

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

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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 ongoing fascination has at least three explanations. First, it has to do with a growing disenchantment with universal approaches to professionalism and professional identity. 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 merit and excellence and subject to universal rules of professional conduct that dismiss as irrelevant non-professional considerations.²

In the historical context of the legal profession's well-documented discriminatory and exclusionary past, its embrace of universal professionalism was, of course, a welcomed step in the right direction.³ 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 White-Anglo-Saxon-Protestant ("WASP"), male, white-shoe underpinnings and calling for a revised, more inclusive, universal account.⁴ 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.⁵

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¹ Marc Galanter, *A Vocation for Law? American Jewish Lawyers and their Antecedents*, 26 *FORDHAM URB. L. J.* 1125 (1999).

² 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).

³ 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).

⁴ Wald, *Resizing the Rules of Professional Conduct*, *supra* note 2.

⁵ See Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional*

Combined, these criticisms of universal professionalism rekindle interest in the complex relationship between the professional and personal identities of lawyers, and, in particular, in the experiences and practices of ethnoreligious attorneys, Jewish lawyers among them.

Second, commentators from within and outside of the legal profession generally view the experience of Jewish lawyers as a success story of integration, professional assimilation and overcoming discrimination.⁶ Confronted with practice realities of persistent glass ceilings and concrete walls affecting women and lawyers of color, scholars of the legal profession are eager to explore and understand the experience of a successful minority, perhaps with an eye toward replicating its achievements.⁷ Finally, and admittedly less universal and more parochial, Jewish lawyers and nonlawyers alike continue their quest to come to terms with their personal and professional identities.⁸

This study of the affinity of Jewish lawyers and the US legal profession thus reveals important insights about the interaction between professional and personal identity. 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 advances a new explanation for the affinity – the *Confluence of Circumstances* theory, pursuant to which the affinity between Jewish lawyers and the US legal profession is explained by a complex interplay of circumstances that took place throughout the twentieth century. The Confluence of Circumstances theory, however, does more than merely explain the affinity between Jewish lawyers and American law. Following the changed practice realities and circumstances of the US legal

Identity, 14 CARDOZO L. REV. 1577, 1601 (1993); 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 Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000). See generally DEVON W. CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA* (2013).

⁶ 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”); Russell G. Pearce, *The Jewish Lawyer’s Question*, 27 TEX. TECH L. REV. 1259, 1261-63 (1996); Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1805, fn 6, 1828 (2008).

⁷ 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); Deborah L. Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731 (1991); 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); 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 (2010). 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).

⁸ ALAN M. DERSHOWITZ, *THE VANISHING AMERICAN JEW: IN SEARCH OF JEWISH IDENTITY FOR THE NEXT CENTURY*; ROBERT H. MNOOKIN, *THE JEWISH AMERICAN PARADOX: EMBRACING CHOICE IN A CHANGING WORLD* (2018).

profession in the twenty-first century, it predicts the end of the affair between Jewish lawyers and the law. Moreover, in Part III the theory is 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. The Confluence of Circumstances theory suggests, regrettably, that contemporary law and law practice have grown less hospitable to excluded groups and are less likely to become a force and vehicle of combating inequality in the foreseeable future.

I. THE JEWISH VOCATION FOR LAW:⁹

Some have advanced an “American exceptionalist” explanation, 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 American by Puritan or other early Americans.”¹⁰ For example, Saul Touster has argued that the Puritan imported to American law the Jewish ideas that “the social body is created by a covenant which is not merely contract but a compact in the service of some high ideal,” and that “the good, the true, the righteous, even the beautiful, can be achieved by law, and particularly by statutes and codes.”¹¹ The Puritan Forebears theory, however, fails for at least three reasons. To begin with, as Galanter points out, it does not explain the well-documented affinity between Jewish lawyers and the law outside of the United States.¹² 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.¹³ Finally, As Stone and Auerbach document, “this 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 American Jews to obliterate the vast actual differences between the two legal systems.”¹⁴ Moreover, to the extent that

⁹ Galanter, *A Vocation for Law?* *supra* note 1.

¹⁰ *Id.* at 1126.

¹¹ Saul Touster, *The View from the Hilltop*, 33 *BUFF. L. REV.* 571, 575 (1984).

¹² Galanter, *supra* note 1, at 1126, fn 5.

¹³ Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 *CARDOZO L. REV.* 1577 (1992). Jewish law firms, for example, adopted the Protestant Cravath System (admittedly at a time when it retreated from its religious underpinnings), and did not develop a thick Jewish identity. See, Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 6, at 1829.

¹⁴ Suzanne Last Stone, *Spinoza's Identity and Philosophy: Jewish or Otherwise?* 25 *CARDOZO L. REV.* 579, 581 (2003). See also, AUERBACH, RABBIS AND LAWYERS, *supra* note 6; Suzanne Last Stone, *In Pursuit of the Countertext: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 *HARV. L. REV.* 813 (1993).

American law and law practice have deep religious underpinnings,¹⁵ these cornerstones have been described as distinctively Christian as opposed to Jewish or Judo-Christian.

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.¹⁶ “When God reveals himself to humans He does so in the form of the law,” Jews are “charged with being interpreters of the Torah law, the Torah,” and “fundamental to Judaism is education, and fundamental to Jewish education is instruction in the Torah.”¹⁷ Indeed, because Jewish law carries-over to American law, it is a “[s]mall wonder, then, that there are so many Jewish lawyers.”¹⁸

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.¹⁹ 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,²⁰ instead adopting a common morality, grounded in religious Jewish morality.²¹ 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 give 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.”²²

Second, the “Prophetic Trope” account emphasizes a prophetic strand in the Jewish tradition committed to social justice and identifies Jewish lawyers and judges as its carriers.²³ 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.”²⁴ Moreover,

¹⁵ See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

¹⁶ Galanter, *supra* note 1, at 1127. See also, Monroe E. Price, *Text and Intellect*, 33 *BUFF. L. REV.* 562 (1984).

¹⁷ 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/>

¹⁸ *Id.*

¹⁹ SAMUEL J. LEVINE, *JEWISH LAW AND AMERICAN LAW – A COMPARATIVE STUDY*, 231 (v. 1, 2018).

²⁰ William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *WIS. L. REV.* 29 (1978).

²¹ LEVINE, *supra* note 19, at 233.

²² Galanter, *supra* note 1, at 1127.

²³ *Id.* at 1128-31.

²⁴ *Id.*, at 1131.

the Prophetic Trope has been used and arguably helps explain the careers of leading individual Jewish lawyers and judges, like Justice Louis Brandeis,²⁵ but not those of the ordinary Jewish lawyers. After all, the vast majority of Jews were not prophets-preachers who lived lives committed to social justice.

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.”²⁶ 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. They are loyal to their fellow Jews and are comfortable with and committed to working with the powers that be. They 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.’”²⁷ 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 and historically 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.” This is certainly a lofty admirable model, reminiscent perhaps of the Lawyer-Statesman ideal (with a Jewish twist),²⁸ but it is unclear whether it describes actual Jewish lawyers let alone a majority of them, or whether it constitutes a desirable ideal Jewish lawyers ought to follow.²⁹

Fourth, while not all Jews are Tzaddiks, 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. Yet this account fares no better than its predecessors for similar reasons. It applies only and assumes Jewish faith as a significant aspect of Jewish

²⁵ 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).

²⁶ Galanter, *supra* note 1, at 1136.

²⁷ *Id.*, at 1144.

²⁸ 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); 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); ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993).

²⁹ David Wilkins has advanced a similar 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).

lawyers' lives, that is, it is persuasive only to the extent it applies to the observant who follow Jewish law and its mandate to pursue justice. Yet, the observant are required to pursue justice in every aspect of their lives, not necessarily in the practice of law, and 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 American law in general is not particularly committed to justice.³⁰

Fifth and finally, the “Ambience Theory” asserts that Jewish life fosters a series of linkages between Jews and American law, including the love of logic, “a certain subtlety of mind which comes from [habitually] dealing with abstract questions, and a zest for debate.”³¹ As advocates of this theory concede, however, it too depends on Jewish upbringing and affiliation and is doubtful in the face of a high rate of assimilation.³²

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 even the combination of conceiving of Jewish lawyers' as guardians of Jewish law, as prophets and Tzaddiks, as servants of justice and as products of Jewish life account for the well-documented affinity of Jews and the legal profession. Yet if the affinity cannot be explained in reference to Jewish lawyers or the exceptionalism of American law, what accounts for it?

II. THE CONFLUENCE OF CIRCUMSTANCES THEORY

The affinity between Jews and the US legal system in the twentieth century might be explained by a *Confluence of Circumstances* theory. Pursuant to the Confluence account, American Jews have no special relationship with or an inherent attraction to American law or the US legal system per se. Rather, throughout the twentieth century, certain circumstances made the practice of law a relatively attractive vocation for American Jews as members of an excluded and discriminated against ethnoreligious group. Put differently, given a host of circumstances applicable for a while at the time, 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 socioeconomic advancement, enhanced status and greater equality.³³ Part A describes the circumstances throughout the

³⁰ ROBIN L. WEST, *TEACHING LAW – JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* 1–42 (Cambridge University Press, 2014); Eli Wald, *The Contextual Problem of Law Schools*, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 281 (2018).

³¹ 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)).

³² Galanter, *supra* note 1, at 1128.

³³ 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, Wald, *The Rise and*

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. A Confluence of Circumstances: Explaining the Love Affair between American Jews and the US Legal System in the Twentieth Century

Before turning to the confluence of circumstances that explain the relationship between Jews and the practice of law in the US, one important clarification and two caveats to bear in mind. To begin with, 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. For purposes of this article, the affinity between Jews and the US legal system consists of at least two components. First, in the first half of the twentieth century, compared with their percentage in the U.S. population, Jews were overrepresented as members of the U.S. legal profession. Second, 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 clarification of the meaning of the affinity claim is subject to two caveats. 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 City's lawyer population. In 1885, there were about 5000 lawyers in New York City, of whom about 400 were Jewish.³⁴ Yet by 1960, the New York City Bar consisted almost exclusively of native-born, white males, and was slightly over 60% Jewish.³⁵ 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,³⁶ and every member of the elite club was a WASP law firm. Thus, most Jewish lawyers were concentrated in the lower spheres of the City's bar as solo practitioners and members of small law firms.³⁷ 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

Fall of the WASP and Jewish Law Firms, *supra* note 6, at 1842. Here, I attempt to generalize the claim, developing a confluence account applicable to the relationship of Jewish lawyers and the US legal system.

³⁴ HENRY W. TAFT, *LEGAL MISCELLANIES: SIX DECADES OF CHANGES AND PROGRESS* 77 (1941).

³⁵ JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 18-19* (1966).

³⁶ 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).

³⁷ CARLIN, *supra* note 35, at 19-28.

City.³⁸ At the same time, the story of New York City and its bar is a microcosm of the US and its legal profession. New York City was the major point of entry for immigrants into the United States; and the City, 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 US law firms. Moreover, the overrepresentation of Jewish lawyers in positions of power and influence, for example, as partners in large law firms and as law professors was certainly not limited to New York City.³⁹

Finally, to an extent the love affair of Jews with the US legal profession was but a subset of the overrepresentation of Jews in the professional world in the United States. 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.’”⁴⁰ Yet, context matters,⁴¹ and 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 professions.

1. The quest for socioeconomic advancement and elevated status

In American law is king, and lawyers are members of a highly paid, well-regarded governing class.⁴² Unsurprisingly, the majority of American lawyers in the eighteenth and nineteenth centuries were Protestant.⁴³ At the turn of the twentieth century, however, waves of immigrants, Jewish and otherwise, flocked to law schools 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.⁴⁴

³⁸ *Growth of 20 Law Firms—1963-1981*, N.Y.L.J., Mar. 16, 1981, at 3; *National Law Firm Survey*, NAT’L L.J., Sept. 18, 1978, at 14.

³⁹ 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).

⁴⁰ 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, Sept. 5, 2005, at 27-34 (studying the affinity between Jews and medicine).

⁴¹ 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).

⁴² THOMAS PAINE, *COMMON SENSE* 29 (London 1776) (observing “that in America The Law Is King”); 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); 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); 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, 51-74 (Gerald W. Gawalt ed., 1984) (exploring the elevated role and status of lawyers in American society).

⁴³ JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 249-55, 313-19 (1950).

⁴⁴ JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 95-96 (1976).

That that this new cohort of lawyers seeking to join the governing class and an elevated status graduated from non-elite 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.”⁴⁵ 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.⁴⁶ Bar associations and newly promulgated attorney regulations entrenched and solidified the profession’s stratification.⁴⁷ 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.⁴⁸

The elite bar’s discrimination against Jewish lawyers was common knowledge.⁴⁹ In 1960, about one third of New York City lawyers were born in America, and recently arrived immigrants were primarily of Eastern European, Jewish origin.⁵⁰ “Jewish lawyers [were] less likely than their non-Jewish colleagues to gain access to [the] high-status position[s]” with the large WASP firms.⁵¹ 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.⁵² 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.⁵³

⁴⁵ *Id.* at 52.

⁴⁶ See generally JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE AND PRINCETON* (2005).

⁴⁷ 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 34, at 81-82.

⁴⁸ 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.” CARLIN, *supra* note 35, 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).

⁴⁹ 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.”).

⁵⁰ CARLIN, *supra* note 35, at 18. Individual practitioners constituted about 47% of the bar, while small firms (2-4 lawyers) constituted about 17%, medium firms (5-14 lawyers) constituted about 15%, and large firms of 15-49 lawyers constituted about 9%. *Id.* The largest firms, of 50 or more lawyers, constituted about 12% of the New York Bar. *Id.*

⁵¹ CARLIN, *supra* note 35, at 22.

⁵² *Id.* at 19, 28.

⁵³ *Id.*

It is therefore important not to sugarcoat or exaggerate the extent of the so-called love affair between Jews and US 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.

2. Opening doors post World War II

Following World War II, several trends combined to gradually open doors for Jewish lawyers into positions of power and influence in the legal profession. A slow but sure decline in ethnoreligious discrimination in American society and culture against Jews and Catholics, a corresponding demise of discriminatory admission quotas at elite law schools, and the introduction of the G.I. Bill rendering elite legal education more affordable all allowed Jewish lawyers to steadily transition from the lower strata of law practice.

The second half of the twentieth century evidenced a slow but sure decline in ethnoreligious discrimination in American society and culture against Jews and Catholics.⁵⁴ Diminished discrimination manifested itself, for example, in opening doors at elite previously exclusionary law schools. The relationship between large law firms and elite law schools 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.”⁵⁵ 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 preferred jobs for elite graduates.⁵⁶ A career with the corporate New York

⁵⁴ Eli Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?* 76 UMKC L. REV. 885, 902-4 (2008).

⁵⁵ 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)).

⁵⁶ Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 IND.

firms became the “holy grail” of law practice,⁵⁷ leading WASP graduates of elite law schools to flock to large law firms.⁵⁸ 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.⁵⁹

After 1945, elite law schools began to drop their discriminatory admission quotas and admit students previously excluded, including Jewish candidates.⁶⁰ 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 later 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 the elite firms were still rejected, while others became essentially token Jewish associates.⁶¹ 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.⁶²

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, *supra* note 44, at 143.

⁵⁷ 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.

⁵⁸ 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).

⁵⁹ 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) (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).

⁶⁰ 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).

⁶¹ AUERBACH, UNEQUAL JUSTICE, *supra* note 44.

⁶² AUERBACH, *supra* note 44, at 97-99 (discussing the elite bar’s critique that night law schools bring down high standards of the profession); CARLIN, *supra* note 35, at 38 n.23; ROBERT STEVENS, LAW SCHOOLS: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 74-79 (1983) (discussing role and expansion of part-time law schools).

Moreover, many of those who were hired as associates were not subsequently promoted to partnership.

These discriminatory patterns, however, inadvertently opened additional doors for Jewish lawyers. Jewish law firms rose and grew quickly, recruiting elite Jewish graduates excluded and not promoted by the WASP firms. Unlike the WASP firms, which early on in their existence featured Protestant values and culture, the Jewish firms did not exhibit a deep hidden commitment to Jewish values or culture.⁶³ 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 firm.

Notably, at the same time doors were beginning to open for Jewish lawyers at elite large law firms and elite law schools were abandoning discriminatory admission quotas, the cost of legal education was being subsidized post WWII by the G.I. Bill, making legal education an even more attractive proposition for Jewish veterans.⁶⁴

3. Overt discrimination, the visibility of individual success and protected pockets of Jewish practice

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 against a background of declining yet still robust discrimination, law practice was an appealing option because of two characteristics: its relative individualistic nature at the time and its high visibility.

While at growing large law firms teamwork was beginning to emerge as a building block, in the lower strata of the profession law was predominantly a sole practice, and one could practice it successfully as a solo 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.

⁶³ Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?* *Supra* note 54, at 892-97.

⁶⁴ *Id.*, at 929-30.

Relatedly, the practice of law featured the possibility of high “visibility of individual success,⁶⁵ 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 became the first Jewish named partner in a major WASP Wall Street firm. Other examples of high visibility opening does at elite WASP firms include Eustace Seligman at Sullivan & Cromwell; Ed Weisl at Simpson, Thacher; Louis Loeb at Lord, Day & Lord in 1947; and Floyd Abrams at (the Catholic law firms) Cahill, Gordon, who represented The New York Times with Alexander Bickel in connection with the Pentagon Papers.⁶⁶

The declining yet still prevalent discrimination at WASP firms combined with the high individual visibility of law practice at the time manifested itself in protected “Jewish” pockets of practice.⁶⁷ The existence of “Jewish” pockets of practice in areas such as litigation, corporate takeovers, bankruptcy and commercial real estate, allowed many individual Jewish attorneys to develop strong reputations in their respective practice areas. The success of individual Jewish attorneys, in turn, lent visibility to their law firms and enabled the rapid growth of Jewish firms. Milton Handler became the prominent authority on takeover law and helped build Kaye, Scholer. 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. 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.⁶⁸ Notably, once Jewish law firms proved their abilities in the protected areas, however, they used their increased access to large corporate entity clients to cross over and compete with the WASP firms for provisions of corporate

⁶⁵ 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 6, at 1843.

⁶⁶ *Id.* at 65, 96-104.

⁶⁷ *Id.* at 1833-36.

⁶⁸ PAUL HOFFMAN, *LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS* 92 (1973).

legal services in the mainstream arenas of corporate law.⁶⁹

4. Stereotypes and the “flip side of bias”⁷⁰

Beginning in the 1960s and continuing throughout the 1970s and 1980s the prevailing Cravath-style ideology of professionalism, 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.⁷¹ Under this emerging business 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.⁷² 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.⁷³

Stereotyping is an egregious form of implicit bias,⁷⁴ and the commercialization of stereotypes is a complicated controversial phenomenon.⁷⁵ The flip side of bias that benefitted Jewish lawyers’ entry

⁶⁹ Brill describes the successful crossover from Jewish pockets to mainstream representation by Skadden, Arps. Steven Brill, *Two Tough Lawyers in the Tender-Offer Game*, NEW YORK, June 21, 1976, at 52, 54 (“When the tender-offer boom began a few years ago, Flom became a hot commodity, not only to raiders but to the more established target companies who decided they’d rather have him defending them than attacking them.”).

A divide among the Jewish firms, to some extent paralleling the white-shoe continuum among the WASP firms, was in terms of the ethnic descent of its lawyers. The “German” firms employed mostly lawyers of German heritage, second-generation Jewish lawyers who were graduates of elite law schools and hailed from middle socioeconomic backgrounds. They were perceived as the upper-class establishments within the Jewish firms, somewhat akin to the socialite WASP firms. The “Eastern European” firms employed mostly attorneys of non-German descent who tended to be first-generation immigrants of lower socioeconomic backgrounds and graduates of non-elite law schools.

⁷⁰ Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, *supra* note 6, at 1844.

⁷¹ 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); *see also* RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 185-211 (1999).

⁷² 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.” GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 191 (1954). 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 categorical rejection in the case of the latter, *id.* at 192.

⁷³ 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); Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283 (2007).

⁷⁴ 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).

⁷⁵ Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

into positions of power and influence in the 1960s and 1970s does not belittle the inherent harm 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 judgment, increased competition and 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 rank of the legal profession.

5. The promise of law and of civil rights

As previously closed doors were beginning to open for some Jewish graduates of elite law schools at Wall Street law firms, others found their calling in 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 to objective merit standards, equality and justice.⁷⁶ In particular, the allure of civil rights as an integral aspect of the changing law and legal profession was a draw for Jewish lawyers.⁷⁷

6. Law as an attractive field

In the second half of the twentieth century, a legal career was an attractive proposition for many Jews. Increasingly competitive and demanding, the practice of law was hard work, but it was intellectual rewarding work, seemingly based on merit and increasingly open for Jews, who had an opportunity to prove their professional worth and rise within the elite ranks of the profession. Law benefitted from strong cultural and social status and promised, for the hardworking, handsome financial rewards.⁷⁸

B. The End of the Affair?

Applying the Confluence of Circumstances theory to contemporary practice realities 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.

⁷⁶ 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).

⁷⁷ Jewish Lawyers in the Civil Rights Movement, CTR. FOR JEWISH HISTORY (Sept. 19, 2007), <http://www.cjh.org/videoplayer.php?vfile=091907JEWSANDJUSTICE.fly>.

⁷⁸ *Supra* note 42 and corresponding text.

1. 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 socioeconomic advancement and elevated status.⁷⁹ As Jews gradually established their status as part of the elite, culturally, socially and financially, however, the allure of law declined.⁸⁰ While the practice of law continues to offer, relatively speaking, high financial rewards compared with some other occupations, the Dream, after all, is not about maximizing wealth but the freedom to set and pursue one's life objectives.⁸¹ The stability and elevated status achieved in part through the practice of law has allowed American Jews, by now well-established 3rd 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 sky is the limit in every field – the counterintuitive consequences of the decline of overt discrimination against Jews

Law was particularly attractive in the second half 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 given the G.I. Bill. The continued decline of 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.⁸² Rather, it means the decline of overt discrimination as a defining characteristic of society, notwithstanding the continued

⁷⁹ LAWRENCE R. SAMUEL, *THE AMERICAN DREAM: A CULTURAL HISTORY* 13 (2012); THOMAS WOLFE, *YOU CAN'T GO HOME AGAIN* (1940). See generally, Eli Wald, *Success, Merit and Capital in America*, 101 *MARQUETTE L. REV.* 1 (2017).

⁸⁰ 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 becoming truly "American" and proving their patriotism. AUERBACH, *RABBIS AND LAWYERS*, *supra* note 6, at 146.

⁸¹ Wald, *Success, Merit and Capital in America*, *supra* note 79.

⁸² See, David Grubin, *The Jewish Americans*, https://www.pbs.org/jewishamericans/jewish_life/anti-semitism.html

prevalence of implicit bias, counterintuitively reduced the attractiveness of previously less discriminatory arenas such as law practice.

Indeed, in some ways, the practice of law has become less attractive than other professional arenas because of the significant increase in the cost of legal education.⁸³ Whereas the G.I. Bill essentially subsidized the cost of legal education after WWII, the increased cost of legal education deters entry in the legal profession from the lower socioeconomic classes.⁸⁴ Notably, many Jews are no longer members of that class and can afford the higher price tag of legal education but the relative appeal of law school (and subsequently of law practice) has diminished given its increased cost.

3. The climate and culture of the US legal profession in the twenty-first century

Counterintuitively, overt discrimination against Jews in the legal profession, specifically, the exclusion of Jews from elite WASP firms and the de facto emergence of protected “Jewish” areas of law practice helped Jewish law firms rise, Jewish lawyers succeed and crossover to more established areas and overall contributed to the demise of discrimination and inclusion of Jews in the legal profession. Today, no large Jewish law firms exist and in a 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.⁸⁵ This observation is neither a nostalgic lament to an overtly discriminatory era nor a normative plea for a “separate but equal” practice of law.⁸⁶ Rather, to the extent that certain aspects of the exclusionary era of law practice ended up indirectly facilitating the gradual decline of discrimination against Jews in the US legal profession, these conditions have changed.

⁸³ 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).

⁸⁴ Eli Wald, *Serfdom without Overlords: Lawyers and the Fight against Class Inequality*, 54 U. LOUISVILLE L. REV. 269 (2016).

⁸⁵ 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* 8; 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 ‘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.

⁸⁶ 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 as best pursued from within elite large law firms and not outside of them by minority law firms).

More generally, the practice of law in the twenty-first century is not only more competitive on meritorious grounds,⁸⁷ it is also less conducive of high individual visibility. Large law firms have grown in size, reducing the dependability on and visibility of superstar individual lawyers, and have become increasingly more of a team exercise.⁸⁸ Thus, the high individual visibility that was a draw and staple of Jewish lawyers' rise and advancement within the profession is less a feature of the profession.

4. Stereotyping and the flip-side of bias

Several considerations explain the flip-side of bias phenomenon that contributed after 1945 to the perception that "everybody wanted to have a Jewish lawyers."⁸⁹ As the profession gradually abandoned its gentlemanly professional façade and replaced it 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 smart, creative, and even manipulative were consistent with the emerging ideology of law as client-centered, meritocratic and instrumental.⁹⁰

Since the 1980s, the profession has gradually moved away from an ideology of competitive meritocracy to hypercompetitive 24-7 client service.⁹¹ 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. Instead, attention has turned to an around-the-clock service account of professionalism, one that features endless commitment to the law firm and its clients. To be sure, this account of professionalism triggers a host of gender and other stereotypes, but these do not appear to target or apply in particular to Jewish lawyers.⁹²

At the same time, the gradual decline of overt discrimination in the twenty-first century has brought more attention to the evils of implicit bias and with it a (desirable) effort to expose and denounce stereotyping.⁹³ 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 greater attention in the practice of law is given to walking away from a reliance on stereotypes.

⁸⁷ Eli Wald, *The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051 (2010).

⁸⁸ David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067 (2010).

⁸⁹ *Supra* notes 70-75 and corresponding text.

⁹⁰ *Id.*

⁹¹ Wald, *Glass-ceilings and Dead Ends*, *supra* note 7.

⁹² *Supra* note 7.

⁹³ Pearce, *Difference Blindness Vs. Bias Awareness*, *supra* note 74.

5. Law and civil rights in the twenty-first century

Beginning in the 1970s, 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 has expanded to include the rise of conservative cause lawyering and the religious rights expansion.⁹⁴

Law continues to attract passionate lawyers committed to and eager to advocate for justice, civil rights advocacy and equality, and the need, in terms of the unmet legal needs of the underprivileged, is as great as ever.⁹⁵ Moreover, 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 members of an excluded and discriminated against 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 cause lawyering has changed, as Jews have become less the targets of overt forms of discrimination, and as the law has grown more conservative.⁹⁶

6. Law is hard

The practice of law has never been easy, and a successful legal career has always demanded hard work and grit. 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 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.⁹⁷

The realities and, as importantly, perception of law in the twenty-first century have changed, and with them its appeal to Jewish (and all) prospective lawyers.⁹⁸ Consider BigLaw. Increased competition, the relative instability of large law firms, the expectations of high billable hours and eat what you kill books of business, and the relative transfer of power from large

⁹⁴ See, e.g., ANN SOUTHWORTH, *LAWYERS OF THE RIGHT – PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT*.

⁹⁵ DEBORAH L. RHODE, *IN THE INTEREST OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

⁹⁶ Ann Southworth, *Our Fragmented Profession*, 30 *GEO. J. LEGAL ETHICS* 431 (2017).

⁹⁷ *Supra* note 42 and corresponding text.

⁹⁸ See, e.g., Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 *CASE W. RES. L. REV.* 531, 607-12 (1994).

law firm lawyers to clients and in-house legal departments renders the position of BigLaw equity partner – a paradigmatic position of power and influence in the not too distant past – somewhat less appealing.⁹⁹ Thus, 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.¹⁰⁰ 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 sphere, which promises the prospects of becoming a staff attorney.¹⁰¹

Similarly, even the rise of alternative elite career tracks such as in-house counsel, may not be sufficient to compensate for the tarnished allure of law practice. 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.¹⁰² Furthermore, while BigLaw was always in significant part about making big money and profits-per-partner, at least the status of BigLaw 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.¹⁰³

Finally, 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,¹⁰⁴ 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. Moreover, to the extent that some do find high-status and high-compensation positions attractive, other areas such as high tech and finance may be as or even more alluring than law practice.

⁹⁹ Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407.

¹⁰⁰ 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).

¹⁰¹ 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).

¹⁰² Eli Wald, *Getting in and out of the House: Career Trajectories of In-House Lawyers*, 88 FORDHAM L. REV. (forthcoming 2020); Eli Wald, *In-House Pay: Are Salaries, Stock Options and Health Benefits a "Fee" Subject to a Reasonableness Requirement and Why the Answer Constitutes the Opening Shot in a Class War between Lawyer-Employees and Lawyer-Professionals*, 20 NEV. L. J. (2019).

¹⁰³ Robert W. Gordon, *The Return of the Lawyer-Statesman?* 69 STAN. L. REV. 1731 (2017).

¹⁰⁴ 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).

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

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 century. Specifically, some of the main circumstances that accounted for the affinity, both pertaining to American Jews and to the particulars of law practice and law have changed, rendering the US legal profession less appealing to Jews.

Such an end to the affair is not necessarily bad news for Jews, the profession or the public. The confluence of circumstances theory suggests that law served an important role in overcoming ethnoreligious discrimination and was an effective vehicle of upward socioeconomic mobility for a previously lower class excluded minority. To the extent that that minority group, Jews, became less of a minority and more integrated into mainstream society and even its elite, and to the extent that law helped Jews, within and outside of the profession, pursue the American Dream and secure elevated status, law and the practice of law have served their purpose and the end of the affair opens the door to other excluded groups to perhaps seek similar objectives.¹⁰⁵

At the same time, however, the confluence of circumstances theory raises important questions about the ability of law and law practice to replicate the success story of Jewish lawyers for other excluded groups. The confluence of circumstances theory is grounded in attention to context,¹⁰⁶ and the details of law and law practice at least in the first quarter of the twenty-first century suggest that contemporary law practice may be less-welcoming,¹⁰⁷ and less-promising as an avenue for socioeconomic advancement, elevated status and equality for minorities.¹⁰⁸

Ample discriminated against and excluded minority groups in contemporary America exist, including immigrants as well as ethnoreligious minorities, yet the ability of law and law practice to play a meaningful role in their quest for greater equality is doubtful. For example, the relationship of the black community and 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.¹⁰⁹

¹⁰⁵ In other words, Jews are not being forced out of the legal profession, rather, they opt out of the historical over-representation, leaving law, arguably a proven vehicle for overcoming discrimination, for other minorities to take advantage of.

¹⁰⁶ *Supra* note 41 and corresponding text.

¹⁰⁷ Wald, *Serfdom without Overlords: Lawyers and the Fight against Class Inequality*, *supra* note 84.

¹⁰⁸ Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509 (2015).

¹⁰⁹ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015).

This, of course, is not to deny or belittle the progress in recent decades in racial justice and equality, not to mention the celebrated careers and contributions of many black lawyers, jurists and law firms.¹¹⁰ 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 necessarily expect to see blacks flocking to law schools in overrepresented numbers seeking to join the legal profession any time soon.

Similarly, the relationship of the latinx community and American law has been one embedded in deep and growing distrust, centered in recent decades around the enforcement of immigration laws, thus law practice may not attract cohorts of latinx.¹¹¹ Moreover, given the correlation between ethnic and race and class identity and inequality in the U.S., the increased cost of legal education makes law schools a farfetched proposition for many latinx.¹¹² Indeed, as class stratification increases, the legal profession grows alienating not only for poor blacks and latinx but also for poor whites.¹¹³

Moreover, law has a complicated, mixed track-record with minorities, even when they do flock to law schools. While the relative success stories of Jews and Catholics as well as some Asian-Americans are well-documented,¹¹⁴ so is the experience of women, who have accounted for approximately fifty percent of law school graduates and entry level positions at elite legal institutions for nearly three decades, only to run against glass ceilings and concrete walls and end up significantly underrepresented in positions of power and influence within the profession.¹¹⁵

Relatedly, although explicit discrimination has been generally in decline in the United States, many minority groups continue to experience both explicit discrimination and implicit bias inside and outside of the legal profession from women (not only exclusion from positions of power and influence but also sexual harassment and pay discrimination),¹¹⁶ to people of

¹¹⁰ 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!": *The Rise and Fall of the Black Corporate Law Firm*, *supra* note 86.

¹¹¹ 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).

¹¹² Wald, *Serfdom without Overlords*, *supra* note 84.

¹¹³ 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).

¹¹⁴ But see, Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 *CAL. L. REV.* 1241 (1993); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 *CORNELL L. REV.* 1258 (1992); FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2002).

¹¹⁵ *Supra* note 7.

¹¹⁶ JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000).

color,¹¹⁷ to ethnoreligious minorities (for examples, Arab-Americans).¹¹⁸ Debating the state of equality and lack thereof in America is outside the scope of this article.¹¹⁹ Yet, it is important to note that while the confluence of circumstances that explains the affinity between Jews and American law includes the gradual decline of individual as well as institutional and structural ethnoreligious discrimination against Jews in the second half of the twentieth century, other minority groups may not benefit from the same positive trends and attitudes in contemporary America to a similar extent.

Next, the dominant culture and climate of law seems less conducive to minorities than it was last century. Specifically, the contemporary hypercompetitive and self-interested culture and ideology of law,¹²⁰ as opposed to the competitive meritocracy of the second half of the twentieth century, not to mention a diminished commitment to the public interest,¹²¹ make law practice as a whole less welcoming to members of minority groups. Once again, the point here is not to debate nor indict American culture or the legal profession, but rather to point out that current practice realities offer a different mix of background conditions that are not particularly conducive to law as an instrument of upper socioeconomic mobility and increased equality for the excluded and underprivileged.

Finally, the relatively harsh realities of law practice, from the challenges faced by recent graduates to find a job to the growing inequality and stratification within the profession, combined with the more conservative construction of civil rights, add to the mix of circumstances that is less welcoming to minorities. To be sure, this is neither a normative lament nor a denial that the changing landscape of law and law practice has produced not only losers but also winners, such as advocates of religious freedoms and commercial free speech. Moreover, American law and lawyers have proven over the years a remarkable ability to adapt such that the state of affairs for American law and the ability of law practice to serve as vehicle for increased equality and justice within and outside of its ranks should not assumed to be fixed and stagnant.

Nonetheless, the confluence of circumstances theory as applied to the experience of Jews and the US legal profession reveals more than the end of the affair for Jews and the law. While that particular disaffection is explained in part by changes unique to the Jewish community such as its successful assimilation into American society and its socioeconomic rise, it also is symptomatic of the changing circumstances and conditions of American law

¹¹⁷ *Supra* note 109.

¹¹⁸ RACE AND ARAB AMERICANS BEFORE AND AFTER 9/11 – FROM INVISIBLE CITIZENS TO VISIBLE SUBJECTS (Amaney Jamal & Nadine Naber eds., 2008).

¹¹⁹ COATES, BETWEEN THE WORLD AND ME, *supra* note 109.

¹²⁰ *Supra* note 104.

¹²¹ *Supra* Part II.B.5.

and law practice more generally rendering them less hospitable and welcoming to the discriminated against, excluded and underprivileged and less likely to play a role in their quest for equality and justice.

CONCLUSION

The confluence of circumstances theory reveals that in the twentieth century the practice of law was a vehicle for change and greater equality, inclusion and justice for American Jews. In particular, law constituted an effective means of seeking elevated status and upper socioeconomic mobility as ethnoreligious discrimination began to decline, elite law school 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 post WWII by the 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 a beacon of civil rights and a commitment to justice, the legal profession was 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.

Scrutiny of the same confluence of circumstances in the early years of the twenty-first century indicates a grim prospect for the ability of law and law practice to be an avenue of greater equality, overcoming discrimination and justice for minority groups. This may not be bad news for American Jews 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, yet the confluence of circumstances theory suggests that the practice of law is unlikely to draw cohorts of minorities and help overcome the deep distrust between American law and discriminated against communities. Furthermore, even if minorities were to flock to the profession in significant numbers, contemporary realities are not conducive for the practice of law in and of itself to serve as an equalizing playing field.