



THE RISE AND FALL OF THE WASP AND JEWISH  
LAW FIRMS

Eli Wald

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INTRODUCTION.....	1804
I. THE RISE AND GROWTH OF THE LARGE WASP LAW FIRM.....	1806
A. <i>The Theory: The A-Religious Identity of the Large Law Firm</i> .....	1806
B. <i>The Reality: The “Hidden” WASP and White-Shoe Identity of the Large Firm</i> .....	1810
1. <i>Nativism, anti-Semitism, and snobbery</i> .....	1811
2. <i>The “hidden” religious identity of the large WASP firm</i> .....	1813
3. <i>The “hidden” cultural identity of the large WASP firm</i> .....	1821
4. <i>Institutionalizing elite status: elite education and professional regulation</i> .....	1823
C. <i>The Growth of the WASP Firm</i> .....	1825
1. <i>The growth of the large firm—the standard account</i> .....	1825
2. <i>Elite professional status, WASP religious identity, and white-shoe cultural identity as impetus for firm growth</i> .....	1826
II. THE RISE OF THE LARGE JEWISH LAW FIRM.....	1828
A. <i>The “Jewishness” of the Jewish Firm</i> .....	1829
B. <i>The WASP Roots of the Jewish Law Firm’s Success</i> .....	1833
1. <i>Protected pockets of “Jewish” practice areas</i> .....	1833
2. <i>Effective discrimination by WASP firms in the shadow of a robust supply of Jewish lawyers</i> .....	1836
3. <i>Tournament theory and the white-shoe ethos as a restriction on firm growth</i> .....	1839

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C. <i>Being at the Right Place at the Right Time—and Making the Most of It</i> ..	1842
1. <i>Size and numbers matter</i> .....	1842
2. <i>The visibility of individual success and its impact on firm growth</i> .....	1843
3. <i>The “flip side of bias”</i> .....	1844
4. <i>The rise of inside counsel</i> .....	1847
5. <i>A Jewish client base</i> .....	1851
III. THE DEMISE OF THE LARGE RELIGIOUS LAW FIRM .....	1852
A. <i>The Disintegration of the Religious and Cultural Identity of the Large WASP Firm</i> .....	1852
1. <i>Embracing meritocracy</i> .....	1853
2. <i>The professionalism paradigm shift: The rise of “law as a business” ideology</i> .....	1854
3. <i>The economics of discrimination in play</i> .....	1856
4. <i>The decline of religious discrimination</i> .....	1857
B. <i>The Decline of the Religious Identity of the Large Jewish Firm</i> .....	1858
1. <i>The collapse of the Jewish firm monopoly on recruitment of Jewish lawyers</i> .....	1858
2. <i>The “flip side of bias” revisited and the future of the Jewish firm</i> .....	1860
C. <i>The Large Law Firm in the Post-Religious Age—Can It Sustain Its Elite Status?</i> .....	1861
CONCLUSION .....	1863

## INTRODUCTION

During their “golden era” in the 1950s and 1960s,<sup>1</sup> large American law firms<sup>2</sup> were segregated along religious and cultural lines between WASP and Jewish law firms.<sup>3</sup> The rise and success of large law firms with distinctive

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1. MARK GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS* 24 (1991).

2. Large American law firms first emerged in New York City. *Id.* at 14-15. Until the 1970s, due to the concentration of large law firms in New York City, the terms “American” and “New York City” law firm could be used interchangeably. By 1979, however, all New York firms except Shearman & Sterling “had been displaced by the largest firms of other cities.” Robert L. Nelson, *Practice and Privilege: Social Change and the Structure of Large Law Firms*, 1981 AM. B. FOUND. RES. J. 95, 104. Still, “[T]he leading role of New York City as a legal center [was] indicated by the presence of twenty-three New York firms” among the largest fifty law firms. *Id.* Studying the rise and growth of large law firms between 1899 and 1980, at a time when New York still dominated the landscape of large American law firms, this Article refers to large New York City firms as the “large law firms.”

3. The religious divide among lawyers in New York City also included Catholic attorneys. Because the number of large Catholic law firms in New York City was relatively small in the time period examined, this Article studies the experience of large WASP and Jewish law firms but not that of large Catholic firms. The literature on large Catholic firms is scant, *but see*, Mark A. Sargent, *An Alternative to the Sectarian Vision: The Role of the Dean in an Inclusive Catholic Law School*, 33 U. TOL. L. REV. 171, 188 (2001). Sargent argues that from the late nineteenth century through the middle of the twentieth century Catholic universities, law schools and law firms did not have to worry about what it meant to be Catholic institutions. “With faculties and student bodies overwhelmingly Catholic, with a strong clerical presence, and a sense (at least tacit) of separation from a non-Catholic social

religious and cultural identities is surprising because the large firm was purportedly a-religious and meritocratic.

After introducing the conventional wisdom regarding the explicitly a-religious and meritocratic identity of the large law firm, Part I explores the “hidden” religious and cultural identity of the WASP law firm.<sup>4</sup> It argues that the dual and seemingly contradictory identities of the large firm were a product of its complex quest for professional elite status. Seeking professional status and recognition, or in Larson’s terminology, participating in the “professional project,”<sup>5</sup> required the large law firm to present itself as a-religious and meritocratic. Seeking to establish itself as the elite within the ranks of the legal profession, however, the large firm cultivated and pursued a parallel *de facto* WASP identity. It first translated elite Protestant values and white-shoe ethic into elite professional status and later on, with its elite status secured, relied on its religious and cultural identity to enable its rapid growth.

Part II studies an unintended and counterintuitive consequence of the WASP identity of the large firm—the rise and growth of the Jewish firm. Though as late as 1950 there was not a single large Jewish law firm in New York, by the mid-1960s six of the largest twenty law firms were Jewish, and by 1980 four of the ten largest law firms were Jewish firms. Moreover, the accomplishment of the Jewish firms is especially striking because while the traditional large WASP law firms grew at a fast rate during this period, the Jewish firms grew twice as fast and did so in spite of explicit discrimination. Part II asserts that the WASP identity of the large firm—and the consequences and commitments embedded in it—led to the emergence of firms that were Jewish by discriminatory default and fostered conditions that explain the rapid growth of the Jewish firm.<sup>6</sup>

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and academic mainstream often ambivalent, if not hostile to Catholicism, it was difficult for those institutions not to be and to feel Catholic.” But, “[w]ith the waning of immigrant identity, the diminishing presence of the clergy, and the very successful integration of Catholic institutions into the American academic mainstream, the easy sense of identity as Catholic began to vanish . . .” *Id.*

4. Discrimination against Jewish lawyers and the segregation of large firms along religious and cultural lines was common knowledge among practitioners at the time and has been documented by scholars of the legal profession since. What is not common knowledge is the impact and consequences of the religious and cultural identity of the large firm for its rise and growth. While the religious and cultural identity of the large firm was not hidden, the role it played and the reasons for its existence, beyond nativism, snobbery, and anti-Semitism, were hidden. *See infra* Part I.B.

5. MAGALI SARFATTI LARSON, *RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS*, at xvii (1977).

6. Thus, the rise and growth of the Jewish firm is not merely another telling of the successful assimilation story of an immigrant institution following and adopting the path of the established elite. *See generally* THOMAS KESSNER, *THE GOLDEN DOOR* (1977) (comparing the upward mobility of Jewish and Italian immigrants in New York City between 1880 and 1915). Rather, the success of the Jewish firm was in part a reaction to discrimination perpetrated by the established elite. In fact, the rise of the Jewish firm is a tale not of

Part III investigates the demise of large religious law firms, WASP and Jewish alike. It tracks the disintegration of the hidden religious identity of WASP firms, the decline of the overt religious identity of Jewish firms, and concludes by exploring the ability of the large law firm to sustain a credible claim for elite professional status in the post-religious twenty-first century.

## I. THE RISE AND GROWTH OF THE LARGE WASP LAW FIRM<sup>7</sup>

### A. *The Theory: The A-Religious Identity of the Large Law Firm*

The large law firm emerged as a distinctive unit of law practice around the turn of the twentieth century.<sup>8</sup> The literature on large law firms describes six unique organizational characteristics of the new entity: a hierarchical structure based on two distinct types of attorneys, partners and associates;<sup>9</sup> close working relationships among partners and associates emphasizing teamwork as opposed to individual work product;<sup>10</sup> development of recruitment procedures based on a carefully prescribed path of excellence,<sup>11</sup> followed by systematic

successful assimilation but one of the triumph of “separate but equal” over discrimination.

7. “Large” has a dynamic meaning. “[N]o firms of large membership appeared, even in the great cities, until the end of the [nineteenth] century. The typical partnership was a two-man affair . . . .” JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 306 (1950). Through the 1920s a firm of four attorneys was considered a “large” firm. WAYNE K. HOBSON, *THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY 1890-1930*, at 161 (1986). The benchmark for “large” reached fifty attorneys by the 1950s. *See* Erwin O. Smigel, *The Impact of Recruitment on the Organization of the Large Law Firm*, 25 AM. SOC. REV. 56, 58 (1960). By the late 1960s, “large” meant 100 lawyers, *see* ERWIN O. SMIGEL, *THE WALL STREET LAWYER* 358-59 (1969), and by the late 1980s, “a firm of 50 members probably would not be considered large” in major cities, *see* Justin A. Stanley, *Should Lawyers Stick to Their Last?*, 64 IND. L.J. 473, 473 (1989). Notably, in 1988, Baker & McKenzie became the first law firm with over 1000 attorneys. *Law Firm Tops 1,000 Barrier*, A.B.A. J., Feb. 1, 1988, at 30, 30. *See generally* Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1873 n.23 (2008) (on the dynamic meaning of “large” firms).

8. *See* Wayne K. Hobson, *Symbol of the New Professions*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 3 (Gerald W. Gawalt ed., 1984); Magali Sarfatti Larson, *On the Nostalgic View of Lawyers’ Role: Comment on Kagan and Rosen’s “On the Social Significance of Large Law Firm Practice,”* 37 STAN. L. REV. 445, 448 (1985). *See generally* GALANTER & PALAY, *supra* note 1, at 4.

9. The firm featured a strict hierarchical structure with partner-owners at the top of the pecking order, followed by associate-employees who were nonetheless attorneys and not mere apprentices, and at bottom non-legal personnel. PAUL HOFFMAN, *LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS* 39-42 (1973).

10. The associates worked as members of a team, received a standardized salary, and were not allowed to have their own clients. *See* HOBSON, *supra* note 7, at 154; Fern S. Sussman, *The Large Law Firm Structure—An Historic Opportunity*, 57 FORDHAM L. REV. 969, 969 (1989).

11. Initially, large law firms recruited recent law school graduates meeting its

training of associates;<sup>12</sup> a probation period for associates, followed by promotion to partnership for some and an “up or out” policy for those not promoted;<sup>13</sup> specialization of individual attorneys’ expertise and departmentalization of work within the firm based on groupings of individual attorneys;<sup>14</sup> and utilization of technology.<sup>15</sup>

The omission of religion as an explicit formal organizing theme of the new entity is by no means a coincidence. The large law firm’s organizational structure, commonly referred to as the “Cravath System,”<sup>16</sup> reflected a vision and an ideology of the practice of law which was radically different from the era’s accepted and prevailing notions of lawyering.<sup>17</sup> Cravath’s model sought

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prescribed path of excellence: attendance at an elite college; Harvard, Yale, or Columbia law school; top-of-the-class credentials; and law review editorship. JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 24 (1976); 2 ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS: 1819-1947*, at 748 (1946) (stating that 85% of Cravath partners graduated from either Harvard, Columbia, or Yale law schools as of 1948). Over time, however, firms have invested in broadening the recruitment pool by screening student candidates attending other elite law schools, conducting “on-campus” interviews, and finally extending “callback” interviews conducted at the firm. See Joyce Sterling et al., *The Changing Social Role of Urban Law Schools*, 36 SW. U. L. REV. 389, 411-12 (2007); David Wilkins et al., *Urban Law School Graduates in Large Law Firms*, 36 SW. U. L. REV. 433, 436 (2007); see also Tom Ginsburg & Jeffrey A. Wolf, *The Market for Elite Law Firm Associates*, 31 FLA. ST. U. L. REV. 909, 921-22 (2004).

12. Associates were trained as general practitioners under the supervision and mentorship of the partners. AUERBACH, *supra* note 11; 2 SWAINE, *supra* note 11, at 2 (describing the firm’s recruitment preference for young lawyers not yet spoiled by habits learned elsewhere).

13. Following a probation period the firm promoted a fraction of its associate pool to partnership. Partners were almost exclusively elected from within the firm’s ranks, with little lateral hiring. Sussman, *supra* note 10, at 969; see also HOBSON, *supra* note 7, at 155 (“To facilitate cohesion, the firm has relied upon . . . the assurance that senior partners will be recruited from within the firm.”). Those not promoted were expected to leave the firm pursuant to its “up-or-out” policy, often placed elsewhere with the assistance of the firm. See generally GALANTER & PALAY, *supra* note 1.

14. The firm represented mostly entity clients, first railroads and banks, and later on, industrialized corporations. HOBSON, *supra* note 7, at 203-06. The focus on entity clients reinforced the organizational structure of the new law firm. The needs of entity clients, compared to individual clients, spanned across many practice areas and were complex, thus greatly straining the ability of one general practitioner to effectively address them all and justifying the firm’s team concept. See *id.*

15. The firm utilized technological advances to more effectively and efficiently serve the needs of its clients. GALANTER & PALAY, *supra* note 1, at 4-9.

16. Paul D. Cravath is credited with being among the first to mold and implement these organizational features together in a working law firm. HOBSON, *supra* note 7, at 196-99. See generally GALANTER & PALAY, *supra* note 1, at 9-10; 1-3 SWAINE, *supra* note 11.

17. 1 SWAINE, *supra* note 11, at 575 (Mr. Cravath’s “first great object was so to organize his firm and its staff as to make it competent to do, as nearly perfectly as it could be done, any acceptable work which might be offered. . . . Prior to the time when Cravath took control as the active head of the firm there had been little attempt at scientific organization in the office.”(quotation omitted)).

to develop and implement a professional ideology of meritocracy based on quality standards of professional performance.<sup>18</sup> Cravath's meritocracy, reflected in the organizational characteristics of the new firm, purported to deem considerations such as religious affiliation, cultural and socioeconomic background, ethnic identity, and social status irrelevant in assessing professional qualifications. The new large firm was ostensibly a-religious because religion per se, like cultural and social standing, was irrelevant under its new, merit-based model of professionalism. In a speech at Harvard Law School in 1920, Cravath specifically stated that a person's family connections or social class were irrelevant to success in the law:

He advised his hearers that for success at the New York bar "family influence, social friendships and wealth count for little" and he emphasized the large number of successful lawyers who had come to New York from small places and "worked up from the bottom of the ladder without having any advantage of position or acquaintance."<sup>19</sup>

Similarly, Arthur Dean of Sullivan & Cromwell opined:

In today's larger legal partnerships advancement is by and large by competence alone. Those who achieve positions of influence and leadership in such firms tend to be those who have manifested their ability to relate into a more comprehensive picture diverse fields of specialization and to view the major problems of clients in a broad social perspective.<sup>20</sup>

Indeed, religion as an organizing theme was not only irrelevant but inconsistent with the merit-based vision and structure of the Cravath System.<sup>21</sup>

18. Mr. Cravath "expected perfection or as near to it as he could get and he seldom got quite as much as he expected." *Id.* at 574 (quotation omitted).

Michael Young critically explored the possibility that the rise of meritocracy would lead to the decline of discrimination. Young cynically proposed that IQ plus effort equaled merit—that is, those who are intelligent and work hard will succeed, irrespective of race, gender, and other such characteristics. MICHAEL YOUNG, *THE RISE OF THE MERITOCRACY 1870-2033: AN ESSAY ON EDUCATION AND EQUALITY* (1958). He concluded, however, that merit is likely to be used as a cover by the dominant elites. *Id.* Professor Guinier explains that Young "coined the term *meritocracy* to satirize the rise of a new elite that valorized its own mental aptitude" through "a set of rules put in place by those with power that leaves existing distributions of privilege intact while convincing both the winners and the losers that they deserve their lot in life." Lani Guinier, Commentary, *Confirmative Action*, 25 *LAW & SOC. INQUIRY* 565, 573 (2000). See generally STEPHEN J. MCNAMEE & ROBERT K. MILLER, JR., *THE MERITOCRACY MYTH* (2004).

While Paul Cravath did not share Young's cynicism, his merit-based Cravath System had exactly the effect Guinier suggested—it installed as the professional elite those with power while convincing both the winners and the losers that they deserve their lot in life. *Infra* Part I.B.

19. 2 SWAINE, *supra* note 11, at 265.

20. ARTHUR H. DEAN, *WILLIAM NELSON CROMWELL 1854-1948: AN AMERICAN PIONEER IN CORPORATION, COMPARATIVE AND INTERNATIONAL LAW* 85 (1957).

21. Of course, since most lawyers were Protestant, this seemingly secular professional role morality existed in the shadow of Protestant values. See, e.g., DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 7, 51-52 (Baltimore, Joseph Neal 2d ed. 1836) (offering law

In fact, Cravath's version of merit-based professionalism was aligned with the emerging notions of professionalism advocated by the newly organized legal profession.<sup>22</sup> Magali Larson has famously argued that the "professional project" is "an attempt to translate one order of scarce resources—special knowledge and skills—into another—social and economic rewards."<sup>23</sup> Importantly, Larson argued that the legitimacy of professionalism was not based on class and property but "on the achievement of socially recognized expertise" and on the creation of a systematic body of knowledge: the image of formal training and meritocratic standards was a desirable asset, lending high public credibility to the claims of expertise and professionalism.<sup>24</sup>

The legitimacy of both the "professional project" and, more specifically, the new entity's claim for professional status depended on avoiding "irrelevant" considerations such as attorneys' religious affiliations or cultural backgrounds. As the legal profession and large law firms were trying to establish their professional status, the latter could not afford to acknowledge formally a religious or cultural identity. Large law firms bearing an explicit religious identity would have been inconsistent with the claim for merit-based professionalism and would have pulled out the rug from underneath the law's "professional project."

Moreover, the apparent rejection of religion as a constitutive feature of the Cravath System was consistent with the teachings of formalism, the dominant American jurisprudential school of thought until the 1920s and 1930s.<sup>25</sup> Formalism celebrated law as an independent science, a body of esoteric knowledge based on and derived from general self-contained principles.<sup>26</sup> In particular, law was to be independent of religion,<sup>27</sup> the practice of law was to

students a prayer and proposed resolutions about religious worship and studious commitments in his proposed course of study).

22. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 54 & n.23 (1986). See generally RICHARD L. ABEL, *AMERICAN LAWYERS* 18-30 (1989) (exploring the profession's struggle to control the market for legal services); AUERBACH, *supra* note 11, at 40-52; HOFFMAN, *supra* note 9, at 203-04.

23. LARSON, *supra* note 5, at xvii. Larson explains:

professionalization [is] the process by which producers of special services [seek] to constitute and control a market for their expertise. Because marketable expertise is a crucial element in the structure of modern inequality, professionalization appears *also* as a collective assertion of special social status and as a collective process of upward social mobility.

*Id.* at xvi.

24. *Id.* at xvi-xvii.

25. See generally AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960*, at 9-31 (1992).

26. 1 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAW* §§ 3.2, 3.4, 4.12 (1935); C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS*, at vii-ix (Boston, Little, Brown & Co. 2d ed. 1879); 2 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 657-58 (Guenther Roth & Claus Wittich eds., 1978).

27. See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, Lecture V, 157-58 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) ("The existence of law

be free of religious influences,<sup>28</sup> the professional identity of attorneys was to be separate and distinct from their religious identity, and the religious identity of a firm was to be non-existent. For the new law firm to formally adopt a religious identity would have amounted to a rejection of formalism and its claim for the law's independence from religion.<sup>29</sup>

*B. The Reality: The "Hidden" WASP and White-Shoe Identity of the Large Firm*

By 1920, the supposedly a-religious organizational structure of the Cravath System dominated the expanding world of large law firms,<sup>30</sup> and by the 1960s, it was so entrenched as to become synonymous with the notion of the large law firm.<sup>31</sup> And yet, in reality, large New York City law firms did have an explicit religious and cultural identity. Until 1945, without exception, all large law

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is one thing; its merit or demerit is another. . . . A law, which actually exists, is a law, though we happen to dislike it . . . . Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense."'). For contrast, *see* ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Human (J.G. Dawson trans., 1965) ("There is no law unless it be just. So the validity of law depends on its justice. . . . Thus all humanly enacted laws are in accord with reason to the extent that they derive from the natural law. And if a human law is at variance in any particular with the natural law, it is no longer legal . . .").

28. *But see, e.g.*, DAVID HOFFMAN, *supra* note 21, at 7, 51-52.

29. Explaining why nineteenth-century large law firms attempted to present themselves as a-religious is not the same as explaining why twentieth-century scholars of large firm organization bought into that claim. And yet, while the distinctive religious identities of large law firms were once familiar facts of professional life and the stratification of the elite bar documented, the existing literature on large law firm organization does not identify religious identity as a constitutive feature of those firms. The scholarly omission of exploring the religious roots of large law firms is explained in part by what Morton Horwitz calls "Presentism"—the attempt to explain historical phenomena from a contemporary perspective, thus failing to appreciate considerations that were important at the time but are not today. *See, e.g.*, Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251 (1975). The present-day rejection of religion as a relevant consideration in the organization of legal institutions and the omnipresence of large law firms make it harder for contemporary scholars to appreciate a reality where religion could have played a different role.

Weber similarly observed that when capitalism became so prevalent that "the attempts of religion to influence economic life" were perceived as "unjustified interference," it was hard to appreciate, even imagine, the important relationship that once existed between religious beliefs and the spirit of capitalism. *See* MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 72-73, 180-81 (Talcott Parsons trans., 1958).

30. HOBSON, *supra* note 7, at 201.

31. AUERBACH, *supra* note 11, at 23-25; Sussman, *supra* note 10, at 970 ("The Cravath system remained the model for big firms until very recently."); *see also* David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 423-26 (1994) (contrasting and comparing the Cravath System to European models).

firms were WASP and, for many years to follow, large firms were known as either WASP, Jewish, or Catholic. Given the dominance of the Cravath System and its merit-based ideology, the de facto religious identity of large law firms appears perplexing.

To be sure, the WASP identity of the large firm was not hidden at the time from practitioners<sup>32</sup> or from scholars of the legal profession.<sup>33</sup> The important question is not whether the large law firm had a de facto religious and cultural identity, but rather, given its purported commitment to meritocracy, why did it have a WASP identity?

### 1. *Nativism, anti-Semitism, and snobbery*

Nativism, combined with anti-Semitism and cultural snobbery, appears to provide a straightforward explanation for the inconsistency between the a-religious theory of the large firm and the reality of large law firms divided along religious lines. Protestants were the native population in the United States and arguably used the advantage of nativism to oppose the ambitions of immigrants.<sup>34</sup> Specifically, the majority of American lawyers in the eighteenth and nineteenth centuries were Protestant.<sup>35</sup> By the late nineteenth and early twentieth century, even as newcomers entered the profession, the majority of graduates of elite law schools—the graduates recruited by large firms pursuant to its meritocratic path of excellence—were Protestant.<sup>36</sup> One might be tempted to conclude that the “religious identity” of the large law firm was both temporary and superficial: temporary because, as the American legal profession became more heterogeneous, large law firms would presumably hire and

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32. Note, *The Jewish Law Student and New York Jobs: Discriminatory Effects in Law Firm Hiring Practice*, 73 YALE L.J. 625, 635 (1964) (“Gentiles were more successful than Jews in getting good jobs, and in getting the jobs of their choice.”); Eli Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?*, 76 UMKC L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1138437>.

33. See, e.g., AUERBACH, *supra* note 11; SMIGEL, *supra* note 7.

34. Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 625-26 (1994).

35. HURST, *supra* note 7, at 249-55, 313-19.

36. An example of nativism in action was apprenticeships, which not only prepared lawyers for the profession, but also served as “an efficient instrument of social control, limit[ing] the number of lawyers and assur[ing] enough work.” Menkel-Meadow, *supra* note 34, at 625. Such apprenticeships kept the legal profession “relatively homogenous in terms of race and class.” *Id.* Following World War I, nativist and patriotic sentiments flourished within the ranks of the profession. See G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 16 (1997). However, as apprenticeships became less common, nativism surfaced instead in regulatory attitudes and admission quotas at elite law schools. *Id.* at 17-18; see also ABEL, *supra* note 22, at 40-73 (studying attorney regulation and the role played by elite law schools in restricting access to the legal profession and specifically to its elite spheres).

promote more non-Protestant lawyers, and superficial because it was nothing more than a reflection of the religious identity of the lawyers it employed rather than an expression of religious values and commitments.

Historical hindsight clearly disproves this temporal account. By the 1960s, the New York City bar was roughly sixty percent Jewish,<sup>37</sup> and the pool of elite law school graduates expanded dramatically to include the sons of immigrants with lower socioeconomic pedigrees, who were often Jewish,<sup>38</sup> and these “aspirants” began to rank at the top of their classes. Yet the large WASP law firms remained very much WASP firms, failing to reflect the growing heterogeneity of the New York City bar.<sup>39</sup>

Nor was the religious identity of the large firms superficial. While the merit-based hiring and promotion criteria of the Cravath System purported to ignore irrelevant considerations such as social standing and religious affiliation, its “carefully prescribed path” was never based on merit alone. Rather, “[i]n addition to academic credentials [the young men] were expected to possess ‘warmth and force of personality’ and ‘physical stamina.’”<sup>40</sup> These hard-to-quantify and difficult-to-assess qualities were a cover for, or at least directly correlated with, certain religious, socioeconomic, and cultural characteristics.<sup>41</sup> In other words, large firms used the “warmth of personality” standard to systematically exclude candidates who satisfied their merit-based criteria but nonetheless were not considered among the “best men”—young, white, Anglo-Saxon Protestant men from affluent socioeconomic backgrounds.<sup>42</sup>

Clearly, the religious identity of the large firm could not be attributed solely to nativism and the religious identity of its attorneys who happened to be Protestant, because the large firm remained predominantly Protestant even when non-Protestant lawyers could have been hired and promoted. This was the result of hiring and promotion practices that were blatantly at odds with the fundamental premise of the Cravath System—meritocracy.

No doubt that there were some anti-Semitic partners at some large law firms at the time who invoked the “warmth of personality” rhetoric to exclude Jewish attorneys for religious and ethnic-based discriminatory reasons.<sup>43</sup> Certainly, the large firms also featured some elitist snobs, who used the

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

38. *See id.* at 18-32.

39. *See id.* at 32-34.

40. AUERBACH, *supra* note 11, at 24.

41. *See id.* at 25.

42. *See id.* (“There was ‘little room for young aspirants outside the favored groups.’” (quoting CHARLES EVANS HUGHES, *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 76 (David J. Danelski & Joseph S. Tulchin eds., 1973))).

43. *Id.* at 71-73, 99-101.

“stamina” criterion to dispose of Jews and WASP candidates of a lower socioeconomic background due to class-based bias.<sup>44</sup>

Moreover, commitment to professionalism based on merit should not be overstated. Prominent large law firm partners and leaders of the organized bar clearly discriminated against minority lawyers and on occasion did not shy away from making derogatory statements on the record. Commitment to meritocracy, as it turns out, was more a question of degree. Yet nativism, even when infused with anti-Semitism and snobbery, fails to fully explain the hiring and promotion patterns at large law firms because exclusion of otherwise qualified candidates for religious and cultural reasons directly contradicted the merit-based vision and organizational structure of the Cravath System and risked the success of its “professional project.” The Cravath System was the embodiment of a real commitment of visionaries such as Paul Cravath. Seemingly contradictory dedication to Protestant values and the white-shoe ethos as evidenced by the near exclusive hiring and promotion of WASP attorneys thus cannot simply be explained in terms of nativism, anti-Semitism, and snobbery.

## 2. The “hidden” religious identity of the large WASP firm

When it first emerged, the large corporate law firm was not part of the established legal elite. While the corporate lawyer was gradually displacing the litigator as the paradigmatic attorney of the era,<sup>45</sup> the large law firm’s new brand of professionalism and close association with its corporate clients were perceived by some as a race to the bottom, even a “sell out”:<sup>46</sup>

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44. See HOFFMAN, *supra* note 9, at 20 (describing Davis Polk as the “epitome of the ‘white-shoe’ firm,” and observing that its attorneys “probably include the highest proportion of Social Register names on Wall Street”). See generally JOSEPH EPSTEIN, SNOBBERY: THE AMERICAN VERSION (2002); RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE (1963); RICHARD A. POSNER, PUBLIC INTELLECTUALS (2001); WILLIAM MAKEPEACE THACKERAY, THE BOOK OF SNOBS (John Sutherland ed., St. Martin’s Press 1978) (1846) (depicting the British version of snobbery).

45. The late 1890s “was the era of the emergence of the ‘corporation lawyer’—the lawyer who, with experience, has acquired special skills in the organization, financing, operation and reorganization of large corporations.” WALTER K. EARLE & CHARLES C. PARLIN, SHEARMAN AND STERLING: 1873-1973, at 123 (2d ed. 1973). “During the period from about 1894 to the end of the war [WWI] the practice of law was undergoing a gradual reorganization corresponding to a change in viewpoint . . . the very rise of a class of counselors in the profession who served as advisers to business rather than as advocates . . .” DAVIS POLK WARDWELL GARDINER & REED, DAVIS POLK WARDWELL GARDINER & REED: SOME OF THE ANTECEDENTS 27 (1935).

46. See, e.g., Louis D. Brandeis, The Opportunity in the Law, Address Before Harvard Ethical Society, in 39 AM. L. REV. 555 (1905) (urging a graduating class of law students to stand their professional ground and practice as lawyers for the people instead of as servants of corporate interests).

The concept of a business lawyer seems logical now, but it was a new idea a century ago, and it was controversial. . . . There was, however, criticism of the corporate law concept within the legal profession. Many resisted the change implicit in the new dimension pioneered by Cromwell and others. It was feared that many lawyers, including some of the leaders of the profession, were becoming mere tools of powerful financial interests. There was apprehension that lawyers would lose sight of their obligations to the ordinary citizen.<sup>47</sup>

The large firm with its new ideology of professionalism was fighting to establish itself as the elite. Indeed, while “[t]he term ‘office lawyer’ was never lacking in dignity or respect; it merely lacked the halos which shone down upon the heads of advocates, the knights in shining armor.”<sup>48</sup>

Rather than being based simply on nativism and bigotry, the use of a “warmth of personality” standard to exclude undesirable “aspirants” was founded on the large law firm’s effective campaign to first establish a credible claim for elite professional status within the ranks of the profession and subsequently to maintain its dominance as the professional elite.<sup>49</sup> The large law firms attempted to translate Protestant values and the white-shoe ethos into professional capital, or, more accurately, to translate elite religious and cultural statuses into professional elite status.<sup>50</sup> For the WASP firms, professionalism was a collective assertion of special social status and a collective process of upward social mobility within the ranks of the profession. The translation process was complex, purporting to rely on special legal knowledge assessed by meritocratic standards to achieve social and economic rewards but in fact substituting scarce professional resources for scarce religious and cultural resources. The campaign for elite professional status consisted of three steps: claiming adherence to professional excellence and merit-based standards,

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47. SULLIVAN & CROMWELL 1879-1979: A CENTURY AT LAW 14 (1979). Arthur Dean opined that:

The nation’s industrial growth in the early 1870’s and 80’s . . . demanded a somewhat different breed of lawyer from the combination trial lawyer-politician-statesman-orator-classicists who were traditionally the leading members of the bar. . . . These new, factual-minded attorneys were hard-headed business counselors and draftsmen of precise legal documents, wills and trust agreements, who rarely appeared in court themselves.

DEAN, *supra* note 20, at 52-53.

48. EARLE & PARLIN, *supra* note 45, at 28; *id.* at 223-24 (“As the practice in the fields of finance and business law increased in volume and importance, its appeal to ambitious young men studying to become lawyers likewise increased. Many of the best of them wanted to work in New York (or in other large cities) and to become ‘corporation lawyers,’ or at least, to break ground in the large ‘corporation law’ firms, where they could be exposed to the operations of Big Business, with its excitement, stimulation and training—at the cost to them of long hours of hard work.”).

49. See generally Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1044-62 (1995) (exploring status production as an organizational motivation).

50. See *supra* notes 22-24 and accompanying text.

manifested in the Cravath System, transferring and translating elite religious (Protestantism) and cultural (white-shoe) status into professional status, and demeaning the status of other segments of the legal profession.

In his seminal work, *The Protestant Ethic and the Spirit of Capitalism*, Weber explored the interplay between religious beliefs, economic ideology, and social institutions, examining the role Protestant values played in fostering conditions conducive to the growth of the capitalist system<sup>51</sup> and concluding that the spirit of capitalism found “in the ethic of ascetic Protestantism . . . a consistent ethical foundation.”<sup>52</sup>

Weber argued that Protestant values informed moral practice—that is, they shaped “those psychological sanctions which, originating in religious belief and the practice of religion, gave a direction to practical conduct,”<sup>53</sup> which was both consistent with the spirit of capitalism and weakened traditional moral values that were inconsistent with capitalism. The notion of a calling, defined as the valuation of the fulfillment of duty in worldly affairs as the highest form which the moral activity of the individual could assume, justified and legitimized a perception of work broader than simply labor as the means of satisfying one’s needs. Belief in predestination cultivated intense commitment to worldly activity as a means of proving one’s faith, producing a moral sensibility according to which “God helps those who help themselves.”<sup>54</sup> Pietism led to intensified asceticism and the development of a unified system of rational methodical control of human life.<sup>55</sup> Religious grace required one “methodically to supervise” one’s own conduct in a state of grace leading to “rational planning of the whole of one’s life.”<sup>56</sup> Weber concluded:

[T]he religious valuation of restless, continuous, systematic work in a worldly calling, as the highest means to asceticism, and at the same time the surest and most evident proof of rebirth and genuine faith, must have been the most powerful conceivable lever for the expansion of that attitude toward life which we have here called the spirit of capitalism.<sup>57</sup>

Weber was careful not to overstate the nature of the relationship between Protestant values, capitalism, and specific social institutions: “[W]e only wish to ascertain whether and to what extent religious forces have taken part in the qualitative formation and the quantitative expansion of [social institutions] . . . by investigating certain correlations between forms of religious belief and

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51. Explaining the organization of his book, Weber asserted that his goal was to study “the influence of certain religious ideas on the development of an economic spirit, or the *ethos* of an economic system.” WEBER, *supra* note 29, at 27.

52. *Id.* at 170.

53. *Id.* at 97.

54. *Id.* at 115. *See generally id.* at 111-15.

55. *Id.* at 117-19.

56. *Id.* at 153.

57. *Id.* at 172.

practical ethics . . . .”<sup>58</sup> Importantly, Weber never argued that Protestantism “caused” capitalism;<sup>59</sup> rather, he identified compatible ethical foundations underlying Protestantism and capitalism.<sup>60</sup>

In this Weberian sense, Protestant values constituted part of the ethical and moral underpinning of the large law firm.<sup>61</sup> Protestant values, to be sure, did not “cause” or lead to the emergence and growth of large law firms. Rather, Protestant asceticism cultivated conditions conducive to the development of such firms in two interrelated ways: first, indirectly, by elevating the practice of law to a calling, and second, directly, by providing the cultural building blocks of their organizational structure.

First, Protestant values simultaneously informed the conception of law as a profession and its perception in America as a civic religion with lawyers

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58. *Id.* at 91.

59. A significant body of empirical work in the 1950s and 1960s attempted to examine Weber’s thesis in contemporary American life by testing the so-called Protestant Ethic hypothesis—the theory that Protestants are more economically ambitious or more achievement-oriented than Catholics. *See, e.g.,* Raymond W. Mack et al., *The Protestant Ethic, Level of Aspiration, and Social Mobility: An Empirical Test*, 21 AM. SOC. REV. 295, 295-96, 300 (1956) (studying whether the Catholic and Protestant faiths in American society exert significant influence on behavior and concluding that “whatever influence these two religious subcultures have upon their adherents is [likely] overridden by the general ethos”). Subsequent work criticized such studies for misunderstanding and therefore expecting too much of Weber’s thesis. *See* Andrew Greeley, *The Protestant Ethic: Time for a Moratorium*, 25 SOC. ANALYSIS 20 (1964) (summarizing empirical work and criticizing it for simplifying Weber’s thesis and trying to extract from it unrealistic predictions regarding upward mobility). Weber, however, did not expect an individual-level relationship to exist between personal piety and work ethic. Rather than directly causing or explaining patterns of upward mobility, his insights explain how religious and infused moral sensibility shaped individual behavior and thus social institutions. Indeed, according to Weber, “cultural ethos was thought to be pervasive, influencing devout and atheists alike, within Protestant societies.” PIPPA NORRIS & RONALD INGLEHART, SACRED AND SECULAR 161 (2004).

60. Weber cautions that while in contemporary times we might be tempted to discount the influence of religion as an integral component in the formation of social order and social institutions, we need to remember past realities in which religion played an important role in creating conditions necessary for the rise of new economic orders. WEBER, *supra* note 29, at 27, 72-73. Robert Stebbins argues that the Protestant ethic is “a dead letter today” and that contemporary “work ethic is but a secular version of the Protestant ethic.” ROBERT A. STEBBINS, BETWEEN WORK AND LEISURE 24, 27 (2004). Nonetheless, Stebbins contends that the Protestant ethic was “an important cultural precursor of the modern work ethic. It helped steer the search for the cultural value of activity toward the domain of work[;] . . . work is good and hard work is even better.” *Id.* at 25. For an analysis of the consequences of secularization on Western work ethic, see NORRIS & INGLEHART, *supra* note 59, at 159-79.

61. To be clear, Weber sought to explain European, not American, history. I follow Weber in exploring religious forces that have taken part in establishing conditions for the qualitative formation of the large law firm, and argue that professionalism, as embodied and practiced by the large law firm was inspired by and relied on the Protestant values of a restless continuous work in a worldly calling, predestination, pietism, asceticism, and religion as a system of rational control of life.

installed as its high priests.<sup>62</sup> A defining characteristic of law as a profession—its claim to be practiced as a calling and a vocation<sup>63</sup>—established law as a secular avenue through which one could pursue religious grace.<sup>64</sup> It is thus no coincidence that the Protestant idea of the “new aristocracy” of the select few who will successfully manage to live according to the standards of an ethic of labor in a calling, the “soldiers of a new faith and the champions of God,”<sup>65</sup> is reminiscent of de Tocqueville’s observation regarding lawyers as the American aristocracy.<sup>66</sup> That is, the Protestant conception of labor as a calling served as a pretext for the rise of law as a profession and the establishment of law as an arena in which to pursue religious grace in the form of a legal calling.<sup>67</sup>

Moreover, while Protestant values were separate and distinct from any specific forms of legal institutions,<sup>68</sup> they were implicitly consistent with a

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62. See, e.g., Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies and Practices of New York City Lawyers, 1879-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA*, *supra* note 8, at 64 (exploring the elevated role and status of lawyers in American society); see also ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993) (bemoaning the fall of the “lawyer-statesman” ideal and the ability of lawyers to live up to it in contemporary practice realities). Kronman’s nostalgic account of the lawyer-statesman is consistent with Gordon’s depiction of lawyers as high priests of law as a civic religion. Importantly, unlike Kronman, Gordon does not take a normative position as to whether the fall of lawyers from positions of public power is a desirable or a regrettable development.

63. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953) (defining a profession as a group “pursuing a learned art as a *common calling in the spirit of a public service*—no less a public service because it may incidentally be a means of livelihood” (emphasis added)); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS. Q.* 1 (1975) (identifying public service as a defining characteristic of professionalism).

64. Weber studied ascetic Protestantism as the origin of the Western conception of personality. See HARVEY GOLDMAN, MAX WEBER AND THOMAS MANN: *CALLING AND THE SHAPING OF THE SELF* 131-68 (1988) (developing Weber’s conception of personality). See generally WEBER, *supra* note 29, at 95-154. Applying Weber’s thesis to the large law firm context and specifically to the development of the professional identity of the large law firm attorney suggests that in the late nineteenth and early twentieth centuries ascetic Protestantism informed the formation of the professional personality and identity of the American lawyer.

65. GOLDMAN, *supra* note 64, at 167.

66. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272-80 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1945) (1835); see also LARSON, *supra* note 5, at 166-77 (explaining how the legal profession sought to insert itself in the upper rungs of the status system).

67. Some argue more strongly that Protestant values not only informed and inspired the evolution of professionalism but that professionals took advantage of and manipulated religious dogma. See BURTON J. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA* 102 (1976).

68. Cf. WEBER, *supra* note 29, at 65 (discussing the rise of the “spirit of capitalism” within traditionalist regimes). Weber is careful not to over-state the nature of the relationship between Protestant values and specific social institutions. “We only wish to ascertain whether and to what extent religious forces have taken part in the qualitative formation and

particular legal institution, namely the large law firm. Protestant values supported a spirit, an ethos, and an ethical infrastructure, as opposed to a mere impulse,<sup>69</sup> for the creation of large firms as the way to practice law as a calling. The notion of performing one's moral duty in a legal calling was the ideal breeding ground for the new large law firm. The practice of law as a calling was a secular avenue in which one could pursue religious grace and the large law firm was the new rational, methodic, efficient form to pursue it. Thus the new large WASP law firm was the manifestation of Protestant values—work for a calling, intense commitment to worldly affairs, asceticism, and rational organization.

Not only did the notions of work in a calling, asceticism, and rational organization, adapted to the professional arena, inform the culture of the firm, but the same moral foundation also led to identification with organizational goals and values and to development of loyalty and organizational commitment.<sup>70</sup> That is, Protestant values help explain the sense of loyalty of large law firm attorneys to the institution and therefore the lack of competitive conditions within and among the large WASP law firms.<sup>71</sup> A contemporary perspective and current practice realities might suggest that the large firm

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the qualitative expansion of [social institutions],” identifying “certain correlations between forms of religious belief and practical ethics.” *Id.* at 91.

69. Just as Weber's thesis regarding the relationship between religious values and economic spirit does not exclude the importance of other factors such as education and minority status in explaining the rise of capitalism, see Richard L. Means, *Protestantism and Economic Institutions: Auxiliary Theories to Weber's Protestant Ethic*, 44 SOC. FORCES 372 (1966), I do not belittle the importance of other factors in explaining the emergence and rise of the large law firm. In fact, the white-shoe ethos, alongside Protestant values, played a significant role in creating conditions conducive to the rise and growth of the large law firm. See *infra* Part I.B.3.

70. See generally Aryeh Kidron, *Work Values and Organizational Commitment*, 21 ACAD. OF MGMT. J. 239 (1978) (using the Protestant Ethic to predict organizational commitment).

71. In a telling narrative, Lisagor and Lipsius describe the loyalty of Sullivan & Cromwell associates in the context of the working long hours in the office:

All the lawyers worked extremely hard, including nights and Sundays. Trials forced the small staff to stay at the office until three or four in the morning, then have to get up to start again at seven the next day. Despite the tensions of overwork and constant courtroom preparation, not even the petroleum exchange speech [the large case at that time] caused an argument to intrude on the firm's congenial prosperity.

NANCY LISAGOR & FRANK LIPSUIS, *A LAW UNTO ITSELF: THE UNTOLD STORY OF THE LAW FIRM OF SULLIVAN & CROMWELL* 22 (1988). The associates displayed such loyalty notwithstanding the fact that they were not quickly rewarded with partnerships.

The lawyers who joined Sullivan & Cromwell just out of law school hoping to make their careers found instead that they remained associates for an unconscionably long time. Hjalmar Boyesen stayed an associate for twenty years. . . . Emery Sykes worked at the firm for forty-seven years, nearly as many as William Corlis's fifty. But neither became a partner.

*Id.* at 57-58. Yet, these associates remained loyal to Sullivan & Cromwell, evincing that they regarded their practice at Sullivan & Cromwell as a calling, explaining why an attorney would remain an associate with relative little pay for such a long time.

“bought” the loyalty of its associates with high pay, as exemplified by Cravath’s documented salary raises.<sup>72</sup> Yet such measures did not take place until the late 1960s. In the late nineteenth century and early twentieth century loyalty to the firm may better be understood in terms of commitment to Protestant values rather than the interest of associates in higher pay.

Though some scholars attempted to expressly base professional values on religious values,<sup>73</sup> Protestant values did not have such a direct causal impact on the emergence and rise of large law firms. Rather, in the Weberian sense, Protestant dogmatic foundations and Protestant work ethic, which were generally consistent with the spirit of the law as a profession and the practice of law as a calling, specifically informed and inspired the organizational structure and culture of the large WASP law firm, and, importantly, legitimized its claim to elite professional status.<sup>74</sup>

The Cravath firm exemplifies the impact of Protestant values and ethic on the organization of the law firm. Associates and partners alike were required to consider the practice of law to be their primary interest, and “solely as a member of the Cravath team.”<sup>75</sup> Associates, and even partners, were expected

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72. In 1968, the Cravath firm, breaking with the unofficial cartelistic rules of conduct regarding the “going rate” that had set New York salaries for the preceding decades, increased starting associate salaries from \$10,500 to \$15,000. *See GALANTER & PALAY, supra note 1, at 56.* These raises were then matched by the major New York firms and also exerted upward pressure on salaries in comparable firms around the country. *Id.* Cravath repeated the exercise in the 1980s, *see* Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 60 (1988), and the 1990s, *see* Edward A. Adams, *Cravath Raises Current Associates’ Pay*, N.Y.L.J., Dec. 20, 1994, at 1 (reporting that Cravath raised senior associate salaries attempting to retain valuable lawyers).

73. In *The Importance of Religion to the Legal Profession*, Boardman asserts that: “[A] profession clothed with so lofty a mission, needs, both for its own sake and for the sake of the country, to be pervaded with a wholesome religious sentiment. . . . [P]iety is the basis of good morals. It makes men conscientious.” HENRY A. BOARDMAN, *THE IMPORTANCE OF RELIGION TO THE LEGAL PROFESSION* 8 (Phila., Wm. S. Martien 1849); *see also* DAVID HOFFMAN, *A COURSE OF LEGAL STUDY* 51-52, 720-24 (Baltimore, Joseph Neal 2d ed. 1836). Contemporary scholars fashioned a more savvy implicit approach. Thomas Shaffer constructs a professional ethic that more explicitly incorporates religious sensibilities. *See* Thomas L. Shaffer, *The Gentleman in Professional Ethics*, 10 QUEEN’S L.J. 1, 35 (1984) (“What rends the gentleman-lawyer’s professional ethic is that gentlemen-lawyers think they can save their clients from suffering.”).

74. In fact, in the Weberian sense, the Protestant ethic also informed and inspired the structure and organization of the large Jewish firms. Weber argued that in contemporary times, while the form of religion remains, its spirit is vanishing away and that as “the religious roots died out [they gave] way to utilitarian worldliness.” WEBER, *supra* note 29, at 176. He concluded: “What the great religious epoch . . . bequeathed to its utilitarian successor was, however, above all an amazingly good . . . conscience in the acquisition of money . . . .” *Id.* Similarly, as the religious foundation of the WASP firm died out it left behind a utilitarian organizational structure which the large Jewish law firms adopted. *See infra* Part II.B.

75. 2 SWAINE, *supra* note 11, at 9.

to remain available and dedicated to the practice of law continuously. For example:

much of Cravath's work with the associates was at night . . . Many nights young lawyers from the office sat [at his home] awaiting his return, spent an hour or two past midnight going over papers or discussing a question of law with him, and then returned to the office with instructions to be back at eight o'clock in the morning with a new draft or the answer.<sup>76</sup>

Partners worked equally hard.

The story, doubtless apocryphal, has long been told that when some of his partners urged that the office was under such pressure as to make additions to the staff imperative, Moore replied: 'That's silly. No one is under pressure. There wasn't a light on when I left at two o'clock this morning.'<sup>77</sup>

Moreover, in his history of the Cravath firm, Swaine repeatedly mentions a particular partner's religious commitments as evidence of that partner's "warmth of personality."<sup>78</sup> Indeed, nearly every attorney promoted to partner from the time Paul Cravath, himself an eighth-generation American Protestant,<sup>79</sup> took charge until the firm's history was written in 1948 was of the appropriate religious lineage.<sup>80</sup> Similarly, accounts of Shearman & Sterling and Sullivan & Cromwell partners refer to the partners' Protestant values and lifestyle as evidence of their professional merit and excellence.<sup>81</sup>

76. *Id.* at 124.

77. *Id.* at 143.

78. For example, "Neilson's [a partner who came to the Cravath firm in 1906] genial smile, ready sense of humor and *great warmth of personality* attracted an extraordinarily large number of friends. He was a member and vestryman of Trinity Church at Hewlett, N.Y., and a member of St. James' Protestant Episcopal Church of New York City . . ." *Id.* at 145 (emphasis added).

79. 1 SWAINE, *supra* note 11, at 581.

80. See 2 SWAINE, *supra* note 11. To cite a few examples:

Douglas Maxwell Moffat entered the Cravath firm in 1909, "a vestryman of St. James' Protestant Episcopal Church of New York City," *id.* at 148, whose grandfather was an ordained Presbyterian minister, *id.* at 146.

Robert Taylor Swaine, who joined the firm around 1917, had ancestors from Yorkshire, England. His grandfather was a chaplain in the Civil War and his grandmother descended from devout Quakers and Methodists. His mother, Alice, "inherited . . . a zest for learning and *religion* which dominated her son's early years." *Id.* at 162 (emphasis added).

Richard Hooker Wilmer joined the firm in 1924. Of English descent, and a Protestant, "Richard's great-grandfather, the Reverend Dr. William Holland Wilmer . . . was the first Rector of St. John's Episcopal Church, Washington." *Id.* at 469.

It should be noted that of the principal partners of the period, Carl August de Gersdorff, Edward Cairns Henderson, Paul Drennan Cravath, and William D. Guthrie, all were Protestant, 1 SWAINE, *supra* note 11, at 493-495, 581, 671, with the exception of the latter who was a "devout communicant of the Catholic Church and an ardent friend of France." *Id.* at 361.

81. At Shearman & Sterling:

Mr. Garver delighted in his country home at Oyster Bay, with its gardens and trees. There he lived a large part of the year in simple comfort. He abhorred ostentation . . . To round out

Protestant values thus help explain the de facto existence of religiously divided law firms. To be sure, the goal of the large law firm in its formative era was never per se to exclude Jewish lawyers. If that had been the goal of the WASP firms, nativism and prevailing anti-Semitism would have sufficed. Rather, the WASP firm sought to establish itself as the professional elite. To achieve professional status it purported to organize itself as a meritocracy, consistent with the bar's "professional project." Yet in order to achieve elite professional status within the profession, the large law firm constituted itself as a Protestant-inspired institution, so it could translate elite religious status into elite professional status. Welcoming Jewish attorneys or, later on, even competing with Jewish law firms, would have been inconsistent with its translation project, vowing for upward social mobility within the ranks of the legal profession.<sup>82</sup>

### 3. The "hidden" cultural identity of the large WASP firm

The large law firm's campaign for elite professional status also relied on the cultural status of its attorneys and clients. This resulted in a cavalier and elitist concept of professionalism, establishing a gentlemanly, anti-competitive legal environment that reflected the firm's focus on high socioeconomic and cultural values: compensation was scarcely discussed;<sup>83</sup> lateral hiring was taboo;<sup>84</sup> competition for clients was considered discourteous,<sup>85</sup> and the firms cooperated in setting the "going rate"—the starting salary of associates in lieu of a market-determined rate.<sup>86</sup> Advertising and client solicitation were forbidden,<sup>87</sup> in part because the large firms needed to do neither.

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this brief sketch of Mr. Garver, we mention his variety of interests and activities . . . . He was, all in all, a civilized, educated and cultured gentleman; and one of the best lawyers we have ever known.

EARLE & PARLIN, *supra* note 45, at 197-98. At Sullivan & Cromwell, the partner to succeed Mr. Cromwell, John Foster Dulles, "was part of a family with diplomatic and religious traditions that strongly influenced his life and career. . . . Foster Dulles' father was a Presbyterian clergyman." SULLIVAN & CROMWELL 1879-1979: A CENTURY AT LAW, *supra* note 47, at 28.

82. See *supra* notes 22-24 and accompanying text.

83. Often, an associate did not know what to expect upon making partner. See SMIGEL, *supra* note 7, at 92.

84. See HOFFMAN, *supra* note 9, at 60-61 (noting the rarity of lateral movement by individual lawyers and that there were no "open breaks").

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

86. SMIGEL, *supra* note 7, at 57-59.

87. Not until the mid-1970s did the Supreme Court, in a line of cases dealing with various states' ethics rules, question the cavalier and anti-competitive apparatus instituted by the organized bar dominated by the large law firms. See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding that a ban on price advertisement violates First Amendment commercial speech rights); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975) (holding that a fee schedule constituted price fixing in violation of section 1 of the Sherman Act). In *Bates*, the Court

Instead of competition, the firms relied on socioeconomic, cultural, and religious networking to establish their elite status, attract elite law students and secure elite corporate clients. These anti-competitive practices were based on the white-shoe ethos, upper-class privilege, and cultural standing.<sup>88</sup> They reflected, and intentionally meant to capture, the elite socioeconomic and cultural status of the firm, of the lawyers the firm employed, and of the clients the firm represented. The large law firm fought to establish, and later to maintain, a credible claim to elite professional status. It was attempting to build, and to translate the elite socioeconomic and cultural status of its attorneys and clients into, elite professional status.<sup>89</sup>

It is important to note that while the Cravath System revolutionized the practice of law—replacing old, paternalistic, lawyer-centered, inefficient professional habits with client-centered, cost-effective, service-minded principles—the large law firm, nonetheless, did not induce market competition for legal services. To the contrary, the large law firm’s vision of professionalism suppressed market competition, instead building on social connections of the old-boys’ club sort, the white-shoe ethos, and Protestant values to establish and maintain elite professional status. Professionalism—

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explicitly rejected respondents’ claim that price advertising will bring about enhanced commercialism and “irreparably damage the delicate balance between the lawyer’s need to earn and his obligation selflessly to serve.” 433 U.S. at 368. *But compare In re Primus*, 436 U.S. 412 (1978) (allowing attorney solicitation for nonprofit impact litigation), *with Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978) (upholding sanctions on lawyer who sought plaintiff in a tort suit).

88. White-shoe law firms are “owned and run by members of the WASP elite who are generally conservative,” says Princeton University *WordNet*. WordNet, WordNet Search Results for “White-Shoe,” <http://wordnet.princeton.edu/perl/webwn?s=white-shoe&sub=Search+WordNet&o2=&o0=1&o7=&o5=&o1=1&o6=&o4=&o3=&h=0>. For an assessment of the meaning and currency of white-shoe, see Elizabeth Chambliss, *The Shoe Still Fits: The White Buck Is Gone from Elite Law Firms, but the Snobbery It Represented Lives On*, LEGAL AFF., Sept.-Oct. 2005, at 18, available at [http://www.legalaffairs.org/issues/September-October-2005/toa\\_sepoct05.msp](http://www.legalaffairs.org/issues/September-October-2005/toa_sepoct05.msp) (exploring the historical and current social and cultural meanings of “white-shoe”).

89. Lisagor & Lipsius report that “[e]very partner at Davis, Polk, for instance, was in the social register. According to the novelist Louis Auchincloss, whose father was a Davis, Polk partner, ‘The firm would have been shocked that its senior partner would ever be Jewish,’ as occurred in the 1980s.” LISAGOR & LIPSIOUS, *supra* note 71, at 106. Just as they reference partners’ Protestant commitments to evidence professional excellence, firms’ accounts refer to the partners’ social and cultural standing to boost their merit. At Shearman & Sterling, for example, partner Guy Fairfax Cary was described in terms of his social pedigree and activities. Mr. Cary’s “father’s forebears (both sides) were distinguished and prominent in the history and social life of Virginia and Maryland; and his mother’s of New York.” EARLE & PARLIN, *supra* note 45, at 208. Indeed, the firm’s history spends no less than six of the first eight paragraphs of Mr. Carey’s description listing his recreational activities and social abilities. *Id.* Another example of a partner at Shearman & Stearling who demonstrated both protestant values and white-shoe culture is Bigelow Winston, whose “family had been prominent in the history and social life of Chicago from its early days.” *Id.* at 227.

large law firm style—and the white-shoe ethos were actually two sides of the same coin. The elite large law firm thus defined itself not only by explicit reference to meritocracy, but also by implicit reference to the ethnic, religious, socioeconomic, and cultural characteristics of its client base and lawyers. In other words, the WASP firms sought more than financial success; they sought elite professional status and were willing to expend wealth and build on the white-shoe ethos and Protestant values to achieve it.<sup>90</sup>

The merit-based Cravath System and the conversion of religious, socioeconomic, and cultural status into professional status were *prima facie* incompatible. While the former rejected religious and other non-performance-based elements as irrelevant to legal practice and firm organization, the latter built on these allegedly “irrelevant” considerations to justify its claim to elite professional status. This duality was the result of the large law firm’s quest for elite professional status. In pursuit of professional status it was ostensibly a-religious and meritocratic. In seeking elite status within the ranks of the profession, however, it featured a deep, hidden nexus between professional identity and religious, socioeconomic, and cultural characteristics,<sup>91</sup> a nexus that was meant to allow it to rely on the latter in order to establish the former. Specifically, the large law firm cultivated an elite professional culture operating alongside its seemingly a-religious organizational structure, which was in part a function of Protestant values and the white-shoe ethos. In other words, the *prima facie* inconsistent duality of the large firm—purporting to be an a-religious institution while cultivating a deep religious and culture identity—was a function of its attempt to establish itself not only as professional but as the elite within the profession.

#### 4. *Institutionalizing elite status: elite education and professional regulation*

The large law firm’s campaign for elite professional status included a third component: bolstering its claim for exclusive elite status by separating and distinguishing itself from the lower segments of the bar.<sup>92</sup> The large New York City law firm rose against the backdrop of a changing legal profession as the nineteenth century brought waves of immigrants and growth to the New York bar.<sup>93</sup> Against this backdrop, “[o]ld-style practitioners . . . cooperate[d] with

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90. Cf. WEBER, *supra* note 29, at 180-83.

91. “To facilitate cohesion, the firm has relied upon the ethnic, social, and educational similarities of firm members . . .” HOBSON, *supra* note 7, at 155.

92. See McAdams, *supra* note 49, at 1029-33 (exploring how groups define themselves by demeaning members of other groups).

93. In 1885, there were about 5000 lawyers in New York City, of whom about 400 were Jewish. HENRY W. TAFT, LEGAL MISCELLANIES: SIX DECADES OF CHANGES AND PROGRESS 77 (1941). The years between 1890 and 1910 witnessed immense growth in part-time and night-time law schools that graduated an increasing number of lawyers born abroad or to foreign-born parents. AUERBACH, *supra* note 11, at 95-96.

[corporate lawyers] in a united front to preserve the legal profession . . . as an Anglo-Saxon Protestant enclave.”<sup>94</sup> As documented by Karabel, elite institutions imposed admission restrictions on the number of less-desirable candidates, resulting in the misleadingly “natural” correlation between top educational credentials and indicia of elite status.<sup>95</sup>

Bar associations and newly promulgated attorney regulations entrenched and solidified the profession’s stratification.<sup>96</sup> The new WASP white-shoe Wall Street firms, previously criticized for turning a profession into a business,<sup>97</sup> rose quickly to professional respectability. The WASP elite expanded and accepted the large law firm corporate lawyers, who, after all, shared its key characteristic: “Best Men.” The New York City bar became strongly stratified. In the top hemisphere, the large corporate firms proudly asserted and wore the badge of elite status, generally serviced large corporate clients, and employed the “Best Men” of the era.<sup>98</sup> The religious and cultural identity of the large WASP firm was thus the result of a complex apparatus that instituted, built on, and reinforced the newly drawn lines between upper and lower legal classes within the New York City bar.

The large law firm’s quest for elite professional status was remarkably successful.

Corporate Lawyers . . . emerged around the turn of the century as the self-appointed guardians of professional interests . . . [d]ominating major professional associations and institutions . . . They constituted a professional elite: a group able to define the terms of admission to the circle of the . . . influential.<sup>99</sup>

Similarly, “the corporation lawyer in the large law firm seems to symbolize what has become of the legal profession in modern America.”<sup>100</sup> Indeed:

The large law firm sits atop the pyramid of prestige and power within the American legal profession. Although comprising but a small fraction of lawyers, through its impact on patterns of recruitment, styles of practice, and the collective institutions of the bar, the large law firm has a significance that

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94. *Id.* at 52.

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

96. See MICHAEL J. POWELL, *FROM PATRICIAN TO PROFESSIONAL ELITE: THE TRANSFORMATION OF THE NEW YORK CITY BAR ASSOCIATION* 141-44 (1988) (discussing the development of bar rules that raised standards at the expense of non-elites); TAFT, *supra* note 93, at 81-82.

97. See, e.g., Brandeis, *supra* note 46, at 559-61.

98. Years later John Heinz documented and coined the term the “two hemispheres” of the legal profession. See JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 319 (1982).

99. See AUERBACH, *supra* note 11, at 4 (quotation omitted).

100. Hobson, *supra* note 8, at 3.

far exceeds the number of lawyers it employs.<sup>101</sup>

### C. *The Growth of the WASP Firm*

The growth of the large firm and its causes have been well documented.<sup>102</sup> Having failed to recognize the hidden religious and cultural identity of the large firm, the literature makes no use of this identity in its standard account of large firm growth. The WASP and white-shoe identity of the large firm had an important impact on its growth. In the formative era, between 1899 and 1945, the religious and cultural identity of the firm played a positive role, contributing to the growth of the firm. Notably, however, after 1945 and to a more significant degree during the 1960s the religious and cultural identity of the WASP firm also had a countervailing effect, inhibiting its own growth and ironically playing a part in the meteoric rise of its rival—the Jewish law firm.<sup>103</sup> In other words, its failure to explore the religious and cultural identity of the large firm prevented the standard account not only from fully explaining the growth of the WASP form but also from being able to explain the unique growth of the Jewish firm.

#### 1. *The growth of the large firm—the standard account*

The Cravath blueprint for the organization of the large law firm was, in part, an institutional response to the growth of large corporate clients.<sup>104</sup> Indeed, the rise of large law firms in the late nineteenth and early twentieth centuries was a response to the demand of big corporate clients.<sup>105</sup> In addition, the growing entity-clients consumed new kinds of legal services. Significant

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101. ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 1 (1988). Galanter and Henderson note that as a result of its massive recruitment needs, the contemporary large law firm employs such a significant number of law school graduates to justify interest in it and possibly its status. See Galanter & Henderson, *supra* note 7.

102. Emerging around the turn of the twentieth century, the large firm established its elite status by the 1920s, significantly grew in size by the 1950s, and reached its Golden Age by the 1960s. See GALANTER & PALAY, *supra* note 1. Next it outgrew its city-based single office model, expanded nationally and overseas, and grew significantly in terms of number of lawyers and profits per partner between the 1960s and the 1980s. Robert L. Nelson, *Of Tournaments and Transformations: Explaining the Growth of Large Law Firms*, 1992 WIS. L. REV. 733, 747-49 (reviewing MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAYERS* (1991)).

103. See *infra* Part II.B.

104. Nelson, *supra* note 102, at 747-49.

105. See Larson, *supra* note 8, at 448 (“It is well known that the large law firm was born . . . in a period of institutional reorganization dominated by the rise of the giant business corporation.”); Milton C. Regan, Jr., *Taking Law Firms Seriously*, 16 GEO. J. LEGAL ETHICS 155, 155 (2002).

growth in the body and scope of statutory and administrative laws regulating the conduct of entity-clients and the increased complexity of the law also contributed to the growth of the large law firms.<sup>106</sup>

On the supply side, the organizational structure of the large law firm supported an internal growth engine produced by the interplay between two of the firm's organizational features: probation periods followed by promotion to partnership and effective profit-maximizing partner-to-associate ratios.<sup>107</sup> Over time the firm's desire to enforce its effective "tournament of lawyers" governance structure, and in particular to maintain profit-maximizing partner-to-associate ratios, meant that, upon the promotion of a few senior associates to partnership, the firm needed to hire additional associates to fill the ranks of the promoted associates and to provide the new partners associate labor.<sup>108</sup> In other words, the large law firm's pyramid structure meant that as the top of the pyramid expanded, it led to corresponding expansions of all layers of the pyramid, at the rate of the effective partner-to-associate ratios. The firm's structure thus resulted in an internal growth engine.<sup>109</sup>

*2. Elite professional status, WASP religious identity, and white-shoe cultural identity as impetus for firm growth*

The rise and dominance of the large WASP firm was also a product of its successful systematic campaign for elite professional status, resulting in corporate lawyers practicing with large law firms being commonly referred to as the "elite" bar. The ability of the large law firm to establish and successfully maintain a credible claim to elite professional status throughout the twentieth century played an important role in enabling its growth: it allowed the large WASP firms to attract clients and law students alike. Because of their claim to elite professional status, the large firms increased their client base and attracted

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106. Nelson, *supra* note 102, at 736-37.

107. The large firm relied on a probation period for purposes of training and selecting talent from within its associate pool for promotion: providing its associates with incentives to work hard, thereby responding to difficulties associated with monitoring both the inherent quality of the associate's work (as opposed to the mere logging of long hours at the office) and the relative quality of work given the firm's dependence on teamwork as opposed to individual output; and discouraging associates from leaving and grabbing the firm's human-capital assets. GALANTER & PALAY, *supra* note 1, at 5-7, 32-35, 48-52. Promotion to partnership at the end of the probation period provided associates with deferred rewards and thus appropriate incentives to overcome the temptations of shirking, grabbing, and leaving. Finally, to maximize utilization of both the associates' labor and the partners' human capital, the firm set ratios of partners and senior associates to associates, which enabled both effective mentoring and supervision of the associates' work and effective use of the partners' and senior associates' time. *Id.* at 89-98.

108. *Id.* at 98-108.

109. *But see* Nelson, *supra* note 102, at 738-41 (offering a summary and criticisms of the Galanter & Palay thesis).

graduates of elite law schools notwithstanding their reputation as “law factories” demanding increasingly higher billable hours from their associates and offering low quality of life choices.<sup>110</sup>

Larson noted the close association between the new forms of legal practice represented by the large law firm and the modern law school modeled on Eliot and Langdell’s Harvard: “By the 1900’s the leading law schools produced lawyers for the leading firms; the firms in turn made the schools prosperous by donations.”<sup>111</sup> The relationship between the large law firms and law schools was a mutual, self-fulfilling prophecy of elite status. The Cravath System conferred elite status on law schools from which it recruited its students, and in turn, the law schools conferred elite status on the large firms by identifying them as preferred, if not ideal, places of employment.<sup>112</sup> The lawyers employed by the large firms, recognized as the elite bar, were perceived as the best available talent. Law review editors from the elite schools, who presumably enjoyed the greatest freedom in choosing their career paths, consistently and overwhelmingly entered private corporate practice upon graduation from law school.<sup>113</sup> Indeed, for some, practice with the corporate New York firms constituted the “holy grail” of law practice.<sup>114</sup> As a result, graduates of elite law schools flocked to large law firms.<sup>115</sup>

The complex interplay of demand and supply forces, combined with the effective campaign for elite professional status, enabled Cravath-style large WASP law firms to benefit from immense financial growth and to solidify their hegemony, elite status, and monopoly over the provision of legal services to large corporate clients. Financial success paralleled professional status as the WASP Wall Street law firms asserted clients’ interests as professional and (capitalist) national interests.<sup>116</sup> Serving clients and thus country, the large

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110. See, e.g., LISAGOR & LIPSIUS, *supra* note 71 (describing the demands imposed on associates at Sullivan & Cromwell). See generally Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999).

111. Larson, *supra* note 8, at 448 (quoting Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (G. Geison ed., 1983)).

112. Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 IND. L.J. 433, 433 (1989) (exploring the “increasingly close connection between the large corporate law firms and the law schools”).

113. “Between 1918 and 1929, 81 percent of a sample of nearly three hundred law review graduates from Harvard, Yale, and Columbia chose employment in private practice immediately upon graduation.” AUERBACH, *supra* note 11, at 143.

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

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

116. See AUERBACH, *supra* note 11, at 130.

firms simultaneously pursued economic and professional power, on the positive side, to enhance their newly attained position atop the bar, and on the negative side, to exclude “other” lawyers, who supposedly diluted and undermined the values and interests that large law firms had committed to upholding.

Beginning in 1945, the positive impact of the religious and cultural identity of the large firm on its growth began to erode. First, the religious and cultural identity of the large firm was slowly yet continuously in decline,<sup>117</sup> and therefore its ability to impact growth was diminished. Second, while it continued to support the claim of the WASP firm for elite status, the religious and cultural identity of the firm after 1945 also had a countervailing effect—it restricted firm growth and facilitated the rise of the Jewish firm.

## II. THE RISE OF THE LARGE JEWISH LAW FIRM

The growth of Jewish law firms is nothing short of an incredible success story. Before 1945, there were essentially no large Jewish law firms in New York City.<sup>118</sup> Most Jewish lawyers were concentrated in the lower spheres of the city’s bar as solo practitioners and members of small law firms.<sup>119</sup> In 1950, without exception, every member of the elite club was a WASP law firm. By the mid-1960s, however, this reality had changed significantly. Growing much faster than the WASP firms, the Jewish firms had caught up with the WASP firms, attained elite status, and accounted for six of the twenty largest law firms in New York City. In less than a fifteen-year time span, Jewish law firms grew, as a group, by an average of 200%.<sup>120</sup> To be sure, WASP firms also grew at an impressive rate. As a group, however, WASP firms grew at 50% the rate of Jewish firms, averaging about 100%. This trend of faster growth continued between 1963 and 1980, and by 1980 Jewish firms were well accepted as members of the elite club and accounted for four of the ten largest firms in New

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117. *Infra*, Part III.A.

118. In 1950, Weil, Gotshal was the largest Jewish law firm with a total of 19 attorneys; Kaye, Scholer had 18; Paul, Weiss had 17; Proskauer, Rose had 15; Stroock, Stroock & Lavan had 13; Fried, Frank had 12; and the Rosenman firm had 7. MARTINDALE-HUBBELL LAW DIRECTORY (1950). Information regarding the largest New York City law firms between 1963 and 2006 was collected using the following sources: *Growth of 20 Law Firms—1963-1981*, N.Y.L.J., Mar. 16, 1981, at 3; *National Law Firm Survey*, NAT’L L.J., Sept. 18, 1978, at 14; *National Law Firm Survey*, NAT’L L.J., Oct. 6, 1980, at 32; *The 20 Largest Firms Based in New York City*, N.Y.L.J., Oct. 1, 1990, at S3; *The NLJ 250*, NAT’L L.J., Sept. 30, 1985, at S1; *The NLJ 250*, NAT’L L.J., Sept. 24, 1990, at S4; *The NLJ 250*, NAT’L L.J., Oct. 9, 1995, at C6; *The NLJ 250*, NAT’L L.J., Nov. 15, 2004, at S16; *Top 25 New York City-Based Firms*, N.Y.L.J., Dec. 11, 2000, at S20; *Top 25 New York City-Based Firms*, N.Y.L.J., Dec. 13, 2004, at 34.

119. CARLIN, *supra* note 37, at 19-28.

120. Fried, Frank and Paul, Weiss grew by 400%, and Kaye, Scholer by 375%. See *supra* note 118 (listing sources of data on the growth of New York law firms).

York City. WASP firms also grew at an impressive rate, but, except for Shearman & Sterling, all of the WASP firms grew by less than 100% during this time.<sup>121</sup>

A. *The “Jewishness” of the Jewish Firm*

By the early 1950s the Cravath System was well accepted as the predominant organizational structure of the large firm and the WASP firms had already successfully established the elite professional status of the large law firm. Understandably then, the emerging Jewish firms adopted the prevailing Cravath System. More accurately, the Jewish firms adopted the a-religious meritocracy facet of the Cravath System while mostly rejecting the religious and cultural overtones of the WASP firm and certainly rejecting the hidden Protestant values and the white-shoe ethos on which they were based.

Once again, Weber’s study of the relationship between Protestant values and the spirit of capitalism is instructive: “To-day the spirit of religious asceticism . . . has escaped from the cage. But victorious capitalism . . . needs its support no longer.”<sup>122</sup> That is, Weber asserted that having helped shape the moral landscape in which capitalism was able to develop, Protestant values declined in importance and influence and the system of capitalism was left standing on its own seemingly secular grounds. Similarly, being built on Protestant values and the white-shoe ethos to establish a credible claim to elite professional status, the religious and cultural underpinning of the Cravath System retreated and left the organizational structure of the large firm standing, seemingly secular and meritocratic. Enter the Jewish firm, which adopts the Cravath System sans its Protestant and white-shoe foundations.

Unlike the WASP firm, the Jewish firm did not exhibit a deep hidden commitment to Jewish values or culture.<sup>123</sup> Not only did it purport to subscribe to principles of professionalism based on merit, the Jewish law firm circa 1950 had no reason to invoke Jewish values and culture. Unlike the WASP firm, which implicitly relied on Protestant values and the white-shoe ethos to help secure its claim to elite professional status, the Jewish firm had reason to distance itself from Jewish identity in an era when anti-Semitism and ethnic

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121. Note that because in 1950 the Jewish firms were much smaller than their WASP counterparts, their percentage growth would be higher for a similar increase in the overall number of lawyers. That said, the growth of Jewish firms is still striking. Whereas in 1950 the large WASP firm had at least fifty attorneys, not a single Jewish law firm had more than nineteen attorneys. *See supra* note 118. By 1963 Jewish firms both achieved comparable numbers to WASP firms and attained elite status. By 1980, although comparable in terms of size, the Jewish firms grew at a faster rate than the WASP firms. *See supra* note 118 (listing sources of data on the growth of New York law firms).

122. WEBER, *supra* note 29, at 181-82.

123. Wald, *supra* note 32, at 8-13.

discrimination were still widely accepted.<sup>124</sup> That is, the Jewish firms did not invoke religious identity, Judaism, as a source of elite professional status—if only because Judaism, unlike Protestantism, was not perceived to be a source of elite status. Importantly then, unlike the WASP firm, the Jewish firm did not implicitly incorporate religious values and cultural attributes into its organizational structure. Its “Jewish” identity was to a significant extent a reflection of the Jewish identity of its practitioners.

That is not to say that the Jewish firm did not incorporate any religious and cultural Jewish features into its firm culture. Rather, the point is that the Jewish firm did not rely on Jewish identity as a source of establishing elite status in the same fashion that the WASP firm translated Protestant values and white-shoe status into elite professional status. As a result, Jewish identity played a much smaller role in the organizational structure of the Jewish firm compared to the role of religious identity at its WASP counterpart.

The WASP law firm, defined as consisting almost exclusively of WASP male attorneys and featuring a white-shoe Protestant-inspired professional culture, and the Jewish law firm, defined as consisting almost exclusively of Jewish attorneys, are ideal types in the Weberian sense rather than an accurate representation of any specific law firms.<sup>125</sup> Some WASP firms hired and promoted Jewish lawyers early on,<sup>126</sup> while other firms had token Jewish

124. The successful campaign of WASP law firms for elite status further discouraged qualified non-Jewish candidates from seeking employment with the Jewish firms. In a telling contrast, Protestant candidates chose WASP firms because they entailed elite status, not because they were Protestant; whereas some Jewish candidates chose Jewish firms because they were Jewish and therefore not likely to discriminate against Jewish attorneys.

125. See MAX WEBER, “Objectivity” in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 49, 90 (Edward A. Shils & Henry A. Finch trans., 1949) (explaining that ideal types represent not actual or probable subjects but rather models of abstraction capturing essential representative qualities); see also SUSAN J. HEKMAN, WEBER, THE IDEAL TYPE, AND CONTEMPORARY SOCIAL THEORY 18-60 (1983); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 95 (1974) (using Weber “ideal types” to characterize litigation types as one-shot and repeat-players).

126. Sullivan & Cromwell was founded in 1879 and grew to seventy attorneys by 1948. In its third year, 1881, the firm hired a Jewish attorney by the name of Alfred Jaretzki, Sr., and promoted him to partner in 1894. Several family members followed Jaretzki to the firm:

His cousin Edward Green, his son Alfred Jaretzki, Jr., and his son-in-law Eustace Seligman all became partners in the 1920s . . . . None but the elder Jaretzki was active in Jewish affairs, and all were from the same family. Nevertheless, the Jewish presence was unusual for a Wall Street firm of the period.

DEAN, *supra* note 20, at 58-59. To be sure, the Jewish presence was unusual, but promoting a Jewish partner to serve as the active managing partner sometime around the year 1900 may have been the most significant departure from practice realities at other “white-shoe” firms. After Sullivan’s death in 1887, Cromwell undertook the active managing partner duties “until around the turn of the [twentieth] century” when Alfred Jaretzki, Sr., assumed the duties of day to day managing partner until Royal Victor took over the role in 1915. *Id.* at

lawyers,<sup>127</sup> and similarly some Jewish firms had non-Jewish attorneys.<sup>128</sup> Drawing a simplistic distinction between WASP and Jewish firms fails to appreciate the heterogeneous nature of large New York City law firms both before 1945 and between 1945 and 1965. Each group of firms was far from uniform in its composition and characteristics.

The large WASP law firm club consisted of both blue-chip firms and socialite firms.<sup>129</sup> Cravath, Swaine & Moore exemplified the former category. It was less known for the social pedigree of its attorneys (although it did feature several Social Register attorneys in 1965)<sup>130</sup> and better known as a “sweatshop” in the sense of its commitment to devote long hours to client service. Davis Polk, on the other hand, distinguished itself not by the work ethic of its attorneys (although it too had its fair share of hard working attorneys) but by the social status of its lawyers, as measured by the number of its partners who appeared on the pages of the Social Register.<sup>131</sup>

Another divide within the WASP law firm group was along the white-shoe continuum. Some of the WASP firms strictly held the line in terms of the socioeconomic characteristics and educational pedigree of their attorneys, whereas others, such as Sullivan & Cromwell, were more open-minded about their lawyers’ background and cultural traits, recruiting lawyers from a more diverse socioeconomic and educational background.<sup>132</sup>

The Jewish firms also were not a homogeneous group. First, some “Jewish” firms, in terms of the religious affiliation of their attorneys, were not exclusively Jewish at all. To an extent significantly greater than that of the

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42. See generally LISAGOR & LIPSIUS, *supra* note 71 (exploring the history of Sullivan & Cromwell); Erik M. Jensen, Book Review, 1990 COLUM. BUS. L. REV. 133 (reviewing LISAGOR & LIPSIUS, *supra* note 71).

127. By “token” attorney I mean a lawyer hired or promoted for symbolic reasons, rather than for reasons consistent with standard policies of the firm. A Jewish attorney was thus a token lawyer when he was hired not solely based on the strength of his credentials but in part because he was Jewish.

128. Paul, Weiss, for example, was the first major Wall Street law firm to hire a black associate. HOFFMAN, *supra* note 9, at 112.

129. HOFFMAN, *supra* note 9, at 128-46 (exploring the blue chip and socialite characteristics of some of the large law firms).

130. Founded in 1886, the Social Register defines itself as:

among America’s oldest and most distinguished private associations. Its membership is drawn from the country’s most prominent families, and many of those currently listed are direct descendants of the original members. . . . Since its inception, the Social Register has been the only reliable, and the most trusted, arbiter of Society in America.

The Social Register Association, <http://www.socialregisteronline.com>.

131. *Supra* note 44.

132. DEAN, *supra* note 20, at i (John Foster Dulles recalling how he got his job at Sullivan & Cromwell despite graduating from the George Washington Law School as opposed to Harvard or Columbia Law School).

WASP firms, some “Jewish” firms were actually mixed firms; that is, they hired and promoted Jews and non-Jews alike.<sup>133</sup>

And yet, rejecting Protestant values and the white-shoe ethos did not mean that the new Jewish firm shied away from adopting some of the snobbish religious and cultural habits of the WASP firm. A second divide among the Jewish firms, to some extent parallel to the white-shoe continuum among the WASP firms, was in terms of the ethnic descent of its lawyers. The “German” firms employed mostly lawyers of German heritage, second-generation Jewish lawyers who were graduates of elite law schools and hailed from middle socioeconomic backgrounds. They were perceived as the upper-class establishments within the Jewish firms, somewhat akin to the socialite WASP firms. The “Eastern European” firms employed mostly attorneys of non-German descent who tended to be first-generation immigrants of lower socioeconomic backgrounds and graduates of non-elite law schools.<sup>134</sup>

Finally, the Jewish firms also differed with regard to their attitudes toward religious observance by their attorneys, with some firms more accepting of conservative observance than others. Some firms did not employ Orthodox attorneys who were “Shomer Shabbos,”<sup>135</sup> while others accommodated Kosher-observing attorneys. None of the Jewish firms, however, hired ultra-Orthodox attorneys before the 1980s.

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133. Prominent among the mixed “Jewish” firms was Paul, Weiss. The firm was formed in 1945 as Mr. Weiss and Mr. Wharton joined forces with Mr. Paul and Mr. Garrison. Unique not only in the heterogeneous religious affiliation of its name partners and attorneys, Paul, Weiss was the first major Wall Street law firm to move to midtown (in 1949), the first to elect a female partner (in 1946 at its D.C. office), and, as noted above, the first to hire a black associate. Judge Rifkind joined the firm in 1950 and the firm gradually gained its reputation as a leading litigation law firm. By 1944, the firm had thirteen lawyers; 110 in 1970; and 138 by 1972. HOFFMAN, *supra* note 9, at 112-13, 121. Another mixed firm was Cleary Gottlieb, formed following a split from Root, Carter. Most Jewish attorneys followed Mr. Gottlieb to Cleary, and Gottlieb became the first Jewish named partner in a major Wall Street law firm. *Id.* at 63-65. From its inception the firm was mixed and never acquired a reputation as a Jewish law firm. Paul, Weiss and Cleary Gottlieb were subsequently followed by other mixed firms. In 1963 Skadden, Arps had 10 lawyers. By 1980, it had 205. By 2004, it was the second largest law firm in New York City with over 1700 attorneys. Skadden, Arps never developed a reputation as a Jewish firm, although many of its attorneys, including some of its founders, were Jewish. *See generally* LINCOLN CAPLAN, SKADDEN: POWER, MONEY AND THE RISE OF A LEGAL EMPIRE 153-75 (1983). Wachtell, Lipton, Rosen & Katz was established by four Jewish named partners. Like Cleary Gottlieb and Skadden, Wachtell never developed a reputation as a Jewish firm, quickly earning a reputation as one of the top elite law firms in New York City and setting the mark for the highest paid associates and the highest profits per partner.

134. Commenting on the interplay between legal education, social standing and ethnic descent, Carlin observed that: “If eastern European Jewish lawyers are generally at the lowest levels of the New York City bar, it is partly because their degrees are from night law schools.” CARLIN, *supra* note 37, at 22.

135. Meaning Torah observant, that is, following Jewish commandments such as not doing work on the holy day of Saturday, following certain dietary restrictions, etc.

B. *The WASP Roots of the Jewish Law Firm's Success*

While the Jewish firm did not explicitly build on Jewish values and culture to define its professional identity, religious and cultural considerations did play an important part in its rise to dominance if only by way of reaction to the religious and cultural identity of the WASP firm. The large Jewish law firm was Jewish by discriminatory and exclusionary default.<sup>136</sup> To be sure, not only did discriminatory hiring and promotion practices at WASP firms help define a “by default” religious identity for the Jewish firms, rather, the religious and cultural identity of the WASP firm contributed to the rise and success of the Jewish firm. While the interplay of increased client demand for corporate legal services, the expansion of corporate law, market restructuring and elite legal education; with the supply-side Cravath-style governance structure utilized by the large law firm, its internal growth engine and the fruits of an effective campaign for elite status, explain the growth of the large WASP law firm before 1945,<sup>137</sup> as well as the growth of large Jewish and WASP law firms alike after 1945, the success story of the emergence of, and unique growth of, the Jewish firm is to be explained in part as a consequence of and a reaction to the religious and cultural identity of the WASP firm.

1. *Protected pockets of “Jewish” practice areas*

The white-shoe ethos and a desire to distance themselves from the lower ranks of the New York bar led the white-shoe firms to stay clear of low-status and otherwise “unbefitting” practice areas such as litigation, bankruptcy law, hostile takeover law, and real estate law. To Paul Cravath, great lawyering was to be done in the conference room, not the courtroom.<sup>138</sup> Litigation was thought of as necessary only as the result of a failed transaction, not as yet another strategic tool at the hands of corporate clients. Litigation, bankruptcy and takeover law were needed only when the corporate attorney failed to successfully reorganize and restructure the affairs of his client. Because the

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136. Geographical dimensions further cemented separation between the large WASP firms and the large Jewish firms. Most Jewish firms were located in midtown, whereas most WASP firms were located on Wall Street. Stroock, Stroock & Lavan, one of two large Jewish law firms on Wall Street, was considered by the WASP bar, slightly condescendingly, as a ‘fine, high-class firm.’ HOFFMAN, *supra* note 9, at 27. Over time, the geographical separation began to collapse as large WASP firms began to move to midtown for cost-saving reasons—first to Park Avenue, then to the West Side.

137. *Supra* notes 106-1117 and accompanying text.

138. The Cravath System was explicitly built on the notion of serving the corporate client’s interests in the conference room, as opposed to the courtroom. Litigation was considered the failure of prudent transactional planning. I SWAINE, *supra* note 11, at 573-74 (“Cravath had no instinct for litigation. On its merits he thought it was something to be avoided at any reasonable price; and he had neither liking nor capacity for courtroom forensics. Cravath’s forum was the conference room.”).

need to practice in these areas of law was perceived to result from attorneys' failures, they were deemed unbecoming practice areas for the elite corporate attorney. Similarly, real estate law, in an era preceding large commercial real-estate transactions was thought of as an area of individual representation and consequently of low professional esteem.

The reluctance of the WASP firms to occupy certain practice arenas led Jewish law firms to flock to those areas.<sup>139</sup> The snobbish habits of the elite firms thus created protected pockets of practice for Jewish law firms, where they were less likely to face competition from the WASP law firms.<sup>140</sup> The elite bar's self-selection out of these "undignified" practice arenas allowed the Jewish firms to grow and establish themselves there, developing great expertise and esteemed reputations as litigation, takeover, bankruptcy and real estate attorneys.<sup>141</sup> The unwillingness of the WASP firms to practice in these areas provided Jewish law firms and Jewish attorneys with access to corporate clients on the best of terms—with an opportunity to showcase their expertise free of competition as well as dispel client ignorance and bias regarding their professional abilities. Access free of competition to corporate clients previously exclusively represented by the WASP firms was particularly important considering the increased client demand for these very legal services.<sup>142</sup>

While the WASP firms willingly conceded "Jewish" pockets of practice areas,<sup>143</sup> they did not want to compromise their dominance in the core areas of corporate law. Once Jewish law firms proved their abilities in the protected areas, however, they used their access to corporate clients to cross over and compete with the WASP firms for provisions of corporate legal services in the mainstream arenas of corporate law.<sup>144</sup> The white-shoe ethos and elitist culture

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139. Joe Flom of Skadden, Arps tellingly commented in an interview, "I got involved [in mergers and acquisitions] because we were in a situation where that was the business that was available. . . . We didn't have a lot to do, and I got involved in it." Garrett Ordower, *Mr. M&A: A Profile of Joseph Flom*, BUS. L. TODAY, July/Aug. 2001, at 38.

140. See Steven Brill, *Two Tough Lawyers in the Tender-Offer Game*, NEW YORK, June 21, 1976, at 52, 54 ("Either because they're still snobby about such fighting, or because Flom [of Skadden, Arps] and Lipton [of Wachtell, Lipton] have such a head start on them in experience and reputation, the old-line law firms are still only rarely involved in tender fights."); Wald, *supra* note 32, at 27-32.

141. Brill concludes his analysis of the tender-offer "pocket" noting that "there is probably no other major area of law where so small a group of attorneys . . . enjoys such total domination." *Id.*

142. *Id.* ("[Flom's] done the most magnificent thing anyone's ever done in the law business. . . . He's broken the link between the old investment-banking firms and blue-chip companies and their Wall Steet lawyers.").

143. "Although the practice of hostile takeovers had been going on for some time [by the mid 1970s], it was never done in legitimate business circles and certainly not by blue-chip companies." Ordower, *supra* note 139, at 40.

144. Brill describes the successful crossover from Jewish pockets to mainstream representation by Skadden, Arps. Brill, *supra* note 140, at 54 ("When the tender-offer boom began a few years ago, Flom became a hot commodity, not only to raiders but to the more

thus not only discouraged the WASP firms from competing with Jewish firms in the protected “Jewish” areas of law, they eventually also led to increased competition in areas of corporate law traditionally dominated by the WASP law firms.<sup>145</sup>

Moreover, as areas of law previously considered low status became “mainstream,” the Jewish law firms and Jewish lawyers who developed expertise in them were well positioned to build on their reputations and expand their client bases into more general corporate law representation.<sup>146</sup> In a bizarre turn of events, when litigation became a more accepted avenue of corporate strategic behavior, rather than a symbol of a transaction gone awry, when takeovers and bankruptcies became mainstream methods of reorganization, and when commercial real estate became a lucrative practice area—the Jewish law firms, which emerged 50 years after the WASP law firms, benefited from acting as the first movers in these practice areas.

The rise and incredible growth of Skadden, Arps and of Wachtell, Lipton, Rosen & Katz between 1965 and 1985 is demonstrative of the consequences of white-shoe ethos and elitist professional culture enabling the creation of protected “Jewish” areas of practice and facilitating the growth and success of Jewish law firms. This era featured increased client activity in the mergers and acquisitions field, including hostile takeovers. Whereas to a significant extent elite WASP firms shunned representation of such “dishonorable” client conduct, Skadden, Arps and Wachtell, Lipton were able to develop expertise in these protected arenas and thus to capture a significant market share of corporate clients in merger and acquisitions matters.<sup>147</sup> As the result of establishing client relationships and outstanding reputations in this limited, protected arena,<sup>148</sup> both firms significantly increased and diversified their

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established target companies who decided they’d rather have him defending them than attacking them.”).

145. Over time, Jewish firms were able to capitalize on their expertise and reputation within the Jewish pockets of practice, cross over and compete with the WASP firms in the respected areas of the law. Joe Flom of Skadden Arps explained the crossover phenomenon during the 1980s. Mainstream clients were seeking to hire Skadden to prevent it from representing competitors. Skadden conditioned such representation on the clients’ hiring the firm to do more than tender-offer protection:

In order to control a number of people that were assaulting us, we wanted to be sure they were serious and we didn’t want the retainer for doing nothing . . . . We said to the client, “we want to know you are going to use us to a certain extent, or it doesn’t pay for us to get involved.”

Ordower, *supra* note 139, at 40-41.

146. See Brill, *supra* note 140, at 55.

147. See Ordower, *supra* note 139, at 40.

148. Martin Lipton of Wachtell, Lipton, for example, developed the “poison pill,” a defense against a hostile takeover, in the tender offer pocket and saw it establish the firm’s reputation and facilitate its crossover to representation of mainstream clients. See, e.g., Sharon Hannes, *The Market for Takeover Defenses*, 101 Nw. U. L. Rev. 125, 132-38 (2007) (describing the invention of the poison pill and its impact on takeover practice).

respective client bases from clients involved with mergers and acquisitions representations to clients involved with all forms of general corporate practice.<sup>149</sup>

Jewish law firms built on these protected pockets of practice to first “move in” on corporate clients that had formerly been the exclusive domain of the WASP firms and slowly yet systematically expanded their client base without encountering competition from the elite bar. Gradually, the Jewish firms took advantage of the protected pockets of practice and offered additional corporate services outside of the traditional “Jewish” arenas to their now existing corporate clients.<sup>150</sup> That is, the decision by the WASP firms to stay out of certain areas of practice not only was costly in terms of allowing the Jewish firms to have a near monopoly in these arenas, but also allowed the Jewish firms to compete for clients in the WASP firms’ practice areas.

*2. Effective discrimination by WASP firms in the shadow of a robust supply of Jewish lawyers*

By the early 1960s, the elite bar’s religious discrimination against Jewish lawyers in New York City was common knowledge.<sup>151</sup> “Jewish lawyers [were] less likely than their non-Jewish colleagues to gain access to [the] high-status position[s]” with the large WASP firms.<sup>152</sup> Constituting 60% of the New York City bar, Jewish lawyers were overrepresented in individual practice and small firms, and significantly underrepresented in large law firms.<sup>153</sup> On the other hand, Protestant attorneys, who constituted only about 18% of the bar, accounted for 43% of the large law firm pool, and only 9% of the individual practitioner pool.<sup>154</sup>

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149. See generally CAPLAN, *supra* note 133.

150. *Supra* note 146 and accompanying text. It is important to emphasize that the crossover phenomenon was gradual and slow. Skadden, Arps, for example, “got into [tender offer representations] by accident in the 50s,” Ordower, *supra* note 139, at 38, and did not achieve its dominance in the pocket, let alone crossover effect for nearly thirty years, *id.* at 40-41.

151. Note, *supra* note 32 (“Gentiles were more successful than Jews in getting good jobs, and in getting the jobs of their choice.”). In 1960, the New York City Bar was almost exclusively native-born, white males, and slightly over 60% Jewish. CARLIN, *supra* note 37, at 18-19. About one third of the lawyers were born in America, and the recently arrived immigrants were primarily of Eastern European, Jewish origin. *Id.* at 18. Individual practitioners constituted about 47% of the bar, while small firms (2-4 lawyers) constituted about 17%, medium firms (5-14 lawyers) constituted about 15%, and large firms of 15-49 lawyers constituted about 9%. *Id.* The largest firms, of 50 or more lawyers, constituted about 12% of the New York Bar. *Id.*

152. CARLIN, *supra* note 37, at 22..

153. *Id.* at 19, 28.

154. *Id.*

After 1945, elite law schools began to drop their discriminatory admission quotas and admit students previously excluded, including Jewish candidates.<sup>155</sup> Jewish law students who excelled at elite law schools began to satisfy, in greater numbers, the formal recruiting standards of the Cravath System. Some even met the WASP firm's hidden socioeconomic and cultural criteria.<sup>156</sup> This phenomenon produced important consequences: it decreased, in relative terms, the number of non-Jewish graduates of elite law schools that the WASP law firms found acceptable, which resulted in increased competition among WASP firms for Protestant candidates and made it more difficult for Jewish firms, even if they were interested in such non-Jewish candidates, to recruit them. The second consequence was the creation of a large pool of qualified Jewish lawyers overlooked by the WASP firms. The availability of such a pool made recruiting of elite law school graduates for the Jewish firms relatively inexpensive and easy.<sup>157</sup>

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155. Prior to 1945, quotas were common practice. *See* 1 U.S. IMMIGRATION COMM'N, THE CHILDREN OF IMMIGRANTS IN SCHOOLS, S. DOC. NO. 61-749, at 154-56, 160 (3d Sess. 1911) (documenting the number of Jewish students enrolled in law schools); 5 U.S. IMMIGRATION COMM'N, THE CHILDREN OF IMMIGRANTS IN SCHOOLS, S. DOC. NO. 61-749, at 776-89 (3d Sess. 1911) (documenting number of Jewish students enrolled in law schools); Bureau of Jewish Soc. Research, *Professional Tendencies Among Jewish Students in Colleges, Universities, and Professional Schools*, in 22 THE AMERICAN JEWISH YEAR BOOK 383, 383-93 (Harry Schneiderman ed., 1920) (surveying professional tendencies among Jewish students in higher education); *see also* HEYWOOD BROUN & GEORGE BRITT, CHRISTIANS ONLY: A STUDY IN PREJUDICE 161-74 (1931) (providing anecdotal evidence of prejudice in hiring in the legal profession).

After 1945, law schools began to drop discriminatory quotas. *See* ABEL, *supra* note 22, at 85-87, 109 (exploring admission quotas as barriers to entering the profession); HAROLD S. WECHSLER, THE QUALIFIED STUDENT: A HISTORY OF SELECTIVE COLLEGE ADMISSION IN AMERICA 168-73 (1977) (discussing selective admission at Columbia's professional schools); Jerold S. Auerbach, *From Rags to Robes: The Legal Profession, Social Mobility and the American Jewish Experience*, 66 AM. JEWISH HIST. Q. 249, 278-81 (1976) (discussing how prevailing admissions criteria had benefited Jewish law students and reversed professional discrimination); Marcia Graham Synnott, *Anti-Semitism and American Universities: Did Quotas Follow the Jews?*, in ANTI-SEMITISM IN AMERICAN HISTORY 233, 258-59 (David A. Gerber ed., 1986) (summarizing rising Jewish enrollment in top law schools and the subsequent decrease in Jewish enrollment in elite law schools by 1946 due to adverse reactions by the elite bar); *see also* Malcolm Gladwell, *Getting In: The Social Logic of Ivy League Admissions*, NEW YORKER, Oct. 10, 2005, at 80 (reviewing admissions policies at undergraduate Ivy League institutions).

156. AUERBACH, *supra* note 11, at 97-99 (discussing the elite bar's critique that night law schools bring down high standards of the profession); CARLIN, *supra* note 37, at 38 n.23; ROBERT STEVENS, LAW SCHOOLS: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 74-79 (1983) (discussing role and expansion of part-time law schools).

157. Wald, *supra* note 32, at 32-42. *See also*, David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1676-77 (1998) (exploring the tendency of partners to mentor those with whom they share a cultural, socioeconomic, and religious affinity).

Discrimination against non-Jews, akin to anti-Semitic discrimination present at the

Specifically, notwithstanding the ability of many Jewish candidates to meet the formal recruiting standards of the WASP firms, the WASP white-shoe firms effectively excluded and discriminated against Jewish law students by recruiting only “token” Jewish associates and failing to promote qualified but non-WASP associates to partnership.<sup>158</sup> Exclusion of Jewish candidates was effective, notwithstanding its competitive cost in terms of forgoing talent, because of its socioeconomic, cultural, and religious underpinnings: recruiting and promoting Jewish lawyers contradicted the white-shoe ethos and values that sustained the elite status of the WASP firms.<sup>159</sup> Effective exclusion meant that many qualified Jewish attorneys, both graduates of elite law schools overlooked by the WASP firms and experienced lawyers not promoted by the WASP firms, were knocking on the doors of the Jewish firms, and it led to rational self-selection by some Jewish lawyers, who in turn opted out of competing for a job at, or promotion within, WASP firms.

The discriminatory recruitment and promotion practices of the WASP law firms facilitated the growth and success of Jewish law firms, in part because they were so successfully enforced: the white-shoe ethos and Protestant values embedded in the Cravath System played a key role in sustaining discrimination against Jewish lawyers between 1945 and 1965 even when discrimination was generally in decline. Given the commitment of the WASP firm to the white-shoe ethos and Protestant values, many Jewish graduates of elite law schools, who were less likely than their WASP classmates to find employment and receive promotion within the WASP firms, went to work for Jewish law firms.<sup>160</sup> Moreover, as token Jewish graduates of Harvard, Yale, and Columbia

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WASP firms, no doubt also played a role in the large Jewish firms’ hiring and promotion decisions. That said, Paul, Weiss, a Jewish law firm, was the first to name a woman partner and hire a black associate, HOFFMAN, *supra* note 9, at 112-13, and Stroock, Stroock & Lavan, another Jewish firm, had the only Puerto Rican partner at a “blue chip” law firm, *id.* at 137.

158. Between the late nineteenth century and the 1960s large law firm discrimination against Jewish lawyers was the norm. While after 1945 some WASP firms gradually began to hire “token” Jewish lawyers and effective discrimination against Jewish attorneys was gradually declining, it is important not to overstate the extent of the change, nor the pace at which it was taking place. The Jewish associate at a WASP law firm in this transitional period, between 1945 and 1965, was not the prototypical metropolitan “Jewish” lawyer of the day. While the latter was typically either a first- or second-generation immigrant of Eastern European descent, of a lower socioeconomic class, and a graduate of a part-time or night law school, the Jewish lawyer that was able to enter a large WASP firm at this time was the exception that proved the discriminatory status quo; he was more likely a second-generation immigrant of German descent, of a higher socioeconomic class, a graduate of an elite law school, a law review member, and sometimes the son of a lawyer, rather than the son of middle-class or working-class parents.

159. See *supra* Part I.B.

160. Kaye, Scholer’s advertisement at Columbia one year illustrated the consequences of this commitment by seeking “law review only” candidates. See HOFFMAN, *supra* note 9, at 132-33.

law schools were hired by WASP firms as associates but almost never promoted to partnership, Jewish law firms benefited from an influx of lateral senior associates coming from downtown Wall Street firms, whom they then promoted to partnership.<sup>161</sup> Effective discrimination by the WASP firms thus ironically subsidized and trained associates who ended up as partners at the Jewish firms. Consequently, the discriminatory hiring and promotion practices enabled Jewish law firms to recruit top Jewish candidates with little competition from the WASP firms and to grow at a tremendous rate.<sup>162</sup>

Interestingly, the ability of the Jewish law firms to secure talent according to the elite standards of the Cravath System helps explain why the Jewish law firms did not challenge the “elite production” apparatus of the then elite WASP firms—because of discrimination by the latter there were many Jewish law school graduates who met the elite criteria and allowed the Jewish firms, in turn, to establish themselves as elite. The result was that Jewish law firm did not challenge the system of elite reproduction put in place by the WASP firms, but rather reinforced it.<sup>163</sup>

### *3. Tournament theory and the white-shoe ethos as a restriction on firm growth*

Galanter and Palay’s seminal study of the tournament theory as an internal engine fueling the growth of large law firms<sup>164</sup> failed to capture the downside of the tournament as a restriction on firm growth. While Galanter and Palay correctly pointed out that tournament theory partially explains the exponential growth of large law firms,<sup>165</sup> they failed to notice that the tournament theory also explains the limited, constrained ability of large firms to grow even faster than they do. The institutionalization of the elite corporate bar and certain

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161. See, e.g., *id.* at 135.

162. It is noteworthy that the discriminatory practices of the WASP firms—with their consequence of a tight competitive market for jobs from the perspective of Jewish graduates of elite law schools—did not result in the standard economic prediction of decline in the demand and interest of Jewish law students in elite law schools. Jewish law students continued to graduate in relatively high numbers from elite law schools and flocked to the large, growing Jewish firms. Regarding the affinity between Jews and the law that may account for this phenomenon, see JEROLD S. AUERBACH, *RABBIS AND LAWYERS: THE JOURNEY FROM TORAH TO CONSTITUTION* (1990). *But see* Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993) (concluding that the perceived intellectual affinity between the Jewish and American legal traditions is often more perceived than accurate).

163. See, e.g., AUERBACH, *supra* note 11, at 184-88 (exploring the opportunity afforded to Jewish lawyers during the New Deal era to help establish in Washington, D.C., an alternative to Wall Street’s elite legal structure).

164. GALANTER & PALAY, *supra* note 1.

165. Demand factors and the consequences of the effective campaign by the large law firms for elite professional status also explain large law firm growth. See *supra* Part I.C.

features of the tournament of lawyers prevented the WASP firms from growing fast enough to match increased client demand for corporate legal services. The elite bar's commitment to set partner-to-associate ratios, long probation periods, the "up or out" policy, the shunning of lateral hiring at both the partner and associate levels,<sup>166</sup> and the rejection of law firm mergers as a legitimate avenue of growth all restricted the ability of the WASP firms to grow even faster than they did.<sup>167</sup> Indeed, as Galanter and Henderson now argue, when the large firms relaxed these features of the tournament theory and adopted the "elastic" model, their growth accelerated and reached new levels.<sup>168</sup>

Furthermore, the large law firm's internal growth engine slowed the WASP firm's growth because its size at any given point in time was a function of its initial relatively small size. Between 1950 and 1963 the WASP firms grew at an impressive rate of nearly 100%,<sup>169</sup> possibly their maximum growth rate given their commitment to the organizational features of the tournament theory. Such an impressive growth rate, however, was insufficient to meet the increased client demand for corporate legal services, and opened the door to competition from Jewish firms and other newcomers.

Importantly, the WASP firms' dominant and prevailing white-shoe ethos compounded the restriction on their growth imposed by the features of the tournament theory. Until the late 1970s, abandoning the professional ideology and commitments embedded in the Cravath System and growing at phenomenal rates (higher than those feasible within the constraints of the tournament theory) would have been considered crass, inappropriate, and ungentlemanly.<sup>170</sup> Adherence to the Cravath System's white-shoe ethos was

166. Hoffman notes:

Except for departures to government service, none has lost more than one partner at a time. Also, when partners leave a firm, they generally go into government, business or academic life. Only a handful quit one firm to practice with another. . . . [T]he Brahmins of the Bar don't shop around for better-paying positions. . . . And, as if by an unwritten agreement, there is almost no "raiding" by one firm of another's talent.

HOFFMAN, *supra* note 9, at 60-61.

167. Hoffman notes, "In recent years [the early 1970s], the blue-chip bar has remained remarkably stable. There has not been a significant split in a major Wall Street or Park Avenue firm for more than twenty-five years." *Id.*; see also SMIGEL, *supra* note 7, at 57 ("Competition for lawyers among the large firms in New York City [was] limited in two major ways: the firms will not pirate an employee from another law office, and they maintain a gentleman's agreement to pay the same beginning salary . . .").

168. Galanter & Henderson, *supra* note 7.

169. See sources cited *supra* note 118; Wald, *supra* note 32, at 15 tbl.2.

170. Mudge Rose grew in the 1960s by successive mergers and the absorption of other law firms, expanding from 55 to 105 lawyers in a ten-year period between 1958 and 1968. See HOFFMAN, *supra* note 9, at 45. Commenting on Mudge Rose's "swell[ing]" from a total of 105 attorneys when President Nixon left the firm to almost 120 attorneys a few years later, Hoffman noted, "Despite its successes, there was a general feeling along Wall Street that it may have sacrificed quality for quantity, that its business burgeoned faster than its ability to handle it." *Id.* at 125. In other words, Mudge Rose's rapid growth was viewed as

widespread among the large firms. Large law firms' "lawyers [were] *strangely cavalier* in their dealings with each other,"<sup>171</sup> as they forwent rational competitive conduct that would have allowed them to hold back newcomers and maintain their elitist culture.<sup>172</sup>

Contrary to Hoffman and Smigel's observations, however, the decision by the WASP firms to adhere to the constraints of the tournament theory and the hidden socioeconomic, cultural, and religious aspects of the Cravath System was not at all "strangely cavalier."<sup>173</sup> The WASP firm's claim to elite status was tied to its commitment to these "cavalier" notions of the white-shoe ethos and Protestant values. Abandoning this firm culture was too high a price to pay, even if it meant sacrificing competitive ground to the Jewish firms. Ironically then, the very same white-shoe ethos and Protestant values that enabled the WASP firms to sustain a credible claim for elite professional status before 1945, and which in turn allowed them to grow and thrive, later constrained their growth and opened the door for competitors, who were not constrained by a thick religious, socioeconomic, and cultural identity, to grow at an even faster rate. Jewish firms, not restricted by these notions of ungentlemanly growth, both recruited new attorneys in relatively high numbers and openly resorted to aggressive lateral hiring.<sup>174</sup>

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"unprofessional" by the Wall Street elite. And the pressure caused Mudge Rose to slow down:

"That's a problem," [Randolph H.] Guthrie [one of the firm's senior partners] concedes . . .  
 "I dare say, if we had really wanted to, we could have doubled the size of the firm. But there's no particular merit in being big . . . We're not hungry. We do very well anyway."

*Id.* at 108, 125.

Indeed, this shows the white-shoe ethos at work in a law firm with "the lineage of a thoroughbred." *Id.* at 108. Tellingly, Paul, Weiss's similar growth during the same timeframe, *see id.* at 45, 115-116, was not inhibited by the same ethos that restricted Mudge Rose. Mudge Rose chose to play by the "rules" of the Cravath System and forgo further aggressive growth.

171. *Id.* at 60 (emphasis added).

172. Smigel quotes a Cravath alumnus as recalling, "Mr. de Gersdorff of Cravath used to say, 'We don't want people for partners with whom we need written agreements.'" SMIGEL, *supra* note 7, at 199. At a time when the Jewish firms were growing faster than the WASP firms, within white-shoe firms, "[s]uper-achievers [were] not made partners. . . . It [was] because of the firm's unwillingness to take in a guy who moves too fast. They don't want to rock the boat." HOFFMAN, *supra* note 9, at 141 (quotation omitted). "In other cities where the bar is more personal and less institutionalized, a lawyer may bounce from firm to firm like a rubber ball. . . . But on the upper levels of the New York bar, the shifts are so rare that lawyers can tick them off on their fingers." *Id.* at 61. The door to the large firm arena was left open for newcomer firms to enter and compete with the established elite.

173. *See infra* note 172.

174. Wald, *supra* note 32, at 31-32..

*C. Being at the Right Place at the Right Time—and Making the Most of It*

*1. Size and numbers matter*

The dominant WASP elite corporate bar was fairly small in terms of the absolute number of large firms and their size as well as in terms of the relative number of large firms and their size vis-à-vis the increased client demand for corporate legal services.<sup>175</sup> Consequently, after 1945, Jewish firms gained ground on the WASP firms in a relatively short time span. If the WASP firms had been either more numerous or bigger in size, perhaps they would have been better positioned to meet the growing needs of corporate clients and would have crowded out the Jewish firms. But their relatively small number and size did not allow them to eliminate the competition. While the WASP firms grew rapidly and consistently both before and after 1945,<sup>176</sup> their growth after 1945 could not satisfy the ever-growing client demand for corporate legal services. Comparatively, the newcomer Jewish firms grew at a much faster rate.<sup>177</sup>

Further, the cartelistic position of the WASP elite bar before 1945 was not based on a natural monopoly. Rather, the WASP firms were simply the first to adopt the Cravath System's blueprint for the organization of a large law firm,<sup>178</sup> and they benefited from a socioeconomic and cultural white-shoe alliance with their corporate clients. As such, the cartelistic position was vulnerable: as increased client demand made the market more competitive,<sup>179</sup> non-WASP, non-white-shoe law firms were able to enter the marketplace with

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175. In 1945, there were approximately three dozen elite large WASP law firms with less than 2000 attorneys. By 1971, the stable group of large WASP law firms grew in number of lawyers employed to approximately 3000, but the number of firms stayed stagnant. HOFFMAN, *supra* note 9, at 1-14; *see sources cited supra* note 118.

176. Shearman & Sterling grew by 150% between 1963 and 1981 and was still the largest law firm in New York; Cravath grew by 81%; Davis Polk by 97%; Sullivan & Cromwell by 91%; and Simpson Thacher by 92%. However, the Jewish firms grew much faster. *See sources cited supra* note 118; Wald *supra* note 32, at 15 tbl.2.

177. Fried, Frank grew by 264%; Weil, Gotshal by 424%; Paul, Weiss by 143%; Kaye, Scholer by 91%; and Cahill, Gordon (the Catholic firm) by 130%. *See sources cited supra* note 118; Wald *supra* note 32, at 15 tbl.2

178. Initially, some leading attorneys resisted the bureaucratization of their firms in the Cravath mold, objecting to growth per se, the use of associates, and utilization of technological innovations. Holding on to the traditional model of law practice, the "dinosaurs" of the past rejected the Cravath System, which they saw as the paradigm shift of "selling out" professionalism to profit-driven big business. *See HOBSON, supra* note 7, at 141-59. This professionalism war within the old elite slowed down, relatively speaking, the initial growth of the WASP firms who required attorneys with a temperament, professional outlook, and set of ambitions somewhat different from that of the old guard's.

179. Some early corporate clients, dominated by powerful WASP founders, were themselves biased against Jewish lawyers. This bias gradually subsided as decision-making authority within corporate entities regarding the retention of outside counsel shifted to inside counsel. *See infra* Part II.C.4.

relative ease, adopt the Cravath model, and compete with the WASP firms for clients and, eventually, for graduates of elite law schools.

2. *The visibility of individual success and its impact on firm growth*<sup>180</sup>

The existence of “Jewish” pockets of practice allowed many individual Jewish attorneys to develop strong reputations in their respective practice areas. The success of individual Jewish attorneys lent visibility to their law firms and enabled the rapid growth of Jewish firms: Milton Handler became the prominent authority on takeover law and helped build Kaye, Scholer; Ira Millstein had a similar impact on Weil, Gotshal; Martin Lipton and Joseph Flom were the personification of reputed anti-takeover lawyers, and their legendary battles in the 1970s helped establish Wachtell, Lipton and Skadden, Arps, respectively, as elite firms; Jules Berman achieved similar success as a real estate attorney at Kaye, Scholer.<sup>181</sup>

The visibility of individual successful Jewish lawyers and their ability to lend their visibility to the creation of Jewish firms was a function of the time and place in which their success stories took place.<sup>182</sup> Jewish lawyers practicing with Jewish law firms displayed their superstar power at a very opportune time. Jewish law firms began to rise after 1945 and achieved prominence by the late 1970s and early 1980s—right before the period when continued institutionalization of the elite bar rendered personal, individual visibility less apparent and anonymity was becoming the norm of large firm practice.<sup>183</sup> “With increasing specialization and division of labor in the blue-chip bar, the individual lawyer . . . has no opportunity to stand out. The firms become the powers, not the men in them. . . . In short, the blue-chip bar has become a place for a man to make money, not to make his mark.”<sup>184</sup>

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

181. In 1947, another Kaye, Scholer attorney “successfully mediated a threatened strike at a New Jersey factory” and his success led to additional mediation cases. “We can trace a whole school of clients from that one case,” a partner at Kaye Scholer noted. HOFFMAN, *supra* note 9, at 92.

182. *See* Wald, *supra* note 32, at 19-20. While the Jewish law firms were benefiting from the high visibility of their attorneys’ professional success, the WASP firms continued to benefit from the high cultural and socioeconomic visibility of their lawyers.

183. *See* HOFFMAN, *supra* note 9, at 52; *supra* note 10 and accompanying text.

184. HOFFMAN, *supra* note 9, at 52 (citation omitted). This legal environment was quite different from the one that existed when Milton Handler, Ira Millstein, Marty Lipton and Joe Flom rose to prominence.

The Cravath System featured teamwork as the locus of representation, not the individual attorney. Nonetheless, while most corporate lawyers were lost in the forest of team-lawyering, until the mid-1980s and the explosion of mega law firms in number and in size there was still a window of opportunity for individual success stories to become visible. Jewish attorneys took advantage of this window, establishing exceptional individual reputations and lending their visibility to their respective firms.

Indeed, the same window of opportunity for visibility and individual success enabled some Jewish attorneys to join WASP firms, even in the discriminatory era between 1945 and 1965. Because it allowed for individual success and visibility, a career in law was perceived to have advantages in light of the prevailing discrimination in American workplaces for those fearing careers in arenas that depended on social structure and networking or required rising through the ranks via teamwork. The practice of law, even within the Cravath System, still offered an opportunity for a highly visible and individual-based career as opposed to a team-dependent and institution-dependent career path.<sup>185</sup> To be sure, the Cravath System, even then, fostered anonymity among its team members. Individual visibility was the exception rather than the rule. Nonetheless, the visibility of successful Jewish attorneys practicing with elite WASP firms, combined with the visibility of individual Jewish attorneys practicing with the emerging Jewish firms, helped build and lend credibility to the reputation and success of Jewish law firms.

### 3. *The “flip side of bias”*<sup>186</sup>

Beginning in the 1960s and continuing throughout the 1970s and 1980s the prevailing Cravath-style ideology of professionalism, simultaneously featuring formal meritocracy alongside implicit reliance on Protestant values and the white-shoe ethos, was eroding, slowly and gradually displaced by a more explicitly competitive and meritocratic ideology.<sup>187</sup> Under this emerging

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185. There are several examples of attorneys whose successful individual visibility enabled Jewish lawyers to succeed at WASP firms, including Leo Gottlieb, who in 1945, after the split of the Root, Clark firm into Cleary, Gottlieb and Dewey, Ballantine, became the first Jewish named partner in a major WASP Wall Street firm (although Hoffman reports that an observer commented that “Cleary Gottlieb took with them all the Jews and liberals”); Eustace Seligman at Sullivan & Cromwell; Ed Weisl at Simpson, Thacher; Louis Loeb, who joined Lord, Day & Lord in 1947, represented *The New York Times* until the paper dropped his firm due to the Pentagon Papers affair, and was the first Jewish president of the New York City Bar Association; and Floyd Abrams at Cahill, Gordon, who represented *The New York Times* with Alexander Bickel in connection with the Pentagon Papers. *Id.* at 65, 96-104.

186. By the “flip side of bias” I mean to denote the positive consequences of prejudice and contrast them with the negative outcomes of bias.

187. What Russell Pearce would later call the “Professionalism Paradigm Shift.” See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229

business ideology, the same prejudices, stereotypes and bias that fueled and helped sustain effective discrimination against Jewish attorneys under the old ideology now made Jewish attorneys desirable under the new model.<sup>188</sup> That is, the paradigm shift in the underlying ideology of large law firms that replaced the prevailing white-shoe ethos with a more explicitly business-oriented notion of professionalism rendered the loathed “qualities” of Jewish lawyers under the old model—smarts, wealth maximizing, manipulative on behalf of clients, and instrumental, not to say conniving—positive attributes of lawyering under the new one. The very same stereotypes that fueled prejudice against Jewish lawyers were now perceived as desirable qualities.<sup>189</sup>

This flip side of bias phenomenon operated at both the individual level (making Jewish lawyers more attractive to WASP firms) and at the firm level (making Jewish law firms more desirable to entity clients). At the individual level, the “flip side” effects worked alongside multiple complex factors,<sup>190</sup> such as human and social capital,<sup>191</sup> familial and community support<sup>192</sup> and a

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(1996); see also RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 185-211 (1999).

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

189. While positive stereotyping might entail beneficial consequences, as was the case for Jewish attorneys and law firms, whether stereotyping is ever desirable is very much in dispute. See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Paul Horwitz, *Uncovering Identity*, 105 MICH. L. REV. 1283 (2007); Chris Frates, *Owens’ “Stereotyping” Not Positively Received*, DENVER POST, Aug. 4, 2006 (discussing the controversy surrounding Colorado Governor Bill Owens’ comments regarding positive Jewish and Asian cultural stereotypes).

190. Jews excelled at other professions as well. See Thomas L. Shaffer, *The Legal Ethics of Belonging*, 49 OHIO ST. L.J. 703, 713 (1988) (“Jews have advanced into the professions more rapidly than any other late immigrant group. In 1970, seventy percent of American Jewish males were in ‘professional, technical, managerial, and administrative careers.’” (citing RAPHAEL PATAI, *THE JEWISH MIND* 497 (1977)); see also, e.g., Barak D. Richman, *How Community Institutions Create Economic Advantage: Jewish Diamond Merchants in New York*, 31 LAW & SOC. INQUIRY 383 (2006) (outlining Jewish domination of the diamond industry); Sherwin B. Nuland, *My Son, the Doctor—the Saga of Jews and Medicine*, THE NEW REPUBLIC, Sept. 5, 2005, at 27-34 (studying the role of intellect in explaining the affinity between Jews and medicine).

191. Social capital is a resource that “exists in the relations among persons.” See James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. 95, 100-01 (1988) (exploring “the use of [social capital] through demonstrating [its] effect in the family and in the community in aiding the formation of human capital”). It is the sum of the resources which allow a person to accomplish economic and non-economic goals, achieved through a person’s network of relationships. Pierre Bourdieu, *The Forms of Capital*, in

traditional cultural commitment to education<sup>193</sup> to contribute to the advancement of Jews in the legal profession. At the firm level, the flip side of bias helped build the Jewish law firm's reputation. Under the new business

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HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241-58 (John G. Richardson ed., 1986); R.S. BURT, STRUCTURAL HOLES: THE SOCIAL STRUCTURE OF COMPETITION (1992). This network provides its members with an advantageous credential that arises from its members' obligations, norms, status, friendships, and esteem with other members in the network. Bourdieu, *supra*, at 249. In addition, a person's network, extended by "friends of friends," J. BOISSEVAIN, FRIENDS OF FRIENDS (1974), connects him with opportunities that would otherwise not have been revealed. Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. SOC. 1360, 1369-73 (1973) (demonstrating that weak connections among groups of people are "indispensable to individuals' opportunities and to their integration into communities"). This network of relationships can exist "inter-generationally," within the family, and from organizational and social participation in the community. Coleman, *supra*, at 109. Social capital in the family and community can facilitate the creation of human capital in "the rising generation." *Id.* Social capital within the family is extremely important for a "child's intellectual development," enhancing a child's opportunity to create human capital. *Id.* at S110, S113-14. Outside of the family, social capital "consist[s] of the social relationships that exist among parents, in the closure exhibited by this structure of relations, and in the parents' relations with the institutions of the community." *Id.* at S113.

The American Jewish community channeled social capital into the study of law. Auerbach makes the case for the cultural affinity of American Jews and a legal career. He argues that after 1945, control of the expressions and direction of American Judaism had switched hands from rabbis to lawyers: Marshall, Brandeis, Frankfurter and Mack. Auerbach submits that for American Jews and Jewish immigrants, legal practice was a means of becoming truly "American" and proving their patriotism. Marshall and Brandeis, for example, provided "a secular legal frame of reference for Jewish acculturation . . . . For both men, the allegiance of American Jews could be only to the Constitution and to the rule of law that it symbolized. Their fervent attachments to the American legal system defined a new identification for American Jews." AUERBACH, *supra* note 162, at 146.

192. The Jewish community provided a social and cultural support system to law students in ample role models both at the upper sphere of the profession (in Justices Brandeis and Frankfurter), and numerous counter-role models at the bottom spheres of the city bar. Jewish students attending elite law schools and seeking a career at a large New York City firm had to overcome the taste for ethnic and religion-based discrimination as well as socioeconomic barriers. Endowed with high social and human capital, however, Jewish lawyers did not have to overcome low intellectual self-esteem. To students who grew up either in the analytical tradition of the Talmud or in the secular intellectual tradition, "learning to think like a lawyer" and an emphasis on analytical skills were familiar. Thus, once Jewish students overcame, with time, low socioeconomic self-esteem, the opportunities in law were unlimited. Jewish lawyers believed that, but for the "irrelevant" socioeconomic factors, they were intellectually qualified for the practice of law. In essence, social and cultural capital served as the foundation upon which Jewish lawyers built in developing high intellectual self-esteem that in turn facilitated their success at elite law schools and practicing with large law firms. See Wald, *supra* note 32, at 43-46. See generally PATAI, *supra* note 190.

193. The Jewish immigrant community had an ethos of learning and commitment to higher education. A "better" life meant increased educational opportunities for the next generation. Second generation Jewish immigrants were encouraged to pursue college and graduate education. Educational achievements were considered prestigious and conferred high social status within the community. The American Jewish community thus encouraged an investment in social and human capital. See Wald, *supra* note 32, at 40-42.

model of professionalism, the default religious identity of the Jewish firm—the product of the religious identity of its lawyers—served as a selling point to its clients. Unlike the old WASP firms, the Jewish firms never cultivated an explicitly Jewish culture of law practice. Nonetheless, their *perceived* religious identity, at this age of “flipped bias” that rendered “Jewish” qualities desirable, made law firms with a majority of Jewish lawyers arguably more attractive to entity clients and, ironically, enabled Jewish law firms to actually benefit from bias and prejudice.

#### 4. *The rise of inside counsel*

The rise of inside counsel<sup>194</sup> and the in-house legal department in the second half of the twentieth century is a well-documented phenomenon.<sup>195</sup> While there is some disagreement in the literature as to when the inside counsel renaissance began, there is no dispute that by the 1970s the trend was significant and robust. Rapid growth occurred in both the importance and size

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194. By “inside counsel” I mean attorneys who are employees of private business corporations. Rosen tracks the evolution of the title of inside counsel from “house counsel,” “tame” and “kept” lawyers, to “inside counsel” and finally “corporate counsel.” The titles reflect the growth of inside counsel’s prestige and power vis-à-vis outside counsel: “tame” and “kept” captured the weak position of inside counsel within their corporate entities and with regard to outside counsel. “Inside counsel” referred to their physical and professional location, as distinguished from the outside large law firms’ lawyers. See Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 479 (1989).

195. See, e.g., George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635 (2006); Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277 (1985); Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955 (2005); Peter J. Gardner, *A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client’s Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17, 32-33 (2003); Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 199-208 (2001); Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201 (1997); Robert L. Nelson & Laura Beth Nielson, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC’Y REV. 457 (2000); Rosen, *supra* note 194; Ted Schneyer, *Professionalism and Public Policy: The Case of House Counsel*, 2 GEO. J. LEGAL ETHICS 449, 458-59 (1988); Jonathan R. Maslow, *The Rise of In-House Counsel*, CAL. LAW., Sept. 1981, at 31; see also Marc S. Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 751-52 (1990) (discussing the rise of in-house corporate law departments); Janet Stidman Eveleth, *Life As Corporate Counsel*, MD. B.J., Jan.-Feb. 2004, at 16 (examining the role of in-house counsel in Maryland); cf. Am. Corp. Counsel Ass’n, *Diversity in the Legal Profession*, ACCA DOCKET, Sept.-Oct. 1996, at 32 (discussing corporate counsels’ ability to influence diversity). See generally MARK STEVENS, *POWER OF ATTORNEY: THE RISE OF THE GIANT LAW FIRMS* 7-16 (1987) (studying the rise of corporate counsel).

of in-house legal departments.<sup>196</sup> Justified in terms of cost-effectiveness and the growth of corporate entities,<sup>197</sup> the expanded role of inside counsel now included completing routine corporate work previously assigned to outside counsel;<sup>198</sup> performing preventive work, that is, strategic and informal planning and systematic prevention to ensure legal compliance;<sup>199</sup> and managing litigation costs, mainly by supervising the work of outside counsel.<sup>200</sup> As manager of outside counsel, inside counsel was responsible for the initial selection of outside counsel, the decision to assign a particular legal issue to the in-house legal department or to outside counsel, the division of work between in-house and outside counsel, and for supervision of outside counsel's work.<sup>201</sup>

As inside counsel consolidated its power and gained prestige,<sup>202</sup> it became the key legal decision maker within the corporate client, taking that role from the chief executive officer.<sup>203</sup> The rise of inside counsel resulted in increased competition among outside counsel, *i.e.*, large law firms.<sup>204</sup> Moreover, within the world of large law firms, it contributed to the rise of Jewish law firms and a concomitant decline in WASP firms' share of the corporate legal services market, because inside counsel was less likely to discriminate based on

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196. Schneyer asserts that "[house counsel] have grown considerably since the 1950s, both absolutely and relatively to other segments of the bar." Schneyer, *supra* note 195, at 458. Others find that the office of inside counsel was still in decline in the 1950s and trace the reversal of the trend to the 1960s. All agree that, by the 1970s, the office of inside counsel was on the rise: "By the 1970s, the general counsel's position in many large corporations grew in stature and scope of responsibility. . . . General counsel joined senior management near or at the top of the corporate hierarchy." DeMott, *supra* note 195, at 960; *see also* Liggio, *supra* note 195, at 1203-07 (exploring the renaissance of corporate counsel in the late 1970s).

197. "[Another] compelling reason[] beside[s] cost to bring legal work in-house . . . [was] [c]orporate growth . . . . 'When a company reaches a certain point . . . common sense tells you that it's a good idea to have your own lawyers.'" Maslow, *supra* note 195, at 31-32.

198. Rosen, *supra* note 194, at 507-10.

199. Chayes & Chayes, *supra* note 195, at 280-89; Rosen, *supra* note 194, at 519-25.

200. Chayes & Chayes, *supra* note 195, at 289-93; Rosen, *supra* note 194, at 510-19.

201. *See* sources cited *supra* note 201.

202. Rosen explores both popular and scholarly reports that explain the rise to power of inside counsel. Rosen, *supra* note 194, at 481-502 (noting in part that "[w]hether out of fear of biting the hand that feeds them, or because of ethical duties to provide the service the client requests, elite practitioners do not openly challenge, and indeed vie for, relationships in which inside counsel have become 'the client,'" and thus exercise control over outside counsel).

203. Chayes & Chayes, writing in 1985, found that "today with respect to outside law firms, the general counsel *is* the client, rather than the CEO or some other representative of the firm." Chayes & Chayes, *supra* note 195, at 290.

204. Maslow, *supra* note 195, at 74 ("Fewer clients are choosing one firm for all their outside business. They're starting to shop around.").

“irrelevant” considerations: “It turned out that corporate clients couldn’t care less if their counsel was [Jewish], as long as they got good service.”<sup>205</sup>

The rise of inside counsel led to increased competition among large law firms for two interrelated reasons. First, as inside counsel replaced outside counsel as the dominant provider of routine corporate work, the volume of routine work done by outside counsel declined. Consequently, corporate clients had little need for the stable and significant relationship with outside counsel traditionally necessitated by the law firm’s role as general counsel. Now, “farming out” mostly complex legal issues, large corporations only rarely relied on a single or even a few outside law firms to act as general counsel.<sup>206</sup> Large law firms could no longer expect to maintain a loyal relationship with one large corporate client who anchored the firm’s operations and provided a steady stream of work and fees.<sup>207</sup> This development had a direct impact on WASP firms because they had traditionally been the nearly exclusive providers of outside counsel services to large corporate entities. Second, the expanded role of inside counsel made corporate clients more sophisticated consumers of outside counsel services.<sup>208</sup> Acquiring expertise in managing litigation, inside counsel pursued a “hands on” approach to purchasing and monitoring outside counsel work. As a result of this heightened scrutiny, law firms’ needed greater expertise and stronger reputations.

In this new competitive era, dominated by sophisticated inside counsel decision makers, selection of outside counsel was driven by merit-based performance and cost analysis, rather than old loyalties to elite firms based on WASP and “old-boy’s club” allegiances. As a result, the elite WASP firms lost their inherent advantage over Jewish law firms: their large corporate clients no longer consumed legal services exclusively from them. Inhibited by their elitist conservative organizational structure, which resisted competition and efficiency as the organizing themes of practice, and their distaste for “undignified” explicit cost considerations as the measuring stick for legal services, the WASP firms were slower to react to these new practice realities.<sup>209</sup> Unlike other

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205. HOFFMAN, *supra* note 9, at 135-36.

206. Chayes & Chayes, *supra* note 195, at 290-91; *id.* at 294 (“[F]irm[s] now perform[] specific, designated tasks, and . . . the client’s business is no longer concentrated in a single firm.” (footnotes omitted)).

207. *Cf.* Rosen, *supra* note 194, at 484 (“[E]lite firms have responded to the emergence of inside counsel as purchasing agents for their services by entering ‘beauty contests’ and bidding wars with their elite rivals.”).

208. Maslow, *supra* note 195, at 32, 73 (arguing that corporate clients’ hands-off attitude vanished as a result of inside counsel’s managerial role and citing Gilson for the proposition that corporate clients were no longer willing to overlook price and performance in the name of loyalty to a long-standing law firm).

209. Rosen, *supra* note 194 at 505 (“[U]nder current market conditions, corporations have found it necessary to control the fees incurred for legal services. Inside counsel substitute for outside counsel because elite firms are not able or willing to renegotiate their

executives within the corporate entity, sophisticated inside counsel, applying performance and cost standards, was less likely to discriminate against Jewish firms. Moreover, as inside counsel disseminated outside work to many law firms as opposed to a single or limited number of outside counsel, Jewish law firms were likely to be assigned at least some of the work. Finally, the Jewish law firms' hospitable attitude towards a "hands-on" managerial approach and willingness to explicitly compete along performance and cost lines made them an attractive choice for inside counsel, especially given the pressure on inside counsel to meet budgetary constraints and manage the in-house legal department efficiently.<sup>210</sup>

As if increased competition, greater client sophistication, and the restructuring of the market along merit lines were not enough, the WASP firms further suffered from the changing nature of the legal work required from outside counsel. As in-house legal departments began to grow, the division of work between inside and outside counsel changed, with the latter predominantly providing litigation services and the former assuming responsibility for routine corporate work.<sup>211</sup> This development benefited Jewish law firms; litigation was their strong suit, while routine corporate work was the expertise of the WASP firms. Indeed, as discussed above, the WASP firms shied away from litigation as an undignified "Jewish" area of practice and allowed the Jewish firms, some of which developed a reputation as litigation firms, to dominate this "protected" arena. Chayes and Chayes speculate that "[l]itigation may have fueled the extraordinary growth of firms in the 1960s and 1970s. It was the ideal producer of the cash flow needed to support one- or two-hundred-person law firms."<sup>212</sup> And in an ironic twist, given the traditional dominance of the WASP firms as outside counsel to large corporate entities, this "ideal producer of cash flow" was, for a while, the near exclusive domain of the Jewish firms.

The white-shoe ethos and the flip side of bias compounded the effects of this development. Litigation, as the new practice focus of a successful outside counsel, was inconsistent with the organizational structure of the Cravath System and its celebration of the conference room lawyer as the ideal attorney. If, a generation ago, the WASP firms could count on cohorts of top law students aspiring to become corporate attorneys as potential recruits, now those same students were anxious to become litigators.<sup>213</sup> The white-shoe ethos, with

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fee structures.").

210. See Rosen, *supra* note 194 at 510-19 (describing the expansion of duties for inside counsel and their tense relationship with outside counsel).

211. *Supra* notes 206-07 and accompanying text.

212. Chayes & Chayes, *supra* note 195, at 296.

213. *Id.* at 295-96 ("In the law schools a generation ago, the ideal legal career envisioned by the students was the office lawyer, the architect of well-crafted and durable legal arrangements that accommodated the parties' needs and interests. A career in litigation

its dignified disapproval of rapid change and aggressive competitive practices, slowed the response time of the WASP firms even as they gradually tried to adapt to the new practice realities created by inside counsel. The flip side of bias further aided Jewish law firms in competing for the provision of litigation services. The image of Jewish law firms as excelling in “combative” and “argumentative” litigation, coupled with the perception that a successful outcome in litigation related less to networking and more to the merit, skill and visibility of successful Jewish litigators and law firms, allowed Jewish law firms to effectively compete for outside counsel work.

### 5. A Jewish client base

Big Jewish clients did not play a direct, significant role in creating a demand for Jewish lawyers and law firms.<sup>214</sup> There is no evidence to suggest that wealthy individual Jewish clients and “Jewish” corporations displayed religious loyalty and sought legal services exclusively from Jewish law firms.<sup>215</sup> Furthermore, there is no evidence to suggest that the Jewish clients of WASP law firms used or attempted to use their influence to demand that the white-shoe firms hire or promote Jewish lawyers. Between 1950 and 1963, “[a]lthough the large Jewish firms [had] some important corporations as clients, these companies were not as large, as old, as conservative, or as important as the major clients of the large Wall Street firms.”<sup>216</sup> “For example, if a Jewish firm [had] a bank as a client, it [was] usually a small bank.”<sup>217</sup> In many sectors, the Jewish law firms did not represent the largest entities.<sup>218</sup> Between 1963 and

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was thought of as barely a step above criminal law or divorce. Today, a large number of the same students are anxious to become litigators.”). It is perhaps not surprising that law students developed an interest in inside counsel positions and hence litigation. Inside counsel positions featured shorter working hours, no pressure to bring in new clients and salaries approximating those of associates at the elite firms. Moreover, the rise of inside counsel also meant the promise of quality work and exercise of professional judgment, the same promise that the large firms used to be able to make before inside counsel took over some of the work they had previously performed. Rosen, *supra* note 194, at 480, 487-88 (noting the exercise of power and quality professional judgment by inside counsel at the expense of outside counsel).

214. See Wald, *supra* note 32, at 20-23.

215. Melvin M. Fagen, *The Status of Jewish Lawyers in New York City*, 1 JEWISH SOC. STUD. 73, 98 (1939). Fagen’s study indicated Jewish lawyers tended to have a larger Jewish client base compared to a non-Jewish client base, but the study also showed that Jewish lawyers were not completely dependent on a Jewish client base. See also SMIGEL, *supra* note 7, at 174 (stating that a partner at a “major Jewish firm” said that more than half of the firm’s clients were non-Jewish but that a partner at a different “large Jewish firm” said that the firm’s clients were “predominantly Jewish”).

216. SMIGEL, *supra* note 7, at 174.

217. *Id.*

218. See *id.*

1980, however, that trend began to change, as Jewish law firms began to represent a client base increasingly similar to that of the WASP firms.

Small and mid-size Jewish clients, however, did support the struggling, lower-status Jewish New York City bar in ways that indirectly led to the fostering of more competitive conditions and the success of Jewish law firms. First, middle- and lower-class Jewish clients, rather than big corporate “Jewish” clients, helped sustain the struggling low status Jewish bar in New York City. The Jewish bar, in turn, before the emergence of the large Jewish law firm, served as the breeding grounds for Jewish lawyers.<sup>219</sup> Moreover, the presence of a robust Jewish bar led to a gradual decline in discrimination against Jewish lawyers by reducing ignorance, prejudice, and bias regarding Jewish lawyers.

Second, a Jewish client base and informal Jewish networking did help indirectly support the emerging large Jewish law firms. Rather than “big” Jewish money and large corporate “Jewish” clients supporting the Jewish firms, the Jewish firms built a large diversified client base compared with that of the typical WASP firm. That is, the typical Jewish firm tended to have a greater number of smaller clients than the WASP firm. The sheer volume of small and mid-size Jewish clients in New York City allowed the emerging Jewish firms to secure a reliable client base until they were able to benefit from the protected pockets of “Jewish” practice and expand their base.

### III. THE DEMISE OF THE LARGE RELIGIOUS LAW FIRM

#### *A. The Disintegration of the Religious and Cultural Identity of the Large WASP Firm*

The religious identity of the large law firm was never explicit or formal. For the emerging large WASP law firm struggling to establish its professional standing and elite status, Protestant values combined with socioeconomic and cultural characteristics were hidden means towards the end of securing elite professional status. Later on, for the established large WASP law firm acting to maintain its dominance, elite professional status was an impetus for growth. Because it was never an explicit feature, tracking the emergence of and role played by the religious and cultural identity of the large law firm called for an examination of the complex interplay between supply and demand forces and socioeconomic, religious, and cultural factors. The decline of the religious identity of the large firm followed the same multifaceted path and is explained by the interplay of overlapping factors.

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219. CARLIN, *supra* note 37, at 19, 22-37 (finding that while Jewish attorneys constituted 60% of the New York City Bar, they were heavily relegated to the lower strata).

### 1. *Embracing meritocracy*

After 1945, once the large law firm successfully established a credible and stable claim to elite professional status—or, in Larson’s words, successfully translated elite religious and cultural status into elite professional status—Protestant values and the white-shoe ethos were naturally phased out. With the religious and cultural WASP spirit that enabled it “escaping the cage,”<sup>220</sup> the meritocratic Cravath System was able to stand on its own two feet. Consequently, the driving force behind discriminatory hiring and promotion practices favoring WASP candidates to the exclusion of Jewish and Catholic lawyers was on the decline.<sup>221</sup>

Moreover, the WASP law firm gradually disassociated itself from the non-professional characteristics that allowed it to secure elite professional status, such as Protestant values and the white-shoe ethos, instead highlighting its commitment to merit and excellence, the so-called natural standards of professionalism.<sup>222</sup> The move to cloak itself in merit-based professionalism was not only desirable as a means of legitimizing its elite status, it was also necessary if the old WASP firm was to maintain that elite status in the latter part of the twentieth century, when religious identity and cultural status were increasingly being viewed as professionally irrelevant. Indeed, with elite professional status secure, the large WASP firm had no need for the Protestant and white-shoe facets of its identity and every reason to eschew and deny reliance upon such “irrelevant” considerations. It was time to feature the meritocratic facet of the Cravath System front and center, rewriting history and pretending as if meritocracy alone was always the sole criterion for hiring and promotion.<sup>223</sup>

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220. WEBER, *supra* note 29, at 181-82.

221. And yet, old hiring and promotion habits die hard, especially when mixed with prevailing anti-Semitism against Jewish attorneys, ethnic and religious discrimination against Catholic attorneys, and socioeconomic and cultural snobbery. Accordingly, in the 1950s, even as the dominance of Protestant values and the white-shoe ethos as organizing themes of the large firm were in decline, large firms still routinely discriminated against non-WASP lawyers. *Supra* notes 152-155 and accompanying text.

222. As Auchincloss points out:

the old managerial elect have shrewdly adapted themselves to the new ways. . . . [They] saw that they could stay rich even if they had lost their rank. . . . [I]n giving this up [their socioeconomic status], the old world gave up nothing that hurt it. Indeed, the whole transformation has been accomplished in such a way that the new rich can boast with a smug satisfaction that the old WASP world is dead and gone.

Louis Auchincloss, *The Persistence of the WASP*, in BIG ISSUES: THE EXAMINED LIFE IN THE DIGITAL AGE 147, 147-48 (Forbes ASAP ed., 2001).

223. Lisagor and Lipsius, for example, referring to the firm’s hiring and promotion of several Jewish attorneys, contrast Sullivan & Cromwell with the other white-shoe firms of the day, and argue, “Where Davis, Polk epitomized aristocratic law, which included most of the white-shoe firms, Sullivan & Cromwell, with its hard-working Jewish partners, epitomized and anticipated the meritocracy that would ultimately overtake all Wall Street

The process of religious and cultural disassociation began to take shape between 1945 and 1965, as the WASP firms started to hire and promote Jews, Catholics, and other men from lower socioeconomic classes. The change was slow and gradual, but nonetheless, clear and distinct. The WASP firms began to make hiring and eventually promotion decisions that would have been inconceivable in years past. While Jewish lawyers hired by WASP firms during this transitional era were sometimes referred to as “token” attorneys, over time Jewish associates and, upon promotion, Jewish partners reached a critical mass and could no longer be referred to as a “token” contingent.<sup>224</sup> By the mid-1960s, what was an incremental phenomenon became a distinct trend, as Jewish lawyers were both hired and promoted with more regularity.

The trend intensified between the 1960s and the 1980s, so much so that by the mid-1980s the old WASP firms’ regular hiring and promotion of Jewish and Catholic attorneys caused them to lose their Protestant identity not only in spirit but also in terms of the religious affiliation of a majority of their associates and partners.<sup>225</sup>

2. *The professionalism paradigm shift: The rise of “law as a business” ideology*

Applying Thomas Kuhn’s theory of paradigm shift, Pearce has argued persuasively that in the late 1980s and 1990s the legal profession experienced an ideological transformation,<sup>226</sup> abandoning its long standing “Professionalism Paradigm”<sup>227</sup> and adopting in its place a Business

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practices.” LISAGOR & LIPSIOUS, *supra* note 71, at 106-07. However, when one considers the possibility that the hard-working Jewish partners may have been hired because of their personal connections and nepotism rather than merit it seems more likely that Sullivan & Cromwell remained entrenched in the white-shoe aristocracy of the day while aspiring towards the meritocracy of its future. *See id.* at 58-59 (Alfred Jaretzki, Sr., the first Jewish partner at the firm “went to Harvard with George Sullivan, the son of Cromwell’s original partner”). Referring to the large Jewish contingency at the firm, Lisagor and Lipsius quote a firm partner who noted: “They were all relatives.” *Id.* The Jewish partners of Sullivan & Cromwell of the early twentieth century were Edward H. Green, Jaretzki’s cousin, Alfred Jaretzki, Jr., and Eustace Seligman, Jaretzki’s son-in-law. *Id.*

224. AUERBACH, *supra* note 11, at 232 (“For the first time, minority-group lawyers in significant numbers gained access to the professional elite in private practice. Ethnic and religious lines still held fast in the older corporate firms . . . [b]ut the expertise accumulated by lawyers in New Deal Washington increased their market value . . . [and yielded rewards for] those [minority lawyers] who followed the traditional path to success . . .”).

225. The period also featured the beginning of a gradual decline in gender discrimination, at least at the hiring stage, if not the promotion-to-partnership stage.

226. Pearce, *supra* note 187. *See generally* Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 *FORDHAM INT’L L.J.* 1239, 1264 (1998) (discussing the “law as a profession v. law as a business” debate).

227. Pearce, *supra* note 187, at 1233-40.

Paradigm.<sup>228</sup> Rather than viewing the practice of law as a social bargain, in which the profession uses its skills and special knowledge for the good of clients and the public, and the public in return grants the profession a monopoly over the provision of legal services,<sup>229</sup> the practice is viewed as a for-profit service industry, organized on the principles of market competition, efficiency, cost-benefit analysis and client satisfaction.<sup>230</sup> While the ideological transformation has affected different segments of the legal profession to varying degrees, it has had a significant influence on the organization and culture of the large law firm, and in turn led to the gradual decline of the white-shoe ethos and Protestant values as important characteristics of the large firm, further eroding the religious and cultural identity of the WASP firm.

Following the Supreme Court decisions in *Goldfarb* and *Bates*,<sup>231</sup> deregulating the market for legal services and essentially allowing lawyer advertising and solicitation, the *American Lawyer* began regularly publishing previously taboo information about attorney compensation, measuring and ranking the status of law firms, not only by the number of lawyers they employed but also by their reported profits per partner.<sup>232</sup> Associate compensation became common knowledge and the taboo of lateral hiring collapsed. The old claims for elite status were dying out, and, in this new professional world, religious identity, along with socioeconomic and cultural statuses, were deemed to be truly irrelevant.

The “law as business” ideology was incompatible with both the formal meritocratic yet anticompetitive culture of the Cravath System and the implicit WASP identity of the large firm. The rise of the market ideology thus exerted pressure on WASP identity and culture. Gradually abandoning its commitment to a firm culture that was built on the white-shoe ethos and Protestant values was, however, more than simply a reaction to the paradigm shift and adoption of a new, business-based professional ideology. In fact, the WASP law firms were not passively experiencing the ideological shift but rather advocating it as it allowed them to maintain their claim to elite professional status while relaxing their discriminatory hiring and promotion practices, which had allowed them to achieve that professional status to begin with. Moreover, the transformation generally allowed the large firms to once again reinvent themselves as the guardians of elite status. Just as the Cravath System ideology in the 1920s aligned itself with the American dream and allowed the large firm to assume a leadership position in pursuit of new professional ideals while

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228. *Id.* at 1263-76.

229. *Id.* at 1238.

230. *See id.* at 1265-67.

231. *See supra* note 87.

232. “[T]he *Bates* decision has had a profound, perhaps radical, effect on our profession.” Duncan A. MacDonald, *Speculations by a Customer About the Future of Large Law Firms*, 64 *IND. L.J.* 593, 594 n.4 (1989).

promising graduates of elite law schools a piece of the “Holy Grail” (albeit in the Protestant spirit), the new competitive professional ideology allowed the large firm, which was ideally suited to pursue that competitive ideology given its economics of scale, a credible claim to elite professional status.<sup>233</sup>

### 3. *The economics of discrimination in play*

The ideological shift taking hold of the large firm reflected and was shaped in part by a parallel shift in practice realities. The continued growth of corporate clients’ demand for legal services and the corresponding growth in the size and number of large law firms led to an immense increase in the recruitment needs of the large law firms and, therefore, to increased competitiveness in the recruitment process. The old WASP firms simply could not afford to recruit exclusively from a WASP candidate pool, nor could they afford to be perceived as doing so for fear of incurring the reputation costs that attend discriminatory practices.<sup>234</sup> In other words, the growing competition for legal services among large law firms complemented the change in ideology: whereas the latter weakened the reasons for sustaining a religious and cultural identity, the former rendered preserving that identity prohibitively costly. Thus, changing practice realities put additional pressure on the WASP ideology and its implicit reliance on the religious identity of the firm.

As demand for lawyers increased, and competition among law firms intensified, large firms that discriminated based on religious grounds faced a smaller pool of talent from which they could hire.<sup>235</sup> Similarly, firms refusing to recruit outside of elite law schools to meet their quotas for new lawyers found themselves at a disadvantage.<sup>236</sup> The result was not only a decrease in religious and cultural discrimination but also enhanced pressure on the traditional firm’s WASP values.

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233. In other words, religious, socioeconomic and cultural characteristics have had a role in allowing the large WASP firm to maintain a claim to elite professional status. Having served their purpose, the old “warmth of personality” qualities outlived their usefulness and slowly became a liability rather than an asset. The large firm responded by rejecting the old white-shoe Protestant-infused ideology and replaced it with the new hyper-competitive business-based ideology of professionalism.

234. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 44-45 (2d ed. 1971).

235. *See id.*

236. David Wilkins et al., *Urban Law School Graduates in Large Law Firms*, 36 SW. U. L. REV. 433, 444 (2007).

#### 4. *The decline of religious discrimination*<sup>237</sup>

New results from a recent survey, the After-the-JD (AJD) study, suggest that large law firms no longer discriminate against Jewish and Catholic lawyers.<sup>238</sup> The decline in discriminatory hiring and promotion practices by large firms was a product of diminished tolerance for religious discrimination against Jews and Catholics in American society. Diminished tolerance for religious discrimination against Jews and Catholics further exerted pressure on the WASP identity of the large firm.

Similarly, Wilkins documents how increased societal intolerance for racial discrimination led large corporate clients and, consequently, large law firms to abandon discriminatory practices and even adopt affirmative action programs.<sup>239</sup> However, it appears that racial and ethnic minorities have not fared as well as religious groups.

[While] the percentage of minority [black, Hispanic] students in law school has increased significantly [twenty percent] . . . [m]inority representation in large law firms . . . remains significantly below this level [fourteen percent of associates, and less than four percent of partners]. . . . [A]lthough these percentages have been steadily (if slowly) improving . . . this growth has largely been driven by the explosion in the number of Asian lawyers working in large firms.<sup>240</sup>

The religious and cultural identity of the WASP firm, as well as the reactionary religious identity of the Jewish firm, are to be understood in the context of the role they played in allowing the large law firm first to establish and then to secure a claim to elite professional status. With this claim secured based on well accepted professional meritocratic grounds, and given profound changes in professional ideology and practice realities, the decline in the religious identity of the large firm was inevitable.

The disintegration of the religious and cultural identity of the large WASP firm was thus the result of an interplay of factors: its embrace of meritocracy to ensure its elite professional status, the paradigm shift to the “law as business”

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237. *But see* CAROL KHAWLY ET AL., 1998-2000 REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS 18 (Hussein Ibish ed., 2001), available at <http://www.adc.org/hatecrimes/pdf/1998-2000.pdf> (reporting discrimination against a Muslim employee at a large law firm). *See generally* Sid Steinberg, *EEOC Reinforces Federal Law Against National Origin Discrimination*, LAW.COM, Jan. 24, 2003, <http://www.law.com/jsp/article.jsp?id=1042568695769> (discussing increased workplace discrimination against Arab, Muslim, Middle Eastern, South Asian and Sikh individuals after September 11, 2001).

238. For a complete description of the study, see Sterling et al., *supra* note 11, at 398-99.

239. David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”*: *The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1556-58 (2004).

240. *Id.* at 1583-84.

ideology which rendered Protestant values and the white-shoe ethos anachronistic at best, the economics of discrimination in play making it increasingly costly to discriminate based on religious, socioeconomic and cultural grounds; and a gradual societal decline in tolerance for religious discrimination. To be sure, WASP firms are not a thing of the past. The legacy of past discrimination still lingers on at some old WASP firms—a legacy, however, that contemporary non-discriminatory hiring and promotion practices will address over time. Moreover, certain implicitly discriminatory cultural features of the firm no doubt will die hard. Nonetheless, the significant role of the religious and cultural identity of the large WASP firm as a constitutive, driving force underlying the organization and practice of the large firm is gone.

*B. The Decline of the Religious Identity of the Large Jewish Firm*

The religious identity of the Jewish firm was a reactionary response to the religious and cultural identity of the WASP firm, as well as to the discriminatory hiring and promotion practices adopted by the WASP firm as a result of its identity and commitment to Protestant values and the white-shoe ethos. The disintegration of the WASP identity thus gradually led to a decline in the thin religious identity of the Jewish firm. Simply put, the Jewish-by-discriminatory-default identity of the Jewish firm was in decline as soon as discrimination against Jewish lawyers was in decline.

*1. The collapse of the Jewish firm monopoly on recruitment of Jewish lawyers*

The collapse of effective exclusion and discrimination by the WASP firms against Jewish lawyers led, in turn, to increased demand for Jewish lawyers. Jewish firms lost their de facto monopoly on the hiring and promotion of Jewish lawyers and were driven to systematically recruit and promote non-Jewish attorneys.<sup>241</sup> The new competitive ideology, as well as competition on the ground for lawyers, removed the discriminatory conditions that produced the overt religious identity of the old Jewish firms. To be sure, some of the old WASP firms still had a predominantly WASP partner pool, and some of the old Jewish firms had a predominantly Jewish partner pool. Even so, rather than a religious identity, these firms seemed to feature nothing more than a majority of partners with certain individual religious identities. And it was only a matter of time until these firms, which regularly hired and promoted Jewish and non-Jewish lawyers alike, no longer featured a distinctive religious identity among their partner pools.<sup>242</sup>

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241. HOFFMAN, *supra* note 9, at 136; Wald, *supra* note 32, at 46-50.

242. Alan Dershowitz's *The Vanishing American Jew* raises the possibility that over

The general decline of systematic and institutionalized religious discrimination against Jewish lawyers by WASP firms after 1985, and the systematic recruitment and promotion of non-Jewish attorneys by Jewish firms during that time, led to the decline of Jewish law firms, or, more accurately, to a decline in the “Jewishness” of the Jewish firms in terms of the religious identity of the majority of the lawyers employed by these firms. Moreover, the Jewish firms lost their “Jewishness” at a faster rate than the WASP firms had lost their religious identity. Unlike the WASP firms, which had to overcome a deeply rooted identity based on the white-shoe ethos and Protestant values, the Jewish law firms were Jewish only by discriminatory default and did not feature a unique Jewish culture of professionalism.<sup>243</sup>

Ironically, just as effective discrimination by the WASP firms led to the growth of the Jewish firms, so the decline of effective discrimination by the WASP firms and the gradual hiring and promotion of non-Jewish attorneys by the Jewish firms<sup>244</sup> led to the decline of the Jewish firms qua Jewish entities. Indeed, the general decline of systematic and institutionalized religious discrimination “struck hardest at the Jewish firms, which saw the graduates they once attracted going to the previously prejudiced gentile [firms] . . . . To

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time, a majority of lawyers in all large law firms will be Christian, if only due to the decline in the number of Jews in America and the corresponding decline in the number of Jewish lawyers. See ALAN M. DERSHOWITZ, *THE VANISHING AMERICAN JEW: IN SEARCH OF JEWISH IDENTITY FOR THE NEXT CENTURY* (1997); SAMUEL C. HELIMAN, *PORTRAIT OF AMERICAN JEWS: THE LAST HALF OF THE TWENTIETH CENTURY* (1995) (exploring the decline in the status of American Jews as the result of social assimilation). Randall Kennedy has pointedly responded that: “Substantial numbers of people in many, maybe all, minority groups feel divided between enjoying fully the opportunities offered by white [A]nglo-[C]hristian America—the ‘mainstream’—and maintaining a distinctive community immune from complete assimilation.” Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145, 1187 n.188 (2001). At the same time, with increased secularization among American professionals it is equally possible that, to borrow from Dershowitz, the vanishing religious lawyer would render the question of the religious identity of the large law firm meaningless.

243. While there is virtually no literature exploring the meaning of a Jewish law firm, there is ample scholarship exploring the question of what it means to be a Jewish attorney. See generally LEONARD BAKER, *BRANDEIS AND FRANKFURTER: A DUAL BIOGRAPHY* (1984); ARTHUR L. LIMAN, *LAWYER: A LIFE OF COUNSEL AND CONTROVERSY* (1998); JOSEPH M. PROSKAUER, *A SEGMENT OF MY TIMES* (1950). For studies exploring the relationship between professional identity and Jewish identity, see, for example, AUERBACH, *supra* note 163 (studying the affinity between Jews and American law); Marc Galanter, *A Vocation for Law?: American Jewish Lawyers and Their Antecedents*, 26 FORDHAM URB. L.J. 1125 (1999); Jerome Hornblase, *The Jewish Lawyer*, 14 CARDOZO L. REV. 1639 (1993); Samuel L. Levine, *The Broad Life of the Jewish Lawyer: Integrating Spirituality, Scholarship and Profession*, 27 TEX. TECH L. REV. 1199 (1996); Russell G. Pearce, *The Jewish Lawyer’s Question*, 27 TEX. TECH L. REV. 1259 (1996); Russell G. Pearce, *Reflections on the American Jewish Lawyer*, 17 J.L. & RELIGION 179 (2002) (reviewing AUERBACH, *supra* note 162, and MICHAEL J. BROYDE, *THE PURSUIT OF JUSTICE AND JEWISH LAW: HALAKHIC PERSPECTIVES ON THE LEGAL PROFESSION* (1996)).

244. For example, consider Stroock’s first “Christian” partner. See HOFFMAN, *supra* note 9, at 136.

remain competitive, [the Jewish law firms] had to achieve a modicum of racial balance by recruiting gentile lawyers.”<sup>245</sup> The ascendancy of Jewish law firms was in part an institutional response to the hidden religious and socioeconomic identity and discriminatory practices of the WASP firms, so the disappearance of that identity and those practices eliminated a key reason for Jewish firms’ existence.

2. *The “flip side of bias” revisited and the future of the Jewish firm*

The effects of the flip side of bias phenomenon—the ability of the Jewish firms to benefit from the positive consequences of stereotyping, that is, from the flipped bias of “everybody wants to have a Jewish attorney”—could have placed Jewish firms in the intriguing position of having to decide whether they would remain “Jewish” so they could reap the fruits of flipped bias. While the professionalism paradigm shift and the economics of discrimination arguments would, of course, have applied to the Jewish firms with equal force, rendering it costly and inefficient to discriminate against non-Jews, maintaining a Jewish identity would have had the countervailing benefit of the fruits of bias. Jewish law firms, unlike WASP firms, never developed a thick religious and cultural identity because Judaism was not perceived to be a source of elite status at the time they emerged. However, the flip side of bias in the age of the new business ideology of professionalism did render being Jewish a source of elite status that the Jewish law firms could have benefited from.

Perhaps then, ironically, the flip side of bias could have afforded Jewish law firms an opportunity to contemplate the meaning and desirability of cultivating a thick Jewish identity, distinct and apart from their default identity in the age of discrimination. The Jewish firm, however, succumbed to the same kind of competitive pressures faced by the WASP firm. Intensifying competition for lawyers among an ever-increasing number of continuously-growing law firms, the ideological shift and the lack of tolerance for religious discrimination and religious considerations interfering with business rationales all led to the quick decline of the Jewish firm qua Jewish firm.<sup>246</sup>

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245. *Id.*

246. To be clear, I am not arguing that distinctively Jewish law firms are a thing of the past. The legacy of near exclusive hiring and promotion of Jewish attorneys still lingers on at some old Jewish firms, a legacy, however, that contemporary non-discriminatory practices will address over time. Moreover, certain cultural features of the firm no doubt will die hard. Nonetheless, Judaism never played a significant role as a constitutive feature underlying the organization and practice of the large Jewish firm and given current practice realities and dominant professional ideology is not likely to occupy that role in the future.

C. *The Large Law Firm in the Post-Religious Age—Can It Sustain Its Elite Status?*

By the mid-1980s, the large law firm's traditional organizational structure had begun to crumble at an accelerated rate—firm breakups, lateral hiring, part-time and flex-time opportunities, and the retention of contract attorneys, temporary attorneys, senior associates, staff attorneys, and other new categories of attorneys have all become common practice realities.<sup>247</sup> The twenty-first century has seen this trend towards disintegration of the structure of the firm continue with greater force. The Cravath System's promotion to partnership tournament has been replaced with multiple tournaments, new categories of lawyers have been created, the "up or out" policy all but abandoned, emphasis on the provision of corporate legal services (as opposed to litigation) has been all but eliminated, and lateral hiring and mergers and acquisitions of law firms have become the norm rather than the exception.<sup>248</sup>

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247. See generally Galanter & Henderson, *supra* note 7; Sussman, *supra* note 10, at 970. Nelson has called these changes the transformation of the "classic big law firm" into the "late big law firm." Nelson, *supra* note 102, at 737.

248. The leading authority on lawyer mobility is Robert Hillman. See ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS (2007); see also Robert W. Hillman, *Law Firms and Their Partners: The Law and Ethics of Grabbing and Leaving*, 67 TEX. L. REV. 1 (1988) (exploring the destabilizing effects of lateral movements on law firms); Robert W. Hillman, *Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms*, 55 WASH. & LEE L. REV. 997 (1998) (providing an overview of lawyer mobility); Robert W. Hillman, *Professional Partnerships, Competition, and the Evolution of Firm Culture: The Case of Law Firms*, 26 J. CORP. L. 1061 (2001) (addressing the emergence of lawyer mobility based on the law granting "supremacy" to a client's right to choose counsel, as well as the costs and effects of lawyer mobility); Robert W. Hillman, *The Hidden Costs of Lawyer Mobility: Of Law Firms, Law Schools, and the Education of Lawyers*, 91 KY. L.J. 299 (2002) [hereinafter Hillman, *Hidden Costs*] (presenting an overview of the differences between the legal profession that pre-dated the proliferation of lawyer mobility and contemporary practice realities). Other scholarship on the subject includes Amon Burton, *Migratory Lawyers and Imputed Conflicts of Interest*, 16 REV. LITIG. 665 (1997) (examining the effects of conflict of interests rules and subsequent motions for disqualification based mostly on Texas cases and Texas rules of ethics); Dorothy M. Gibbons-White, *Migratory Lawyers in Private Practice: Should California Approve the Use of Ethical Walls?*, 33 LOY. L.A. L. REV. 161 (1999) (arguing that with increased lawyer mobility, a broad view of imputed disqualification results in a greater danger that ethical rules will be used as a tactical "weapon" by opposing counsel, thereby undermining the rules); Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the tension between Confidentiality and Contemporary Lawyers' Career Paths*, 31 J. LEGAL PROF. 199 (2007) (exploring the impact of increased lawyer mobility on the rules of professional conduct and pressure mobility exerts on the rules' underlying ideology); Robert M. Wilcox, *Enforcing Lawyer Non-Competition Agreements While Maintaining the Profession: The Role of Conflict of Interest Principles*, 84 MINN. L. REV. 915 (2000) (arguing that courts' general rule dismissing covenants not to compete is too burdensome and asserting that courts should apply a "balancing test" between the interests of clients and of law firms); see also Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry*

At the same time that large law firms are experiencing the destabilization of their classic organizational structure, they are also facing a decline in the social significance of their practices,<sup>249</sup> and therefore a serious threat to their ability to sustain a credible claim to elite professional status. So long as the large law firm is able to maintain its claim to elite status, it will likely succeed in meeting the challenges of increasingly dynamic organizational structures and hyper-competition for clients. Yet the threat to large law firms as the elite of the legal profession is real.

To the extent that large law firms are no longer able to offer their lawyers meaningful opportunities to exercise and develop practical wisdom and professional judgment,<sup>250</sup> that is, insofar as they are not able to sustain a credible promise to produce high quality work and provide quality training and mentorship to their associates,<sup>251</sup> and as the number of large law firms continues to grow, decreasing the ability of each individual firm to represent a high number of elite clients, the large firms may find themselves unable to sustain a credible claim to elite professional status. Having shelved its elite religious, socioeconomic, and cultural identity, the large law firm now possesses only its elite professional identity. If stripped of elite professional status, the large law firm might find it harder to attract cohorts of top graduates from elite law schools, and, over time, might find it harder to sustain its client base.<sup>252</sup>

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*into Corporate Law Firms and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985) (exploring law firm profit structure, specialization, diversification, and treatment of individual attorneys as valuable assets or “human capital”).

Importantly, notwithstanding this radical transformation and proliferation of organizational models within the large law firm universe, the constitutive features of the firm qua firm, as opposed to a loose affiliation of lawyers, have endured: a hierarchical structure, close affiliation among firm lawyers, the team as the core unit of practice, almost exclusive reliance on entity clients, increased specialization and departmentalization, and the utilization of new technologies. Moreover, Paul Cravath’s vision of the law firm as a merit-based, client-centered, service-providing institution has become not only his legacy, but the core constitutive identity of the contemporary law firm.

249. “[T]he influential and independent counselor role is now an exceptional rather than a common aspect of large law firm practice . . . .” Robert A. Kagen & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 435 (1985). See generally ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993) (lamenting the decline of the social significance of the lawyer statesman’s role and its crowding out by the increased specialization and marginalization of the large law firm attorney).

250. KRONMAN, *supra* note 249, at ch. 5.

251. See, e.g., Hillman, *Hidden Costs*, *supra* note 248 (arguing that increased lawyer mobility results in the inability of large firms to offer high quality mentorship to associates).

252. While the survival of the large law firm as a leading institution depends in part on its ability to sustain the perception of “elite” status, it is unclear whether maintaining that status is desirable from a social point of view or from the perspective of clients. See POSNER, *supra* note 188, at 185-211 (arguing that the demystification of so-called notions of professionalism is in the best interests of clients); Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 966 (1997)

## CONCLUSION

This Article asserts that the large WASP law firm, despite its ostensibly a-religious organizational structure, had a deeply rooted religious and cultural identity. Its commitments to Protestant values and the white-shoe ethos help explain its rise at the turn of the nineteenth century, its successful campaign for elite professional status within the ranks of the legal profession, and its dominance until 1945. Moreover, the religious and cultural identity of the large WASP firm also explains the rise and success of its main competitor after 1945—the Jewish law firm. Exploring the consequences of the WASP firm’s commitments to Protestant values and white-shoe culture, this Article identifies unique reasons for the remarkable success story of the Jewish firm, whose growth rate far exceeded that of the WASP firm. Finally, the Article chronicles the disintegration of the religious identity of the large firm, WASP and, as a result, Jewish alike.

The findings of this Article suggest that a category-specific law firm is not currently feasible because the unique conditions that enabled the rise and unique growth of Jewish firms are inapplicable or irrelevant in today’s practice environment. Current practice realities make it less likely that a category-specific law firm—whether a religious, racial, ethnic, or gender category—will be able to replicate the success story of the Jewish firms.

The professional ideological shift is complete and it is hard to see how, under the current hyper-competitive business model, any such category-specific quality will be deemed relevant to the contemporary practice of law in the same fashion that WASP firms were able to build on the white-shoe ethos and Protestant values to establish a credible claim for elite professional status. Compared to the era of Jewish firms’ growth, the tournament theory no longer constrains the competitiveness of the large firms because contemporary firms deviate from its rules, as well as from other features of the Cravath System, in order to more effectively compete in the market place. Consequently, large firms tend to respond fairly quickly to, and to pursue, new practice arenas as they develop rendering the existence of “protected pockets” of practice less likely.

The overall number of large law firms and their relative large size constitutes an entry barrier to any newcomer large firm. Newcomer law firms will find, as a result of increased specialization, that the “team” concept dominates the structure of legal practice, making it hard for individual lawyers to excel, let alone utilize their reputation as a building block of a firm. Furthermore, because systematic and institutionalized discrimination is both illegal and socially unacceptable, the emergence of religion-specific, race-

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(arguing that professional ethics rules represent “a naked exercise of guild power, serving the interests of lawyers at the expense of clients or the general public”).

specific or gender-specific law firms is unlikely. Indeed, such firms will find attracting category-specific attorneys difficult, as the prevailing market-based paradigm of professionalism does not seem to build on any category-specific stereotype.<sup>253</sup> Finally, no category seems to offer a distinctive client base that a category-specific law firm might build upon, even if some discriminatory attitudes are alive and well in today's climate.

Perhaps most tellingly, the experience of the Jewish law firm teaches us that the rise of contemporary large-scale category-specific firms is not plausible because it would require, at the least, an effective discriminatory apparatus against which to rise. Fortunately, such explicitly effective discriminatory days are no longer imaginable. In other words, the fact that a category-specific firm is no longer plausible is to be celebrated, not mourned. As Wilkins has argued persuasively, opening up large law firms and other power-yielding institutions to minorities is the way to achieve equality, rather than proceeding on "separate but equal" grounds.<sup>254</sup> The Jewish law firm was, in great part, a product of a specific time and place, and in particular of systematic and institutionalized discrimination against Jewish lawyers. Such effective, overt, and widespread discrimination no longer exists in the American legal profession. Consequently, the key justification for the existence of the Jewish firm qua Jewish firm no longer exists. Even assuming that other minority groups continue to suffer from implicit and informal forms of discrimination, category-specific law firms may not be an appropriate response for battling such discrimination. Given our current understanding of discrimination, segregated, category-specific law firms may be too high a price to pay even if it can be shown that in the long term such "separate but equal" law firms can contribute to the decline of discrimination. The days of category-specific firms as an effective avenue of overcoming discrimination are gone. Has something been lost?

Assessing the normative consequences of the fall of the large black law firm, David Wilkins argues that from the perspective of integrating the bar the development is a positive one.<sup>255</sup> Black firms, Wilkins asserts, were started as

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253. For example, while the stereotype of Asian-Americans as hard working, see Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1258, 1261-62 (1993), is consistent with the hyper-competitive business-based professionalism paradigm, a negative stereotype, see Terri Yuh-lin Chen, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 ASIAN L.J. 69, 85 (2000); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1270-73 (1992) (describing negative stereotyping of Asian-Americans in popular culture), suggests that Asian-Americans lack the imagination and assertiveness that play an important role in the paradigm of a successful professional attorney. See generally FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2002).

254. David B. Wilkins, "If You Can't Join 'Em Beat 'Em!": *The Rise and Fall of the Black Corporate Law Firm*, 60 STAN. L. REV. 1733, 1737 (2008)

255. *Id.* at 1738.

a result of large firms' racial discrimination and exclusionary ethos. As both explicit racial discrimination and exclusionary culture are in decline, the case for creating black law firms is less appealing.<sup>256</sup> Moreover, to the extent that implicit racial discrimination is still a reality at some firms, Wilkins argues that the most effective measures of combating such discrimination lay in promoting equality within firms, not by resorting to black-only firms.<sup>257</sup>

A similar argument applies when assessing the decline of both WASP and Jewish firms. The fall of WASP firms qua WASP firms is clearly a positive development from the perspective of pursuing an integrated legal profession. The case for a law firm with a Protestant identity was always implicit and instrumental—seeking elite professional status. While some have explored infusing the practice of law with religious content,<sup>258</sup> a normative case for a Protestant firm, as opposed to an instrumental case, was never made, and it is hard to see how such a case could be made given prevailing contemporary opinions regarding the separation of church and state, and, even more so, of church and law. Similarly, there was never a compelling normative reason for the creation of the Jewish firm. It was created by discriminatory default, as a reaction and response to discriminatory hiring and promotion practices at WASP firms. Jewish firms never embraced a thick religious identity and presumably would be delighted to be rid of any such identity imposed upon them.

On the other hand, as documented above, Jewish firms did play a significant role in overcoming discrimination. They provided a platform on which Jewish attorneys could perform and excel, disprove biases and prove their worth. They offered, not unlike their black counterparts, an oasis of comfort and security in what was correctly perceived to be a hostile and anti-Semitic legal environment. Nonetheless, because religious discrimination and an exclusionary ethos against Jewish attorneys, at least in large urban areas, seem to be a thing of the past, to the extent that the Jewish firm played an important role in undermining discrimination, its time, and the need for it, has passed.<sup>259</sup>

Or has it? The fall of the Jewish firm qua Jewish firm taps into old tribal fears of demonic persecutions and renewed anti-Semitism. For some, the sense that something has been lost with the fall of the Jewish firm may be grounded

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256. *Id.* at 1789.

257. *Id.* at 1789.

258. *See supra* note 73.

259. In fact, unlike black attorneys who still face implicit discrimination at large law firms, *see generally*, David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996), Jewish lawyers arguably experience no such discrimination, at least in large urban areas. Thus the case for a contemporary Jewish law firm is even weaker than the case for a contemporary black law firm.

not in the rational but in the historical fear of discrimination. The Jewish firm represented a safe haven and its demise makes the world, if only the professional world, a dangerous place for Jews—a world where, should discrimination rear its ugly head, they would have no place to go. Yet perhaps it is time to overcome these demonic fears. Relying on the existence of Jewish firms as professional havens in the event of renewed religious discrimination against Jewish lawyers comes at a cost—it keeps the fear of discrimination alive. Letting go of the idea of the Jewish firm is part of letting go of the fear of discrimination.