Fordham Urban Law Journal

Volume 40
Number 1 *The Law: Business of Profession? The Continuing Relevance of Julius Henry Cohen for the Practice of Law in the Twenty-First Century*

Article 13

March 2016

# A History of Professionalism: Julius Henry Cohen and the Professions as a Route to Citizenship

Rebecca Roiphe
*New York Law School*

# A HISTORY OF PROFESSIONALISM: JULIUS HENRY COHEN AND THE PROFESSIONS AS A ROUTE TO CITIZENSHIP

*Rebecca Roiphe**



## INTRODUCTION

This Article revives and defends a largely discredited history of professionalism. It argues that the rhetoric of the professions at the turn of the twentieth century provided immigrants, minorities, women, and outsiders of all sorts with an imagined route to citizenship. This rhetoric combined with the partially open doors of the profession helped people to move from the periphery to the center. It helped newcomers, who were viewed as at best irrelevant and at worst a burden on America, to transcend their role as outsiders and see themselves as architects of a new and just social order. It also provided a way for women and minorities to translate their experience on the periphery into a new vision for the American polity. Professionalism, in other words, served an important function.

* Associate Professor of Law, New York Law School; Ph.D. University of Chicago; J.D. Harvard Law School. I am grateful to Elizabeth Chambliss, Doni Gewirtzman, Bruce Green, James Grimmelman, Molly Land, Ed Purcell, and Ruti Teitel for their comments on this Article. The Article also benefited from the thoughtful response of the participants in the Fordham Law School Conference, *The Law: Business or Profession? The Continuing Relevance of Julius Henry Cohen for Law Practice in the Twenty-First Century*.

It provided a growingly diverse and intensely divided country with an arena in which to negotiate these differences and translate them into a common language.

For years, historians and sociologists have reminded us of just how harmful professionalism can be. They have ably and powerfully documented the abuses committed in the name of the professional ideal. But relatively few in recent years have uncovered or even recognized professionalism's more beneficial side.[1] This Article seeks to correct that distortion. In doing so, it begins what will hopefully be an ongoing effort to use history to identify aspects of profession and the rhetoric that accompanies it that are worth preserving.

Professionalism is such an elastic concept that it can and has served many different purposes over the years. Some of those purposes have been pernicious—the rhetoric of the professions has, for example, been used to justify the exclusion of newcomers of all sorts, particularly ethnic and racial minorities and women.[2] It has been used to create hierarchies within the profession and reinforce unjustified monopolies.[3] But other purposes have been more benign. Professionalism, for instance, has also served as a repository for a certain version of the American Dream.[4] It has stood for the ability of individuals on the outskirts to make their way, in one generation at most, to the inner circles of American society.[5] The imagined role of professions was itself useful to those who fought to achieve status through professional advancement. Not only did it provide motivation, it also supplied meaning for their pursuit.

1. Robert Gordon and William Simon are a notable exception. *See* Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 230 (Robert L. Nelson et al. eds., 1992) [hereinafter LAWYERS' IDEALS/LAWYERS' PRACTICES]. Bradley Wendel has also defended professionalism, although his concept of professionalism is a bit more specifically defined than the common use of the term. *See* W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1168–76 (2006).

2. *See* Mark Galanter & Thomas Paley, *The Transformation of the Big Law Firm*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 1, at 31, 39.

3. *See* Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 1, at 144, 148–49.

4. *See* Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, *in* LAWYERS' IDEALS/LAWYERS' PRACTICES, *supra* note 1, at 177.

5. *See id.*

So, this Article argues, professionalism did not simply serve as a way to consolidate the power of a new middle class elite. It did not grow, as the sociologist Andrew Abbott has suggested, solely from a monopolistic impulse—a way to lay claim to a jurisdiction and protect against the intrusion of other professions and occupations.[6] It was not, as Jerold Auerbach has suggested, purely a product of the elitism, greed, and xenophobia of a particular social and economic class.[7] Nor was it only a cultural process by which an emerging middle class defined itself and consolidated its power.[8] Of course, exclusion and elitism were a big part of the story, but they were not the only part. The blend of elitism and egalitarianism in the rhetoric of the professions allowed for a greater emphasis on the latter. As such, immigrants, women, and other ethnic minorities could use the rhetoric of professionalism for their own purposes.

After unearthing this more benign history of professionalism, this Article argues that this turn-of-the-twentieth-century version of professionalism is still relevant and desirable today. The professions still serve as a receptacle for a version of the American Dream. The rhetoric of the professions can still offer a mechanism for those who have lived, for whatever reason, at the edges of society to imagine their way in. It can still provide a way for outsiders to translate their individual experiences into a common language that can change and benefit the country as a whole.

Professionalism, like theories that enjoyed popularity at the end of the last century, was general—a system of thought, in which ethnic and religious difference did not matter.[9] What mattered instead was a combination of intellect and moral fiber.[10] Professionalism posited a system of merit in a world in which merit alone could not buy

6. *See* ANDREW ABBOTT, THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR 5, 15–16 (1988).

7. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 88, 92, 99–102 (1976).

8. *See* BURTON J. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA 31–39 (1946); SAMUEL P. HAYS, THE RESPONSE TO INDUSTRIALISM: 1885–1914, at 74, 84 (1957); ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877–1920, at 111–33 (1967); *see also* BRUCE A. KIMBALL, THE "TRUE PROFESSIONAL IDEAL" IN AMERICA, A HISTORY 198–300 (1981) (arguing that professionalism emerged not as a necessary part of industrialization but as a product of the late nineteenth century obsession with science); DOROTHY ROSS, THE ORIGINS OF THE AMERICAN SOCIAL SCIENCE 35 (1991).

9. *See* WIEBE, *supra* note 8, at 141.

10. *See id.*

success.[11] Overt prejudice and networks of Anglo-Saxon white male power ensured that access to the professions only got you so far.[12] But professionalism—the idea of the unique role of professions in the polity—imagined away this reality. It envisioned a world in which the professions—open to all who possessed the intellect and moral worth—provided a theoretical key to membership not just in those wood-paneled legal clubs but also in the nation as a whole. Law, in theory, required its practitioners to both create and support the flesh and bones of the American system. By practicing the law and preserving its integrity, attorneys proved not only their allegiance to the American system but also their centrality to it. How better to earn acceptance than to catapult from the periphery to the center? The mechanism was not exactly a professional degree. It was a degree coupled with rhetoric about what that degree meant.

As we face a massive change in the nature of the legal profession in the years to come, exploring the history of professionalism is, perhaps, more important than ever. As we experience rapid and intense shifts in the economics of the profession, our understanding of the professions and their proper role in society will certainly change. It is, this Article argues, important to retain some version of the professional ideal because it has been and can be useful. But we must also remain thoughtful and critical about it at the same time. We ought to work to preserve the useful purposes of professionalism while shedding the antiquated and destructive ones. It is worth building on and developing the profession in light of its (good) ideals and revisiting and discarding the relics of its more destructive purposes. By exploring the role that professionalism has played, we are better equipped to preserve and perpetuate the good things about it, while discarding its outdated or destructive elements.

For decades, scholars have observed that the legal profession has become increasingly segmented.[13] There are services for the rich and those for the poor. There are lawyers for fancy corporate clients and lawyers for individuals. There are bespoke services and commodified ones.[14] Recently, this observation has come in vogue. Some

11. *See* Christine Parker & Tanina Rostain, *Law Firms, Global Capital, and the Sociological Imagination*, 80 FORDHAM L. REV. 2347, 2356–58 (2012) (summarizing the functionalist approach to the professions).

12. *See* LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 39–42 (2002).

13. *See* Andy Boon et al., *Postmodern Professions? The Fragmentation of Legal Education and the Legal Profession*, 32 J.L. & SOC'Y 473, 486 (2005).

14. *See id.* at 481–82.

journalists and legal theorists have criticized law schools, in part, for failing to recognize this divide.[15] Critics, such as Brian Tamanaha, suggest that law schools ought to track the market and cater their education to the likely careers of their graduates.[16] Personal injury lawyers, they say, do not need fancy theory. They don't need classes in jurisprudence or even professors who dabble in that esoteric world.[17] This Article serves as a reminder that the idea and rhetoric of a unified profession (while never really accurate) has been useful.[18] It has provided a way for those on the outside of our society to imagine a way in. Segmentation poses a threat to that. In envisioning both the nature of the profession and education, we should bear this in mind.

Part I of this Article provides some background on the history of the professions and recounts how historians and sociologists have analyzed the role of the professions and the rhetoric of professionalism in American history. Part II explores the life and work of Julius Henry Cohen, a prominent Jewish lawyer who wrote about the profession in the early decades of the twentieth century. Cohen's musings on the profession as well as his life and work as a lawyer illustrate the historical point that minorities have used the rhetoric of the professions to imagine their own ascent to leadership.

Cohen helped develop a discourse of professionalism to transcend the crippling particularity of his circumstances and define a route to citizenship in somewhat hostile territory. In his book, *The Law: Business or Profession?*, Julius Henry Cohen used and developed this rhetoric of inclusion to create a brand of professionalism that not only accepted him but in some way needed him.[19] Cohen, a Jew and an immigrant living in turn-of-the-century New York, used professionalism to carve out a position for himself (and other

15. *See* BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 167–83 (2012).

16. *See id.* at 174.

17. *See id.* at 172–74.

18. The rhetoric of a unified profession was never accurate and, as David Wilkins has pointed out, has led the bar to resist the increasingly specialized and contextual nature of legal work. *See* David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1209, 1217–18 (1993). While I advocate the idea of a unified profession in this Article, I agree that the bar needs to abandon that notion for the purposes of ethics and write rules that acknowledge the different types of work that lawyers do. *See* Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 207 (2010).

19. *See* JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? 242 (1916).

outsiders) in America.[20] He used professionalism strategically to blanch out difference and imagine a national identity for himself in a world that still discriminated against him because of his religion.[21] Once he achieved a certain status in the profession, Cohen did not abandon his experience as an outsider.[22] He associated poor ethical conduct within the profession not with ethnic identity but with a lack of education or merit.[23] By doing so, he used the rhetoric of the professions to proclaim the potential for human transformation. He used professionalism to argue and fight for the removal of permanent barriers to admission and success. In the same breath, he drew on the rhetoric of the professions to replace fixed barriers to success with contingent categories that individuals of whatever creed could transcend with hard work, dedication, and a strong moral sense.[24]

The Article concludes that Cohen was not simply an antiquated product of a hegemonic vision of America as a melting pot, in which difference gradually disappeared and made way for the Anglo-Saxon ideal. The idea of a unified profession can continue to serve a critical and beneficial purpose in the American imagination. In a country that has tasted the value of multiculturalism—a world that (mostly) respects rather than despises difference—there is a way of preserving the legal profession as a means of social integration without adopting the cultural hegemony of Cohen's era or the arrogance of the melting pot ideal. To make this argument, Part III briefly reviews the political science literature on assimilation and multiculturalism. The historical attack on professionalism in the 1970s and 1980s captured a contemporary political attack on the idea of assimilation.[25] It reflected a new liberal ideal, which embraced multiculturalism and pluralism.[26] Since then, political scientists have modified their understanding of multiculturalism, arguing that it is still possible to celebrate diversity without abandoning the search for shared values.[27] This section of the Article seeks to bring this more nuanced

20. For a detailed analysis of Cohen's life and work, *see* Samuel J. Levine, *Rediscovering Julius Henry Cohen and the Origins of the Business/Profession Dichotomy: A Study in the Discourse of Early Twentieth Century Legal Professionalism*, 47 AM. J. LEGAL HIST. 1, 11–13 (2005).

21. *See infra* Part II.

22. *See infra* Part II.

23. *See infra* Part II.

24. *See infra* Part II.

25. *See infra* notes 230–39 and accompanying text.

26. *See infra* notes 230–39 and accompanying text.

27. *See infra* notes 243–56 and accompanying text.

commitment to the multicultural ideal back into the debate over professionalism. This Article concludes that the professions can play a critical part in a world which respects difference but seeks and embraces substantive common values at the same time. The legal profession, in particular, can play an important role in negotiating and translating values in a heterogeneous world and working toward this set of shared goals.

Cohen's story offers a cautionary tale. Without grasping onto outdated entry requirements and rules that create unfair monopolies, lawyers should try to define core skills and values that form the essence of the profession and preserve those values as the profession goes through what seem like fairly convulsive changes. One of those values is the coherence of the profession, the notion that lawyers engaged in all different sorts of work share a common pursuit—that they all in some way seek to improve their community—whether it is local, national, international, or even virtual.

## I. THE PROFESSIONS IN HISTORICAL CONTEXT

### A. A Short History of the Professions in America

I am writing an Article about professionalism rather than the professions. In other words, I am using Julius Henry Cohen to help understand the role the idea of the professions played in the American imagination. To do that, however, it is helpful to briefly sketch the history of the American professions and the rhetoric surrounding them. It is impossible, of course, to untangle one from the other.

At the time of the founding, lawyers enjoyed an exalted role.[28] The idea of law as a public profession thrived. A tradition of "republicanism" gave lawyers a sense of public purpose.[29] They were, as Tocqueville later explained, an American substitute for the

28. *See* Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1183–84 (2009) [hereinafter Gordon, *Citizen Lawyer*].

29. *See id.* at 1200; Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 14 (1988) [hereinafter Gordon, *Independence*]; Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 GEO. J. LEGAL ETHICS 241, 241 (1992) [hereinafter Pearce, *Rediscovering*]; Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1346–50 (2006).

aristocracy.[30] Lawyers were to defend the legal system from the inevitable incursions by executive tyrants, populist mobs, or factions of economic or social interests.[31] They would recommend reform in the law to strengthen it against attack.[32] They would ensure that the law adapted to the changing landscape before opportunistic groups took advantage of the lag.[33] Lawyers were particularly suited to this high calling at the time. They were statesmen and scholars, gentlemen adept at oratory and part of an educated literary class.[34] This group of elite lawyers would, in theory, help the people preserve and fulfill their own customs and values. At the time, professionalism mandated that only lawyers possessed the talent to read the common law and dictate how men should behave toward one another and the community as a whole. As the historian Robert Gordon has explained, "the legal elite was to help the People guard their collective customary wisdom and realize their historical destiny as Americans."[35]

The early nineteenth century posed a challenge to this paternalistic understanding of the lawyer's role. In the general democratizing zeal of the Jacksonian period, lawyers were easy targets.[36] Radical democrats sought to reform the law and make it accessible to all.[37] They hoped that doing so would minimize the need for a legal profession.[38] It would reduce the status of lawyers as a special class with unique responsibilities to preserve the legal system and promote justice.[39] Politicians and reformers insisted that just about anyone with natural gifts and ambition could practice law.[40] As this view grew

30. *See* Gordon, *Citizen Lawyer*, *supra* note 28, at 1183–84 (citing ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA (Henry Reeve trans., Arlington House Press 1966) (1835) ("[M]embers of the legal profession . . . constitute the only aristocratic body which can check the irregularities of the people.")).

31. *See* Gordon, *Independence*, *supra* note 29, at 14.

32. *See id.* at 17.

33. *See id.* at 13–14; *see also* Pearce, *Rediscovering*, *supra* note 29, at 242.

34. *See* Gordon, *Independence, supra* note 29, at 32.

35. Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 84 (Gerald L. Geison ed., 1983) [hereinafter Gordon, *Legal Thought*].

36. *See* Gordon, *Legal Thought, supra* note 35, at 83–86; Aziz Rana, *Statesman or Scribe? Legal Independence and the Problem of Democratic Citizenship*, 77 FORDHAM L. REV. 1665, 1694–1700 (2009).

37. *See* Rana, *supra* note 36, at 1695–96.

38. *See id.*

39. *See* Gordon, *Legal Thought*, *supra* note 35, at 83.

40. *See id.*

to dominate, the British classes of solicitors and barristers were eliminated.[41] Bar associations and clubs were dismantled.[42] Entry requirements were stripped away,[43] and lawyers' political power subsided for a time.[44]

The Civil War posed a crisis to traditional understandings of professionalism.[45] As Norman Spaulding has elegantly explained:

> Elite lawyers active in the professionalization movement of the Gilded Age kept looking for social stages on which to enact the role of Tocqueville's lawyer-aristocrats. But the social stages they sought out were different, more humble, than the stage implied by the strongest version of antebellum professional ideals. . . . [T]he profession retreated to organizational structures that provided collective, less directly political, venues in which to secure professional authority.[46]

The legal elite still envisioned itself as a leading force in society, but Spaulding argues that it shifted focus from direct political engagement to supplying scientific expert knowledge to government and business.[47]

After the Civil War, the rapid expansion of the market and the growth of big cities rendered interactions impersonal and unpredictable.[48] Networks of trusted friends and business partners gave way to anonymous corporate interactions.[49] The anonymity was accompanied by what at the time seemed an alarming stratification.[50] Progressive era reformers sought to bring not only order and

41. *See* RICHARD L. ABEL, AMERICAN LAWYERS 40 (1989).

42. *See id.* at 45–48.

43. *See id.* at 40–41.

44. *See* J. WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS 298 (1950). For my purposes, I will focus on the late-nineteenth century to the present, the period in which the professions in general and the legal profession in particular gained national prominence.

45. *See* KIMBALL, *supra* note 8, at 201.

46. Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 WM. & MARY L. REV. 2001, 2094 (2005) (internal quotations omitted). Spaulding argues that the legal profession experienced a crisis in legitimacy as the law degenerated into a political battle over secession. He argues that the profession retreated during Reconstruction into a fairly conservative consensus about the meaning of federalism in order to restore professional status. *Id.*

47. *See id.* at 2095.

48. *See id.* at 2096; *see* KIMBALL, *supra* note 8, at 200.

49. *See* WIEBE, *supra* note 8, at 81.

50. *See generally* STEVEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1982).

efficiency but also morality to the growingly diffuse and diverse national community.[51] Against this backdrop, lawyers grew to national prominence once more. The need for a special class to mediate the interests of the wealthy and the poor, the government and its citizens, gained renewed urgency.[52] Thriving off of the late-nineteenth century fascination with science and expertise, national organizations grew to protect and promote the interests of lawyers.[53] Unlike the Whig predecessors, the legal elite justified its special role in society not as a product of lawyers' position as statesmen, not as a result of their superior knowledge of the common law, but rather as a result of the ability to refine liberal legal science and engage in the expert management of public affairs.[54]

The shift in rhetoric may be due in part to the crisis in the Civil War, as Norman Spaulding argues.[55] But it seems likely also to have shifted as a result of the changes in lawyers' work. Just as lawyers experienced this renaissance, their daily work was changing significantly. The great trial lawyers and orators of the nineteenth century were gradually being replaced by business experts who spent more time practicing in offices than advocating in courts.[56] Experts with specialized knowledge about the growing needs of business were gradually replacing the nineteenth century generalists who argued in the same breath for clients and legal reform.[57] This new zenith in professional power and prestige was accompanied by the decline of professional independence.[58] The web of government agencies and

51. *See* Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. AM. HIST. 113 (1982). In his book on the emergence of the American Social Science Association, Haskell argues that the growth of the professions was a response to a general shift in understanding of human motivation. The growing interdependence of society, he argues, led to a crisis in conventional understandings about human motivation, will, and causality. *See* THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE 234–56 (1977).

52. *See* BLEDSTEIN, *supra* note 8, at 80–92.

53. *See id.* at 84–87.

54. *See* Gordon, *Legal Thought, supra* note 35, at 97.

55. *See* Spaulding, *supra* note 46, at 2012–19.

56. *See id.* at 2010–11.

57. *See* Robert W. Gordon, *"The Ideal and the Actual in the Law": Fantasies and Practices of New York City Lawyers, 1870–1910*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA 60 (Gerard W. Gawalt ed., 1984) [hereinafter Gordon, *The Ideal and the Actual*].

58. *See id.*

the increasingly powerful nature of corporate clients encroached on lawyers' control over their life and work.[59]

In the late nineteenth century, most lawyers worked as solo practitioners.[60] They gained expertise and entrance to the profession through apprenticeships.[61] In the early years of the twentieth century, the bar began to impose educational requirements.[62] It started to restrict entry to the profession to citizens.[63] As Chair of the New York County Lawyers Association (NYCLA) Committee on the Unauthorized Practice of Law, Cohen himself was a part of the movement to define a distinct and protected area of practice for lawyers.[64] Along with other elite members of the profession, he urged the various bar associations to exclude bar corporations and laymen from practicing law.[65]

In addition to educational requirements and entry restrictions, the legal profession sought to regulate its own conduct.[66] In the name of preserving independence, the bar drafted the Canons of Professional Ethics, which were soon adopted by most states.[67] In doing so, the legal elite created rules against solicitation, advertising, and contingent fees that made it harder for solo practitioners in metropolitan areas to subsist.[68] It developed a division between the elite of the profession and everybody else by setting up rules that were almost impossible for most lawyers, particularly those practicing alone in urban areas, to follow.[69] The growth in tort litigation that accompanied the expansion of factories and railroads also contributed to the divide between lawyers for corporations and lawyers for individuals.[70] It too led to a drive to reform and limit the scope and power of plaintiffs' attorneys.[71]

59. *See* Norman W. Spaulding, *Professional Independence in the Office of the Attorney General*, 60 STAN. L. REV. 1931, 1948–49 (2008).

60. *See* ABEL, *supra* note 41, at 11.

61. *See id.*

62. *See id.*

63. *See id.* at 12.

64. *See Reducing Litigation: Movement of New York County Lawyers' Association Against Legal Quacks*, N.Y. TIMES, June 11, 1922.

65. *See id.*

66. *See* AUERBACH, *supra* note 7, at 40–73.

67. *See id.*

68. *See id.* at 43–48.

69. *See id.*

70. *See* FRIEDMAN, *supra* note 12, at 29–31, 349–50.

71. *See id.*

At the turn of the twentieth century, the legal profession secured its national identity as an elite group with political, economic, and social power once again. Lawyers, it seemed, would control not only the application of the law but also its creation and its meaning.[72] From the very moment of its greatest power and prestige, the bar experienced pressure to open its doors to newer members of society.[73] The expanding, heterogeneous, urban culture seemed to be knocking at the door of inherited privilege.

But the powerful elite did not give in so easily.[74] After World War II, the professions, like many other arenas of American society, felt the push for inclusion and democratic egalitarianism.[75] More diverse people had access to higher education and were pursuing law degrees.[76] The bar had an increasingly hard time keeping them out.[77] Thus, the Whig-Federalist rhetoric of exclusion and the Jacksonian critique seemed to coexist in an uneasy balance.[78]

Few historians have explored the period following the early consolidation of the legal profession. Rayman Solomon argues that the concept of professionalism and its sense of perpetual crisis remained fairly constant up until the 1960s.[79] The bar raised familiar cries against the unauthorized practice of law, solicitation, and advertising.[80] Leaders among the bar demanded a greater independence from market forces, independence from client demands, autonomy from the partisan politics, and dedication to the public.[81] Historical events such as prohibition, the Great Depression, President Roosevelt's court-packing plan, and McCarthyism posed a challenge to the ideals of the profession and produced a renewed call for lawyers to commit to bringing the values of the profession into practice.[82]

72. *See* Gerald W. Gawalt, *Introduction* to THE NEW HIGH PRIESTS: LAWYERS IN POST CIVIL-WAR AMERICA vii–viii (Gerard W. Gawalt ed., 1984).

73. *See id.*

74. *See id.* at viii; *see also* AUERBACH, *supra* note 7, at 23–28.

75. *See* AUERBACH, *supra* note 7, at 23–28; MICHAEL J. POWELL, FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION xvii (1988).

76. *See* POWELL, *supra* note 75, at xvii.

77. *See id.*

78. *See* Samuel Haber, *The Professions*, *in* II ENCYCLOPEDIA OF AMERICAN SOCIAL HISTORY 1573, 1582 (Mary K. Cayton et al. eds., 1993).

79. *See* Solomon, *supra* note 3, at 144–45.

80. *See id.* at 151.

81. *See id.* at 152–53.

82. *See id.* at 154–68.

As the profession worked its way into contemporary times, the corporate bar seemed to have drifted further from the service ideal. The structure of law firms has made it difficult for informal networks to enforce social norms.[83] Corporate lawyers abandoned the long-range social interest of the corporate client in favor of immediate benefits.[84] Perhaps, as some have argued, the public service ideal has not been lost but rather migrated to more specialized areas of practice.[85]

The practice of law has grown increasingly diverse and knowledge increasingly specialized.[86] Globalization and new technology have driven lawyers to compete more wildly for clients.[87] These forces have, among other things, contributed to increasingly stark segmentation in the profession—between bespoke and commodified services, services for global law firms and those for individuals.[88] These trends threaten the concept of professionalism. It is hard to identify one profession when the practice of law looks so different depending on the area of practice. The segmentation of the profession, too, threatens to create a permanent divide that challenges the notion of professionalism.

### B. The Professions and Professionalism: A Historiography

Historians have long debated the ascent of the professions in the late nineteenth century (and the rhetoric surrounding it). In the years after World War II, liberal thinkers tended to celebrate the professions along with expertise in general and the source of both material and social progress.[89] According to Talcott Parsons, the

83. *See* MILTON C. REGAN, EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER 37 (2004); *see also* Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1867–76 (2008).

84. *See* Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1209–10 (2003).

85. *See* Gordon, *Independence*, *supra* note 29, at 65–68.

86. For overviews of this trend, see Robert W. Gordon, *The Legal Profession*, *in* LOOKING BACK AT LAW'S CENTURY 287, 289–94 (Austin Sarat et al. eds., 2002) and RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 190–93 (1999).

87. *See* Elizabeth Chambliss, *Two Questions for Law Schools About the Future Boundaries of the Legal Profession*, 36 J. LEGAL PROF. 329, 339–50 (2012).

88. *See id.* at 339.

89. *See generally* HURST, *supra* note 44; TALCOTT PARSONS, ESSAYS IN SOCIOLOGICAL THEORY (1954).

professions were the most critical component of modern society.[90] Increasingly effective and important, professionals were essentially apolitical experts seeking to coordinate the country's progress.[91] They served a function by providing, as Emile Durkheim argued, a solution to the woes of modern society.[92] Dedicated to the good of all, professionals could moderate the effect of so many egoistic selfish impulses.[93] Parsons explained professional ethics (and particularly the monopoly control over the profession) as a necessary part of the profession's function as a fiduciary.[94] Clients, according to Parsons, were unable to assess the quality of lawyers' expert services.[95] Professional ethics and monopoly restrictions were necessary to ensure that lawyers are serving their fiduciary responsibility to clients.

Ever since, generations of historians and sociologists have criticized this argument, demonstrating the problems inherent in professional authority and the ideological role the professions play. In the 1960s and 1970s, neo-Marxist scholars argued that the professions in general, and the legal profession in particular, emerged in the late-nineteenth century as an organized force because lawyers were useful in consolidating the power of industrial capitalists.[96] Professional ethics served more as a source of social control than anything else.[97] Corporate capitalists needed to frame their own economic interests in the legitimating language of the law, and the legal profession leant its expertise and the badge of both respectability and selflessness to the capitalists' uniquely selfish endeavor.[98] Weberian sociologists similarly viewed the ideology of the professions with skepticism,

90. *See* PARSONS, *supra* note 89, at 34, 270.

91. *See* Gerald L. Geison, *Introduction* to PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA, *supra* note 35, at 3 (citing Talcott Parsons, *Professions*, *in* 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 545 (David Sills ed., 1968)).

92. *See* EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 10–14 (Cornelia Brookfield trans., 1958).

93. *See id.*

94. *See* PARSONS, *supra* note 89, at 381.

95. *See id.* at 372–80.

96. *See generally* JEFFREY L. BERLANT, PROFESSIONS AND MONOPOLY (1975); MARGALI S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977); *see also* John A. Matzko, *"The Best Men of the Bar": The Founding of the American Bar Association*, *in* THE NEW HIGH PRIESTS, *supra* note 57, at 75 (arguing that the American Bar Association was founded by an elite that was anxious about its status given the growing power of immigrants, corporate clients, and other professions).

97. *See* Matzko, *supra* note 96, at 78–80.

98. *See id.*

arguing that the legal profession rhetorically wedded its special knowledge and expertise to the pursuit of justice as a way to justify its social ascent.[99] They interpreted the rise of the professions as part of a class quest for both social status and wealth.[100]

These historians of the legal profession have chronicled how leaders of the bar pushed to limit admission and prevent external regulation. Monopoly control was not, as functionalists like Parsons had argued, a benign way to ensure quality in the profession but rather a sinister cog in the mechanism of social control.[101] In the early twentieth century, lawyers sought to secure their ranks and reinforce the exclusivity of their club by locking the door to newcomers, especially those with a different race, ethnicity, or gender.[102] To do so, this elite had to control the educational institutions, the licensing bodies, certifying agencies, and regulatory bodies.[103] By controlling bar associations, elite lawyers were able to make it harder for the new class to intrude. These lawyers wrote rules against contingency fees, advertising, and solicitation.[104] They sought, in other words, to create their own monopoly. Yet at the same time, the leaders of the bar eliminated the most obvious badges of a privileged class.[105] They trumpeted education as way to eradicate the networks of privilege that existed among the wealthy established class.[106]

In the late 1980s, historians added layers of complication to this story by looking at the professions in context. They explained the emergence of modern professions as a part of the late-nineteenth and early-twentieth century ambivalence about meritocracy and elitism.[107] The professions, as several of these historians argued, grew up amidst

99. For an overview of Weber's contribution to the idea of professionalism, see ABEL, *supra* note 41, at 14–30. *See, e.g.*, LARSON, *supra* note 96, at 34; *see also* KEITH M. MACDONALD, THE SOCIOLOGY OF THE PROFESSIONS 29 (1995).

100. *See* ABEL, *supra* note 41, at 14–30.

101. *See id.*

102. *See* Maxwell H. Bloomfield, *Law: The Development of a Profession*, *in* THE PROFESSIONS IN AMERICAN HISTORY 33 (Nathan O. Hatch ed., 1988); Haber, *supra* note 78, at 1582. For a history of these monopoly restrictions, see Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 MINN. L. REV. 1115, 1118–40 (2000).

103. *See* ABEL, *supra* note 41, at 47–73, 112–15; AUERBACH, *supra* note 7, at 3–7, 12–13, 40–74; FRIEDMAN, *supra* note 12, at 39–41.

104. *See* FRIEDMAN, *supra* note 12, at 39–41.

105. *See id.* at 33–39.

106. *See id.* at 37.

107. *See id.*

that tension.[108] Not simply a tool of the new industrial classes, the professions served a more complex function by organizing and commandeering knowledge in order to consolidate power.[109] Because they were organized around merit and skill rather than privilege and wealth, the professions provided a radically egalitarian way of seeking status.[110] In other words, at least theoretically, the professions were open to all, which threatened to render status a fluid concept.

As Samuel Haber argues, the new middle class longing for status intensified rather than subsided amidst the increasingly consumer-oriented, market-driven, competitive, and individualistic culture of turn-of-the-century America.[111] This new world seemed hostile to inherited privilege, but the professions provided a pocket in which this oddly pre-modern elitism could thrive still, unmarred by the assault.[112] At the same time, the rapid expansion of corporate capitalism threatened to replace professional status with wealth and power.[113] The American Dream seemed to shift from achieving status through participation in a professional group to obtaining wealth through ingenuity. The professions responded, according to sociologist Andrew Abbott, by intensifying monopolistic controls through ethical rules.[114]

Professionalism has always had a moral component. Even as (or perhaps especially as) the rhetoric of the professions shifted its emphasis on political leadership to technocratic expertise in the early twentieth century, leaders of the bar insisted that lawyers are not interested in their own gain but rather are concerned with their clients, the community, and justice.[115] Most historians have cynically dismissed the moral rhetoric of professionalism as fundamentally

108. *See* Nathan O. Hatch, *Introduction: The Professions in a Democratic Culture*, *in* THE PROFESSIONS IN AMERICAN HISTORY, *supra* note 102, at 3; *see also* BLEDSTEIN, *supra* note 8.

109. *See* JAN GOLDSTEIN, CONSOLE AND CLASSIFY: THE FRENCH PSYCHIATRIC PROFESSION IN THE NINETEENTH CENTURY 10–11 (1987).

110. *See* BLEDSTEIN, *supra* note 8.

111. *See* SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750–1900, at xi (1988).

112. *See id.*

113. *See id.*

114. *See* Andrew Abbott, *Professional Ethics*, 5 AM. J. SOC. 855, 875 (1983). Abbott argues that the push for greater monopoly restrictions tends to follow times of great stress to professional status. He argues that the Canons responded to exactly this strain in the early part of the twentieth century. *See id.* at 875–77.

115. *See* Solomon, *supra* note 3, at 144–46.

disingenuous.[116] Lawyers, they claim, deliberately described their mission as a moral one to justify the market control they exert over their own profession.[117] But some historians have taken issue with this interpretation. Robert Gordon, for instance, has argued that lawyers at the turn of the century did take their commitment to the public seriously in representing private clients.[118] The language that professionals used to justify themselves is itself important. While lawyers may fall terribly far from their aspirations, rhetoric can also function to inspire men and women to live up to a higher goal, to pursue a good beyond their own self-interest.[119] Especially when doing so earns you not merely a place in heaven or the private satisfaction of self-sacrifice, but also a sense of belonging in and to that larger community.

After the Civil War, the legal profession secured its national identity as an elite group with political, economic, and social power.[120] Lawyers, it seemed, would control not only the application of the law but also its creation and its meaning.[121] From the very moment of its greatest power and prestige, the bar experienced pressure to open its doors to newer members of society.[122] The expanding, heterogeneous, urban culture seemed to gradually knock at the door of inherited privilege and elitism.[123] But the powerful elite did not give in so easily.[124] After World War II, the professions, like many other areas of American society, felt the push for inclusion and democratic egalitarianism. More diverse people had access to higher education

116. *See, e.g.*, AUERBACH, *supra* note 7, at 43–52 (criticizing the bar for excluding outsiders by heavily regulating and prohibiting the use of contingency fees); *id.* at 106–09 (arguing that the bar raised educational requirements to restrict entry to those who already had power within the country and the profession); WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 91–92 (1994) (arguing that the educational requirements of the professionalization project closed the profession to all but a small elite); POWELL, *supra* note 75, at 17–18 (arguing that bar membership requirements kept ethnic minorities from achieving certain rank in the profession).

117. *See* AUERBACH, *supra* note 7, at 102.

118. *See* Gordon, *The Ideal and the Actual*, *supra* note 57, at 51–52; *see also* KIMBALL, *supra* note 8, at 104–05 (arguing that the moral rhetoric of professionalism was not mere subterfuge but rather part of a process through which the group of lawyers defined itself).

119. *See* KIMBALL, *supra* note 8, at 104–05.

120. *See* Gawalt, *supra* note 72, at vi–vii.

121. *See id.*

122. *See id.* at viii; *see generally* AUERBACH, *supra* note 7.

123. *See generally* AUERBACH, *supra* note 7.

124. *See id.*

and were pursuing law degrees.[125] The bar had an increasingly hard time resisting this trend.[126]

Several recent historians have noted that these histories of the profession focus almost exclusively on the elite.[127] While they mention other lawyers scrambling at the door of privilege, these studies neglect to examine the experience of other lawyers, like women, African-Americans, and solo practitioners.[128] Scholars like Kenneth Mack and Susan Carle have described the work of lawyers outside the elite, and these case studies have done much to enrich our understanding of the profession and its history.[129]

What even these historians have overlooked is how its mashed-up ideology left professionalism open to alternate interpretations and uses. Julius Henry Cohen's book on professionalism reminds us of the Jacksonian strand in the rhetoric of the professions.[130] It demonstrates how newcomers could (and still can) use the language of professionalism in an effort not to defeat the more elitist reality but to find a back door in—an imagined route to becoming a part of that elite. Cohen drew on the republican language of moral virtue and civic participation to invent a road for himself—not only to inclusion but to leadership in the American polity.

Of course, we cannot forget the very real lessons of the neo-Marxist historians. But before we celebrate the demise of professionalism, it is worth remembering that professionalism has promised newcomers and outsiders a way to enter into the larger community. It has offered them at least a promise that with enough hard work and determination, they too can join a small group of moral and intellectual leaders of the country.[131] None of this is to

125. *See* FRIEDMAN, *supra* note 12, at 457–59.

126. *See id.*; AUERBACH, *supra* note 7, at 232; POWELL, *supra* note 75, at xvii.

127. *See* Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925-1960*, 87 CORNELL L. REV. 1405, 1409 (2002); *see also, e.g.*, VIRGINIA G. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY 5–6 (1998); KAREN BERGER MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1638 TO THE PRESENT 249 (1986); Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 LAW & HIST. REV. 97, 98 (2002).

128. *See* Mack, *supra* note 127, at 1409; *see also* DRACHMAN, *supra* note 127, at 5–6; MORELLO, *supra* note 127, at 249; Carle, *supra* note 127, at 98.

129. *See, e.g.*, Carle, *supra* note 127; Mack, *supra* note 127.

130. *See* COHEN, *supra* note 19, at 242.

131. Aziz Rana has argued that the governing role of lawyers is not necessarily elitist. If we tap into an older tradition where all work is a site for moral and political

suggest that this is purely a good thing. It is merely to point out that professional ideology reflects (and in turn helps create) important and complicated themes in American history. Julius Henry Cohen reminds us that professionalism is, in addition to other things, a receptacle for a particularly American dream of self-invention: a dream of the past disappearing and the future becoming something of our own making.

## II. JULIUS HENRY COHEN AND THE PROFESSIONALISM MELTING POT

Julius Henry Cohen was born in Brooklyn, New York, in 1873.[132] At the age of twenty-three, he graduated from New York University and was admitted to the New York State Bar the following year.[133] A prominent New York lawyer, Cohen served as counsel to the Transit Reform Committee of 100, the Merchants Association, and the Port Authority.[134] In 1897, he investigated and prosecuted Asa Bird Gardiner, the corrupt Manhattan District Attorney who had deep ties to the Tammany Hall political machine.[135] The *New York Times* labeled him the "controversy minimizer" as he worked to resolve the 1910 garment workers strike.[136] A prominent attorney with connections to the established elite members of the bar, Cohen was an influential and powerful lawyer in New York.[137] He published his book, *The Law: Business or Profession?*, in 1916.[138] Cohen was an active member of the NYCLA where he chaired the Committee on the Unauthorized Practice of Law, the New York State Bar Association, and the Association of the Bar of the City of New York (ABCNY).[139]

participation, then lawyering, like all other occupations, becomes a significant part of the political order. *See* Rana, *supra* note 36, at 1670.

132. *See Julius Cohen, 77, Lawyer 53 Years*, N.Y. TIMES, Oct. 7, 1950, at 12.

133. *See id.*

134. *See id.*

135. *A Talk with Julius H. Cohen, Minimizer of Controversy*, N.Y. TIMES MAG., Jan. 26, 1913, *available at* http://query.nytimes.com/mem/archive-free/pdf?res=F10B1EFE385F13738DDDAF0A94D9405B838DF1D3.

136. *See id.*

137. *See id.*

138. *See* COHEN, *supra* note 19.

139. *Julius Cohen, 77, Lawyer 53 Years*, *supra* note 132; *see also* POWELL, *supra* note 75, at 40–41. Cohen is perhaps best remembered for his work in support of the Federal Arbitration Act. *See* Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265 (1926). In some ways, his effort to bring peaceful resolution to commercial and labor disputes mirrors his efforts within the

Cohen grew up at a time when anti-Semitism was mounting.[140] The economic recessions and accompanying class conflict of the 1890s, which were hitting just as he entered college and intensifying as he graduated, exacerbated an already tense and deeply ambivalent attitude toward Jews in America.[141] The American legal profession was far from immune from the general attitude toward Jews. The elite of the bar kept Jewish professionals at a safe distance, allowing some to play in their ranks but never fully opening the doors to them.[142] President Wilson nominated Louis Brandeis to the Supreme Court in January 1916, the same year that Cohen published his book.[143] The controversy over Brandeis's nomination focused on his alleged radical positions, but historians and biographers have agreed that much of the resistance from the established bar was a product of anti-Semitism.[144]

These underlying issues remain at a safe distance in Cohen's book on the legal profession. His experiences with discrimination, which were no doubt immediate, do not figure in. Cohen used the rhetoric of the professions to promote a meritocracy open to all who could meet its requirements.[145] The elitism of inherited privilege gave way in Cohen's reading to privilege based on intelligence, hard work, and character.[146]

---

profession to minimize the permanence and intractability of difference. For a history of arbitration in America, see generally IAN R. MACNEIL, AMERICAN ARBITRATION: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992).

140. *See* John Higham, *Anti-Semitism in the Gilded Age: A Reinterpretation*, 43 MISS. VALLEY HIST. REV. 559, 563–66 (1957).

141. *See id.* at 564–65. More recent historians have criticized what they perceive as the post-war generation of historians downplaying anti-Semitism as an endemic part of American society and culture. *See* MICHAEL N. DOBKOWSKI, THE TARNISHED DREAM: THE BASIS OF AMERICAN ANTI-SEMITISM 3–7 (1979). Dobkowski particularly takes issue with attributing the cause of anti-Semitism to economic forces. But ultimately, historians seem to agree that hatred and bigotry against Jews rose throughout the Gilded Age. While it may have ebbed and flowed, as Higham argues, it undoubtedly mounted as the thirties approached. *See* Higham, *supra* note 140, at 571.

142. *See, e.g.*, AUERBACH, *supra* note 7, at 70–73.

143. *See* Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L. J. 1445, 1447–49 (1996).

144. *See* AUERBACH, *supra* note 7, at 71.

145. *See* COHEN, *supra* note 19, at xv (arguing that the law has a value to society and ought to be limited to those who are "specially trained and qualified"); *id.* at 1–23 (discussing disbarment of lawyers who do not possess the proper moral and intellectual qualities).

146. *See id.*

In 1916, Julius Henry Cohen published a book called *The Law: Business or Profession?* This book offers insight into the role professionalism played in its early years in America and helps answer what place it ought to have now. At the turn of the twentieth century, professionalism offered newcomers of all sorts an imagined avenue not only to material advancement but also to a true sense of belonging and leadership.[147] It offered at least the promise and possibility of citizenship in the traditional republican sense of the word. Professionalism not only offered the hope of belonging and partaking of the country's riches but also held out the promise that a recent immigrant or someone lingering for whatever reason on the fringe could, through hard work and determination, contribute to society. In so doing, that person could earn true membership in its ranks. The professions still hold out hope in the form of that particular version of the American Dream.

Julius Henry Cohen argued against a growing sense that business clients had rendered the idea of a separate legal profession obsolete.[148] In a familiar republican lament, he decried the decline of the professional ideal only to argue for the ultimate need and potential for its redemption.[149] He cataloged the disarray, the abuses, and the degeneration of professionalism just as he defended it as a cornerstone of modern democracy.[150] But professionalism itself comprehends that rhetoric of decline and regeneration. Lawyers, for instance, are always at once the source of the problem and the solution.

Cohen used professionalism to recreate the liberal values that seemed subtly threatened by his own experience and by the social

147. *See id.* at 31–32 (arguing that the legal profession is necessary to solve society's "stupendous" problems and promote "the harmony and coordination of its parts, its convenience, its permanency, and its facility"); *id.* at 318 (arguing that lawyers are responsible for truth and justice in society because "the administration of the law is *Justice* itself").

148. *See id.* at xiii–xviii, 271 (noting that the relationship between a lawyer and a client ought not to be commodified).

149. *See id.* at 309–15.

150. It was not uncommon at the time to think of history as cyclical. Evolution and Social Darwinian theories led many historians and social critics to conclude that history itself follows the pattern of birth, decay, and death. Progressives often added regeneration to the list, envisioning a positive and optimistic progression toward a better world as the old order died, while the best and strongest aspects survived spawning a new culture in its wake. *See* PETER NOVICK, THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION 92–100 (1988); STOW PERSONS, AMERICAN MINDS: A HISTORY OF IDEAS 227–28 (1958).

realty in turn-of-the-century New York.[151] By promoting professionalism, Cohen attempted to create an Enlightenment world (or at least a fantasy of one) in which social and moral progress would emerge through science, education, and hard work.[152] The only place to find all three of these values, he argued, was in the professions in general and the legal profession in particular.[153] Cohen infused this notion of progress through professional advancement with a moral component, insisting that the legal profession was a receptacle for morality and integrity and the only possible source of its perpetuation in a world that was becoming increasingly secular, anonymous, and ruthless.[154] Professionalism allowed Cohen to envision harmony

151. For a description of the cultural dislocation in turn-of-the-century America, see generally T.J. JACKSON LEARS, NO PLACE OF GRACE: ANTI-MODERNISM AND THE TRANSFORMATION OF AMERICAN CULTURE (1880–1920) (1981). *See also* RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BRYAN TO F.D.R (1955); WIEBE, *supra* note 8.

152. *See* COHEN, *supra* note 19, at 316–17 ("We must permit freedom of access to the Bar, but this freedom of access must be *conditioned* upon adequate moral and professional training. The schools of law must be open to all men, but the 'door of admission to the Bar must swing on reluctant hinges, and only he be permitted to pass through who has by continued and patient study fitted himself for the work of a safe counselor and the place of a leader.'").

153. *See id.*

154. H. Stuart Hughes argued that this period in European intellectual thought marked a clear revolt against the Positivism of the previous century. While Cohen, unlike the European thinkers Hughes analyzed, was not expounding a theory of social integration, he too managed to mix a reverence for science and reason with a role for morality and free will. *See* H. STUART HUGHES, CONSCIOUSNESS AND SOCIETY: THE RECONSTRUCTION OF EUROPEAN SOCIAL THOUGHT 1890–1930, at 33–66 (2002). Many scholars have written about the condition of modernity. *See, e.g.*, MARSHALL BERMAN, ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY (1982); ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY (1990). T.J. Jackson Lears has argued that America in the early twentieth century embraced a kind of anti-modernism in which people sought the intensity and release that was absent in the capitalist world that demanded perpetual psychological self-control. *See* LEARS, *supra* note 151, at 47–58. Professionalism fits into Lears's thesis. It, too, provided an antidote to the banality of the secular world by importing a language of religious devotion and intense dedication to a worldly pursuit. Other historians have tracked the specific changes in America that accompanied immigration, industrialization, and urbanization at the turn of the nineteenth century and argued about the culture's response to these phenomena. *See* HOFSTADTER, *supra* note 151, at 323–30; GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916 (1963); WIEBE, *supra* note 8, at 164–95; John D. Buenker, *The Progressive Era: A Search for a Synthesis*, 51 MID-AMERICA 175 (1969); Samuel P. Hays, *The Politics of Reform in Municipal Government in the Progressive Era*, 55 PAC. NW. Q. 157, 157–59 (1964); David P. Thelen, *Social Tensions and the Origins of Progressivism*, 56 J. AM. HIST. 323, 335–41 (1969). For a summary of this debate, see Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. AM. HIST. 113 (1982).

between individual rights and social order just as the strain between the two seemed so glaringly apparent in his own life and experience.

Perhaps most importantly, without drawing attention to it, Cohen promoted professionalism to preserve his own tenuous route to assimilation.[155] As historians have explained, the professions provided a road, albeit an imperfect one, to middle class life for the children of immigrants and ethnic minorities.[156] By supplying avenues of advancement, professions like law and medicine to some limited extent provided access to the 'good life' in America.[157] But in reality the professions were saturated with prejudice and, in the early twentieth century, the top echelon of the bar remained out of reach for most immigrants.[158] As a system of thought, professionalism made good on the promise. In other words, the rhetoric of the professions offered a route to leadership to all, regardless of race or ethnicity.[159] The rhetoric of professionalism suggested that anyone could eradicate difference and cloak him or herself in an identity that was both American and at least on the surface agnostic as to ethnic, religious, or racial identity. According to the rhetoric, professionals were stripped of personal characteristics. They were bastions of expertise and, ideally, virtue. As a Jew, Cohen could imagine and promote a route to citizenship, which, in theory, avoided all the practical obstacles that he faced in his real struggle to succeed in American life. In a way, professionalism was as significant to Julius Henry Cohen's success as his practical achievements as a lawyer.[160]

The educational requirements that Cohen defended so vigorously served a purpose other than just monopoly restrictions on entrance to the profession. In Cohen's imagination, education provided the key to assimilation.[161] It was this process of learning that erased the particularity of one's immigrant background and allowed one to assume a new distinctly professional (and American) identity. It was education that replaced the insular culture of the inner city ghetto

155. He does not say so explicitly. Nor does he even mention his religion anywhere in his book, but his emphasis on moral and intellectual worth, hard work, and education are all tacit justifications for his own ascent within the profession.

156. *See* FRIEDMAN, *supra* note 12, at 457–505.

157. *See id.*

158. *See id.* at 459–60.

159. COHEN, *supra* note 19, at xiii–xviii, 316–17.

160. For a discussion of the barriers to women, blacks, and Jews in the profession, see FRIEDMAN, *supra* note 12, at 29–33.

161. *See* COHEN, *supra* note 19, at 125–41 (arguing that law schools were essential for building character and training students to become good lawyers).

with a new set of mores designed for a new community. In Cohen's imagination, the three-year law school provided the fire that would ultimately fuel the melting pot.[162] Without education, the immigrant was thrown into the law with his particular, parochial, old-world ethic intact—a recipe, according to Cohen, for corruption and the disintegration of professional values.[163]

While it seems somehow silly and naïve from our vantage point to suppose that entrance into the legal profession offered the key to social acceptance in 1914, Cohen used professionalism to help create the reality that was just out of his reach.[164] Cohen used the rhetoric of professionalism, its decline, and its rebirth to argue not only that immigrants and minorities could access American culture, but also to suggest subtly that immigrants possessed a unique ability to contribute to the professions because of their identity as outsiders.[165] Their erstwhile place on the periphery suited them to serve as mediators between the needs of individuals and the dictates of the law. The immigrant could earn his membership in society through education, but he would never be absorbed completely. He would never lose his ability to critique the law from the outside, providing that extra check, that extra balance that Alexis de Tocqueville always imagined as part of the role of American lawyers.[166]

In the 1920s, Cohen argued for a unified state bar association, insisting that the selective admission based on ethnicity undermined professional ideals.[167] He argued that while there were forty women lawyers at the annual NYCLA dinner:

> The daughter of a distinguished lawyer, fired by ambition to follow in his footsteps, might win the highest honors in her college, come out at the head of her class in the law school, be the first in the list of those admitted by the Appellate Division, overwhelmingly demonstrate her character and fitness to the appropriate committee, engage in the practice of law and at once win esteem and confidence, yet she could knock at the doors of the city bar

162. *See id.*
163. *See id.*
164. *See id.*
165. *See id.*
166. *See supra* note 30 and accompanying text.
167. *See* POWELL, *supra* note 75, at 41.

> association until the skin fell from her knuckles and the door-keeper would keep her out.[168]

Despite his advocacy for inclusion, Cohen did not want to open the doors of the profession to all.[169] He fought to replace the superficial characteristics of inherited privilege with merit.[170] Cohen led the movement for a unified bar.[171] He argued against discrimination but he was certainly not a modern day Jacksonian, arguing to dismantle professional privilege and make the law accessible to all.[172] It is particularly significant that in arguing for a unified bar, Cohen did not use the example of his own ethnicity and religion. He used a different marginalized group instead.[173] As Samuel Levine has noted, Cohen's own relationship to Judaism is not particularly clear.[174] There are shreds of evidence that he may have left his religion behind for a more secular existence.[175] But he did not abandon his background exactly. The idea of the professions as a route from the periphery to the center for those with intelligence, dedication, and character must have been formed by his experience as a Jew in America. Nor did he completely shed his experience as an outsider as he worked to reform the profession from within.

Cohen published his book, *The Law: Business, or Profession?*, two years after Louis Brandeis published his collection of essays with a very similar title, *Business—A Profession*.[176] Perhaps this is a coincidence. But maybe not. Brandeis argued, in a speech with the same name as his book, that business had become a profession. Cohen would not go so far. He certainly agreed with Brandeis that business had assumed many of the traits of a profession and that many businessmen conducted their affairs with a thoughtful eye to

168. *See* POWELL, *supra* note 75, at 43 (quoting Julius H. Cohen, *The National Call for the Organization of an All Inclusive Bar*, 4 N.Y. L. REV. 95 (1926)); *see also* Julius H. Cohen, An Address at the Annual Banquet of the Rhode Island Bar Association (Jan. 15, 1926).

169. *See* COHEN, *supra* note 19, at 316–17.

170. *See id.*

171. *Id.*

172. *See* Julius Henry Cohen, *Address, The Community's Interest in High Standards of Qualification for Admission to the Bar*, *in* REPORT OF THE TWENTY-NINTH ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION 157, 165 (1924).

173. *See* Levine, *supra* note 20, at 10–12.

174. *See id.*

175. *See id.*

176. LOUIS D. BRANDEIS, BUSINESS—A PROFESSION 1–12 (1914).

the good of all.[177] But there is something in his book, an answer to Brandeis, in a way, suggesting that the legal profession would always have a greater role than business in preserving the good of society.

Cohen began his book by cataloguing disciplinary cases.[178] He sought to convince his reader that the courts and the bar were busy policing the ranks of lawyers, discarding those who were unfit and preserving the dignity of the profession. For the most part, the miscreant lawyers were nameless.[179] With a few notable exceptions, they lacked attributes. They could have been Jewish, Italian, Catholic, women, or Protestants. The reader is left to guess by the names in the footnotes.[180] This must have been intentional. By omitting personal characteristics, the only thing we know is that these lawyers were bad. They harmed their clients, the public, and the reputation of the profession. That, alone, warrants exclusion. Cohen capitulated in the restrictive policies of the bar, but by stripping these lawyers of their racial or ethnic identity, he disassociated these sorts of rules from animus against certain groups of newcomers entering the profession.

Cohen mentioned one case in which the court suspended a lawyer's license because he falsely claimed on behalf of his wealthy corporate client that a conversation was privileged.[181] Here, Cohen's egalitarian strand gained the pen. The lawyer, it seems, claimed that his acts were justified because his powerful client brought wealth to society.[182] As such, he argued, his client should have been shielded from liability. Society deserved protection from plaintiffs seeking to suck its resources dry. Cohen quoted the court's admonition:

> If the profession is to have the respect of the community; if it is to be trusted by courts and by others who have to do with the administration of justice, its members must realize that a crime is a crime whosoever commits it . . . . [N]either his wealth nor prominence will protect a lawyer in going outside of his professional obligations to shield him from the consequences of his acts.[183]

The threat to the legal profession, in other words, comes from all ranks—the elite representing the most prestigious clients and the

177. *See* COHEN, *supra* note 19, at 40–41.
178. *See id.* at 1–23.
179. *See id.*
180. *See id.*
181. *See id.* at 16–17.
182. *See id.*
183. *See id.* at 17.

rank and file whose clients are powerless and poor. It is not race, ethnicity, wealth, or status that determine worth in the world of professionalism, but rather intelligence and character, two things that were distributed equally throughout the growingly segmented profession.

Cohen devoted much of his time to battling the unauthorized practice of law.[184] He served on bar committees dedicated to studying and eliminating the problem of the unauthorized practice of law.[185] Cohen consistently argued that laymen—notaries and corporations particularly—could not protect clients adequately.[186] The public suffered as the court invalidated wills and deeds created by individuals with no experience in the law.[187] Of course, as many historians have noted this self-serving rhetoric masked the self-interest of the profession.[188] Lawyers could keep prices high by eliminating competition.[189] While serving as the chairman of a committee fighting the unauthorized practice of law, Cohen admitted that many notaries guilty of violating the rules were foreign born.[190] But in the same breath, he explained that in many countries other than the United States, notaries were educated and qualified to draft wills and deeds.[191] In a gesture unnecessary to his central argument, Cohen excused the immigrants as ignorant rather than malicious or greedy.

As historians like Auerbach have argued, professionalism may have been used to exclude immigrants and establish a kind of professional aristocracy.[192] But at the same time, the rhetoric contained the seeds for the extinction of this sort of inherited

184. *See A Talk with Julius H. Cohen, Minimizer of Controversy*, *supra* note 135; *see also, e.g.*, Julius Henry Cohen, *Address, The Unlawful Practice of Law*, *in* CALIFORNIA BAR ASSOCIATION, PROCEEDINGS THIRTEENTH ANNUAL CONVENTION 66–88 (1922); Julius H. Cohen, *Unlawful Practice of the Law Must Be Prevented*, 101 ANNALS AM. ACAD. POL. & SOC. SCI. 44, 44–48 (1922); Julius H. Cohen, *Lay Practice of Law Injures Clients, Not the Legal Profession*, 5 J. AM. JUD. SOC. 52, 52–53 (1921–22); Julius Henry Cohen, *Unlawful Practice of the Law by Laymen and Corporations*, 22 LAW STUD. HELPER 12, 12–15 (1914) [hereinafter Cohen, *Laymen and Corporations*].

185. *See* Cohen, *Laymen and Corporations*, *supra* note 184, at 12–13.

186. *See id.*

187. *See id.* at 12.

188. *See* ABEL, *supra* note 41, at 112–13; AUERBACH, *supra* note 7, at 74–129.

189. *See supra* note 188 and accompanying text.

190. *See* Cohen, *Laymen and Corporations*, *supra* note 184, at 12.

191. *See id.*

192. *See* AUERBACH, *supra* note 7, at 4–13.

privilege. And Cohen—a newcomer who had managed to make his way in—emphasized this alternate aspect of professionalism. Quoting an appellate court opinion, Cohen insisted that

> The practice of law is not a business open to all . . . but a personal right, limited to a few persons of good moral character . . . with special qualifications ascertained and certified after a long course of study, both general and professional, and a thorough examination by a state board appointed for the purpose. . . . The right to practice law is in the nature of a franchise from the state conferred only for merit. It cannot be assigned or inherited but must be earned by hard study and good conduct.[193]

As he progressed in his career, Cohen grew more explicit in his understanding of the professions as a guaranteed path to success for worthy immigrants. In an address at the Maryland State Bar Association in 1924, Cohen affirmatively stated that the profession must remain open to all.[194] He began by defending the profession in a way that even then must have seemed familiar. The profession, unlike most obligations, is noble because its members serve a greater good.[195] There are rules and principles, which dictate that the lawyer must pursue something beyond his own self-interest.[196] Cohen insisted that this public function was more important than that of other professions.[197] "Society," he claimed, "cannot exist without law."[198] Lawyers created the fabric of the community.[199] He emphasized that lawyers, unlike judges, have obligations to both the law and to individuals.[200] It is precisely this position on the border, he argued, that guarantees liberty.[201]

Cohen then reasoned that in order to perform this function, the bar must select people who are both knowledgeable and virtuous.[202] The only way to do so was through strict entry requirements.[203] He concluded by discussing why the British system cannot suffice.[204] He

193. COHEN, *supra* note 19, at 247–48.
194. *See* Cohen, *supra* note 172, at 158–66.
195. *See id.* at 159.
196. *See id.*
197. *See id.* at 158–60.
198. *Id.* at 160.
199. *See id.*
200. *See id.* at 160–61.
201. *See id.*
202. *See id.* at 164.
203. *See id.*
204. *See id.* at 165.

wrote, "[b]ecause of the very important functions the bar performs, the people of our country do not want an aristocratic bar, they want a *democratic* bar. They want a bar of made up [sic] men who come from all parts of the country and from all classes."[205] Cohen then directly addressed the question of how America could sustain a democratic bar that serves such a critical function:

> It means that the bar shall be open to everyone, no matter where he comes from, no matter where he was born, no matter what his race or religion is, that the opportunities for education shall be so broad that every man of capacity can acquire the necessary education to fit himself for admission to the bar.[206]

Cohen, who was generally a fairly content member of a legal elite, which at the time sought to eliminate night schools, went on to defend part-time legal education as fundamental to the professional mission.[207] He concluded,

> It is possible in America to have a democratic bar responsive to the general sentiment of the country so that those who have in their hands the great power of administering justice shall come from all sections of the country, all sections of the people, and yet at the same time to insist upon the very highest standards of moral qualifications for admission to the bar.[208]

Cohen used the rhetoric of the professions to argue that outsiders and immigrants could become not only acceptable members of the profession, but moreover critical ones. They connected the bar to a constantly changing democratic spirit while simultaneously controlling the meaning and interpretation of the country's laws.

His faith in the educational system to instill knowledge and virtue, reward merit, and provide equal opportunities to all certainly seems outdated. But the hope for a meritocracy, for a way to create something akin to democratic access through education, is not dead yet. Like the professional ideal itself, this aspect of the Enlightenment project is useful to retain as a (perhaps unattainable) goal.

205. *Id.*
206. *Id.*
207. *See id.*
208. *Id.*

## III. BEYOND THE MULTICULTURALISM-ASSIMILATION DIVIDE

Cohen's optimism, his ability to embrace professionalism as a source of transformation, in which the particularities of one's background melted away, may have thrived on a different zeitgeist. Nativism, at the turn of the century, had a different tone than it does today. At the risk of glorifying a rather troubled time in our past, even most xenophobes had a relatively welcoming attitude toward foreigners and minorities for a time.[209] Americans, for the most part, had not yet fully embraced a fixed notion of race and identity.[210] The nativism of the early 1900s largely shared the optimistic tone of its era. While decrying the poor hygiene and moral depravity of immigrant populations, most reformers had faith in the nation's power to transform the masses and rehabilitate them in its image.[211] They believed that America's unique wonder was not its Anglo-Saxon race, exactly, but rather the national spirit most nobly embodied in that race.[212] So reformers—temperance societies, social workers, and women's groups, to name a few—confidently paraded into the inner city slums with the intent to convert the newest members to America's code of conduct.[213] As historians have repeatedly argued, this agenda was fueled by paternalistic assumptions about the superiority of the Anglo-Saxon way of life.[214] Progressive reformers were ignorant about the value of other cultures and their unique contributions to the communities in which they now lived.[215] Furthermore, scholars have argued, the effort to convert immigrants to "American" values was in some ways even more insidious than overt hatred and exclusion.[216] And that is true—in a way. But the idea of the melting pot did offer a theoretical place to newcomers who were willing to work hard to relinquish the old ways

209. *See* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925, at 106–23 (1955).

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.* at 119–22.

214. For a historiography of the settlement movement, see ALLEN F. DAVIS, SPEARHEADS FOR REFORM: THE SOCIAL SETTLEMENTS AND THE PROGRESSIVE MOVEMENT, 1880–1914, at xvii–xxiv (1984).

215. HIGHAM, *supra* note 209, at 119–22.

216. *See generally* RUTH BORDIN, WOMEN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873–1900 (1981); PAUL BOYER, URBAN MASSES AND MORAL REFORM IN AMERICA, 1890–1920 (1992); DAVIS, *supra* note 214; ELLEN FITZPATRICK, ENDLESS CRUSADE: WOMEN SOCIAL SCIENTISTS AND PROGRESSIVE REFORM (1993).

and fuse with the new culture. It offered a way to imagine success in the new country.[217]

The melting pot ideal, with all its arrogance and condescension, is not something we should to strive to replicate. How then is the story of Cohen and the perspective it lends to professionalism relevant? To understand if and how Cohen's version of professionalism can fit into a modern dialog, it is useful to explore how theories of integration, Americanization, and cultural differences have evolved. Cohen used professionalism to create a route to assimilation.[218] He imagined a world in which differences faded as professionals shared a language of expertise with a community that had proved commitment, intelligence, and moral worth.[219] But the particularities of Cohen's life, his ethnic origin, and his past made their way back in and shaped his understanding of the professions. Our attitude toward cultural difference has changed since Cohen's time, but his understanding and use of professionalism is still relevant and worth preserving.

The rhetoric of the melting pot, born in Julius Henry Cohen's day and made popular in the 1950s, has gone out of style.[220] Historians, political theorists, and sociologists have all pointed out how the assimilation ideal masked racism, xenophobia, and cultural imperialism.[221] The middle class reformers of the Progressive Era who sought to assimilate the newcomers to America condescendingly

217. In 1911, Franz Boas, perhaps the most well-known anthropologist of the time, published a report on immigration designed to prove that immigrants' traits were evolving to suit the new American environment. Franz Boas, *Introductory*, *in* REPORTS OF THE IMMIGRATION COMMISSION: CHANGES IN BODILY FORM OF DESCENDENTS OF IMMIGRANTS, S. DOC. NO. 208, at 1–3 (2d Sess. 1911). As John Higham has argued, Boas essentially devoted his academic life to proving that immigrants and ethnic minorities would shed bad traits and meld into American society. *See* HIGHAM, *supra* note 174, at 125. It is not a coincidence that this theory of racial dissolution should come from Boas, who was himself a Jewish immigrant from Germany. Boas was, in his own work, describing a process by which the attributes that separated him from the mainstream would disappear. He was writing just as the influx of Eastern European Jews seemed to threaten the German Jewish ascent, which made Boas's theory even more critical.

218. *See supra* Part II.

219. *See* COHEN, *supra* note 19, at xv, 1–23.

220. *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 14 (1995). The term "Melting Pot" was popularized by a play with the same title, written by Israel Zangwill in 1908. Kymlicka explains that after World War II, liberals hoped that the emphasis on universal human rights would resolve minority conflict so the United Nations and other international initiatives shifted focus from the rights of particular minorities to an emphasis on universal human rights. *See id.* at 2–3.

221. *See id.* at 14.

hoped to teach them hygiene, morality, and manners.[222] They hoped, in other words, to impose the language and customs of the majority on immigrant groups. Recently, historians have argued that between the wars, some reformers were more sensitive to cultural difference.[223] Their effort to assimilate immigrants included a celebration of the cultural gifts that each different group could bring to the whole.[224] This "cultural gifts movement" was limited in its approach to socioeconomic difference and the entrenched and complicated nature of prejudice but its proponents did recognize the value that diversity could bring to education and civic life.[225]

In the 1950s and early 1960s, the assimilation ideal reached a new level of popularity. After World War II, historians, public intellectuals, and the media sought to minimize difference and to celebrate a uniquely American spirit, a kind of Anglo-Saxon essence.[226] But the rise of identity politics in the 1960s put an end to the focus on assimilation.[227] The Vietnam War and the social unrest that accompanied it undermined the faith in a benevolent Anglo-Saxon spirit. Historians and cultural critics began to celebrate separate immigrant cultures just as popular social movements promoted diverse racial, ethnic, gender, and sexual identities.[228]

In the 1970s and 1980s, scholars of international law, political theory, and philosophy promoted multiculturalism. Proponents of multiculturalism, unlike the champions of assimilation, acknowledged and celebrated difference.[229] Assimilationists hoped to impose the language and customs of the majority on immigrant groups.[230] Critical of this approach, scholars of international law, political theory, and philosophy promoted multiculturalism in its stead.[231]

222. *See* HIGHAM, *supra* note 209, at 119–22.

223. *See* DIANA SELIG, AMERICANS ALL: THE CULTURAL GIFTS MOVEMENT 2 (2008).

224. *See id.*

225. *See id.*

226. KYMLICKA, *supra* note 220, at 14. *See generally* OSCAR HANDLIN, THE UPROOTED: THE EPIC STORY OF THE GREAT MIGRATION THAT MADE THE AMERICAN PEOPLE (1951).

227. KYMLICKA, *supra* note 220, at 61–69.

228. *See* HERBERT G. GUTMAN, WORK, CULTURE, AND SOCIETY IN INDUSTRIALIZING AMERICA (1976) (arguing that immigrants maintained their own ethnic identities).

229. *See* KYMLICKA, *supra* note 220, at 11, 14.

230. *See id.*

231. *See id.*

Multiculturalism, unlike assimilation, acknowledges and celebrates difference. In America, multiculturalism was born mostly as an educational movement, a movement that encouraged schools to teach students to celebrate difference and embrace diverse cultures rather than allowing the majority to displace and denigrate them.[232] So in the 1970s, Stanford invested in residential houses based on ethnic and racial difference,[233] the Supreme Court celebrated diversity as a compelling state interest,[234] and private grade schools sought to increase the racial and ethnic diversity of their student bodies.[235] Almost immediately, however, multiculturalism came under attack. According to one critique, multiculturalism breeds distrust.[236] It divides and atomizes rather than unites.[237] We inevitably lose the chance of civic membership of a robust, or really any, sense of the public good as we all retreat to enclaves defined by our ethnicity, race, gender, or sexual orientation.[238]

Some political theorists have further claimed that multiculturalism is inconsistent with liberalism.[239] How could a liberal democracy tolerate and even celebrate groups that deny rights to its members? Certainly, if one were to import multiculturalism from the educational context to the polity, it would be hard for a liberal state to tolerate and encourage groups that routinely discriminated against or abused certain members of that group. Liberalism and multiculturalism may not be mutually exclusive, but there are strange tensions and hypocrisies. One problem with multiculturalism is that by protecting minority communities, we can inadvertently endorse the mistreatment of some within that community. For example,

232. *See* Richard Rorty, *The Demonization of Multiculturalism*, 7 J. BLACKS HIGHER EDUC. 74, 74 (1995).

233. *See* Madhavi Devasher, *Campus Defends Its Ethnic Theme Houses*, STANFORD DAILY, Nov. 19, 2002.

234. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 279 (1977); *see also* Grutter v. Bollinger, 539 U.S. 306, 321–24 (2003).

235. *See* Devasher, *supra* note 233.

236. *See* Amy Gutmann, *Introduction* to MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" 3, 18–21 (1992).

237. *See id.*

238. Historian and legal scholar Reva Siegel has argued recently that the "swing" justices on the Supreme Court have begun to recognize this problem (which she labels "balkanization") and integrate it into their decisions concerning affirmative action. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278, 1280–1303 (2011).

239. *See* BRIAN BARRY, THE CULTURE OF EQUALITY 163 (2001).

scholars have argued that many ethnic groups treat women poorly.[240] By demonstrating respect, tolerance, and approval of these insular communities, a multicultural state risks inadvertently legitimizing these destructive sorts of hierarchies.[241]

Recently, political theorists have addressed this tension by trying to reconcile multiculturalism with liberalism. Bhikhu Parekh, for instance, has argued that we have to nurture diversity but also encourage a sense of belonging to the state as a whole.[242] The state should encourage and protect cultural rights, which allow individuals and groups to cherish and perpetuate their cultural identity.[243] But as a community, we must balance the claims of groups against the rights of individual members of those groups.[244] A multicultural state cannot ignore that we all live in a community and we must foster a sense of responsibility and commonality among all groups and individuals.[245] Parekh celebrates difference but also recognizes the importance of a shared community with a robust sense of values and the common good.[246] He promotes a political and legal world that would recognize both.[247] That is a tall order, to say the least.

To make this work, we need to understand the complex interaction between individuals and the various groups to which they belong.

240. *See* Ayelet Shachar, *Group Identity and Women's Rights in Family Law: The Perils of Multicultural Accommodation*, 6 J. POL. PHIL. 285, 285–91 (1998). Shachar gives the example of Israeli courts accommodating Rabbinical courts and Halakhic law. Halakhic law gives husbands the sole right to determine whether or not to divorce. By accommodating this law in a multicultural fashion, Israel does more than just accommodate the religious group, it tacitly accepts the domination of women within that group. *See id.* at 291.

241. *See id.* at 288; *see also* AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 17 (2001). In addition, multiculturalism in America produced a kind of intellectual tyranny from the left that rivaled the consensus patriotism that preceded it on the right. Prone to excess, some proponents of multiculturalism insisted that only certain forms of scholarship and certain sorts of statements were valid. They refused to listen to dissent and stifled conversation by ostracizing anyone whose thoughts strayed from the party line. Of course, this intolerance is not inherent to the idea of multiculturalism but did seem to accompany it into public debate.

242. *See* BHIKHU PAREKH, RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY 342 (2000).

243. *See id.* at 341.

244. *See id.*

245. *See id.* Parekh advocates a dialogue between cultures and the "ethical norms, principles and institutional structures presupposed and generated by [those cultures]." *Id.* at 14.

246. *See id.* at 341.

247. *See id.*

Charles Taylor, a renowned professor of political philosophy, has pointed out that identity is not fixed.[248] People develop an idea of self, which is perpetually created and recreated in a symbiotic relationship with collective identity.[249] Taylor rejects the idea that the public space ought to be devoid of particularity, characterized only by republican political culture.[250] He dismisses the liberal conception of a public sphere that erases individual difference.[251] Instead, each different culture should preserve its authenticity while simultaneously participating in a public conversation.[252] Charles Taylor moves the debate away from respect for different ethnicities and cultures to the idea of a nation built on cultural difference.[253] He argues that over the course of the last two centuries, nationalism has moved from a sense of legal rights to ethnic culture.[254] In other words, according to Taylor, we are unified not by geography, political contract, or nation states, but rather by ethnic ties.[255]

Taylor's work helps to conceptualize the problem, but no one has quite solved how to balance the concerns over balkanization with the need to respect difference. This is where professionalism can play a critical part. As Emile Durkheim argued, the professions have a role to play in resolving these tensions.[256] The professions do hold out the (still viable) hope of inclusion and participation, as they did for Julius Henry Cohen.[257] It is not just that education and the professions offer hope to a bunch of immigrants sitting with their faces pressed up against the window of privilege. It is also that the legal profession

248. *See* Charles Taylor, *The Politics of Recognition*, *in* MULTICULTURALISM AND "THE POLITICS OF RECOGNITION" 25, 31–37 (1992).

249. *See id.* at 31; *see also* MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 150–65 (1982) (articulating a communitarian philosophy based on the notion that individuals are critically formed by groups like churches, neighborhoods, family, and unions). Kymlicka agrees that identity is formed by subnational groups, but he believes that the values of these individuals and groups can be reworked and revised in dialogue with others. *See* KYMLICKA, *supra* note 220, at 92–93.

250. *See* Taylor, *supra* note 248, at 37–51.

251. *See id.*

252. *See id.* at 31–37.

253. *See id.*

254. *See id.* at 28–30.

255. *See id.* at 56–61.

256. In wrenching professionalism from the clutches of its critics, I am also in some ways relying on the functionalist analysis that has long gone out of style. *See* Parker & Rostain, *supra* note 11, at 2362. I am obviously not trying to do so in a way that ignores the important critiques that followed, but rather, acknowledging some limited but critical worth to the functionalist argument.

257. *See supra* notes 155–60 and accompanying text.

offers the promise of civic participation, a kind of participation that allows newcomers not just to belong but also to shape the rules that constitute the community. Those rules then will reflect not just a blanched out version of their creators, but rather a complex professional identity that is created through interaction with all the groups to which each individual belongs. This should include racial, ethnic, religious, civic, gender political, and professional groups, to name just a few.

In order to capture both cultural specificity and unity, we need an arena in which the particulars of ethnic and racial identity dissolve momentarily only to be reconstituted.[258] It is a limited melting pot, one in which the ingredients reemerge magically after altering the nature of the mix.[259] The expertise and daily occupation of professionals provides a common language, a shared goal, of sorts. The rules of professional ethics and the norms of the courtroom supply a professional identity. The traditional account of lawyers' ethics insists that this source of identity should replace all others. In Sanford Levinson's terms, lawyers must assume a "bleach[ed] out" professionalism.[260] But this account is not only undesirable, it is also unrealistic. Just as Julius Henry Cohen brought his own particular circumstances to bear on his work within the profession, so too inevitably will all professionals.[261] To do so, however, professionals

258. In international law, Ruti Teitel and Iavor Rangelov have argued that resorting to courts to resolve conflict in a world that is increasingly plural is not necessarily de-politicizing. They suggest that a global civil society can produce an arena "where legitimacy of justice claims and structures are produced, negotiated, and contested." Ruti Teitel & Iavor Rangelov, *Global Civil Society and Transitional Justice*, *in* GLOBAL CIVIL SOCIETY 2011: GLOBALITY AND THE ABSENCE OF JUSTICE 162, 176 (Martin Albrow & Hakan Seckinelgin eds., 2010). I am essentially arguing that the legal profession itself can, and to some degree does, serve a similar purpose in America.

259. I am not arguing that the legal profession is the only possible source for this kind of meaningful participation. I agree with Aziz Rana that all sorts of work can provide the opportunity for this sort of cultural translation. *See* Rana, *supra* note 36, at 1670, 1694–1700.

260. Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1577 (1993).

261. At its most extreme, professionalism demands that its members relinquish their identity, dispense with their sense of morality, and embrace a new professional persona and a new set of ethical rules in their place. *See generally* Levinson, *supra* note 260. David Wilkins has questioned the wisdom of this understanding of professionalism. *See* David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1041 (1995) [hereinafter Wilkins, *Race, Ethics, and the First Amendment*] (suggesting that race ought to play a role in selecting clients); David Wilkins,

do have to adopt a professional identity, a miniature version of a public persona, but the interpretation of professional norms and values will constantly and invariably be defined by other aspects of the lawyer's identity. Of course, professionalism does not provide the entire answer to the dilemma that the need to balance respect for difference with a sense of unity and common purpose poses. But it does offer one way to begin to muddle through. As Durkheim argued, the professions in modern society can offer a bridge.[262]

Much of the discussion about multiculturalism presumes an authentic self. It assumes that one's ethnic, racial, gender, or sexual identity forms that essential being and that everything else is masquerade.[263] As a purely descriptive matter, that seems wrong. Lawyers can belong to more than one world, and it is not simply that the significance of belonging in an ethnic or racial group shapes their true self and their public or professional life requires them to blanch out that difference and assume a false identity to find a common interest with all.[264] As sociologist Erving Goffman argued half a

*Straightjacketing Professionalism: A Comment on Russell*, 95 MICH. L. REV. 795, 796 (1997) [hereinafter Wilkins, *Straighjacketing Professionalism*] (arguing that the attorneys in the O.J. Simpson Case had obligations both as professionals and as African Americans). Wilkins argues that black lawyers have responsibilities both as professionals and as members of their race. They are constantly negotiating these two axes of their identity. Thus, Wilkins explains:

> The legal profession's "mainstream" norms carry moral, not just practical, weight. They therefore constitute a legitimate constraint on how a black lawyer should respond to the fact that he or she is both representing race as well as representing clients.
>
> This does not mean that black lawyers must accept uncritically prevailing ethical practices. Like other members of the profession, black lawyers have the right—and indeed the duty—to question the norms of "mainstream legal practice," and to seek to change these prevailing understandings when they produce injustice. As I argue elsewhere, African-American attorneys may have a particularly strong duty to seek change in cases where existing norms disadvantage the black community.

Wilkins, *Straitjacketing Professionalism*, *supra*, at 800. This Article takes Wilkins's argument one step further perhaps in arguing that race (or the particulars of one's identity) inevitably plays a role in professional decision-making. While I agree with Wilkins that this is both necessary and desirable, I am also suggesting that it is one of the ways in which the profession can and should translate the interests of groups into a language of expertise, which is accessible to all.

262. *See* DURKHEIM, *supra* note 92, at 10–14.

263. *See* KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 22 (2006).

264. *See* Levinson, *supra* note 260, at 1601; Russell Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2083 (2005).

century ago, private life is shaped by the larger community and the larger community is shaped by ethnic identity.[265] In other words, ethnic identity is not authentic and public persona is not artificial. The individual and group are, as Charles Taylor suggests, constantly defining one another.[266]

The exchange, the movement back and forth, is facilitated by professional groups—groups that bridge the public and the private; groups that provide a common shared knowledge and expertise. Through shared language of expertise, professionals translate both for themselves and for others. At least, it could be like that. Julius Henry Cohen, for instance, took his own experience as an outsider and translated it into advocacy for part-time law schools and an inclusive bar.[267] While he was not out fighting for civil rights, he was working in his daily life to make changes within the mainstream profession to accommodate and welcome outsiders.[268] In doing so, he drew on and subtly changed the rhetoric of the professions.

In his book, *Covering: The Hidden Assault on Our Civil Rights*, Yale Professor and legal scholar Kenji Yoshino argues that the world (including the workplace) requires a sinister form of masquerade.[269] It requires that individuals play down qualities that make them different from others. Drawing on Erving Goffman's book on stigma, Yoshino claims that like Franklin Delano Roosevelt, who played down his disability, Americans feel the need to disguise their sexual, racial, or ethnic identities.[270] So, he sums it up, "[w]e are at a transitional moment in how Americans discriminate. . . . [I]ndividuals no longer need to *be* white, male, straight, Protestant, and able-bodied; they need only to *act* white, male, straight, Protestant, and

265. *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959). Goffman uses the imagery of a stage, arguing that each person chooses his or her stage, props, and costume. The goal, it seems, is to maintain coherence, but coherence is not the same as authenticity. The goal is not to preserve one true authentic self throughout all interactions but rather to find ways to crossover, to maintain a coherent but evolving sense of self despite the many different contexts in which we find ourselves. *See id.* In a series of articles, Russell Pearce has reflected on the meaning of professional identity and its intersection with racial, religious, or ethnic identity. *See* Pearce, *supra* note 264, at 2089–99 (arguing that white lawyers should view themselves as having a racial identity to avoid establishing their own identity as the norm).

266. *See* Taylor, *supra* note 248, at 25, 34.

267. *See supra* notes 132–75 and accompanying text.

268. *See id.*

269. *See* YOSHINO, *supra* note 263, at 22.

270. *See id.*

able-bodied."[271] This, in a way, is the legacy of assimilation. Americans can invent themselves. All boundaries are permeable. We can even shed the particularity of our racial, ethnic, or gender identities to merge into the mainstream. But at what cost?

Without disputing Yoshino's contribution, it is possible to see this process as less sinister than he makes it out to be. Of course, it would be bad if individuals were required consistently to repress characteristics of their sex, race, gender, or sexual orientation. This demand is neither realistic, nor is it really being made. People always choose to highlight certain qualities and mute others depending on the setting. Even white men must blanch out certain personal characteristics in order to fold themselves into the workplace. The professions, it seems, provide an opportunity to do so strategically. Cohen, for instance, seems to have muted his Jewish identity, but simultaneously translated it into an understanding of what the profession ought to be.[272] He fought for equal access in a way that gave purpose to that aspect of his identity. And of course, the profession has changed significantly as those on the periphery have made their way in.[273]

## CONCLUSION: RELEVANCE OF PROFESSIONALISM AS A ROUTE TO PARTICIPATION IN A POST-MULTICULTURAL STATE

Of course, we live in a world very different from that of Julius Henry Cohen. Among other things, the legal market has been changing at a rapid pace.[274] The profession has been highly stratified

271. *Id.*

272. *See* Levine, *supra* note 20, at 3; *see also* Wilkins, *Race, Ethics, and the First Amendment*, *supra* note 261. Wilkins argues that race can and should influence all sorts of decisions that one makes as a professional. *Id.* at 1041. For example, in criticizing the black lawyer for representing the Klu Klux Klan, he argues that African-American lawyers' experiences as a part of a racial minority ought to inform and alter the norms of the profession as a whole. *See* Wilkins, *Straightjacketing Professionalism*, *supra* note 261, at 800.

273. *See* Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1852–54 (2008).

274. *See generally* William D. Henderson & Rachel M. Zahorsky, *Law Job Stagnation May Have Started Before the Recession—and It May Be a Sign of Lasting Change*, A.B.A. J. (July 1, 2011), http://www.abajournal.com/magazine/article/paradigm_shift/; John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, Mar. 5, 2011, http://www.nytimes.com/2011/03/05/science/05legal.html; Aric Press, *A Chasm With Consequences*, AM. LAW. (June 1, 2011), http://www.amlawdaily.typepad.com/amlawdaily/2011/06/chasm.html; Joel Stashenko, *Lawyers Face New Challenges from Global Competition*, N.Y. L.J., Feb. 4, 2011.

ever since Cohen was an active member of the bar.[275] The diverse nature of the bar has always existed in an odd tension with the idea of a unified profession. For years, the proliferation of different sorts of legal work and areas of expertise has posed a challenge to the ideal of a unified profession.[276] Technology and globalization now threaten to render the concept obsolete.[277] The opportunities in the law seem to be shutting down rather than expanding.[278] Amidst these challenges, many call for the segmentation of law schools to track the growingly distinct realms of legal practice.[279] Scholars like Brian Tamanaha suggest that the top ten law schools ought to continue as they are, teaching theory to an elite group who will use their grasp of jurisprudence to shape the laws of the country by practicing in prestigious law firms or government jobs.[280] All the others, who study law at inferior institutions, ought be trained to serve individual clients and practice a trade.[281] This education will be faster, cheaper, and more relevant. Certainly, the argument goes, there is no place for theory, classes on jurisprudence, or the antiquated Socratic method at these lower ranked schools.

Recently, legal scholar and sociologist Elizabeth Chambliss has criticized this call for the segmentation of law schools, arguing that it assumes that corporate clients need lawyers educated in history, theory, and philosophy, while average individual clients do not.[282] It assumes that representing individuals is simple and requires relatively little understanding of how the law develops and changes. It assumes that we should funnel all the best-credentialed students to corporate practice. It assumes that corporate clients do not need lawyers with skills in counseling and human interaction. All of these assumptions are unproved, if not patently false.

While it would be silly to swim against the tide and resist changes in the legal profession that are inevitable products of a growingly

275. *See* Wald, *supra* note 273, at 1824.

276. *See* ABEL, *supra* note 41, at 9; Wilkins, *supra* note 18, at 1152–54.

277. *See* Elizabeth Chambliss, *Implications of Strategic Alliances with U.S. Law Schools*, FORDHAM L. REV. (forthcoming); Markoff, *supra* note 274; Stashenko, *supra* note 274.

278. *See* Richard A. Matasar, *The Viability of the Law Degree: Cost, Value, and Intrinsic Worth,* 96 IOWA L. REV. 1579, 1621–25 (2011); TAMANAHA, *supra* note 15, at 167–71.

279. *See id.* at 172–76.

280. *See id.* at 174.

281. *See id.*

282. *See* Chambliss, *supra* note 277.

global market, it is also unwise to embrace all the changes without contemplating what, if any, aspects of the profession are worth trying to preserve. This Article offers one caution. The idea of a unified legal profession and the rhetoric that accompanies it is useful. It has, among other things, served those on the periphery as a narrative of success. It has provided a story not just about financial gain but about movement from the irrelevant outskirts of an alien nation to the center, in which the newcomer (or her children) may shape the rules and values of the world in which she lives.

Even before the nation felt the full extent of the 2008 financial collapse, some scholars suggested that this version of the American Dream is dying. In an article in the literary and political magazine *N+1*, law professor and political theorist Aziz Rana argued that President Obama could not attract a popular following because his message of success through hard work, merit, and professional education is no longer accessible to most.[283] In his campaign, Obama claimed (much like I have argued here) that his position as an outsider, as the child of a racially mixed marriage who made his way in through professional success, situated him perfectly to fight for equal opportunity.[284] Obama's message, quite similar to that of Julius Henry Cohen, rang hollow. The American public viewed him as elitist and, ironically, his opponent John McCain—a child of privilege—as a man of the people.[285] This, Rana argued, is because the professional version of the American Dream is inherently elitist.[286] It assumes that only a precious few will rise up through its ranks.

In this way, Julius Henry Cohen is, perhaps, a relic. Perhaps his use of professionalism is antiquated like most of the others. However, it is precisely the blend of elitism and equality in the professional ideal that makes it relevant and worth salvaging. It is the exclusivity that offers the real promise of success. Of course, if the predictions are correct and access to the good life through professional advancement is really ossified then the promise is empty. But, this is, at least in part, a self-fulfilling prophecy. If we abandon the rhetoric of professionalism and allow it to fall by the wayside along with the other versions of the American Dream, we are essentially capitulating. The ideal gives individuals and the

283. *See* Aziz Rana, *Obama and the Closing of the American Dream*, N+1 (Sept. 8, 2008), http://www.nplusonemag.com/obama.

284. *See id.*

285. *See id.*

286. *See id.*

community as a whole something to strive for and demand. As long as that is not completely futile, then it is worthwhile to maintain the legal profession's promise and try to make good on it.

Of course, there are concerns along the way. If the myth of a unified profession persists, if the frontier has not yet disappeared completely, then regulators need to be careful that they do not carry the ideal beyond its useful limits. Professionalism can serve the useful purpose this Article has identified without serving the pernicious purposes that others have correctly noted before me. There is no reason, after all, why all lawyers practicing in different areas need to be governed by the same ethical rules.[287] There is no reason why the rhetoric of the professions needs to dictate severe entry requirements and outdated rules against competition. There is no reason why the notion of a profession, with a singular role in finding and promoting a common good in society, needs to support rules restricting multidisciplinary practice or barring innovative ways to finance litigation. In other words, the rhetoric of the professions has been used to justify a lot of unnecessary monopolistic conduct. It has been used to resist change and hold onto outmoded ways of practice. The rhetoric can be divorced from these side effects and used to further its more constructive purpose.

287. *See* Wilkins, *supra* note 18, at 1216–17.