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THE LAW: BUSINESS OF PROFESSION? THE CONTINUING  
RELEVANCE OF JULIUS HENRY COHEN FOR THE PRACTICE OF  
LAW IN THE TWENTY-FIRST CENTURY

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## An Entrepreneurial Perspective on the Business of Being in Our Profession

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## AN ENTREPRENEURIAL PERSPECTIVE ON THE BUSINESS OF BEING IN OUR PROFESSION

*Steven H. Hobbs\**

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### INTRODUCTION

Julius Henry Cohen's project is to take a reflective look back at the broad history of the law profession, searching for the fundamental organizing tenets.<sup>1</sup> From that historical perspective, he identifies the

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1. *See generally* JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* (1916). Throughout the book, Cohen articulates his vision of what lawyers are and what they do and he cites the writings of others, including courts, to make this grand point:

In proportion as the client is poor, ignorant or helpless. And hence less likely to be able to exercise judgment in making choice, the necessity of adequate learning and purity of character on the part of every lawyer increases in importance. Thus the interest of the public in the intelligence and learning of the [B]ar is vital. Manifestly the practice of the law is not a craft, nor trade, nor commerce. It is a profession whose main purpose is to aid in the doing of justice according to law between the state and the individual, and between man and man. Its members are not and ought not to be hired servants of their clients. They are independent officers of the court, owing a duty as well to the public as to private interests. No one not possessing a considerable degree of general education and intelligence can

intrinsic values and traditions that have shaped the professional and ethical aspirations that define our practice as a highly respected profession populated by individuals of high character and intellect.<sup>2</sup> Significantly, Cohen found that an ethic of public service was essential to the authenticity of the practice of law.<sup>3</sup> At the heart of his critique is the sober recognition that far too many lawyers have fallen from ethical grace<sup>4</sup> and are practicing law for the selfish purpose of amassing personal financial wealth on the backs of their clients.<sup>5</sup> Moreover, the ease of entry into the profession has afforded woefully unprepared persons to claim the title of lawyer, thereby causing grievous harm to an unsuspecting public.<sup>6</sup> Ethical change would be critical to the profession's survival.<sup>7</sup>

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perform this kind of service. Elemental conditions and essential facts as to the practice of law must be recognized in the standards to be observed in admission to the bar.

*Id.* at 288–89.

2. See *id.* at 147–56 for Cohen's discussion on fundamental principles for the Bar.

3. In reviewing the early historical record of the American Bar Association, Cohen noted the emphasis on the philosophical, ethical underpinnings of the profession:

Yet in the very same volumes where are reported these expressions of political philosophy, other and sometimes the same gentlemen were appealing gravely to the Bar to believe that the State created lawyers—who certainly were citizens—not for their own benefit, as individuals, but for the benefit of the State. In bursts of eloquence they urged upon their profession the maintenance of the guild ideal, the ideal of the merger of the individual's personal life in the larger life of the community—the ideal of service rather than profit.

*Id.* at 126–27.

4. See *id.* at 1–23 for Cohen's discussion of scandalous lawyer conduct and discipline.

5. *Id.* at 234–42, 37–40.

6. *Id.* at 101–02, 244.

7. For Cohen, it was the organized bar's responsibility to police the profession and set high ethical standards, notwithstanding possible self-interest in weeding out lawyers:

I make no doubt that some of the enthusiasm of my brethren in all these movements is due to an impulse to make competition easier for those who have paid and still pay the heavy price of education, of training, and observance of the ethical code of conduct governing the profession. But the main impulse behind these activities of the Bar is, I sincerely believe—I *know*—to preserve and keep clean,—in the interest of the community—a profession whose existence is primarily for the benefit of the community. As *we* are witnesses of unprofessional practices, as *we* know its consequences, as *we* know the value of preliminary training, so, because of our nearness to the fact, the community calls upon us for initiative, for guardianship, and for zeal.

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Cohen's book is a clarion call to the organized Bar to clean up our professional house;<sup>8</sup> to set mandatory educational and moral standards to enter the profession;<sup>9</sup> and to diligently remove those whose actions and style of practice do not meet the lofty ideals that have historically guided the practice of law.<sup>10</sup> He sought to uncover fresh thinking and encouraged others to be creative in expounding upon the ethical values of the profession.<sup>11</sup> To this end, he highlighted the innovative approaches of various state bars and of the American Bar Association to construct canons of ethics and regulatory processes to police the profession and establish standards of ethical practice.<sup>12</sup> Moreover, he studied how ideas about traditional morality were continually evolving in terms of depth and insight and shaping the practice of law.<sup>13</sup>

In this Article I will examine Cohen's book from the framework of entrepreneurship. The discussion is premised on the idea that the book itself is an entrepreneurial effort.<sup>14</sup> More specifically, I see it as

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*Id.* at 258–59.

8. *Id.* at 109.

9. *Id.* at 137–41.

10. *Id.* at 150–51, 158–66.

11. Cohen noted the serious work that was being done and more that needed to be done, urging, "Radical reorganization of the American Bar is still necessary if the disciplinary power of the Bar is to be efficiently exercised." *Id.* at 155.

12. *See generally id.* at 165–71. *See also id.* at 277–85 (discussing the plan in Missouri to tackle the unauthorized practice of law).

13. In observing how business clients were evolving in terms of the ethical conduct of their business, Cohen saw that lawyers would need to rise to those emerging expectations:

We may say with confidence that the time is imminent, also, when business men will realize that in the modern lawyer the quality of trustworthiness is as important as the quality of celerity, and that loyalty to the ideals of the profession is quite as much a requisite as business acumen. Neither he who cringes nor he who fawns, neither he who supplicates nor he who panders is to be the elect. . . . The lawyer of self-respect respects his office, and respecting his office becomes worthy of the respect of his clients.

*Id.* at 313.

14. Cohen seeks to promote ideas about the ideal of a profession and see fundamental change in the way lawyers regard what they do, noting:

Primarily this book is written so that layman as well as lawyer may grasp the deep-rooted and historically well-founded conviction that the profession has a value to the community, that a sound public policy underlies the limiting of the practice of law to those specially trained and qualified, and that in carrying out the principle of personal and direct responsibility of lawyer to client and to court a wholesome result is achieved for society. So much, then, for the purpose of the book.

*Id.* at xv.

an exercise in social entrepreneurship that goes beyond the mere question of whether the practice of law is a business or a profession and entails the question of what type of society Cohen desired to construct by having quality lawyers as he described them.<sup>15</sup> Moreover, if the book could be read as an entrepreneurial social commentary on the practice, I find that Cohen has left out the social crisis that would shape the nation's future.<sup>16</sup> There is no mention of the race-based turmoil that was sweeping across the country at the turn of the century,<sup>17</sup> nor of the lawyers and legal cases that addressed the political and social oppression of persons of African descent.<sup>18</sup> Ultimately I find the underlying question of whether the law is a business or profession to be of little significance if it does not also address the question of what type of society we wish to live in and how lawyers and the law can play a crucial role in insuring that our truly fundamental values about freedom and democracy are central to how we practice law.

### I. THE ENTREPRENEURIAL LENS

In reading Cohen's book, I could not help analyzing it from an entrepreneurial perspective, or what Professor Benjamin Means calls an "entrepreneurial lens."<sup>19</sup> To view the world from an entrepreneurial perspective is to understand that entrepreneurship is

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15. See *infra* notes 70–93 and accompanying text.

16. See *infra* notes 94–97 and accompanying text.

17. For a survey of a variety of social issues including voting, farm and factory workers, and social critiques of inequality and injustice, see *TIME LONGER THAN ROPE: A CENTURY OF AFRICAN AMERICAN ACTIVISM, 1850–1950* (Charles M. Payne & Adam Green eds., 2003).

18. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976).

19. See Benjamin Means, *Foreword: A Lens for Law and Entrepreneurship*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 1 (2011). Means wrestles with the challenge of defining the boundaries between two fields of study—Law and Entrepreneurship. He suggests a different vantage point:

The lens metaphor offers important advantages. By setting aside worries about the boundaries of entrepreneurship as a location, we can start to think of entrepreneurship, not just as a category distinction, but as a way of talking about the law's relation to innovation and opportunity. Law and entrepreneurship differs from other kinds of business law scholarship in its particular attention to the role of individuals (alone, in groups or within established organizations) who identify and respond to opportunity. Law and entrepreneurship scholarship gains power, therefore, if it is allowed to range widely across commercial settings, exploring the various intersections of law, innovation and opportunity.

*Id.* at 17.

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the study of how an individual perceives an opportunity in a marketplace, strategically conceives of a unique method to take advantage of the opportunity, gathers the necessary resources, and successfully actualizes the plan in the marketplace.<sup>20</sup> To perceive, or to have perception, is to recognize a problem that needs a solution.<sup>21</sup> Perception results from a thought or imaginative exercise that visualizes a new or improved product or service.<sup>22</sup> The opportunity to act on a perception can be found from identifying a problem or idea from a myriad set of marketplaces—commercial, educational, political, social, or professional.<sup>23</sup> To bring the perceived opportunity to fruition requires an ordered and strategic planning process that maps out the necessary steps to achieve the desired goal.<sup>24</sup> And finally, one needs the internal drive and the willingness to risk failure to make the solution of the problem a reality.<sup>25</sup>

While the basic theories on entrepreneurship have focused on commercial enterprises, the same concepts have provided insight into other areas where dynamic processes are driving change. For example, in education, information technology has changed the way students learn and teachers teach.<sup>26</sup> With the portability of computer technology and easy access to the Internet, learning can now take place in cyberspace. This changes the relationship between learners and teachers, as methods of interacting are limited only by the

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20. See Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241 (1997).

21. Steven H. Hobbs, *Entrepreneurship and Law: Accessing the Power of the Creative Impulse*, 4 ENTREPRENEURIAL BUS. L.J. 1, 8–10 (2009).

22. *Id.* at 11–13.

23. *Id.*

24. *Id.* at 14–15.

25. *Id.* at 16.

26. See generally Paul L. Caron & Rafael Gely, *Taking Back the Law School Classroom: Using Technology to Foster Active Student Learning*, 54 J. LEGAL EDUC. 551 (2004). Dr. George Daniels of the University of Alabama journalism program encourages professors to utilize emerging technologies:

He would encourage other educators to recognize that students are more and more becoming tech-driven learners. “We have to acknowledge their tech-conscious lifestyle, but we can use that to teach them how to learn. Technology can enhance the classroom experience, and it is in the classroom that we teach critical thinking and content application.”

*Technology in the Classroom: Students Expect It*, DIALOG (Mar. 5, 2012), <http://www.dialog.ua.edu/2012/03/technology-in-the-classroom-students-expect-it/>.

imagination.<sup>27</sup> One need only point to the virtual professional responsibility textbook authored by Professors Russell Pearce, Daniel Capra, and Bruce Green to understand the enormous possibilities of developing new learning modalities.<sup>28</sup> The point is that entrepreneurial theory can be applied in any number of fields.<sup>29</sup> A fuller, but still limited, discussion of the entrepreneurial process is presented below.

I read Cohen through this entrepreneurial lens. He sees the looming threat to the profession as an opportunity to chart a higher path towards honor, integrity and professional excellence.<sup>30</sup> Like the experienced lawyer that he is, he recalls past times when the professional ideals were elevated, gathers salient facts of present conditions, and articulates a vision of what the profession can become.<sup>31</sup> The book is the strategic planning process that identifies fiscal and human capital capable of achieving the vision.

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27. For a discussion on innovative teaching techniques requiring a more interactive learning/teaching approach, see CHET MEYERS & THOMAS B. JONES, *PROMOTING ACTIVE LEARNING* (1993).

28. See generally RUSSELL G. PEARCE, DANIEL J. CAPRA, & BRUCE GREEN, *PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH* (2010). The authors of this textbook want to encourage their students to develop an excitement for the subject:

In the spirit of the interactive series, we intend to create a community of users of this text. We welcome comments and suggestions, including ideas for links that we should include in the next edition. To facilitate the creation of this community, we are establishing a blog under the title "Professional Responsibility: A Contemporary Approach." The blog will allow us to share comments and suggestions with all users of the book, as well as to provide current updates.

*Id.* at v.

29. For a differing view on the usefulness of entrepreneurial theory, see Jeffrey M. Lipshaw, *Why the Law of Entrepreneurship Barely Matters*, 31 W. NEW ENG. L. REV. 701 (2009).

30. Noting the change in society and how ethical training for lawyers was lacking, Cohen sensed the opportunity to pursue a higher plain:

We had failed to train ourselves properly for our true place in society; we were deficient in methods of moral training for our acolytes; we could have made a mighty contribution to the new philosophy which is to be American democracy's greatest gift to the world, and we did not. We carried under our robes a philosophy of social service that, for two thousand years, like a holy grail had been handed down through our Guild. And we kept it hidden. . . .

We awoke, slowly . . . to find the country made over during our slumber. And there we were, sleepy-eyed and bewildered by the change.

COHEN, *supra* note 1, at 146.

31. Cohen spends two chapters (Nine and Ten) looking back at the immediate history of the Bar from 1850 to 1915 and pointing forward to what the Bar could and

This took me back to previous work I have done on the intersection of law and entrepreneurship. In an article entitled *Ethics in the Age of Entrepreneurship*, I suggested that entrepreneurship was changing the relationship and methods of conducting business at a time of great technological and innovative changes in the manner in which commercial enterprises were created and developed.<sup>32</sup> Rapid innovation in computer science and the convergence of new products and services in virtually every aspect of life amplified the recognition of entrepreneurship as a driving force of economic and business development.<sup>33</sup> Entrepreneurship is primarily the theoretical foundation for establishing an applied modality for efficiently pursuing the economic ideal of wealth production.<sup>34</sup> The endeavor may not only produce a profit for the promoters and investors, but also produce a product or service valued by the end consumers.<sup>35</sup> Ultimately, the highest end of the entrepreneurial endeavor may be a positive change for society as well as a deep sense of satisfaction for the stakeholders who engaged in the dynamic process of change.

In that article, I suggested that lawyers should tap into the thought processes of entrepreneurship and of entrepreneurial clients so that clients can be better served.<sup>36</sup> From the perspective of the law, clients were seeking legal frameworks that aided entrepreneurial endeavors and did not retard them.<sup>37</sup> Without a doubt, clients sought legal services that helped promote their enterprises in an effective, efficient, and economical manner. At the heart of this ever-expanding trend of entrepreneurial thinking about how enterprises worked was the idea that lawyers must not only understand the

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should become. *Id.* at 112–41. His high estimation of what a lawyer should be is summed up in part as follows:

In the establishment of justice, in the creation of new institutions, in inculcating a respect for law and order for its own sake, in bringing about better and more just relations between man and man, the lawyer is called upon to play his part. *That* is his profession—his chosen guild.

*Id.* at 318–19.

32. See Steven H. Hobbs, *Ethics in the Age of Entrepreneurship*, 39 S. TEX. L. REV. 599 (1998).

33. *Id.* at 600–02.

34. Hobbs, *supra* note 21, at 3–4.

35. *Id.*

36. See Hobbs, *supra* note 32, at 616–17.

37. See Timothy A. Slatling & Jay P. Kesan, *Making Regulatory Innovation Keep Pace with Technological Innovation*, 2011 WIS. L. REV. 1109 (2011).



entrepreneurial drive of their clients, but that lawyers must also create new and alternative methods of providing legal services.<sup>38</sup>

At the center of this entrepreneurial discourse are the varying manners in which the express definition of entrepreneurship is understood. While there are many ways to approach the subject, one of the stronger options is through a consideration of innovation, imagination and creativity.<sup>39</sup> Innovation places an emphasis on perfecting existing products or services by applying new technology and knowledge to the existing processes in a manner that adds value, promotes utility, and efficiently addresses a need in the planning, building or distribution of the product or service.<sup>40</sup> Imagination calls for a visioning process that foresees the emergence of new products or services.<sup>41</sup> In essence, the imagination gives a person the genius it takes to create a world of products and services that never before existed.<sup>42</sup> Related to innovation and imagination is the power of creativity. After someone has produced an innovative approach to a product or service, or imagined a new paradigm, creativity fosters the process of solving the logistical task of bringing the product or service into reality.<sup>43</sup>

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38. One example in that article was the emergence of managed health care which not only changed the way health services were offered, but also created new contractual relationships amongst the participants in the healthcare system. This evolved medical care system raised quality of care issues that reshaped the traditional, legal landscape in medicine, including ideas about medical malpractice. See Hobbs, *supra* note 32, at 614–15; see also Rangamohan V. Eunni, *Competing in Emerging Markets: The Search for a New Paradigm*, 31 W. NEW ENG. L. REV. 611 (2009).

39. See generally Hobbs, *supra* note 21.

40. *Id.* at 10–11.

41. One scholar, whose focus is on entrepreneurs, those creative people who work in already existing enterprises, suggests a dynamic way of pursuing ideas:

The evolution of this particular entrepreneur can be divided into two distinct stages: developing the vision, and then realizing it. The first period involved much reading and reflection, while the second required a good deal of organizational work. In fact, the majority of successful entrepreneurs go through the same two stages. First, there is a commitment, manifested in the form of thinking. Ideas are then formed around a central focus—the vision—and finally, concrete action is taken.

Louis Jacques Filion, *From Employees to Intrapreneurs*, in *THE DYNAMICS OF ENTREPRENEURSHIP: GROWTH AND STRATEGY* 158, 159 (Tan Wee Liang ed., 2002).

42. *Id.* at 11.

43. According to Ken Robinson,

Creative processes are rooted in imaginative thought, in envisaging new possibilities. But creativity goes further. Imagination can be an entirely private process of internal consciousness. You might be lying motionless on your bed but in a fever of imagination. Private imaginings may have no

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Innovation, imagination, and creativity often exist against a background of profound social, commercial, and ideological change. The entrepreneur looks out into the world, observing the way people and products and technological processes interact in a collectivity of change, often called a paradigm shift.<sup>44</sup> Some of the changes are minor, but may nonetheless be progenitors of incremental progress toward a new way of being in the world.<sup>45</sup> Other creative innovations present such radical social, economic and legal change that the world is forever changed.<sup>46</sup> All of this is possible when someone with an entrepreneurial lens looks out into the world and has a creative vision of what the landscape could be if only an imaginative plan could be actualized.<sup>47</sup>

A close reading of Cohen reveals very similar threads in that he looks out into the world where lawyers work and asks whether there can be a better, more authentic method of legal practice.<sup>48</sup> By

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impact in the public world at all. Creativity does. It would be odd to describe someone as creative who just lay still and never did anything. Whatever the task, creativity is not just an internal mental process: it involves action. In a sense, it is applied imagination. To call somebody creative suggests they are actively producing something in a deliberate way. A first definition of creativity then is *imaginative processes with outcomes in the public world*.

KEN ROBINSON, *OUT OF OUR MINDS: LEARNING TO BE CREATIVE* 115 (2001).

44. Hobbs, *supra* note 21, at 13.

45. The process of seeing emerging ideas and new methods of logical thinking is what promotes change in how we exist in the world. As one scholar on creativity describes:

Our present worldview has been hugely shaped by the rapid scientific, technological and cultural revolutions that emerged from this paradigm shift from the medieval to the modern world. In the process, the explanatory powers of logic and of scientific evidence, and the intellectual authority of science as a whole have become firmly implanted in our own worldview. They are part of modern ideology and they interact powerfully with how we think and create theories in every field.

ROBINSON, *supra* note 43, at 73.

46. *See generally* GEORGE GILDER, *THE SPIRIT OF ENTERPRISE* (1984).

47. Hobbs, *supra* note 21, at 13–14.

48. Cohen recognized the tension created by the question, “law—business or profession?” He posited a recognition of the challenge of pursuing fundamental change:

Just about the time that the Bar of the nation awoke from its slumbers and became aware of its community function, its traditional ideal of service went through a professionalizing renaissance, and set in motion—let us hope, never to stop—an organized movement to lift *up* the profession, there came a new strength to the movement to drag it *down*, to kill its professional ideal at birth, to destroy its sense of fealty to court, to client and to community; to substitute for its historical tradition of *service* the current standard of the

examining the emergence of the legal profession from a time of lax regulatory schemata to the situation of the Bar in the first decades of the twentieth century, Cohen imagines a world that is morally grounded in traditional values.<sup>49</sup> Through telling stories of great and not-so-great lawyers, one sees the crumbling of the Bar through the lens of corruptions and insufficient attention to the details of admission, standards, and discipline.<sup>50</sup> Overall, what Cohen accomplishes is nothing less than a penetrating critique of the legal profession's fall from grace and the countervailing wave of regulatory efforts to raise the organized Bar to a level of practice that would be the envy of the world.<sup>51</sup> The creative response to such a threat to the integrity of the Bar is the development of national and local Bar associations designed to lift the professional character and credentials of the Bar and to discipline those who fail to meet baseline qualifications.<sup>52</sup>

Cohen acts in an entrepreneurial fashion by bringing together historical facts and philosophies to make a case that in the marketplace of legal practice the product and service offered could be improved. In their book *Built to Last*, Collins and Porras emphasized that a business, indeed even a profession, must simultaneously preserve its core, traditional values and pursue progress to keep up with changing times and processes.<sup>53</sup> This tendency is central to entrepreneurial enterprises that seek to remain relevant in the marketplace, which for Cohen is a field of dreams where ethics and character play.<sup>54</sup> He also attempts to co-opt other Bar leaders, whom one could also call stakeholders, to engage in this project.<sup>55</sup> One scholar of creativity studies calls this aspect of the project

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market place,—“*Profits first*” in short, to *commercialize* instead of *professionalize* the practice of law.

COHEN, *supra* note 1, at 243.

49. *Id.* at 150–56.

50. *Id.* at 160–71.

51. *See id.* at 125–41 (Chapter X).

52. In the 1924 revised edition of his book, Cohen reviews the significant progress that had been made in uplifting the profession by Bar leaders and state and national Bar associations to improve standards for entry, methods of discipline and addressing the issues that created the crisis of commercialism to begin with. *See generally* JULIUS HENRY COHEN, *THE LAW: BUSINESS OR PROFESSION?* (rev. ed. 1924).

53. JAMES C. COLLINS & JERRY I. PORRAS, *BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES* 80–90 (1994).

54. *See* COHEN, *supra* note 1, at 110.

55. *See id.* at 158–63, 258–59; *see also id.* at 277–85 (discussing legislative changes in Missouri designed to curb the unauthorized practice of law).

“symphony,” in that Cohen is acting much like a conductor encouraging all parts of his Greek chorus to sing together.<sup>56</sup> Hence, his project is about making fundamental changes in the community of lawyers.<sup>57</sup>

In many ways, one could view Cohen’s approach as social entrepreneurship, because he addresses nonprofit organizations that have a public purpose to better society. The mission to create social improvement has been described as follows:

Social entrepreneurs create social enterprises. They are the reformers and revolutionaries of our society today. They make fundamental changes in the way that things are done in the social sector. Their visions are bold. They seek out opportunities to improve society, and they take action. They attack the underlying causes of problems rather than simply treating symptoms.<sup>58</sup>

For this cause, Cohen emphasizes the ideas of service and public commissions as officers of the court.

To fully understand Cohen’s project, one must adopt his perspective, which requires identifying a frame of reference that holds the lens by which he perceives the world of law. He wrote at a time some have called “The Gilded Age.”<sup>59</sup> Perhaps nothing symbolizes

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56. DANIEL H. PINK, *A WHOLE NEW MIND: WHY RIGHT-BRAINERS WILL RULE THE FUTURE* 130 (2005).

57. See COHEN, *supra* note 1, at 258.

58. J. GREGORY DEES, JED EMERSON, & PETER ECONOMY, *ENTERPRISING NONPROFITS: A TOOLKIT FOR SOCIAL ENTREPRENEURS* 5 (2001).

59. For a description of rapid industrial growth and the accumulation of great wealth by successful capitalists, see *The Gilded Age—Industrial Revolution in America*, CLASSIFICATION AM. WEALTH, [http://www.raken.com/american\\_wealth/Gilded\\_age\\_index.asp](http://www.raken.com/american_wealth/Gilded_age_index.asp) (last visited Jan. 12, 2013), which notes:

The saga of American wealth creation, both from the nation and for its enterprising capitalists, reached its apotheosis during the Gilded Age, a period roughly delimited by the end of Civil War and the beginning of World War I. In America, this period was characterized by seemingly boundless economic expansion and the emergence of a new nation, which had completed the conquest of its vast Western territories and taken the lead among other nations, in industry and trade. America had always been a continent of opportunity, a promising land for the adventurous capitalist as well as for the poor immigrant. Yet, during the Gilded Age, the rapid transformation from an agricultural and mercantile economy to industrialism, presented unprecedented opportunities to daring speculators and inventive entrepreneurs. As the United States economy transformed itself and grew under the leadership of new tycoons, America’s established mercantile society once again transformed itself under the impact of the nouveau riche, opportunistic industry leaders or speculative railroad promoters.

that period better than the building of the H.M.S. Titanic, a ship of unprecedented size and scale.<sup>60</sup> Its maiden voyage carried some of the wealthiest, most influential individuals and families of the day.<sup>61</sup> It also carried many of the “huddled masses yearning to breathe free.”<sup>62</sup> Of course, the Titanic failed to make its scheduled docking in New York City.<sup>63</sup> Our westward expansion across this vast land would be nearly completed once those native to the land were properly defeated or placed on land specifically reserved for them.<sup>64</sup> After the election of Rutherford B. Hayes, the North and the South settled their differences, at least as far as federal oversight of the southern states.<sup>65</sup> The states became united in the active pursuit of commercialization, both agricultural and industrial.<sup>66</sup> America was finally prepared to take its place on the world stage. Our emergence as a world power was hastened by our reluctant entrance into the so-called “war to end all wars.”<sup>67</sup> The creative strength of our innovative, industrial might was aptly demonstrated “over there.”<sup>68</sup> As a people, we rallied shoulder-to-shoulder to defeat the forces of evil, demonstrating our commitment to our constitutional ideals.<sup>69</sup>

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*Id.*

60. See RICHARD DAVENPORT-HINES, *VOYAGERS OF THE TITANIC: PASSENGERS, SAILORS, SHIPBUILDERS, ARISTOCRATS, AND THE WORLDS THEY CAME FROM* (2012).

61. *See id.*

62. *Message of the Statue of Liberty*, LIGHT OMEGA, <http://lightomega.org/worldwatch/StatueofLiberty.html> (last visited Jan. 12, 2013) (passage derived from a poem by Emma Lazarus inscribed on the Statue of Liberty).

63. The Titanic sank on April 15, 1912. See *New Liner Titanic Hits an Iceberg; Sinking by the Bow at Midnight; Women Put Off in Lifeboats; Last Wireless at 12:27 A.M. Blurred*, N.Y. TIMES, Apr. 15, 1912, at 1.

64. For a description of the removal of Native Americans from the state of Alabama, see JACQUELINE ANDERSON MATTE, *THEY SAY THE WIND IS RED: THE ALABAMA CHOCTAW—LOST IN THEIR OWN LAND* (2002).

65. See W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA* (The Free Press 1998) (1935); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION* (2002).

66. See *The Gilded Age—Industrial Revolution in America*, *supra* note 59.

67. See *The War to End All Wars*, BBC NEWS (Nov. 10, 1998), [http://news.bbc.co.uk/2/hi/special\\_report/1998/10/98/world\\_war\\_i/198172.stm](http://news.bbc.co.uk/2/hi/special_report/1998/10/98/world_war_i/198172.stm).

68. This phrase is from the song written by George M. Cohan to capture the spirit of Americans going off to fight in World War I. See Jennifer Rosenberg, “*Over There*”: *A Famous Song of World War I*, ABOUT.COM, <http://history1900s.about.com/od/1910s/a/overthesong.htm> (last visited Jan. 12, 2013).

69. For a sense of the patriotism of African Americans even as racial injustices multiplied, consider this statement by W.E.B. DuBois in NAACP magazine, *THE CRISIS*:

We of the colored race have no ordinary interest in the outcome. That which the German power represents today spells death to the aspirations of

## II. JULIUS HENRY COHEN: THE ENTREPRENEUR IN A CHANGING SOCIETY

From reading his book, I sense that Cohen's orientation was toward the world of big business practice, and even small businesses that wish to become big at the turn of the century. He viewed the commercial world through a lens tinted by tremendous industrial growth as manufacturing became the driving force of commercial development.<sup>70</sup> The factories were powered by innovative technologies and the nationwide spread of the railroads, which opened up the country to movement of raw, natural resources and citizens seeking new opportunities.<sup>71</sup> It seems everyone sought to increase their personal wealth, resulting in masses of immigrants flooding the country and filling factory floors with workers.<sup>72</sup> (Ironically, the second and third generation of these immigrants received educations and would eventually seek entrance into the legal profession.)<sup>73</sup> Accordingly, lawyers were needed for drafting contracts, organizing commercial enterprises, and negotiating the financial instruments needed to fund commercial growth.<sup>74</sup> Finally, and perhaps most essentially, lawyers were needed who could engage in commercial litigation and protect the financial backsides of the captains of industry.<sup>75</sup>

Cohen sought out some of the best lawyers of the day.<sup>76</sup> He lobbied highly regarded lawyers and identified the most advanced Bar regulatory systems that had innovatively established codes of ethics, which were spreading around the country.<sup>77</sup> He held important

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Negroes and all darker races for equality, freedom and democracy. Let us not hesitate. Let us, while the war lasts, forget our special grievances and close our ranks shoulder to shoulder with our own white fellow citizens and the allied nations that are fighting for democracy. We make no ordinary sacrifice, but we make it gladly and willingly with our eyes lifted to the hills.

W.E.B DuBois, *Close Ranks*, THE CRISIS, July 1918, at 111.

70. See COHEN, *supra* note 1, at 210–14.

71. See *The Gilded Age—Industrial Revolution in America*, *supra* note 59.

72. See generally JOHN BODNAR, *THE TRANSPLANTED: A HISTORY OF IMMIGRANTS IN URBAN AMERICA* (1987).

73. For a discussion on the development of immigrant lawyers and Cohen's perspective on this topic, see Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Professional Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1 (2005).

74. See COHEN, *supra* note 1, at 101.

75. See *id.* at 211–12.

76. See *id.* at 153.

77. See *id.* at 321–52.

positions in well-connected professional associations, seeking a forum to be heard on his professionalism project.<sup>78</sup> His ideas were structured to encourage the best, brightest and most well-bred men to populate the profession.<sup>79</sup> The rhetoric of the discourse was set up to achieve these lofty goals.

The fact that Cohen viewed the world of practice from an entrepreneurial perspective is hardly surprising, given that he was an entrepreneur of the highest rank and had tarried in several different vineyards. Cohen fits the model of the entrepreneurial lawyer portrayed in “Ethics in the Age of Entrepreneurship.”<sup>80</sup> He helped create a field of law with his modes of practice and his written works on commercial arbitration.<sup>81</sup> He helped settle a major labor dispute utilizing innovative methods of dispute resolution.<sup>82</sup> Seeing the challenge the Hudson River posed to getting goods in and out of the Port of New York, he was the principal architect in 1921 of the Port Authority of New York (now Port Authority of New York and New Jersey).<sup>83</sup> Using the Port of London Authority as a model, he conceived of the idea of an independent public authority vested with governmental powers to raise funds through tax-free bonds and contract with private enterprises for construction services.<sup>84</sup> Further, he drafted the interstate compact between New Jersey and New York that made the bi-state authority possible.<sup>85</sup> This was the first time that the Interstate Compact Clause of the United States Constitution<sup>86</sup> was used in such a manner.<sup>87</sup> The Port Authority of New York became the model for other such public authorities throughout the country.<sup>88</sup> Moreover, serving as an entrepreneurial general counsel to the Port Authority of New York and New Jersey, he participated on a grand

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78. *See id.* at 153.

79. *See id.* at 114–21.

80. *See* Hobbs, *supra* note 32, at 600–01.

81. *See generally* JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* (1918).

82. *See* Richard A. Greenwald, “More Than a Strike”: *Ethnicity, Labor Relations, and Origins of the Protocol of Peace in the New York Ladies’ Garment Industry*, 27 *BUS. & ECON. HIST.* 318, 327 (1998).

83. Gerald Fetner, *Public Power and Professional Responsibility: Julius Henry Cohen and the Origins of the Public Authority*, 21 *AM. J. LEGAL HIST.* 15 (1977).

84. *Id.* at 20.

85. *Id.* at 25–26.

86. U.S. CONST. art. I, § 10, cl. 3.

87. *Id.* at 25.

88. *See* Jameson W. Doig, *Leadership and Innovation in the Administrative State*, 20 *INT’L. J. PUB. ADMIN.* 861 (1997).

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scale in the creation of the bridges and tunnels that today not only inter-connect these two states, but also provide transportation avenues that made possible the commercial activity that formed the foundation of his practice.<sup>89</sup>

Cohen was the quintessential social entrepreneur.<sup>90</sup> His life was animated by a commitment to creatively improving a variety of social systems.<sup>91</sup> He was a promoter, a person who could take ideas about recognized problems, push them, and then eventually ensure that solutions came to fruition.<sup>92</sup> Cohen's entrepreneurial lens was

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89. Cohen's influence on the development of the Port Authority and other such agencies should not be underestimated:

When the Port Authority was created in the spring of 1921, Cohen was chosen as General Counsel of the agency, a position he held for the next twenty years. In terms of the evolution of the public-authority idea, however, his extracurricular activities may be more important than his crucial role in shaping the Port Authority's program. For Cohen continued to be an advisor to Al Smith who served as New York's governor through most of the 1920's, and in the mid-1920's Cohen and Smith devised legislation to create similar semi-independent agencies to develop state programs for housing and water power.

*Id.* at 873.

90. *See generally* DAVID BORNSTEIN, *HOW TO CHANGE THE WORLD: SOCIAL ENTREPRENEURS AND THE POWER OF NEW IDEAS* (2004). Bornstein's study of individuals from around the world who are making a difference in the lives of people who live at the margins of society focuses on what he labels social entrepreneurs:

This is a book about people who solve social problems on a large scale. Most of its characters are not famous. They are not politicians or industrialists. Some are doctors, lawyers, and engineers. . . . What unites them is their role as social innovators, or social entrepreneurs. They have powerful ideas to improve people's lives and they have implemented them across cities, countries, and, in some cases, the world.

*Id.* at 1.

91. In describing leadership in the field of public administration, Doig considers what makes an individual an entrepreneurial leader:

Based on our biological studies, the personality characteristics that appear to be important are these: (1) a well-developed capacity to identify a range of alternative paths through which one's goals might be achieved and to calculate the probabilities of success if one set of strategies or another is undertaken; (2) the ability to see larger historical trends and to connect one's personal and programmatic goals to these trends; and (3) a personal desire to "make a difference" . . . to have an impact on one's agency and society.

Doig, *supra* note 88, at 868.

92. *See* Doig, *supra* note 88, at 872 ("Social entrepreneurs create social enterprises. They are the reformers and revolutionaries of our society today. They make fundamental changes in the way that things are done in the social sector. Their visions are bold. They seek out opportunities to improve society, and they take action. They attack the underlying causes of problems rather than simply treating the symptoms. And, although they may act locally, their actions have the very real



sharpened by a unique perspective that social problems could be solved by devising ways for various stakeholders, especially private business and government, to work together in a cooperative fashion.<sup>93</sup> Moreover, lawyers, with their training, expertise, and commitment to public service, should contribute significantly to a cooperative environment for business and government to solve disputes by reasoned, negotiated agreements as described by Fetner:

In the cooperative society the lawyer would negotiate between business, government and the community. In spite of the obvious difficulty with such a stance, Cohen believed the lawyer could balance these competing interests. The lawyer must convince businessmen and reformers that each had more to gain by seeking to understand the others' motives. Social reformers, in turn, must not consider every effort by business to increase efficiency and maximize profits as an example of underhandedness.<sup>94</sup>

But if Cohen was a social entrepreneur, his field of vision was limited in scope. The discourse was principally aimed at white men; no Negroes, Jews, Irish, Italians, Native Peoples, and other unwashed persons needed to apply.<sup>95</sup> In fact, they are out of the frame much like Ralph Ellison's *Invisible Man*, not seen by Cohen as relevant participants in the project.<sup>96</sup> Cohen neglected the rapid social changes that were occurring at that time—changes of which an officer of the court, dedicated to the rule of law and the triumph of the administration of justice, should have been concerned.<sup>97</sup> Moreover, in

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potential to stimulate global improvement in their chosen arena, whether that is education, health care, job training and development, the environment, the arts, or any other social endeavor.”).

93. Fetner, *supra* note 83, at 20–21.

94. *Id.* at 21.

95. For a discussion of the organized bar's reviews on the entry of racial and ethnic groups into the profession, see Levine, *supra* note 73. See also *In re Taylor*, 48 Md. 28 (1877), for an example of a case which upheld a state statute that allowed only white males to be admitted to practice law.

96. See RALPH ELLISON, *INVISIBLE MAN* 3 (1952) (“I am an invisible man. No, I am not a spook like those who haunted Edgar Allen Poe; nor am I one of your Hollywood-movie ectoplasms. I am a man of substance, of flesh and bone, fiber and liquids—and I might even be said to possess a mind. I am invisible, understand, simply because people refuse to see me. . . . When they approach me they see only my surroundings, themselves, or figments of their imagination—indeed, everything and anything except me.”).

97. For a survey of some of the significant, but often overlooked, efforts of African Americans to achieve the promises of freedom, equality and human dignity, see TIME LONGER THAN ROPE: A CENTURY OF AFRICAN AMERICAN ACTIVISM, 1850-1950, *supra* note 17.

his survey of outstanding and upstanding attorneys, whom he held up as paragons of right thinking and action, he woefully missed some who were valiantly engaged in the pursuit of liberty, freedom, and justice for all of America's citizens.<sup>98</sup> As we shall soon see, their stories are written in many significant legal battles and their efforts to promote social justice.

### III. SOCIAL ENTREPRENEURS OF A DIFFERENT HUE

My entrepreneurial lens looks back at the tremendous social entrepreneurial effort occurring in the 1890s and the first two decades of the twentieth century. After the end of Reconstruction, the southern, white power structure reasserted its dominance over the freed people who had previously been held in forced servitude.<sup>99</sup> Gone was that brief window of time when blacks actively participated in democratic governance.<sup>100</sup> Southern states effectively

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98. See *REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS* (J. Clay Smith, Jr., ed., 1998); J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944* (1999). Both of these works document the struggle of black lawyers to be able to even practice at the Bar and record the history of the National Bar Association, formed by black lawyers who could not join the American Bar Association.

99. With the election of President Rutherford B. Hayes in 1877, Reconstruction came to an end as the federal presence in the South was minimized and white southerners were given the authority to control local government. As one scholar noted:

Constrained only by the increasingly remote possibility of federal intervention, the survival of enclaves of Republican political power, and fear of provoking divisions within the now dominant democracy, the Redeemers moved in the final decades of the nineteenth century to put in place new systems of political, class, and race relations. A new social order did not come into being immediately, nor could the achievements of Reconstruction be entirely undone. . . .

No single generalization can fully describe the social origins or political purposes of the South's Redeemers, whose ranks included secessionist Democrats and Union Whigs, veterans of the Confederacy and rising younger leaders, traditional planters and advocates of a modernized New South. They shared, however, a commitment to dismantling the Reconstruction state, reducing the political power of blacks, and reshaping the South's legal system in the interests of labor control and racial subordination.

ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 587–88 (1988).

100. See RODNEY P. CARLISLE, *PROLOGUE TO LIBERATION: A HISTORY OF BLACK PEOPLE IN AMERICA* 139 (1972) ("Some blacks who had been educated in the North before the Civil War and others who were self-taught or educated in the army during the war served in various elective and appointive positions during Reconstruction. Altogether, fourteen black congressmen and two black senators were sent to

disenfranchised blacks, and often poor whites, as Alabama did when it enacted a new, repressive state constitution.<sup>101</sup> Jim Crow laws and black codes created the American apartheid system, making legal and social segregation of the races a twisted reality.<sup>102</sup> Laws were enacted which created the convict leasing system that forced individuals convicted of even petty crimes to work for private businesses.<sup>103</sup> Rural areas installed a sharecropping system that did nothing but provide virtually free labor to wealthy agricultural interests.<sup>104</sup> The north, while certainly not as explicit in terms of racial segregation, effectively enforced racially restrictive land covenants and de facto segregation to maintain a system of economic and political discrimination.<sup>105</sup>

Most insidious of all, America “gleefully” accepted the hideous practice of lynching black men and women, not to mention a substantial number of whites as well.<sup>106</sup> I say gleefully because legally permitted and sanctioned lynching emerged as a spectator sport that local residents eagerly watched and in which they became participants via their assenting voyeurism of the brutal killings.<sup>107</sup> Ida B. Wells, an African-American woman who was born into slavery in 1862 in Holly Springs, Mississippi, recorded the horrifying details in her

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Washington. P.B.S. Pinchback, a wealthy mulatto, served as lieutenant governor of Louisiana and as acting governor during the absence of the governor.”).

101. For a study of how southern states, especially Alabama, rewrote their state constitutions to disenfranchise blacks and how citizens organized to challenge the constitutionality of such laws, see R. VOLNEY RISER, *DEFYING DISFRANCHISEMENT: BLACK VOTING RIGHTS ACTIVISM IN THE JIM CROW SOUTH 1890–1908* (2010).

102. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (commemorative ed. 2002).

103. See DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

104. For a description of the life of a sharecropper in the first half of the twentieth century, see THEODORE ROSENGARTEN, *ALL GOD’S DANGERS: THE LIFE OF NATE SHAW* (1974).

105. See WOODWARD, *supra* note 102, at 113–15.

106. See RALPH GINZBURG, *100 YEARS OF LYNCHING* (1962); JAMES H. MADISON, *A LYNCHING IN THE HEARTLAND: RACE AND MEMORY IN AMERICA* (2001); JONATHAN MARKOVITZ, *LEGACIES OF LYNCHING: RACIAL VIOLENCE AND MEMORY* (2004); ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING 1909–1950* (1980).

107. See *IDA IN HER OWN WORDS: THE TIMELESS WRITINGS OF IDA B. WELLS 45–56* (Michelle Duster ed., 2008); see also DAVID BRADLEY, *THE CHANEYSVILLE INCIDENT* (1981).

comprehensive study of the practice of lynching.<sup>108</sup> A newspaper publisher who fiercely documented maltreatment of blacks in Memphis, Wells is known as a fearless crusader for human dignity for all citizens and an active member of the suffragette movement.<sup>109</sup> Ironically, she herself was thrown off of a railroad passenger car for refusing to sit in the car designated for Negroes.<sup>110</sup> She unsuccessfully challenged the constitutional validity of such discriminatory laws.<sup>111</sup> She was forced to flee for her life after her offices and printing presses were burned when she published a scathing editorial condemning the lynching of three African-American businessmen in Memphis.<sup>112</sup> Her extensive writings and speaking engagements in the United States and Europe should be a staple of American history education.<sup>113</sup>

Ida B. Wells was writing at this time of rapid, dynamic social change sparked in part by the philosophical thinking and social activism of many significant social entrepreneurs. One of Wells's mentors was Frederick Douglass, from whom she sought wisdom and contacts in pursuing the campaign against lynching.<sup>114</sup> Douglass, a news publisher like Wells, authored many critiques of the American democratic project.<sup>115</sup> He died in 1895, the year before *Plessy v. Ferguson*<sup>116</sup> was decided and the Supreme Court declared that legalized segregation was constitutional.<sup>117</sup> Douglass's death did not leave the field of black political and social thought vacant.<sup>118</sup> I can only present a small sampling of those who were writing at the time Cohen was designing his professional world and possessed a far

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108. See IDA B. WELLS-BARNETT, *ON LYNCHINGS* (2002) (reprinting publications by Wells-Barnett from 1882, 1895, and 1900).

109. *CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS* (Alfreda M. Duster ed., 1970).

110. See *A Darky Damsel Obtains a Verdict for Damages Against the Chesapeake and Ohio Railroad*, *THE MEMPHIS (TENN.) APPEAL AVALANCHE*, Dec. 25, 1884, at 4.

111. *Chesapeake, O. & S. R. Co. v. Wells*, 85 Tenn. 613 (1887).

112. See WELLS-BARNETT, *supra* note 108, at 14.

113. See MICELLE DUSTER, *IDA FROM ABROAD: THE TIMELESS WRITINGS OF IDA B. WELLS FROM ENGLAND IN 1894* (2010).

114. For a collection of letters between Wells and Douglas, see *id.* at 97–124.

115. See FREDERICK DOUGLASS, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* (Philip S. Foner ed., 1950).

116. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

117. See generally WOODWARD, *supra* note 102, at 70–72.

118. See *NEGRO THOUGHT IN THE TWENTIETH CENTURY* (Francis L. Broderick & August Meier eds., 1965).

different view of the society reflected in his book. Here are but a few examples that filled the void.

Booker T. Washington was perhaps one of the best-known black leaders of the time.<sup>119</sup> A former slave, he was educated at The Hampton Institute (now Hampton University) and went on to found The Tuskegee Institute (now Tuskegee University) in Alabama in 1881 with the express purpose of “uplifting the race” from the dark times of slavery.<sup>120</sup> The school was committed to affording vocational training and education to those who were formerly held in a condition of forced labor and to their descendants, who found themselves in a place of ever-shrinking opportunity to carve out a decent life.<sup>121</sup> He was also committed to the development and promotion of black-owned businesses—a mercantile class for which Cohen’s idealized lawyers should have been willing to serve.<sup>122</sup>

Washington is widely known for his speech at the Atlanta Cotton Exposition in 1895.<sup>123</sup> Responding to the growing threat of immigrants displacing black labor, Washington urged the business community to hire from the deep pool of qualified, trained workers already existing in the South.<sup>124</sup> Many of them were rapidly migrating to the North for better economic opportunity.<sup>125</sup> In attempting to allay the fears of whites who were concerned with social integration and miscegenation, he declared, “In all things that are purely social we can be as separate as the fingers, yet one as the hand in all things essential to mutual progress.”<sup>126</sup> Washington was advocating for jobs

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119. See LOUIS R. HARLAN, *BOOKER T. WASHINGTON: THE MAKING OF A BLACK LEADER, 1856–1901* (1972).

120. BOOKER T. WASHINGTON, *UP FROM SLAVERY* 111 (Magnum Books 1968) (1901).

121. *Id.* at 128.

122. Washington organized the National Negro Business League in 1900. See HARLAN, *supra* note 118, at 266. One of the early black-owned businesses was founded by Madame C. J. Walker, in 1906 to produce hair care products for black women. A’LELIA BUNDLES, *ON HER OWN GROUND: THE LIFE AND TIMES OF MADAM C. J. WALKER* 17 (2001). She was an active participant in Washington’s National Negro Business League, even though their relationship was at times strained. *Id.* at 121–23.

123. See WASHINGTON, *supra* note 120, at 217.

124. *Id.* at 218.

125. See W.E.B. DuBois, *Social Planning for the Negro, Past and Present*, 5 J. NEGRO EDUC. 110, 113 (1936) (“[T]he migration of Negroes from the South to North has gone on continually since the Civil War. Between 1880 and 1900, some 10,000 to 20,000 a year went into the North, while from 1910 to 1930, between 1,000,000 and 1,500,000 moved in one of the great mass movements in the history of migration.”).

126. See WASHINGTON, *supra* note 120, at 221.

and for black businesses to gain economic opportunity.<sup>127</sup> He was strongly emphasizing the necessity of mutual economic cooperation between Southern whites and blacks, using the metaphor of casting down a water bucket he noted:

Cast it down in agriculture, mechanics, in commerce, in domestic service, and in professions. And in this connection it is well to bear in mind that whatever other sins the South may be called to bear, when it comes to business, pure and simple, it is in the South that Negro is given a man's chance in the commercial world, and in nothing is the Exposition more eloquent than in emphasizing this chance.<sup>128</sup>

Not everyone in the black community agreed with Washington, because his statement could be used to validate the ruling of *Plessy*. Some, labeling him an accommodationist, heard his speech to be a call for the support of segregation and a second-class status in America.<sup>129</sup> This created a great rift between him and the other leaders that were emerging in the fight for civil rights.<sup>130</sup> One dissenting voice came from Dr. William Edward Burghardt DuBois, who graduated from Harvard College in 1890 and earned a doctorate in 1895.<sup>131</sup> He vigorously criticized Washington's speech in his classic book, *The*

127. *Id.*

128. *Id.* at 219–20; *see also*, HARLAN, *supra* note 119, at 266–71 (discussing the National Negro Business League founded by Washington in 1990).

129. *See* JOHN HOPE FRANKLIN & EVELYN BROOKS HIGGINBOTHAM, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 286 (9th ed. 2011).

130. *See generally id.* at 300–06. Ida B. Wells was a forceful spokesperson for full constitutional rights for blacks. *Id.* at 287–88; *see also* ON LYNCHINGS, *supra* note 108, at 6. In *FROM SLAVERY TO FREEDOM*, Franklin and Higginbotham suggest:

African Americans did not fail to do their part in the pursuit of their rights. Civil-rights leaders such as W.E.B. Du Bois, the Grimké brothers (Francis and Archibald), Monroe Trotter, Ida B. Wells, Nannie Helen Burroughs, and many other black men and women had spoken forcefully against racial discrimination before the war, and they would continue to do so. Some remained in all-black organizations, while others joined with whites in organizations of Progressive-era reform, such as the NAACP (National Association for the Advancement of Colored People), the Commission on Interracial Cooperation, and the National Urban League; a major swelling of the voices to Booker T. Washington's accommodationist position and formed activists organizations.

FRANKLIN & HIGGINBOTHAM, *supra* note 129, at 352.

131. For a comprehensive biography of W.E.B. DuBois, *see* DAVID LEVERING LEWIS, *W.E.B. DUBOIS: A BIOGRAPHY OF A RACE, 1868–1919* (1993) and W.E.B. DUBOIS: *THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY, 1919–1963* (2000).

*Souls of Black Folk*”, published in 1903.<sup>132</sup> That book provided a penetrating critique of the conditions black Americans faced, especially in the South.<sup>133</sup> With a distinctive focus on higher education, the book served as a counterweight to Booker T. Washington’s emphasis on industrial education.<sup>134</sup> Cohen could have benefited from a close reading of even a small portion of DuBois’s writings.<sup>135</sup>

DuBois was a principal participant in the Niagara Movement, so called because the initial meeting had to be held in 1905 on the Canadian side of Niagara Falls because no hotel on the New York side would accommodate blacks.<sup>136</sup> The participants were some of the leading black scholars and activists of that time. At the second meeting in 1906, held purposefully at Harper’s Ferry, West Virginia to recognize the life of abolitionist John Brown, DuBois and others penned a list of principles and objectives grounded in the Declaration of Independence and the United States Constitution.<sup>137</sup> For several reasons, the organization did not gain enough momentum to become sustaining.<sup>138</sup> However, the participants and the ideas that the

132. See generally W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (1903).

133. See *id.* at 111.

134. See *THE SEVENTH SON: THE THOUGHTS AND WRITINGS OF W.E.B. DUBOIS* 385–403 (Julius Lester ed., 1971). DuBois argued:

Work alone will not do it unless inspired by the right ideals and guided by intelligence. Education must not simply teach work—it must teach Life. The Talented Tenth of the Negro race must be made leaders of thought and missionaries of culture among their people. No others can do this work and Negro colleges must train men for it. The Negro race, like all other races, is going to be saved by its exceptional men.

*Id.* at 403 (quoting “The Talented Tenth”).

135. See *id.*

136. For the principles of the Niagara Movement, see *id.* at 428–32. The leaders of the movement included William Monroe Trotter, W.E.B. DuBois, and Ida B. Wells, who was one of the first women members. See FRANKLIN & HIGGINBOTHAM, *supra* note 128, at 287.

137. See HARPER’S FERRY NATIONAL PARK, *THE CALL FOR JUSTICE AND THE STRUGGLE FOR EQUALITY: THE NIAGARA MOVEMENT, A NINETY YEAR RETROSPECTIVE* (1996) (on file with author); *The Niagara Movement*, NAT’L PARK SERVICE, <http://www.nps.gov/hafe/historyculture/the-niagara-movement.htm> (last visited Jan. 12, 2013).

138. For a discussion of the history of the Niagara Movement see ROBERT H. BRISBANE, *THE BLACK VANGUARD: ORIGINS OF THE NEGRO SOCIAL REVOLUTION 1900–1960*, at 39–41 (1970). Brisbane notes:

[T]he struggles of the organization: In spite of the best efforts of Du Bois and Trotter, the Niagara Movement never became more than an annual round table conference of young Negro intellectuals. Without funds or permanent organization, the group was never properly equipped for the

Niagara Movement articulated formed the ground upon which the National Association of the Advancement of Colored People (NAACP) was formed in 1909.<sup>139</sup>

Another voice that echoed in the streets of New York was that of Marcus Mosiah Garvey, a Jamaican who organized the Universal Negro Improvement Association (UNIA) in 1914.<sup>140</sup> Inspired by the life story of Booker T. Washington, Garvey came to New York City in 1916 to establish a world headquarters.<sup>141</sup> Like Washington, Garvey's mission was to "uplift the race" in America and in the African Diaspora.<sup>142</sup> He, too, advocated for human rights and social justice, staunchly opposing lynching.<sup>143</sup> He created commercial

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task it was known to have selected for itself. Booker T. Washington was too strongly entrenched in the favorable opinion of the country, backed as he was by the white press and several white philanthropists. Moreover, Washington began plotting the destruction of the Niagara Movement from the very day of its inception. He planted spies and informers within the group and actually sought to encourage dissension and division. And though the use of his considerable influence over the editors and publishers of Negro newspapers, he was able to effectuate at least a partial blackout of news of the Niagara Movement with the Negro press.

*Id.* at 40–41.

139. See *THE SEVENTH SON*, *supra* note 133, at 428–29.

140. For a general biography, see COLIN GRANT, *NEGRO WITH A HAT: THE RISE AND FALL OF MARCUS GARVEY* (2008).

141. See 2 *MARCUS GARVEY, PHILOSOPHY AND OPINIONS OF MARCUS GARVEY* 126 (Amy Jacques Garvey ed., 1925); see also E. CRONON, *BLACK MOSES* 15–17 (1949).

142. Garvey's prime message was that the Negro race could and should be the equal of other races and his organization was designed to achieve that goal:

The Universal Negro Improvement Association believes in the manhood and initiative of the Negro, that whatsoever other races, let them be white or yellow, have done, that the Negro will do, and that after the Negro has successfully done by himself, not only in this western world, but throughout the world, what others have accomplished, he will be lifted to the common standard of human progress and there enjoy fellowship and companionship with all those who have even advanced before him.

4 *MARCUS GARVEY, THE MARCUS GARVEY AND UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION PAPERS* 592–93 (Robert Hill ed., 1985).

143. See *id.* at 594. Garvey believed that blacks should have their own government in order to offer protection from racial oppression:

Not until the Negro reaches the point of national independence, not until the Negro has built up for himself successfully his strong and powerful government, not until the Negro has become a great industrial power, not until the Negro has lifted himself from the position of a serf, a peon and a slave to that of a real man, a great African citizen, not until then, I say, will lynching be stopped; not until then will white men cease their prejudices against us; not until then will the black man receive the recognition and enjoy the respect of the world.



enterprises and started a steamship line that briefly operated out of the Port of New York.<sup>144</sup> The UNIA was perhaps one of the largest black organizations ever formed with a claimed membership estimated at two million worldwide.<sup>145</sup> Garvey emphasized pride in the black race and preached principles of self-determination as a way to control one's own destiny.<sup>146</sup> Every time one sees the color combination of red, black and green, one should recognize the hand of Garvey.<sup>147</sup>

One of the principle objectives of the UNIA was to redeem Africa from colonial rule and commercial exploitation.<sup>148</sup> Garvey believed that "Africa should be for the Africans, those at home and abroad."<sup>149</sup> After World War I, Garvey attempted to petition the Paris Peace Conference to grant Germany's former African Colonies to his organization.<sup>150</sup> Ida B. Wells was to be part of the delegation, but the United States Department of State denied her a visa.<sup>151</sup> Garvey also attempted to obtain a hearing in the United States Congress and to convince President Woodrow Wilson that the UNIA's claims were in line with the fourteen principles Wilson presented as the foundation for a League of Nations.<sup>152</sup> All of this was to no avail, as the colonies were distributed under the mandate system set up to leave the colony

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*Id.*

144. See MARCUS GARVEY: LIFE AND LESSONS 35–96 (Robert Hill & Barbara Bair eds., 1987).

145. GRANT, *supra* note 140, at 164.

146. See MARCUS GARVEY: LIFE AND LESSONS, *supra* note 144, at 19, 301.

147. The flag of UNIA was red, black and green. It was a symbol of great pride and power. See 2 MARCUS GARVEY, MARCUS GARVEY AND THE UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION PAPERS 316–17 (Robert Hill ed., 1983).

148. 2 GARVEY, *supra* note 141, at 67.

149. 1 GARVEY, *supra* note 141, at 27.

150. GRANT, *supra* note 140, at 173–75.

151. *Id.*

152. The UNIA petition to Congress asking it to not consent to President Wilson's efforts to form the League of Nations because Germany's former colonies were distributing to western powers under the mandate system can be found in 1 MARCUS GARVEY, THE MARCUS GARVEY AND UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION PAPERS 366–69 (Robert Hill ed., 1983). The UNIA petition to the Paris Peace Conference after World War I can also be found therein. *Id.* at 284. For an editorial by Garvey claiming the rights of Africans to have self-determination over their lands, see *id.* at 302–03.

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in the control of designated countries.<sup>153</sup> African independence would have to wait.<sup>154</sup>

Garvey was later convicted of mail fraud in 1925.<sup>155</sup> After serving part of his sentence, President Calvin Coolidge commuted the remaining part and Garvey was deported in 1927.<sup>156</sup> The scant evidence of mail fraud that was presented at his trial was gathered by J. Edgar Hoover through the United States Justice Department's Bureau of Investigation.<sup>157</sup> Under Hoover, agents infiltrated the UNIA and became secret operatives sent to destroy the organization from within.<sup>158</sup> The tactics developed by Hoover to spy on United States citizens would be utilized against every effort by African Americans to achieve social justice and the freedoms taken for granted by other Americans.<sup>159</sup>

Two additional social occurrences need to be noted. First, from about 1914, blacks began to migrate in great numbers from the South to the North seeking to escape Jim Crowism and to seek better opportunity for their families.<sup>160</sup> It has been said that by 1930 over one-and-a-half million had settled in the northern cities and on the west coast.<sup>161</sup> Several black organizations were formed to assist those making the transition from a rural life to an urban existence.<sup>162</sup> Second, after World War I ended in 1917, the nation was wracked with many race riots, generally reflecting the increased tension between black and white urban populations.<sup>163</sup> The summer of 1919

153. See QUINCY WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* (Greenwood Press 1968) (1930).

154. 1 GARVEY, *supra* note 152, at 391.

155. See *Garvey v. United States*, 4 F.2d 974 (2d Cir. 1925).

156. GRANT, *supra* note 140, at 410–11.

157. For a discussion of the mail fraud case against Garvey and the extensive federal surveillance of his organization see Steven H. Hobbs, *The Marcus Garvey Case: A Law and Power Theory Analysis of Political Suppression of Human Dignity*, 2 GEO. MASON U. C.R. L.J. 15 (1991).

158. *Id.* at 25.

159. See generally *FEDERAL SURVEILLANCE OF AFRO-AMERICANS (1917–1925): THE FIRST WORLD WAR, THE RED SCARE, AND THE GARVEY MOVEMENT* (Theodore Kornweibel, Jr. ed., 1986).

160. See, e.g., ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* (2011).

161. See Alan D. DeSantis, *Selling the American Dream Myth to Black Southerners: The Chicago Defender and the Great Migration of 1915–1919*, 4 W.J. COMM. 474 (1998).

162. See Brisbane, *supra* note 138, at 63–69 (discussing the creation of the National Urban League).

163. See FRANKLIN & HIGGINBOTHAM, *supra* note 129, at 357–62.

was called the Red Summer, since many African Americans were killed during the riots, many by lynching.<sup>164</sup> Of those lynched the ugliest episodes involved black soldiers in uniform returning from the war that was supposed to save democracy.<sup>165</sup>

#### IV. THE INVISIBLE LAWYERS

This historical account is exceedingly brief and does not reflect the intellectual depth of this sociological discourse nor the extraordinary breadth of the activities that were occurring at the time Cohen was researching and writing his book. The vibrancy and the commitment with which individuals and organizations acted to demand social, economic, and political justice would certainly require a richer, fuller exploration of that time.<sup>166</sup> What is of merit in this too short recitation is the observation that within that pursuit of justice there were lawyers who acted in much the way Cohen would have found to be instrumental in developing a theory of ethics and professionalism. There were, as Charles Hamilton Houston would say, lawyers who were social engineers advocating in the best traditions of the profession to achieve revolutionary changes in the society.<sup>167</sup> Again, this aspect of social entrepreneurship was what made Cohen's career so extraordinary.

There are but a few examples of lawyers, both black and white, who were laboring in the vineyards of freedom. Albion Winegar Tourgée was a lawyer who represented Homer Plessy in his efforts to challenge Jim Crow street car laws.<sup>168</sup> Tourgée fought for the Union during the Civil War, sustaining several injuries.<sup>169</sup> He once asked for a commission to command colored troops near the end of the war.<sup>170</sup> Among his many accomplishments, including fighting against Jim

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164. See CAMERON MCWHIRTER, *RED SUMMER: THE SUMMER OF 1919 AND THE AWAKENING OF BLACK AMERICA* (2011).

165. See Vincent P. Mikkelsen, *Fighting For Sergeant Caldwell: The NAACP Campaign Against "Legal" Lynching After World War I*, 94 J. AFR. AM. HIST. 464 (2009).

166. For a significant and comprehensive study of the history of the African American struggle for freedom and equality see FRANKLIN & HIGGINBOTHAM, *supra* note 128.

167. GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 216–17 (1983).

168. See John Minor Wisdom, *Plessy v. Ferguson—100 Years Later*, 53 WASH. & LEE L. REV. 9, 10 (1996).

169. *Id.* at 12.

170. *Id.*

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Crow regimes after the end of Reconstruction, he was a writer, and in 1879 penned a popular novel set in the time of reconstruction called *A Fool's Errand: A Novel of the South During Reconstruction*.<sup>171</sup>

In 1906, Noah Parden and Styles Hutchins, two African American lawyers in Chattanooga, Tennessee were retained to appeal the death sentence of Ed Johnson, a black man who was wrongly convicted of raping a white woman.<sup>172</sup> After failing to get a new trial through the Tennessee Supreme Court, the lawyers sought a stay of execution by filing a writ of habeas corpus with the United States District Court in Knoxville, a process that had not been used in federal courts.<sup>173</sup> When that writ failed, they appealed to the United States Supreme Court and received a stay pending a hearing, signed by Associate Justice John Harlan (the dissenting Justice in *Plessy*).<sup>174</sup> Unfortunately, with the complicity of the local sheriff, Joseph F. Shipp, a mob stormed the jail where Ed Johnson was housed and lynched him.<sup>175</sup> Sheriff Shipp and others were charged with contempt of the Supreme Court.<sup>176</sup> After much pre-trial maneuvers, they were convicted of contempt on May 24, 1909 after the first criminal trial ever tried before the full Court.<sup>177</sup> The case of *United States v. Shipp* revolutionized the law of habeas corpus and Parden was one of the first African American lawyers to argue a case before the Supreme Court when his original petition was heard by Justice Harlan.<sup>178</sup>

Wilford H. Smith was another African American lawyer known for his expertise on constitutional law, especially the Thirteenth, Fourteenth and Fifteenth Amendments.<sup>179</sup> Using the Fourteenth Amendment of the United States Constitution, he successfully challenged the exclusion of blacks from grand juries in the case of

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171. *Id.* at 11.

172. See Mark Curriden, *A Supreme Case of Contempt: A Tragic Legal Saga Paved the Way For Civil Rights Protections and Federal Habeas Actions*, 95 A.B.A. J. 34, 37–38 (2009).

173. *Id.*

174. *Id.* at 39.

175. *Id.* at 39–40.

176. *Id.*

177. *Id.* at 41.

178. For an in-depth discussion of the case, see MARK CURRIDEN & LEROY PHILLIPS, JR., *CONTEMPT OF COURT: THE TURN-OF-THE-CENTURY LYNCHING THAT LAUNCHED A HUNDRED YEARS OF FEDERALISM* (1999).

179. See Irvin C. Mollison, *Negro Lawyers in Mississippi*, 15 J. OF NEGRO HIST. 38, 63 (1930); Wilford H. Smith, *The Negro and the Law*, in *THE NEGRO PROBLEM* 127 (Booker T. Washington ed., Ayer Co. Publishers 1969) (1903).

*Carter v. Texas*.<sup>180</sup> He was also successful in challenging racial exclusion from grand juries in the case of *Rogers v. Alabama*,<sup>181</sup> where blacks were excluded from voter rolls and thus ineligible to be empanelled on grand juries.<sup>182</sup> Smith was certainly one of the first African Americans to argue for civil rights before the United States Supreme Court.<sup>183</sup> Based in New York, one of his more noted clients was Marcus Garvey, for whom he provided legal assistance during Garvey's mail fraud trial.<sup>184</sup> Smith was also the personal lawyer of Booker T. Washington.<sup>185</sup> While he handled many of Washington's legal matters, he was instrumental in assisting Washington's efforts to fight disenfranchisement of black voters.<sup>186</sup> After Reconstruction, disenfranchisement was perhaps the most systematic effort by southern state governments to ensure that blacks would not hold a place in the body politic.<sup>187</sup> A fuller discussion of disenfranchisement

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180. See *Carter v. Texas*, 177 U.S. 442 (1900).

181. See *Rogers v. Alabama*, 192 U.S. 226 (1904).

182. *Id.* at 230.

183. See Riser, *supra* note 101, at 101–11; see also WILFORD H. SMITH, THE NEGRO'S RIGHTS TO JURY REPRESENTATION (1904) (urging blacks to challenge criminal prosecutions based on *Carter v. Texas* and *Rogers v. Alabama*):

You should avail yourselves of the benefit of these decisions, by moving to quash all indictments and panels of petit juries in criminal and civil cases, in courts where competent members of your race are excluded from jury service. If the community in which you live, or the court in which you are tied, is not willing to concede representation on the juries to the competent of your race, which is a right guaranteed by the Federal Constitution, there can be very little reason to hope that your case will be fairly and impartially considered in such a community or by such a court.

*Id.*

184. See 2 GARVEY, *supra* note 141, at 210–11.

185. See HARLAN, *supra* note 119, at 302.

186. See RISER, *supra* note 101, at 111; see also *Giles v. Harris*, 189 U.S. 475 (1903) (unsuccessful challenge to disenfranchisement in Alabama).

187. Wilford Smith presented a brief description of the challenge of disenfranchisement:

The boldest and most open violation of the negro's rights under the Federal Constitution, was the enactment of the grand-father clauses, and understanding clauses in the new Constitutions of Louisiana, Alabama, the Carolinas, and Virginia, which have had the effect to deprive the great body of them of the right to vote in those States, for no other reason that their race and color. Although thus depriving him of his vote, and all voice in the State governments at the South, in all of them his property is taxed to pay pension to Confederate soldiers, who fought to continue him in slavery.

Smith, *supra* note 179, at 142–43.

is beyond the scope of this Article, but the efforts to achieve the full right to vote would continue throughout the twentieth century.<sup>188</sup>

James Weldon Johnson was another African-American lawyer who exhibited the best qualities of a social entrepreneur.<sup>189</sup> He was admitted to the Florida Bar in 1897, and would become U.S. Consul to Venezuela and Nicaragua.<sup>190</sup> He was field secretary for the NAACP and eventually became the Executive Director in 1920.<sup>191</sup> Johnson was one of the leaders of the early years of the NAACP's Anti-Lynching Crusade, designed to bring the gruesome practice to the country's attention.<sup>192</sup> As executive secretary of the NAACP, Johnson organized in Manhattan the historic Silent March of 1917 to protest the national crime of lynching.

During his tenure as executive secretary of the NAACP, Johnson also led a national campaign against lynching that garnered significant congressional support in the form of the Dyer Anti-Lynching Bill of 1921, a bill that would have made lynching a national crime, but it failed to become law because of insufficient votes in the Senate.<sup>193</sup>

He was a man of letters and wrote several books and collections of poems.<sup>194</sup> He is most remembered for composing, along with his brother, John Rosamond Johnson, in 1900, the hymn "Lift Ev'ry

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188. See FRANK R. PARKER, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965* (1990).

189. See *James Weldon Johnson: 1871-1938*, POETRY FOUND., <http://www.poetryfoundation.org/bio/james-weldon-johnson> (last visited Jan. 12, 2013).

190. *Id.*

191. *Id.*

192. See ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING 1909-1950* (1980). Donald Nieman describes Johnson's role in the Crusade thusly:

James Weldon Johnson and Walter White of the NAACP staff worked closely with Leonidas Dyer, a St. Louis Republican, to capitalize on the change in public sentiment created by the anti-lynching campaign. In 1918 Dyer introduced in the House of Representatives legislation providing broad sanctions against lynchers as well as public officials and communities that tolerated lynching.

DONALD G. NIEMAN, *PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT* 125 (1991).

193. *James Weldon Johnson*, JAMES WELDON JOHNSON INST., <http://jamesweldonjohnson.emory.edu/sub-james.htm> (last visited Jan. 12, 2013).

194. See JAMES WELDON JOHNSON, *THE AUTOBIOGRAPHY OF AN EX-COLORED MAN* (1909); JAMES WELDON JOHNSON, *GOD'S TROMBONES: SEVEN NEGRO SERMONS IN VERSE* (1927).

Voice and Sing,” which is considered the “Negro National Anthem.”<sup>195</sup>

The NAACP had many lawyers affiliated with it during its early years. Arthur Spingarn, a white lawyer, was chairman of the Legal Redress Committee and served on the NAACP Board of Directors along with his brother, Joel Spingarn.<sup>196</sup> In *Guinn v. United States*,<sup>197</sup> the NAACP challenged the grandfather clause in voting laws in Maryland and Oklahoma and won a Supreme Court victory declaring them unconstitutional under the Fifteenth Amendment.<sup>198</sup> The NAACP also brought the case of *Buchanan v. Warley*<sup>199</sup> to the United States Supreme Court to challenge Louisiana’s restrictive covenant law in 1917 with Morefield Storey as the lead counsel.<sup>200</sup> I am sure Cohen knew Story since, in addition to being chair of the NAACP Board of Directors, he was also a past president of the American Bar Association.<sup>201</sup> It seems doubtful that Cohen missed these events.

Further, Cohen talks extensively of developing high educational standards for students to become lawyers.<sup>202</sup> I would point to three individuals who came of age during the time the Cohen was engaged in his professionalism project. The first is Paul Robeson, who was raised in Somerville, New Jersey and matriculated at Rutgers University, the third African-American to enroll.<sup>203</sup> He earned varsity

195. See, e.g., *James Weldon Johnson*, *supra* note 193.

196. Both Spingarn brothers were well known and this was said about Joel:

Spingarn, the son of Jewish immigrants, was one of the leading figures in the civil rights movement from 1910 until the eve of the Second World War. Early in the war, he criticized Germany’s aggressiveness and, believing US intervention to be both just and unavoidable, advocated a policy of preparedness. In January 1915, he tied the war to the condition of black Americans in a speech in which he stated that the ‘real cause of the present war in Europe was a contempt for weaker people’ shown in the desire for colonization. He then turned to the oppression of blacks in the South, which he attributed to racist Southerners in Congress.

Jonathan Rosenberg, *For Democracy, Not Hypocrisy: World War and Race Relations in the United States, 1914–1919*, 21 INT’L HIST. REV. 592, 595 (1999).

197. 238 U.S. 347 (1915).

198. See FRANKLIN & HIGGINBOTHAM, *supra* note 129, at 288.

199. 245 U.S. 347 (1917).

200. See *id.*; see also FRANKLIN & HIGGINBOTHAM, *supra* note 129, at 288.

201. See DuBois, *supra* note 125.

202. See generally COHEN, *supra* note 1, at 125–41.

203. For a discussion of Robeson’s early years, see LLOYD L. BROWN, *THE YOUNG PAUL ROBESON: ON MY JOURNEY NOW* (1997); see also SUSAN ROBESON, *THE WHOLE WORLD IN HIS HANDS* 20 (1981).

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letters in football, baseball, basketball and track.<sup>204</sup> He earned Phi Beta Kappa honors and graduated valedictorian in 1919.<sup>205</sup> He graduated from Columbia University Law School in 1923 and was hired by a big law firm but was consigned to a back room doing little more than filing.<sup>206</sup> He went on to a legendary career as an actor and singer, travelling throughout the world with a special interest in performing before working class people.<sup>207</sup> He was also a civil rights activist whose stand on principles of freedom cost him career opportunities and extraordinary scrutiny by the government, which accused him of having impermissible communist affiliations.<sup>208</sup> Robeson also participated in the American Crusade to End Lynching, bringing a stern message to President Harry Truman at the White House in September 1946, which was reported as follows:

The singer said he also pointed out what he considered misdirections in American Foreign policy. He said it was hard to see the distinction between current lynchings and the Nuremburg war crimes trials. He explained that he meant by this that the United States could not logically take the lead in punishing the Nazis for the oppression of groups in Germany while the Government here permitted Negroes to be lynched and shot.<sup>209</sup>

Another Phi Beta Kappa student was Charles Hamilton Houston, who graduated from Amherst College in 1915.<sup>210</sup> Born September 3, 1895 in Washington, D. C., his father, William Houston, had been admitted to the District of Columbia Bar three years earlier.<sup>211</sup> After teaching at Howard University after graduation, Houston and others fought the War Department to be trained as officers to fight in World

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204. ROBESON, *supra* note 203, at 20.

205. *Id.*

206. *Id.* at 31, 34.

207. For a collection of articles chronicling Robeson's artistic career and his emphasis on human rights, especially for workers, see PAUL ROBESON: ARTIST AND CITIZEN (Jeffery C. Stewart ed., 1998).

208. Paul Robeson's philosophies, opinions and perspective on social activism are found in his autobiography, where he said:

To be free—to walk the good American earth as equal citizens, to live without fear, to enjoy the fruits of our toil, to give our children every opportunity in life—that dream which we have held so long in our hearts is today the destiny that we hold in our hands.

PAUL ROBESON, *HERE I STAND* 108 (1958).

209. ROBESON, *supra* note 203, at 157.

210. MCNEIL, *supra* note 167, at 33.

211. *Id.* at 24.



War I in 1917.<sup>212</sup> When a training camp was finally opened to train potential black officers, Houston found Jim Crow firmly in residence.<sup>213</sup> Even after he was deployed to France, he continued to experience virulent racism from fellow white officers and enlisted soldiers.<sup>214</sup> To add insult to injury, one evening in Paris while on leave, Charles Houston found himself in a situation where he and three other black lieutenants were surrounded by two white officers and a crowd of white enlisted men.<sup>215</sup> Tempers flared and the white soldiers threatened to lynch the black lieutenants.<sup>216</sup> Only the arrival of a superior white officer prevented the situation from becoming violent.<sup>217</sup> Such were the circumstances of black Americans in 1919 who came home from serving their country in war only to be subjected to race riots and lynching, even when wearing the uniform of their country. Houston went on to Harvard Law School where he was an editor of the Harvard Law Review and graduated in 1922,

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212. *Id.* at 34–45. To convince the War Department to provide training for black officers, Charles Hamilton Houston and other black college graduates formed the “Central Committee of Negro College Men.” *Id.* at 37. They had the assistance of Joel E. Spingarn (whose brother Arthur, a lawyer, was an original founder of the NAACP) who was instrumental in achieving training for black officers:

Charles and other black college graduates were encouraged by Joel E. Spingarn. He was advocating a separate officers’ training camp for blacks because he believed blacks were capable of commanding troops and was not convinced that the government would permit blacks and whites to train together. All of this he did in an unofficial capacity, not as the board chairman of the National Association for the Advancement of Colored People (NAACP). Even so, many believed it incongruous for the prominent white leader of the NAACP, a biracial organization founded in 1909 to address the issues of racial discrimination and equality under the law, to promote a Jim Crow officer training camp. Yet for the young black men such as Charles, Spingarn’s position was welcome.

*Id.* at 36–37.

213. *Id.* at 43 (“Army traditions and regulations regarding the treatment of officers were violated at virtually every turn. Jim Crow policies were the rule in army camps, Red Cross-controlled hotels, and even some small inns where owners had been carefully warned about blacks by American whites. American artillery instructors humiliated, abused, and unfairly evaluated the black officers in advanced artillery classes. White American officers and enlisted men spread their racist ideas among Europeans and German prisoners of war; it was explained that black officers were of an inferior grade to whom no respect was owed. To French women, it was explained that black men wearing the uniforms of the American Expeditionary Forces had a peculiarly lecherous nature.”).

214. *See id.*

215. *Id.* at 44.

216. *Id.*

217. *Id.*

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after which he was candidate for Doctor of Juridical Science.<sup>218</sup> Charles Hamilton Houston first practiced law with his father in Washington, D.C.<sup>219</sup> He became Vice-Dean of Howard Law School in 1929, committed to training the cadre of lawyers who would become the civil rights advocates who killed Jim Crow.<sup>220</sup> Houston became the head of the NAACP Education and Legal Defense Fund and crafted the litigation strategy that effectively reversed *Plessy v. Ferguson*.<sup>221</sup>

Sadie T. M. Alexander was an African-American woman who could literally be called “over-qualified” to practice law. The standards of the profession did not quite measure up to her level of preparation. Professor Kenneth W. Mack stated the obvious in his Article, *A Social History of Everyday Practice: Sadie T. M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925–1960*, when he noted:

Having obtained her B.S. (1918), M.S. (1919), Ph.D. (economics, 1921), and J.D. (1927) from the University of Pennsylvania, she could already count herself as one of the most highly educated women of her time, and one of the relatively few to establish herself successfully in the private practice of law. After law school, she joined the prestigious African-American law firm founded in 1923 by her husband, Raymond Pace Alexander, where she became a well-respected practitioner of probate and domestic relations law.<sup>222</sup>

She was an active participant in the National Urban League, which was founded in 1911, President Harry S. Truman’s, Committee on Civil Rights, and the Philadelphia Human Relations Commission.<sup>223</sup> As an aside, her husband, Raymond, was a Harvard Law schoolmate of Charles Hamilton Houston.<sup>224</sup>

These are but three of the well-qualified individuals who became models of lawyers committed to the democratic ideals implied in Cohen’s work. They were seemingly invisible in the world that Cohen painted. Cohen did inadvertently leave a clue as to why they were invisible. As he recounted how the various state bars were

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218. *Id.* at 52.

219. *Id.* at 56.

220. See generally Spotswood W. Robinson, *No Tea For the Feeble: Two Perspectives on Charles Hamilton Houston*, 20 *How. L.J.* 1 (1977).

221. Stephen H. Hobbs, *From the Shoulders of Houston: A Vision for Social and Economic Justice*, 32 *How. L.J.* 505 (1990).

222. 87 *CORNELL L. REV.* 1405, 1406 (2002).

223. *Id.* at 1461–62.

224. *Id.* at 1414, 1424.

raising the standards for admission to the Bar and increasing the educational requirements of membership, he noted the recent requirement by the State of Maryland of attending the Law Department at the University of Maryland, which read:

“Any white male citizen of Maryland, above the age of twenty-one years,” who had been a student of law for two years, or a graduate of the Law Department of the University of Maryland, could apply to a Board of Examiners, which, after hearing evidence of his knowledge, and proof that he had been a student of law for two years, and of his “probity and general character” could recommend his admission.<sup>225</sup>

Ironically, this law prevented Thurgood Marshall from attending his home state law school; instead, he attended Howard Law School in 1933 under Charles Hamilton Houston.<sup>226</sup> Houston and Marshall led the fight to overturn this law in the case of *Pearson v. Murray*<sup>227</sup> in 1936, which upheld Donald Murray’s right to attend the University of Maryland Law School.<sup>228</sup>

This brief survey of African American lawyers suggests the rich source of legal talent that served the public in the best of the traditions that Cohen articulated. They and others made their mark on American jurisprudence and set high standards of practice. Moreover, they were not unknown to the various white lawyers that Cohen cited in his work. One is left to wonder what these lawyers could have added to the discourse on professionalism.

### CONCLUDING THOUGHTS

Throughout his book, Cohen writes about the idea that lawyers must be committed to justice.<sup>229</sup> Cohen, answering his own question about the practice of law said, “It is a profession whose main purpose is to aid in the *doing of justice* according to law between the state and the individual, and between man and man.”<sup>230</sup> Lawyers ought to have a role in the shaping of a democratic society.<sup>231</sup> Cohen borrows the following from President Woodrow Wilson’s address to the American

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225. COHEN, *supra* note 1, at 118.

226. *See* KLUGER, *supra* note 18, at 179.

227. 182 A. 590 (Md. 1936).

228. For a discussion of the background of this case, see KLUGER, *supra* note 18, at 187–94.

229. *See* COHEN, *supra* note 1, at 244, 263, 318.

230. *Id.* at 288–89 (emphasis added).

231. *See id.* at xiv–xv.

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Bar Association meeting in 1910 in Chattanooga one year after *U.S v. Shipp*, the criminal contempt case involving a lynching, was decided:

Meanwhile, look what legal questions are to be settled, how stupendous they are, how far-reaching, and how impossible it will be to settle them without the advice of learned and experienced lawyers! The country must find lawyers of the right sort and of the old spirit to advise it, or it must stumble through a very chaos of blind experiment. It never needed lawyers who are also statesmen more than it needs them now—needs them in its courts, in its legislatures, in its seats of executive authority—lawyers who can think in the terms of society itself, mediate between interests, accommodate right to right, establish equity, and bring the peace that will come with genuine and hearty cooperation, and will come in no other way . . . .<sup>232</sup>

One cannot proclaim a commitment to democratic ideals and miss the social tension that would shape (and continues to shape) the American odyssey. I accept Professor Sam Levine’s cautionary admonition not to view Cohen through the lens of contemporary historical knowledge.<sup>233</sup> I also accept the fact that Cohen wrote primarily to lawyers involved in the business world. It is clear, given just this meager accounting of the history of race, that W.E.B. DuBois was correct when he opined that, “The problem of the Twentieth Century is the problem of the color line.”<sup>234</sup> Certainly, as discussed above, there were many examples of lawyers dedicated to answering legal questions that hindered the full citizenship participation of African Americans and others left out of the mainstream of society. And as has been borne out, lynching as a violent means of control and oppression was a glaring “legal question” of Cohen’s time.

I am left to wonder whether Julius Henry Cohen ever heard Billie Holiday sing the song *Strange Fruit*, written first as a poem by Abel Meeropol in 1936.<sup>235</sup> The first verse continues to bring haunting images of that time when lynching was commonly accepted:

Southern trees bear a strange fruit,  
 Blood on the leaves and blood at the root,  
 Black body swinging in the Southern breeze,

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232. COHEN, *supra* note 1, at 32.

233. See Levine, *supra* note 73, at 33.

234. DUBOIS, *supra* note 132, at xi.

235. Peter Daniels, “*Strange Fruit*”: *The Story of a Song*, WORLD SOCIALIST WEB SITE (Feb. 8, 2002), <http://www.wsws.org/articles/2002/feb2002/frut-f08.shtml>.

Strange fruit hanging from the poplar trees.<sup>236</sup>

Holiday recorded the song in 1939 and it became her signature song and her way of challenging a socially unjust system that would permit lynching.<sup>237</sup> I recognize that the song came after Cohen's book, but it clearly captures the historic moment in which Cohen lived.

Consider also the poem, "If We Must Die," written in 1919 by Claude McKay during the Red Summer.<sup>238</sup> It was published in the *Messenger*, a magazine dedicated to unions and workers, a subject of great interest to Cohen.<sup>239</sup> McKay was one of the many African American writers participating in the Harlem Renaissance during the 1920s.<sup>240</sup> He captured the essence of the determination of African Americans to achieve the full rights of citizenship. The first portion of the poem reflects how lynching too often occurred:

If we must die, let it not be like hogs  
 Hunted and penned in an inglorious spot,  
 While round us bark the mad and hungry dogs,  
 Making their mock at our accursed lot.  
 If we must die, O let us nobly die,  
 So that our precious blood may not be shed  
 In vain . . . .<sup>241</sup>

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236. *See id.*

237. The social and cultural significance of this song by Billie Holiday was pointed out by scholar and activist, Angela Davis:

"Strange Fruit" evoked the horrors of lynching at a time when black people were still passionately calling for allies in the campaign to eradicate this murderous and terroristic manifestation of racism. While she never sang "Strange Fruit" exactly the same way twice, each time Holiday performed it she implicitly asked her audiences to imagine a dreadful lynching scene, and to endorse and identify with the song's anti-lynching sentiments. Yet her performance of this song did much more. It almost singlehandedly changed the politics of American popular culture and put the elements of protest and resistance back at the center of contemporary black musical culture.

ANGELA Y. DAVIS, *BLUES LEGACIES AND BLACK FEMINISM: GERTRUDE "MA" RAINEY, BESSIE SMITH, AND BILLIE HOLIDAY 183-84* (1998).

238. *See* FRANKLIN & HIGGINBOTHAM, *supra* note 129, at 361-62.

239. *See* Rosenberg, *supra* note 196, at 620. For a description of the *Messenger* as labor union magazine, see *id.* at 609.

240. *THE CONCISE OXFORD COMPANION TO AFRICAN AMERICAN LITERATURE 489-90* (Andrews, Foster, & Jarris eds., 1997).

241. Claude McKay, *If We Must Die* (1919), *reprinted in* *THE BLACK POETS* 63 (Dudley Randall ed., 1985).

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The poem indicated a commitment to do more than passively accept the oppressive conditions that came of age with Jim Crow.<sup>242</sup>

I will leave for others the task of doing further forensic work on the psychological, intellectual, and social motivations for the perspectives Julius Henry Cohen developed about the profession. As an entrepreneurial lawyer steeped in the law of commerce, he missed the teleological essence of his own work. Of course, the practice of law is a business, or else we should be government employees. Clients enter into the marketplace to choose the very best lawyers, of which Cohen was one, to assist in their affairs. While some clients may have inadequate information when making the choice and some will be harmed by the avarice of the chosen attorney, they generally expect one to have high ethical standards.<sup>243</sup> Some clients will search for lawyers who are willing to aid in corrupt, dishonest business affairs, but both client and lawyer should know that they are liable to share a jail cell.

The larger lesson from his writing is that we are indeed professionals. Porras and Collins would call this “avoiding the tyranny of the *or*.”<sup>244</sup> They posit a way of thinking that incorporates the idea of “both/and.”<sup>245</sup> This is the ability to hold two competing thoughts in the mind and see the value and usefulness of both. We can call this having a tolerance for ambiguity. We attorneys are professionals, but not in the sense that Cohen seems to suggest in that we have a commission to be quasi-governmental agents acting as if we have no financial interest in making a living. Rather, we are professionals in the sense that we have been licensed to exercise a special power that requires specialized training and experience. The power can be exercised for good or for evil. When exercised for evil, it is the Bar’s responsibility to protect the public and remove the power from those who exploit the attorney-client relationship.<sup>246</sup> Evil also applies to those in society who suppress the citizenship rights and human dignity of a significant portion of the nation.<sup>247</sup> In these terms, Charles Hamilton Houston certainly spent his professional life developing a system of training lawyers committed to the fight for

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242. See FRANKLIN & HIGGINBOTHAM, *supra* note 129, at 361.

243. See COHEN, *supra* note 1, at 313.

244. COLLINS & PORRAS, *supra* note 53, at 43–45.

245. *Id.*

246. COHEN, *supra* note 1, at 345–46.

247. *Id.* at 318.

social justice.<sup>248</sup> In terms of using our legal skills to fulfill the promise of the Constitution, Houston would often say, “A lawyer’s either a social engineer or he’s a parasite on society.”<sup>249</sup> Now that is an alternative answer to what it means to be a professional.

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248. See Hobbs, *supra* note 221, at 508.

249. MCNEIL, *supra* note 167, at 84. McNeil offers the following expanded definition of social engineer: “A social engineer was a highly skilled, perceptive, sensitive lawyer who understood the Constitution of the United States and knew how to explore its uses in the solving of ‘problems of . . . local communities’ and in ‘bettering conditions of the underprivileged citizens.’” *Id.*