworking, handsome financial rewards. Increasingly competitive and demanding, the practice of law was hard work, but it was intellectually rewarding undertaking, seemingly based on merit and increasingly open for Jews, who had an

¹⁰⁰ On the complex relationship between the Jewish and African-American community before and during the civil rights era, see *BLACKS AND JEWS – ALLIANCES AND ARGUMENTS* (Paul Berman, ed., 1994).

opportunity to prove their professional worth and rise within the elite ranks of the profession.

Thus, the Confluence of Circumstances theory helps explain the affinity between Jews and American law in the twentieth century. While consistent with the existing Carry-Over, Prophetic, Tzaddik, Tikun Olam and Ambience theories, it does not assume the thick religious identity of Jewish lawyers and therefore is not vulnerable to increased rates of secularism and assimilation among American Jews. Moreover, the Confluence and Circumstances theory has the potential to explain the love affair between Jews and the law outside of the U.S.¹⁰¹ Such contextual explorations closely examining applicable confluence of circumstances elsewhere fall outside the scope of this article but outline a promising future research agenda.¹⁰²

B. The End of the Affair?

Applying the Confluence of Circumstances theory to contemporary practice realities in the U.S. in the twenty-first century, that is, revisiting the very same circumstances that accounted for the affinity between Jewish lawyers and American law in the last century, paints a rather different picture, and suggests the end of the affair between Jews and the legal profession.

1. *Law practice as a quest for elevated status and Jews as part of the established elite*

Throughout the twentieth century, the practice of law was an attractive means for pursuing the American Dream for American Jews seeking to prove themselves as American, socioeconomic advancement, and elevated status.¹⁰³ The twenty-first century,

¹⁰¹ Galanter, *supra* note 1, at 1126, fn 5.

¹⁰² Historically, in pre-war and in-between-the-wars years, the overrepresentation of Jews among legal professions in eastern Europe, for example, may have been the consequence of a confluence of circumstances of exclusion from other occupations and land ownership, as well as prevailing stereotypes and relative high rates of literacy among Jews compared with the general population. In contemporary Israel, unpacking the high concentration of lawyers may require contextual attention to the experience and circumstances of different constituents within the profession: Ashkenazi Jews, Sephardic Jews, other ethnic Jews such as Ethiopian and Russian in the last decades of the twentieth century and early decades of the twenty-first century, and Arab- and Israeli-Palestinians.

¹⁰³ LAWRENCE R. SAMUEL, *THE AMERICAN DREAM: A CULTURAL HISTORY* 13 (2012) (defining and describing the American Dream); THOMAS WOLFE, *YOU CAN'T GO HOME AGAIN*

however offers a different mix circumstances, both in terms of the public perception of the law and lawyers in the U.S., and the objectives and identity of American Jews.

The practice of law continues to attract many and offer high financial rewards compared with other occupations,¹⁰⁴ yet to the extent that law was ever king in America, the king may be dead and lawyers are no longer perceived to be high priests of law as a civic religion. Public surveys reveal disillusionment with the law and relative high rates of discontent with lawyers,¹⁰⁵ and lawyers themselves report dissatisfaction with their careers.¹⁰⁶ At the core of this transformation in the public and internal perception of the law is a paradigm shift from understanding law as a public calling practiced as a profession in the public interest to law as a service industry centered upon the interests of private clients.¹⁰⁷ The point here, to be sure, is not to debate claims about the decline of professionalism,¹⁰⁸ rather, it is merely to note that the contemporary practice of law may have many advantages but it is no longer commonly understood as a manifestation of what it means to be an American.

As importantly, as Jews gradually established their status as part of the elite, culturally, socially and financially, the allure of law practice for them declined.¹⁰⁹ The practice of law was an avenue to

(1940) (same). *See generally*, Eli Wald, *Success, Merit and Capital in America*, 101 MARQUETTE L. REV. 1 (2017) (exploring the interplay between the American Dream, conceptions of merit, and economic, social and cultural capital) [hereinafter, Wald, *Success, Merit and Capital in America*].

¹⁰⁴ The U.S. lawyer population topped 1,000,000 in 1999 and exceeded 1,350,000 in 2019. *See* ABA NATIONAL LAWYER POPULATION SURVEY, HISTORICAL TREND IN TOTAL NATIONAL LAWYER POPULATION, 1878-2019, available at https://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2019.pdf.

¹⁰⁵ Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1340 (1997) (finding that “‘professionalism’ has declined, public opinion of attorneys and the legal profession has plummeted, and lawyer dissatisfaction and dysfunction have increased.”).

¹⁰⁶ Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 874-77, 881-82 (1999).

¹⁰⁷ Pearce, *supra* note 93.

¹⁰⁸ MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); KRONMAN, *supra* note 30; SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994).

¹⁰⁹ Auerbach makes the case for the cultural affinity of American Jews and a legal career. He argues that after 1945, control of the expressions and direction of American Judaism had switched hands from rabbis to lawyers: Marshall, Brandeis, Frankfurter and Mack. Auerbach submits that for American Jews and Jewish immigrants, legal practice was a means of

pursue elevated status in the U.S. and the American Dream, yet the Dream, after all, has never been about maximizing wealth per se but rather about the freedom to set and pursue one's life objectives.¹¹⁰ The stability and elevated status achieved in part thorough the practice of law has allowed American Jews, by now well-established third- and fourth-generation immigrants, to do just that – take advantage of their status and options and venture into all walks of professional life. The socioeconomic drive and desire of immigrants, newcomers and outsiders that channeled many American Jews into the professions as lawyers and doctors has been replaced with the relative comfort of the middle-upper class, seeking a wider array of occupations and pursuits.

2. *The decline of competitive meritocracy and rise of hypercompetitive meritocracy*

Elsewhere I have documented the decline of the ideology of competitive meritocracy and rise of hypercompetitive meritocracy as the dominant ethos at large law firms and throughout the legal profession.¹¹¹ Briefly, this ideological shift reflects and shapes a corresponding change in practice realities, one in which a commitment to serve clients around the clock, increasingly defer to clients' wishes and objectives with relatively little pushback, and a willingness to understand the public interest as nothing more than an aggregate of clients' private interests have come to define professional excellence.¹¹² This does not mean that lawyers do not aspire to offer and that clients do not expect lawyers to provide excellent legal services, rather, hypercompetitive meritocracy captures a more subtle insight: the very meaning of lawyerly excellence has expanded to include, in addition to merit, an ethos of 24-7 client-centered service.

Thus, to the extent that in the second half of the twentieth century the practice of law attracted Jewish lawyers eager to compete in an increasingly level playing field and prove themselves deserving of elite status based on meritorious criteria, that draw has subsided as success in the upper echelon of the profession, always requiring long hours and hard work, is now symbolically understood to communicate

becoming truly "American" and proving their patriotism. AUERBACH, RABBIS AND LAWYERS, *supra* note 1, at 146.

¹¹⁰ Wald, *Success, Merit and Capital in America*, *supra* note 103.

¹¹¹ Wald, *Glass-ceilings and Dead Ends*, *supra* note 61.

¹¹² *Id.*

not just merit but also a demonstrated long-term commitment to around the clock client service and willingness to strike corresponding work-life balances. Put differently, the practice of law was particularly attractive to Jews and others seeking elevated socioeconomic status when hard work was a necessary but insufficient condition and merit was the mark of excellence, success and professional prominence. It is not as appealing a proposition for less hungry members of the middle and upper-middle classes when merit is a necessary but insufficient condition and 24-7 service commitment appears to be the clinching ingredient in attaining professional success.

3. *The cost of legal education*

The significant increase in the cost of legal education during the late twentieth century and into the twenty-first century in real dollars and relative to other graduate degrees makes the practice of law, for which a J.D. degree continues to be a prerequisite, less attractive than other professional pursuits.¹¹³ First, the absolute increase in the cost of legal education makes it increasingly out of reach for candidates hailing from disadvantaged backgrounds.¹¹⁴ Second, the increased cost of legal education is taking place at the same time as the upside of the J.D. degree has been stagnant, such that the overall value of legal education has been in decline,¹¹⁵ making it less attractive than other graduate degrees.¹¹⁶ Worse, as stratification and inequality within the profession rise, for example, as measured by the gap in first year compensation between those accepting a position with

¹¹³ Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651, 669–672 (2012); Steven C. Bennett, *When Will Law School Change?*, 89 NEB. L. REV. 87, 89–90, 108–09 (2010); Herwig Schlunk, *Mamas 2011: Is a Law Degree a Good Investment Today?*, 36 J. LEGAL PROF. 301 (2011).

¹¹⁴ Eli Wald, *Serfdom without Overlords: Lawyers and the Fight against Class Inequality*, 54 U. LOUISVILLE L. REV. 269 (2016) [hereinafter, Wald, *Serfdom without Overlords*].

¹¹⁵ Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth*, 96 IOWA L. REV. 1579 (2011); Cynthia E. Nance, *The Value of a Law Degree*, 96 IOWA L. REV. 1629 (2011); Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249, 253 (2014).

¹¹⁶ A law degree has not been alone experiencing a decline in value. The traditional M.B.A. degree has lost ample value given the rise in popularity of part-time and online degrees offered by elite business schools and lower-ranked programs at a significant discount. See, e.g., Andy Kessler, *Is an M.B.A. Still Worth It? You'd Gain Some Neat Tricks and Well-Heeled Friends, But the Cost is Prohibitive*, WALL ST. J. (Sept. 22, 2019), available at <https://www.wsj.com/articles/is-an-m-b-a-still-worth-it-11569184032>.

BigLaw and everybody else,¹¹⁷ the decline in the value of the J.D. degree has not had a uniform effect on all lawyers. Rather, the decline tends to disproportionately impact graduates of non-elite schools entering the individual hemisphere representing predominantly individual clients and small businesses, who tend to hail from disadvantaged backgrounds and favor graduates of lite law schools entering the corporate hemispheres representing large entity clients, who tend to be the more privileged graduates.¹¹⁸

These profound changes in the cost side of legal education and the overall value of the J.D. degree have had an impact on the interest of prospective Jewish law students. On the one hand, Jews in general are no longer members of the low socioeconomic class and can afford the higher price tag of legal education. On the other hand, the relative appeal of law school may have diminished in the twenty-first century relative to the past not only because legal education is no longer subsidized but because other professions and occupations offer a more attractive cost-benefit analysis in financial terms and because higher paid legal positions at BigLaw entail long hours and many years of commitment to attain equity partner status.¹¹⁹

4. *Discrimination, implicit bias and the economics of discrimination and bias in the twenty-first century*

Most of the twentieth century was an era of systematic exclusion and overt discrimination, one in which Jews were first not admitted to elite law schools and law firms, and later were overlooked and discriminated against in terms of retention and promotion. Nonetheless, law practice was particularly attractive in the second half

¹¹⁷ The National Association for Law Placement's salary distribution curves for the classes of 2009-2018 reveal a pattern of unequal income distribution. While the majority of newcomers into the profession feature a normal distribution peaking at \$50,000-\$70,000 annually, entry level associates at large law firms earn on average between \$170,000-\$190,000. See *Distribution of Reported Full-Time Salaries—Class of 2018*, available at <https://www.nalp.org/salarydistrib#2018> and *Salary Distribution Curves*, available at <https://www.nalp.org/salarydistrib>.

¹¹⁸ HEINZ & LAUMANN, *supra* note 56.

¹¹⁹ Contrast the typical tournament of lawyers, in which making partner took on average 8-10 years, see, MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* 4 (1991), with the revised two-tier tournament, in which making equity partner takes twice as long. Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008); William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691 (2006).

of the twentieth century, as we have seen, because as ethnoreligious discrimination against Jews (and Catholics) was in decline, professional doors began to open, especially at elite institutions, at the same time as the cost of legal education declined in part given the G.I. Bill. This, to be sure, does not belittle the harsh consequences of discrimination for generations of Jewish lawyers who struggled to survive in the lower strata of the profession. However, overt discrimination against Jews in the legal profession, and specifically, the exclusion of Jews from elite WASP firms and the de facto emergence of protected “Jewish” pockets of law practice helped Jewish law firms and Jewish lawyers rise, succeed and crossover to more established areas and overall contributed to the demise of discrimination and to the increased inclusion of Jews in the legal profession.

The twenty-first century features new challenges in the profession’s ongoing quest for increased equality. As explicit discrimination has declined, attention has appropriately shifted to combating less obvious forms of exclusion, such as institutional and structural discrimination and implicit bias,¹²⁰ as well as to promoting diversity and overcoming underrepresentation of previously excluded groups in positions of power and influence.¹²¹

The decline of overt discrimination is, of course, an unmitigated good. Counterintuitively, however, in some ways, the more equal playing field in the context of hypercompetitive practice realities has made the practice of law less attractive for Jewish lawyers. Today, no large Jewish law firms exist and in an increasingly competitive legal profession no “Jewish” or otherwise protected pockets of practice exist in which minority law firms and lawyers can showcase their skills and talent.¹²² This observation is neither a

¹²⁰ Pearce, *Difference Blindness Vs. Bias Awareness*, *supra* note 96.

¹²¹ Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079 (2011) [hereinafter, Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession*].

¹²² Alan Dershowitz’s *The Vanishing American Jew* raises the possibility that over time, a majority of lawyers in all large law firms will be Christian, if only due to the decline in the number of Jews in America and the corresponding decline in the number of Jewish lawyers. DERSHOWITZ, *supra* note 1; SAMUEL C. HELIMAN, *PORTRAIT OF AMERICAN JEWS: THE LAST HALF OF THE TWENTIETH CENTURY* (1995) (exploring the decline in the status of American Jews as the result of social assimilation). Randall Kennedy has pointedly responded that: “Substantial numbers of people in many, maybe all, minority groups feel divided between enjoying fully the opportunities offered by white [A]nglo-[C]hristian America—the

nostalgic lament to an overtly discriminatory era nor a normative plea for a “separate but equal” practice of law.¹²³ Rather, to the extent that certain aspects of the discriminatory era of law practice ended up indirectly facilitating the gradual decline against Jews in the U.S. legal profession, these conditions have changed. The continued decline of explicit discrimination against Jews throughout American society has diminished the relative attraction of law practice in the sense that all professional (and nonprofessional) arenas are now welcoming to Jews. As the sky becomes the limit in every field in terms of professional aspirations, there is little to draw Jews in particular to law as a relatively less discriminatory zone. This, to be sure, does not mean there is no Anti-Semitism in America.¹²⁴ Rather, it means that the decline of overt discrimination as a defining characteristic of society, notwithstanding the continued prevalence of implicit bias, counterintuitively reduced the attractiveness of previously less discriminatory arenas such as law practice.

Moreover, to the extent that Jewish lawyers are now part of, and perceived to be members of, the elite circles of the legal profession, greater attention to diversity and to proactively addressing the systemic underrepresentation of lawyers from previously excluded groups in positions of power and influence may deter some Jews from competing for such positions or at least reduce their perception as attractive among prospective young Jewish professionals. The point here is not to debate let long validate claims about the possible unintended consequences of commitment to diversity, reverse discrimination, and white and class privilege, which may apply to Jewish lawyers.¹²⁵ Rather, it is to acknowledge that in terms of

‘mainstream’—and maintaining a distinctive community immune from complete assimilation.” Randall Kennedy, *Racial Passing*, 62 OHIO ST. L. J. 1145, 1187 n.188 (2001). At the same time, with increased secularization among American professionals it is equally possible that, to borrow from Dershowitz, the vanishing religious lawyer would render the question of the religious identity of the large law firm meaningless.

¹²³ David B. Wilkins, “If You Can’t Join ‘Em Beat ‘Em!’: The Rise and Fall of the Black Corporate Law Firm, 60 STAN. L. REV. 1733 (2008) (cautioning against the possible appeal of separate but equal firms and arguing that overcoming implicit bias is best pursued from within elite large law firms and not outside of them by minority law firms) [hereinafter, Wilkins, “If You Can’t Join ‘Em Beat ‘Em!’”].

¹²⁴ See David Grubin, *The Jewish Americans*, https://www.pbs.org/jewishamericans/jewish_life/anti-semitism.html. (last visited Mar. 2, 2020).

¹²⁵ For a primer on privilege and reverse discrimination claims, see, Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J. L. & POL’Y 245 (2005).

assessing the affinity between Jewish lawyers and the U.S. legal profession as manifested in the overrepresentation of Jews in positions of power and influence in the second half of the twentieth century, justified attention and even support for increased diversity may nonetheless reduce the attractiveness of law practice for Jews as members of an overrepresented cohort in the legal elite.

5. *Practicing in teams and the invisibility of individualized success*

At large law firms, the practice of law in the twenty-first century has become less conducive of high individual lawyer visibility. Large law firms have significantly grown in size and specialization, rendering each firm attorney more anonymous, expandable and interchangeable, reducing the dependability on and visibility of superstar individual lawyers. BigLaw, to be sure, are in the business of cultivating human capital, and are loath to lose powerful rainmakers to increased mobility, yet the sheer size of firms and increased specialization mean that fewer equity partners are in a position to advise large entity clients holistically and serve as lawyer-statespersons exercising practical wisdom in a manner that develops highly visible individual reputations.¹²⁶ Indeed, even large entity clients that claim to “hire lawyers, not law firms,”¹²⁷ practically mean that they rather hire teams within large law firms led by a powerful equity partner rather than an individual lawyer, as hardly any individual attorney is capable of serving the complex needs of large entity clients. If it all, the locus of high visibility in the elite corporate hemisphere of legal services has migrated from outside counsel to in-house legal departments, and in particular from BigLaw equity partners to the General Counsel of large entity clients,¹²⁸ but even that claim is somewhat inaccurate. In the context of corporate America’s C-Suite hierarchy, few General Counsel exercise enough power and autonomy to develop individual reputations and visibility outside of the entities and particular industries.¹²⁹ Thus, the high individual

¹²⁶ KRONMAN, *supra* note 30.

¹²⁷ Wilkins, *supra* note 89.

¹²⁸ BEN W. HEINEMAN JR., *THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION* (2016) (arguing that General Counsel of large corporate entities have replaced large law firms partners as lawyer-statespersons who advise their entity clients on how to pursue their private interests consistent with the public spirit).

¹²⁹ Gordon, *The Return of the Lawyer-Statesman?*, *supra* note 30.

visibility that was a draw and staple of Jewish lawyers' rise and advancement within the profession in the second half of the twentieth century is less a feature of the contemporary legal profession.

6. *Stereotyping and the flip side of bias*

Recall that several considerations combined to explain the flip side of bias phenomenon that contributed, after 1945, to the perception that "everybody wanted to have a Jewish lawyers."¹³⁰ As the profession gradually abandoned its gentlemanly professional façade and WASP meritocracy and replaced them with an embrace of competitive meritocracy in which the best lawyers were increasingly understood to mean not the good old boys but the smartest hardest-working talent, stereotypes of Jews as smart, creative, and even manipulative on behalf of clients were consistent with the emerging ideology of law as client-centered, meritocratic and instrumental.¹³¹ Thus, the ability of Jewish lawyers to benefit from the flip side of bias depended on a widespread reliance on stereotyping and a positive value-conferring match between prevailing Jewish stereotypes and the dominant professional ideology of the legal profession.

The gradual decline of overt discrimination in the twenty-first century has brought more attention to the evils of implicit bias and stereotyping and with it a desirable effort to expose and denounce stereotyping.¹³² Thus, to the extent that Jews are still the target of certain stereotypes, their ability to reap the benefits of some of these is reduced as the practice of law gives greater attention to walking away from reliance on stereotypes. Denouncing stereotyping is normatively desirable but it does diminish the appeal of law practice for Jewish lawyers in the twenty-first century compared with the heyday of the flip side of bias era during the second half of the twentieth century.

Moreover, the profession has moved away from an ideology of competitive meritocracy to hypercompetitive 24-7 client service.¹³³ This does not mean that merit and smarts do not matter but it does mean that the emphasis has somewhat shifted away from these characteristics and related stereotypes.¹³⁴ Instead, attention has turned

¹³⁰ *Supra* Part II.A.6.

¹³¹ *Id.*

¹³² Pearce, *Difference Blindness Vs. Bias Awareness*, *supra* note 96.

¹³³ Wald, *Glass-ceilings and Dead Ends*, *supra* note 61.

¹³⁴ *Id.*

to an around the clock service account of professionalism, one that benefits endless commitment to the law firm and its clients and relies on related service stereotypes as opposed to merit stereotypes. Consequently, to the extent that Jewish lawyers are still the target of certain stereotypes, their ability to reap the benefits of some of these is reduced given the mismatch between these stereotypes and the dominant ideology of hypercompetitive meritocracy. In contrast, hypercompetitive meritocracy may reinforce 24-7 service and commitment to clients gender stereotypes, favoring male attorneys and disproportionately harming female attorneys.¹³⁵

7. *Law and civil rights in the twenty-first century*

The practice of law continues to attract passionate lawyers committed to and eager to advocate for justice, civil rights and equality. At the same time, client needs, in terms of the unmet legal needs of the underprivileged, are as great as ever.¹³⁶ Beginning in the 1970s, however, American courts and law have grown more conservative. The Warren Court has been replaced with the Burger, Rehnquist and Roberts Courts, and liberal cause lawyering and civil rights advocacy have expanded to include the rise of conservative cause layering the religious rights expansion.¹³⁷ To the extent that our conception of justice and rights have expanded to include more conservative notions and values, there are certainly Jewish lawyers of that persuasion. Yet, to the extent that the draw of law for Jews as

¹³⁵ On gendered ceilings, see Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041 (2011); Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585 (1996); Rhode, *supra* note 80; Cynthia Fuchs Epstein *et al.*, *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291 (1995); Cynthia Fuchs Epstein, *Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors*, 49 U. KAN. L. REV. 733 (2001); Nancy J. Reichman & Joyce S. Sterling, *Recasting the Brass Ring: Deconstructing and Reconstructing Workplace Opportunities for Women Lawyers*, 29 CAP. U. L. REV. 923 (2002); Nancy J. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27 (2004); Wald, *Glass-ceilings and Dead Ends*, *supra* note 61. On racial ceilings, see David Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms: An Institutional Analysis*, 84 CALIF. L. REV. 493, 526-27 (1996)..

¹³⁶ DEBORAH L. RHODE, IN THE INTEREST OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000).

¹³⁷ See, e.g., ANN SOUTHWORTH, LAWYERS OF THE RIGHT – PROFESSIONALIZING THE CONSERVATIVE COALITION (2008); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT (2008).

members of an excluded and discriminated upon group was its commitment to justice and equality captured and reflected in the New Deal and civil rights movement of the 1960s, that attraction has been diminished as law changed, as Jews have become less the targets of overt forms of discrimination, and as the law has grown more conservative.¹³⁸

8. *The Confluence of Circumstances theory: law practice as a less attractive proposition for Jewish lawyers in the twentieth-first century*

The practice of law has never been easy, and a successful legal career has always demanded hard work and grit.¹³⁹ The solo Jewish lawyers barely eking a living in the lower strata of the bar in the first half of the twentieth century and the large law firm Jewish lawyers trying to make partner and equity partner in the second half of the century were no exception. Yet throughout the twentieth century law practice remained, or at least was perceived to hold the promise of, an attractive proposition for generations of aspiring young men and later women: hard work as a lawyer was rewarded with intellectual satisfaction, elevated and high social and cultural status, high pay, and the ability to do good while doing well.¹⁴⁰

The realities and, as importantly, perception of law in the twenty-first century have changed, and with them the appeal of law practice to Jewish (and all) prospective lawyers.¹⁴¹ Consider a career in BigLaw. The relative transfer of power from large law firm partners to General Counsel presiding over in-house legal departments renders these former elite positions of the past less appealing to a new generation of lawyers.¹⁴² It is not just that it is harder and more time-consuming to make equity partner than it used to be in recent times, but making equity partner is a less appealing proposition for many.¹⁴³

¹³⁸ Ann Southworth, *Our Fragmented Profession*, 30 GEO. J. LEGAL ETHICS 431 (2017).

¹³⁹ The increased competitiveness of the market for legal services in the twenty-first century notwithstanding, it is revealing to recall that some of the most successful elite large law firms of the twentieth century were known as sweat shops. See Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 36, at 1831.

¹⁴⁰ *Supra* Part II.A.1.

¹⁴¹ See, e.g., Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 607-12 (1994).

¹⁴² See generally Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407 (2012).

¹⁴³ Galanter & Henderson, *supra* note 119; Henderson, *supra* note 119.

Relatedly, the proliferation of tracks within BigLaw undercuts its allure: not everyone was going to and wanted to make partner, but few would be attracted to practice in a context in which so few make equity partner.¹⁴⁴ Moreover, the rise of alternative elite career tracks such as General Counsel of large entity clients,¹⁴⁵ may not be sufficient to compensate for the tarnished allure of law practice at BigLaw. In-house departments generally do not hire law school graduates and information and knowhow about how to become a General Counsel is not readily available nor intuitive.¹⁴⁶ Furthermore, while BigLaw was always in significant part about making big money and profits-per-partner, at least the status of BigLaw equity partners entailed professional independence and the promise of trying to do good, characteristics harder to come to terms with when one is working for one for-profit entity client holding a position on its management team.¹⁴⁷

Ultimately, as law has grown to be understood more as a hardcore service industry engaged in advocacy on behalf of clients (not to mention lawyers' self-interest), and less about a project committed to justice and the public good,¹⁴⁸ the promise of high compensation and, down the road, even modest wealth in return for long grueling hours in the office is simply not as attractive to new generations of Jews, many of whom are no longer members of a poor lower socioeconomic class.

In sum, a reexamination of the confluence of circumstances that explains the affinity between Jews and the U.S. legal profession in the twentieth century suggests the end of the affair by the twenty-first century. The very confluence of circumstances that accounted for the overrepresentation of Jews in the U.S. legal profession compared with their percentage in the population in the first half of the twentieth century and to the overrepresentation of Jewish lawyers in prestigious

¹⁴⁴ David B. Wilkins, *Partner, Shmartner! EEOC v. Sidley Austin Brown & Wood*, 120 HARV. L. REV. 1264, 1264 (2007); Russell G. Pearce & Eli Wald, *The Relational Infrastructure of Law Firm Regulation: Is the Death of BigLaw Greatly Exaggerated?* 42 HOFSTRA L. REV. 109, 142 (2013).

¹⁴⁵ HEINEMAN, *supra* note 128.

¹⁴⁶ Wald, *supra* note 142.

¹⁴⁷ *The Return of the Lawyer-Statesman?*, *supra* note 30.

¹⁴⁸ Russell G. Pearce & Eli Wald, *The Obligation of Lawyers to Heal Civic Culture: Confronting the Ordeal of Incivility in the Practice of Law*, 34 U. ARK. LITTLE ROCK L. REV. 1 (2011); Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601 (2016).

positions of power and influence, such as partners of large law firms and law professors, compared with their percentage in the U.S. legal profession in the second half of the twentieth century has changed dramatically in the twenty-first century making the practice of law not an unappealing but certainly a less appealing proposition for America's Jews.

Admittedly, the claims of the Confluence of Circumstances theory regarding the declined affinity between Jews and the U.S. legal profession may not be empirically verifiable for two related reasons. First, recall that in the twentieth century Jews were overrepresented among members of the New York City bar and later as partners at large elite Wall Street law firms when New York City and its large law firms were a microcosmos of the U.S. Legal profession and its elite. As the practice of law in the U.S. and its elite expanded and spread throughout the country, assessing the current affinity between Jews and American law by testing whether Jews are overrepresented in the U.S. legal profession is likely going to prove futile. Attempting to measure and quantify the percentage of Jewish lawyers relative to the U.S. population and the percentage of Jewish lawyers in positions of power and influence relative to the national lawyer population may not only be an Herculean task, it would also end up comparing apples (current national figures) to oranges (past New York City figures). Even measuring the participation and overrepresentation of Jews in select large urban legal centers as opposed to their numbers nationally risks comparing different contemporary apples to past oranges.

Second, attempting to measure the percentage of Jewish lawyers relative to the U.S. population and the percentage of Jewish lawyers in positions of power and influence relative to the national lawyer population may not only be an Herculean undertaking but may also be an impossible task because of the difficulty of defining who qualifies as Jewish in general and for purposes of the study.¹⁴⁹ The Confluence of Circumstances theory, however, does more than explain the affinity of Jews and American law in the twentieth century and offer a compelling hypothesis regarding the decline of that affinity in

¹⁴⁹ Wald, *Is the Jewish Law Firm Generic?*, *supra* note 78, at 897-98. For example, were examinations of Jews' participation in the U.S. legal profession and of Jewish lawyers' participation in positions of power and influence within the U.S. legal profession possible and were they to document reduced participation rates, the findings may be undercut by contested definitions of who qualifies as Jewish and increased rates of assimilation among American Jews.

the twenty-first century. It offers a blueprint for understanding the experience of other previously and contemporarily excluded groups in the U.S. legal profession, a topic the article explores next.

C. Jewish Lawyers and American Law: Lessons and Implications

The Confluence of Circumstances theory helps explain the affinity between Jews and the U.S. legal profession throughout the twentieth century as well as the possible end of the affair in the twenty-first. Specifically, the theory explores the confluence of circumstances that coalesced in the twentieth century to account for the overrepresentation of Jews in the legal profession and its elite, and, tracking these changing circumstances in the twenty-first century, suggests the end of the affair in years to come. At the same time, explaining the success story of Jewish lawyers reveals important insights about the role law, the practice of law and legal institutions can play in the ongoing quest for increased equality, as well as about the professional identity of lawyers and its relationship with personal identity.

1. The role of law, legal practice and elite institutions in combating inequality

The affinity between Jews and the U.S. legal system tells more than the success story of a previously excluded group overcoming discrimination and attaining elevated elite status within and outside the profession. It is also a tale of the positive role American law, the practice of law and legal institutions such as law firms and law schools can play in the ongoing fight for greater equality in the profession and in society at large. Attending law schools and practicing law throughout the twentieth century, Jews were able, over time, to climb up the socioeconomic, social and cultural ladders in American society, overcome discrimination and attain elevated status. Moreover, the practice of law was a means for Jewish immigrants to become American and for their descendants to pursue the American Dream. From this perspective, the Confluence of Circumstances theory, which explains the historical affinity between Jews and American law, provides a blueprint with which to assess the capacity of law, its practice and its leading institutions to successfully contribute to the

contemporary battles of other previously excluded groups fighting for equality in the profession.

Moreover, to the extent that the twenty-first century has ushered in the end of the affair between Jews and the U.S. legal system, such falling out may not be bad news. Exactly because law, legal practice and legal institutions have played a useful role in allowing Jews to overcome discrimination and facilitating their immersion in American society and its elite circles, law and its practice have run their course as instruments of social change for members of the Jewish community. The end of the affair is nothing but a natural next step for Jews and the decline of their overrepresentation in the legal profession and its elite institutions may simply open the door, if only symbolically, for other previously excluded groups to benefit from the role of law practice in overcoming discrimination and successfully seeking elevated socioeconomic status in America.

Acknowledging the positive role law practice and legal institutions played in overcoming discrimination and achieving greater equality for Jews does not mean that the legal profession and its elite institutions willingly embraced a commitment to justice and equality. Quite the contrary, as we have seen, elite law schools systematically excluded Jewish candidates, the legal profession erected entry barriers and its elite law firms openly discriminated against Jewish lawyers.¹⁵⁰ The relationship between Jews and American law, and, more generally, between the legal profession and justice is thus a complicated love affair, revealing a potential but certainly not a guarantee inherent in law practice as a vehicle for positive social change.

2. *Universal professional identity and Jewish lawyers*

Universal professionalism stands for the proposition that as professionals all lawyers are created equal irrespective of various facets of their personal identities, such as gender, race, ethnicity, religion, sexual orientation, and national origin. In particular, lawyers are to be admitted, evaluated, retained and promoted by standards of

¹⁵⁰ *Supra* Part II.A.

merit and excellence and subject to universal rules of professional conduct that dismiss as irrelevant non-professional considerations.¹⁵¹

The desirability of universal professionalism seems self-explanatory. Moreover, in the historical context of the legal profession's well-documented discriminatory and exclusionary past, its embrace of universal professionalism was, of course, a welcome step in the right direction.¹⁵² Yet, by the early twenty-first century, two related lines of inquiry have joined to question the desirability of unmitigated universalism. Some commentators have unearthed the roots of universal professionalism, exposing their WASP, male, white-shoe underpinnings and have called for a revised, more inclusive, universal account.¹⁵³ Others have pointed out that universalism is a form of bleached out professionalism, not only in the sense that it enshrines the current orthodoxy of the bar as its model of professionalism but also in that it purports to belittle as irrelevant aspects of lawyers' personal identity that inform and should inform their professional identity and exercise of professional judgment. Such scholars call not for the abandonment of universalism but rather for a more nuanced account of professionalism that acknowledges and welcomes the various contributions personal identities and experiences can make in one's professional life.¹⁵⁴

The Confluence of Circumstances theory and its insights regarding the affinity between Jewish lawyers and the U.S. legal profession add to the skepticism about universal professionalism. Universal professionalism may be an unassailable ideal but it is not reflective of the world we live in. As the Confluence of Circumstances theory reveals, adherence to universal professionalism ignores the legal profession's past and may undercut its future.

In the first half of the twentieth century, the experience of Jewish lawyers was shaped by two forces: robust, explicit discrimination on the one hand, and a strong drive as poor immigrants

¹⁵¹ Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 231-34 (2014) (summarizing the universal approach to law practice and professionalism).

¹⁵² Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession*, *supra* note 121.

¹⁵³ Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 36.

¹⁵⁴ See Levinson, *supra* note 8, at 1601; David B. Wilkins, *Beyond "Bleached Out" Professionalism: Defining Professional Responsibility for Real Professionals*, in ETHICS IN PRACTICE: LAWYERS' ROLES, RESPONSIBILITIES, AND REGULATION 207, 207, 218-25, 230-34 (Deborah L. Rhode ed., 2000); see also Carbado & Gulati, *supra* note 95. See generally DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA (2013).

to become and prove themselves as American while seeking an elevated socioeconomic status. These forces had to do with facets of Jewish lawyers' personal identity: their ethnoreligious identity, their national origin identity and their low socioeconomic identity. In the second half of the twentieth century, several aspects of universal professionalism explain some of the success of Jewish lawyers, such as the rise of meritocracy measuring excellence in terms of effective client advocacy and the exercise of practical wisdom, and the high visibility of individual meritorious law practice. Yet, facets of Jewish lawyers' personal identity continued to influence their experience as lawyers, including the existence of protected "Jewish" pockets of practice, the flip side of bias phenomenon building on prevailing Jewish stereotypes, and the commitment of some to the civil rights movement. Indeed, even the apparent end of the affair in the twenty-first century is explained in part by the personal identity of Jewish lawyers as members of a more affluent socioeconomic class. Thus, understanding the experience of Jewish lawyers in the twentieth century and by extension the experiences of other groups in the legal profession in the twenty-first century requires paying attention to the complex interplay between professional and personal identity.

IV. THE CONFLUENCE OF CIRCUMSTANCES THEORY AND THE U.S. LEGAL PROFESSION IN THE TWENTY-FIRST CENTURY

Applying the Confluence of Circumstances theory to contemporary practice realities offers a cautionary optimistic account of the role law, legal practice and elite institutions can play in the quest for enhanced equality in the legal profession in the twenty-first century.

To begin with, the dominant business-minded, client-centered, service-based, hypercompetitive ideology of the profession operating alongside highly competitive practice realities has undercut the perception that in America law is king, making it less likely that current and future cohorts of immigrants would think of the practice of law as means of becoming and proving their Americanness. A practice increasingly understood as centered upon serving private clients' interests and greasing the wheels of the economy as opposed to an arena in which lawyers mitigate private and public interests and help pursue the common good may have lost its relative shine and appeal, yet it is still a well-recognized means of pursuing socioeconomic

mobility and elevated status in American society. Growing inequality and stratification within the profession notwithstanding, becoming a lawyer in the U.S. still holds the promise of climbing up economic, social and cultural ladders, of replacing blue- with white-collars, and of pursuing the American Dream. This, in turn, suggests the role law schools can play in preserving law as a sphere of possible social change, by introducing law students to alternative ideologies of the legal profession, to varying conceptions of justice, and to competing modes of professional identity formation.¹⁵⁵

Next, in contrast with the darker early years of the twentieth century, the legal profession is by and large free of explicit discrimination, allowing newcomers to enter a level playing field and compete for retention and promotion based on their hard work and merit. This, to be sure, is not to deny the prevalence of institutional and structural discrimination, of implicit bias, and of the relevance of attributes of lawyers' personal identity to the formation of their professional identity.¹⁵⁶ At its core, however, the practice of law assesses and judges lawyers based on meritorious performance in a marketplace free of explicit discrimination, at least relative to its past. Hypercompetitive meritocracy may demand around the clock loyalty to clients and law firms alike, but it is a meritocracy nonetheless, in which excellence may not be outcome determinative but is certainly a key ingredient.

Relatedly, contemporary practice realities predominantly in law firms and within them in teams obscure to some extent the high individual visibility of old, but law practice retains swathes of individualism and independence, from performance at law school to the representation of clients, which potentially allow newcomers and outsiders to enter and excel at the profession without relying on greatly reduced or altogether missing endowments of social networks and cultural capital.¹⁵⁷

The high cost of legal education in the first few decades of the twenty-first century and the growing conservatism of the law are certainly unwelcoming to the previously excluded and

¹⁵⁵ Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 429-42 (2011); Wald, *supra* note 33, at 315-27.

¹⁵⁶ See, Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509 (2015)

¹⁵⁷ This is not to deny the significant role social and cultural capital endowments do play in achieving success in law practice and the imperatives of law firms' transparency and efforts to offer all of their attorneys opportunities to build their capital endowments. *Id.*

underprivileged, yet the experience of Jewish lawyers may counsel perseverance in the face of exclusion and discrimination. Moreover, these harsh realities suggest what law schools and law firms can do in terms of reducing the cost of legal education and making the practice of law more inviting to all.¹⁵⁸

The heart of the Confluence of Circumstances theory is context.¹⁵⁹ Accordingly, examining the experience of various groups in the legal profession in future work to assess the potential of law and law practice to play a positive role in combating inequality will require close attention to different relevant circumstances. Women lawyers, for example, have accounted for approximately fifty percent of all J.D. students since the mid-1980s and are well-represented in desirable and prestigious entry-level positions.¹⁶⁰ Studying the prospects of overcoming gender glass-ceilings in positions of power and influence, however, will require close attention to the confluence of implicit bias, sexual harassment, hypercompetitive meritocracy and persistent gender stereotyping, among other circumstances.

The relationship of the black community with American law has been a painful and complicated one, from slavery to Jim Crow to the contemporary mass incarceration of black men, to the indifference of the law and its role in sustaining the (white) American Dream on the backs of black America.¹⁶¹ This, of course, is not to deny the progress in recent decades, not to mention the celebrated careers and contributions of many black lawyers, jurists and law firms.¹⁶² Yet the centuries-long complex relationship of abuse and deep mistrust between the black community and American law may help explain why one should not expect to see blacks flocking to law schools in overrepresented numbers seeking to join the legal profession any time soon, pipeline programs notwithstanding.

¹⁵⁸ *Id.*; Wald, *Serfdom without Overlords*, *supra* note 114. While it is premature to predict the future of legal education and law practice in the midst of the Coronavirus outbreak, remote teaching, postponed bar exams, working from home, pay cuts and lost jobs, perhaps a silver lining could be the emergence of a significantly cheaper online model of online legal education.

¹⁵⁹ *Supra* note 46.

¹⁶⁰ *Supra* note 135.

¹⁶¹ *See, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); COATES, *supra* note 33.

¹⁶² J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944* (1993); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 *STAN. L. REV.* 1915, 1927-41 (2005); Wilkins, *"If You Can't Join 'Em Beat 'Em!"*, *supra* note 123.

The relationship of the latinx community with American law has also been one embedded in deep and growing distrust, centered in recent decades around the enforcement of immigration laws,¹⁶³ thus law practice may be a complicated proposition for some latinx.¹⁶⁴ Moreover, given the correlation between ethnic, race and class identity in the U.S., the increased cost of legal education makes attending law schools a farfetched proposition for many latinx.¹⁶⁵ Indeed, as class stratification increases, the legal profession grows alienating not only for poor blacks and latinx but also for poor whites.¹⁶⁶

The Confluence of Circumstances theory can shed a revealing light on the experience of various groups within the U.S. legal profession. Tracking multiple factors influencing entry into the profession and career trajectory within it, including the capacity of law practice to facilitate upper socioeconomic, social and cultural mobility and allow members of disadvantaged groups to seek elevated status, the impact of influential professional ideologies, the cost of legal education, the consequences of the decline of forms of explicit discrimination and the ongoing battle to reduce the prevalence of implicit bias, the extent to which law practice amplifies the visibility of individual exercise of independent professional judgment, and the effects of various stereotypes, can account for the underrepresentation (and overrepresentation) of different constituents and suggest ways in which law, legal practice and leading institutions can play a positive role in the profession's ongoing quest for greater equality within its ranks.

V. CONCLUSION

The Confluence of Circumstances theory reveals that in the twentieth century the practice of law was a vehicle for change and

¹⁶³ See, e.g., CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS* (2019).

¹⁶⁴ Once again, this is not to belittle the importance of gains made by latinx in the legal profession. See, e.g., Jill L. Cruz & Melinda S. Molina, *Hispanic National Bar Association Commission on Latinas in the Legal Profession*, 37 PEPP. L. REV. 971 (2010).

¹⁶⁵ Wald, *Serfdom without Overlords*, *supra* note 114.

¹⁶⁶ Lisa R. Pruitt, *How You Gonna' Keep Her Down on the Farm . . .*, 78 UMKC L. REV. 1085 (2010); Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S. D. L. REV. 466 (2014); Lisa R. Pruitt, *Acting White? Or Acting Affluent? A Book Review of Carbado & Gulati's Acting White? Rethinking Race in 'Post-Racial' America*, 18 J. GENDER, RACE & JUST. 159 (2015); Hannah Haksgaard, *Rural Practice as Public Interest Work*, 71 ME L. REV. 209 (2019).

greater equality, inclusion and justice for American Jews. In particular, law practice constituted an effective means of seeking elevated status and upper socioeconomic mobility as ethnoreligious discrimination began to decline, elite law schools started abandoning discriminatory admission quotas, and elite law firms opened their doors to the previously excluded, all at the same time as legal education was subsidized by the post WWII G.I. Bill. Notably, while law and law practice emerged as attractive choices for Jewish men (and later Jewish women), showcasing high visibility for individual success and capturing a promise of law as a beacon of civil rights and a commitment to justice, the legal profession and its elite institutions were less than welcoming to Jews. Indeed, the very discriminatory habits and practices of the profession, such as the existence of protected pockets of “Jewish” areas of practice and the flip side of bias, played a role in the eventual demise of overt discrimination against Jews. Thus, the theory explains the overrepresentation of Jews in the legal profession and the overrepresentation of Jewish lawyers in positions of power and influence in the profession.

Tracking this evolving confluence of circumstances in the twenty-first century, the Confluence of Circumstances theory suggests that the affinity between Jews and the U.S. legal profession may be in decline. This, to be sure, does not mean that law practice is unwelcoming to Jews. Rather, the practice of law may no longer be a particularly attractive proposition for America’s Jews. This development, however, may not be bad news for American Jews: law practice has run its course as a vehicle of positive social change for Jews as members of a previously excluded group who have succeeded in utilizing law and law practice to pursue the American Dream and have achieved elevated status, upper socioeconomic mobility, equality and justice.

In addition to explaining the affinity between Jews and the U.S. legal profession, the theory examines the circumstances under which American law, law practice and legal institutions can play a positive role in the quest of other previously excluded groups for greater equality in the profession, and offers a blueprint for future studies of the experiences of such groups in the U.S. legal profession. Finally, by documenting the numerous ways in which the personal identity of Jewish lawyers shaped and informed their professional identity, the Confluence of Circumstances theory lends support to critics of universal professionalism who view it as a form of bleached out

professionalism and call for the formation of professional identity in a manner that honors and recognizes the contributions personal identity can make to the exercise of professional judgment.