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## The Emergence of Law Firms in the American Legal Profession

Thomas Paul Pinansky

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# THE EMERGENCE OF LAW FIRMS IN THE AMERICAN LEGAL PROFESSION

*Thomas Paul Pinansky\**

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## I. INTRODUCTION

In most popular historical accounts of the United States, the last few decades of the nineteenth century are remembered as the period when super capitalists, often referred to as robber barons, dominated the country. Men by such names as Carnegie, Mellon, Gould, Rockefeller, Fisk, and Vanderbilt took control of the nation's economy in an unprecedented display of entrepreneurship. Yet the exploits of these individual capitalists aided the arrival of an organizational society in America. One of the new forms of private organization was the law firm.

Even today, lawyers who are members of law firms constitute a minority of the legal profession. In 1980, approximately one-third of the legal profession were members of private law firms.<sup>1</sup> However, law firms have been invested with significance that far exceeds their number and size.<sup>2</sup> The corporate lawyers of law firms have been at or near the "pinnacle of professional aspiration and power" since the late nineteenth century.<sup>3</sup>

The law firm cannot be unambiguously distinguished from its historical predecessors. Throughout history, most lawyers have practiced as individuals. There have been partnerships since the first quarter of the nineteenth century, but, as the renowned legal historian James Willard Hurst observed, firms of large membership did not appear until the end of the nineteenth century.<sup>4</sup>

The emergence of law firms was an evolutionary process. Until the post-Civil War period, the private organization of legal work rarely

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1. *Lawyers—Selected Characteristics: 1954 to 1980*, in STATISTICAL ABSTRACT OF THE UNITED STATES 177 (1986); *Lawyers—Selected Characteristics: 1948 to 1970*, in STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 416 (1976).

2. J. AUERBACH, UNEQUAL JUSTICE 22 (1976).

3. *Id.*

4. J. HURST, THE GROWTH OF AMERICAN LAW 306 (1950).

went beyond the traditional two-man office. Many of these offices informally adopted a division of labor comparable to the English solicitor-barrister distinction.<sup>5</sup> However, these partnerships, with their lack of formal partnership agreements,<sup>6</sup> and their "dimly lit, poorly staffed" offices, were "suited to unhurried times and to small claims."<sup>7</sup>

Although many of the first metropolitan law firms were "indistinguishable from the traditional two-man offices,"<sup>8</sup> by the 1870's there were metropolitan firms that contrasted sharply with the simplicity of the two-man law offices.<sup>9</sup> Hurst noted that the Strong and Cadwalader firm of New York City had a staff of ten (six legal and four nonlegal) in 1878.<sup>10</sup> Similarly, when the New York City firm of Shearman & Sterling was formed in 1873, it had a staff of seven (five legal and two nonlegal).<sup>11</sup>

In addition to having larger staffs than the two-man offices, the first law firms were more likely to have formal partnership agreements. Profit percentages were set and the legal work of major clients was shared.<sup>12</sup> Shearman & Sterling and the Philadelphia firm of Morgan, Lewis and Bockius both had such agreements at their founding.<sup>13</sup>

The new law firms of the late nineteenth century certainly were distinguishable from the "organized, departmentalized, and routinized" law firms of the twentieth century.<sup>14</sup> The fundamental importance of the first law firms is that they were the vanguard of a transformation in the way a significant percentage of legal work was organized. It is therefore essential in a work examining the emergence of law firms to study the period when law firms first took on characteristics that distinguished them from the antecedent two-man offices. For this reason, this work concentrates on a period of years beginning approximately in

5. Writing in 1872, James Bryce, Professor of Roman Law at Oxford, noted the parallel between the two-man law office and England's solicitor-barrister distinction. See J. Bryce, *An English View of the Legal Profession in America*, 5 ALB. L. REV. 357 (1872).

6. J. HURST, *supra* note 4.

7. J. AUERBACH, *supra* note 2, at 23.

8. *Id.*

9. J. HURST, *supra* note 4.

10. *Id.*

11. W. EARLE, MR. SHEARMAN AND MR. STERLING AND HOW THEY GREW 24 (1963).

12. *Id.* at 30. Earle's account revealed that even though most of the business was Shearman's, Shearman agreed to share all the profits of Shearman & Sterling equally with Sterling.

13. J. STOKES, MORGAN, LEWIS AND BOCKIUS 51 (1973). Stokes added that formal partnership agreements were not absolutely essential until the 1940's, when tax laws made it necessary to specify the respective partnership interests so that at death there would be something in writing to satisfy the Internal Revenue Service.

14. J. AUERBACH, *supra* note 2.

1870 and extending to the end of the nineteenth century.

In his dissertation, Wayne K. Hobson presented data that displays the pattern of law firm emergence that occurred in the late nineteenth (and early twentieth) century. In the table below, a "large firm" is any firm with at least four members (any combination of partners and associates):<sup>15</sup>

TOTAL NUMBER OF LARGE FIRMS, BY YEAR,  
FOR TOP TEN CITIES

City	1872	1882	1892	1903	1914
New York	10	23	39	64	85
Chicago	2	2	4	23	41
Boston	0	2	2	13	18
Cleveland	0	0	2	8	13
Detroit	0	1	3	6	12
Philadelphia	0	0	1	5	12
Kansas City	0	0	1	8	13
Buffalo	0	0	3	4	7
Milwaukee	1	2	1	4	7
Cincinnati	<u>1</u>	<u>1</u>	<u>2</u>	<u>6</u>	<u>8</u>
Total	14	31	58	141	216

It is apparent that during the late nineteenth century a new private legal organization, different from the two-man law office, emerged throughout the metropolitan areas of the United States. The basic task of this work is to answer the question: Why did law firms emerge in late nineteenth century American society?<sup>16</sup> In answering this question, three distinct analytic approaches are utilized.

In Section II, two case studies of law firms that emerged in the period under study are presented. The two case studies provide invalua-

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15. Hobson, *The American Legal Profession and the Organizational Society, 1890-1930*, at 161 (1977) (dissertation, Stanford Univ.) (available on Xerox Univ. Microfilms, Ann Arbor, Mich.).

16. In responding to this question, countless related research questions necessarily arise. Such issues as the geographic pattern of law firm emergence and the relationship between the emergent law firms and the nineteenth century's robber barons and monopolizing corporations are discussed as they apply to the problem of explaining the emergence of law firms.

ble insight into the personal actions that led to the creation of the first law firms. Although the main goal of the first chapter is simply to recount the origins of two law firms, the case studies reveal the significant role that interpersonal relations played in the founding of the first law firms.<sup>17</sup>

Section III moves away from the world of individual actors and into a broader societal perspective by examining social-structural and technological factors. It is the aim of Section III to show that certain societal changes were at least partially responsible for the development of law firms in the late nineteenth century. Most literature on organizations and/or the legal profession has tended to stress this approach. The structural-technological explanation, as it is called in this work, tends to depict the emergence of law firms as a natural result of changes in the demand for legal services. These heavily functionalist and demand-side analyses were challenged by the work of Magali Sarfatti Larson in her book, *The Rise of Professionalism*.<sup>18</sup>

Larson attempted to prove that the professionalizing impulse is driven by supply-side concerns. She contended that professionals seek to monopolize markets, and thus the rise of professionalism is explained by a collective assertion of special social status and a collective process of upward social mobility. Larson went as far as calling this collective assertion "The Collective Mobility Project."<sup>19</sup> Although Larson rarely dealt with the legal profession directly, her seminal work does force a reexamination of the adequacy of the structural-technological explanation of the emergence of law firms.

In Section IV, this work goes beyond the structural-technological explanation of the emergence of law firms, and uses supply-side analysis to help explain some of the unique features of the law firm. The supply-side approach is used to present a hypothesis explaining a most basic, but completely neglected, question — how the newly organizing lawyers of the late nineteenth century maintained their economic independence in the face of the enormous monopolizing impulses of the business interests.

Taken as a whole, this article is a synthesis of sociological methodologies. Case studies, demand-side analysis, and supply-side analysis

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17. Admittedly, explanations that rely too heavily on a case study or an interpersonal approach provide an incomplete understanding of organizations. See C. PERROW, *COMPLEX ORGANIZATIONS* (1979). Most sociologists have accepted the view that a purely interpersonal approach is of little use in understanding organizations. People always make history and they always create institutions.

18. M. LARSON, *THE RISE OF PROFESSIONALISM* (1977).

19. *Id.* at xvi, 66-79.

are used to provide a comprehensive explanation of the emergence of law firms in the American legal profession. This work attests to the importance of all these methodologies and rejects the idea that any one approach is sufficient. Finally, this synthesis is used to explore new questions concerning law firms and raise still further questions for research.

## II. THE FOUNDING OF THE FIRST LAW FIRMS: TWO CASE STUDIES

The initial organizing impulse that makes a group of lawyers unite into a law firm can be traced to a variety of direct and indirect causes that are both specific and general in character. The analysis in this article concentrates on the organization-stimulating factors that were generally applicable to United States society during the latter part of the nineteenth century. However, in this section, instead of making generalized findings, the object is to stress that the actual founding of particular law firms was a result of unique interpersonal relations, and more importantly, that these relations were extremely significant in determining the future of the newly founded organization.<sup>20</sup>

Shearman & Sterling of New York City and Reed Smith Shaw & McClay of Pittsburgh were selected for study. (Both firms are still thriving today.) When examining the details of these firms' beginning years, it is necessary to rely heavily on their respective law firm histories.<sup>21</sup> These histories were written by partners of the firms, and thus must be read with the assumption that the author was attempting to present the best image of his firm. Yet despite the initial skepticism this might engender in the researcher, the rich factual detail of these historical accounts puts to rest any suggestion that the works are of little use in sociological or historical analyses.

### A. Shearman & Sterling

The main root of the law firm of Shearman & Sterling was

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20. The two firms examined in this chapter were selected in somewhat random fashion. The main determinants were that there were sufficient resources available (detailed law firm histories) and that the firms had not been too closely examined in the existing literature concerning law firms. The sheer paucity of literature in this area rendered the latter condition nearly irrelevant. Only the Cravath firm stands out in the literature as a frequent reference. This is almost certainly due to the voluminous history of the firm and its predecessors by Robert T. Swaine. See R. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS* (1946-48) (privately published at Ad Press, Ltd., 1946-48). In addition, because of the predominant role that New York City played in the development of law firms, one New York City firm was intentionally chosen.

21. W. EARLE, *supra* note 11; R. DEMMLER, *THE FIRST CENTURY OF AN INSTITUTION: REED SMITH SHAW & MCCLAY* (1977).

Thomas G. Shearman. Shearman first organized the firm that directly descended to the present-day Wall Street law firm of Shearman & Sterling. However, a number of significant actors probably had as great an influence on the founding of Shearman & Sterling as he did.

Shearman was admitted to the bar in December of 1859. Walter K. Earle, the historian of the Shearman & Sterling firm, described Shearman's situation at the time. "Shearman was then twenty-five . . . and had no clients and nothing to do."<sup>22</sup> This description hardly suggested imminent success, or for that matter, imminent development of a law firm. However, Shearman quickly established ties with David Dudley Field, who was "a famous lawyer with more clients and would-be clients, and more of their business, than he wanted or could possibly have handled."<sup>23</sup>

Field's eminence in the legal profession of his day was attested to by his success at attracting clients, his participation in significant litigation (for example, the 1866 Supreme Court case of *Ex parte Milligan*<sup>24</sup>) and the reverence with which his contemporaries and near-contemporaries held him.<sup>25</sup> His greatest contribution was his leadership in the codification movement of American common law procedure. In December 1870, *The Springfield Republican* listed Field as the acknowledged leader of the New York bar.<sup>26</sup> In 1895, a year after his death and twenty years after his most significant codification work, Field was referred to in legal journals as one who had done great work and as a true exemplar of the service ideal for the legal profession.<sup>27</sup> Shearman's early connection with Field, who in turn was "well connected" in all meanings of the phrase, proved to be the essential contact that allowed Shearman to establish the necessary interpersonal relations to found a successful law firm.

In 1860, Field called on Shearman, who at the time was a struggling lawyer taking his first fling at local politics, and thanked him for a vehement political speech he had given. The speech supported Field's candidacy in the delegate contests for the national GOP convention of that year. According to Earle, Field was so impressed with Shearman that he hired him to assist in the preparation of a book on which he was working. Field was pleased with Shearman's work and, a short

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22. W. EARLE, *supra* note 11, at 1.

23. *Id.*

24. 71 U.S. (4 Wall.) 2 (1866).

25. W. EARLE, *supra* note 11, at 5, 9.

26. *Id.* at 21.

27. Styles, *Response to "The Commercialization of the Profession,"* 3 AM. LAW. 142 (1895).



time later, he employed Shearman again (at a higher rate of pay). This time Shearman worked on Field's great codification project.<sup>28</sup> When the work was successfully completed, Field offered Shearman full-time employment. (Again, Shearman was to work on a book for Field.) The Field-Shearman connection was formalized on February 4, 1864 when Field hired Shearman as the managing clerk in his office, with the right to continue taking outside work to be done in "off hours."<sup>29</sup> The significance of this event was well summarized by Earle: "And thus it came to pass that Tom Shearman, at thirty, and after five long and difficult years of . . . writing and vagarious small-bit law practice, felt his feet on solid ground, with his once-in-a-lifetime opportunity beckoning."<sup>30</sup> A formal connection with the office of an eminent lawyer was a reality, and this generated a new set of interpersonal relations for the firm that was soon to emerge as Shearman & Sterling.

When Shearman began his formal employment, David Dudley Field's office was composed of five men. There were two partners, Field and his son Dudley, and three law clerks.<sup>31</sup> Dudley had previously served as office manager along with fulfilling his duties as the other, but acknowledged inferior, partner. Earle stated that Dudley was not a good manager,<sup>32</sup> and thus Shearman assumed an important role.

After Shearman "straightened out" the office and got it in "running order," he expanded his activities and began working on the firm's business.<sup>33</sup> In 1867, three years after being employed by Field, Shearman won two "impossible" cases and attained wide acclaim for the first time. Field realized that it would be difficult to keep Shearman without making him a partner. In addition, Field had recently been retained by James "Jim" Fisk, Jr., to begin a complicated law suit against a major railroad. Field decided to make an offer of partnership to Shearman, and Shearman accepted. The name of the firm became Field & Shearman.<sup>34</sup>

At about this time (August 1867), John W. Sterling, a recent graduate of Columbia Law School, entered the Field office as an un-

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28. W. EARLE, *supra* note 11, at 2-3.

29. *Id.* at 4.

30. *Id.*

31. Clerks in this period could either be trained lawyers comparable to present-day associates or apprenticed young men (and possibly, though extremely unlikely, young women) comparable to present-day law students. The former were sometimes paid a small salary, the latter usually received no financial remuneration at all.

32. W. EARLE, *supra* note 11, at 7.

33. *Id.* at 9.

34. *Id.* at 10-11.

paid clerk.<sup>35</sup> This set the stage for the formation of Shearman & Sterling. However, before recounting Shearman and Sterling's break with Field, it is important to elucidate a few more details of the interpersonal network of the Field office.

The new client, Jim Fisk, introduced Field & Shearman to the litigious maze that later was referred to as the "Dreadful Decade." Before its culmination in the late 1870's, such famous super-capitalists as Jay Gould, Daniel Drew, Cornelius Vanderbilt, in addition to Fisk, and such prominent politicians as "Boss" Tweed and Peter B. Sweeney were entangled in each other's affairs. These entanglements have since acquired names such as the "Erie Wars," the "Rock Island Litigation," the "Gold Panic," "Black Friday," and the "Trials of Boss Tweed."<sup>36</sup> This network of men provided an immense quantity of work for the lawyers involved.

Both Fisk and Gould secured Field & Shearman as counsel,<sup>37</sup> and the affairs of these two men became the most important generator of income and future clients for the lawyers of the Field office. Field and Gould were responsible for an enormous amount of lucrative work, and their prominence in the daily affairs of the time gave much publicity to their attorneys. Although harsh criticism abounded concerning the litigants, the lawyers involved had received an unusual opportunity to display their skills in a publicized arena.<sup>38</sup>

During this period, after having left briefly over salary problems, Sterling became a partner, the elder Field greatly reduced his activities, and Shearman became the real leader of the firm. Both Fisk and Gould came to rely on Shearman to the exclusion of Dudley Field.<sup>39</sup> At the same time, Sterling's role grew increasingly important. On November 17, 1873, Shearman and Sterling broke off from the Field & Shearman office and established their own firm. This apparently rash action was actually a logical step in view of the following four developments: (1) Dudley Field (the younger Field) had grown increasingly jealous and piqued over Shearman's leadership role, making it difficult for the two men to continue as partners; (2) Sterling was gaining in reputation and was ready to assume greater responsibilities; (3) Shearman had a conversation with Jay Gould in which Gould assured him that Shearman and Sterling could count on his business; and (4)

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35. *Id.* at 11.

36. *Id.* at 12-17.

37. *Id.*

38. Field & Shearman successfully defended both Fisk and Gould.

39. W. EARLE, *supra* note 11, at 19.

Shearman and Sterling had reason to believe that they would retain the business of other clients of the old firm for whom they had been working. Earle summarized by stating, "The prospects of the new firm were good."<sup>40</sup>

Thus, interpersonal relations played an essential role in the emergence of Shearman & Sterling. The association with the eminent David Dudley Field, the particular form of human interaction that caused Shearman to be drawn to Sterling but repelled from Dudley Field, and lastly, the powerful clients that the Field office attracted, all contributed to the emergence of a successful new law firm. Of all these interpersonal relations, it is the latter that had the most lasting significance for Shearman & Sterling. As members of the Field & Shearman firm, Shearman and Sterling made the contacts that assured them long-term success:

And during that time [the Dreadful Decade] Mr. Shearman and Mr. Sterling acquired the confidence and were handling the affairs of a number of men who had come to the firm originally because of some association with Gould or Fisk, and who remained because of Shearman and Sterling, and who in later years became the bedrock of the practice of Shearman & Sterling.<sup>41</sup>

Despite the long-term importance of the big client in the emergence of the particular firm of Shearman & Sterling, it must be kept in perspective. The emergence of Shearman & Sterling was initially traced to a well-connected lawyer who had the necessary contacts. In the case of Shearman & Sterling this well-connected lawyer was David Dudley Field. In addition, the emergence was a direct result of Shearman's ability to get along well in a working situation with one man (Sterling) and his inability to get along well with another (Dudley Field). In sum, interpersonal relations played a complicated but significant role in the founding of Shearman & Sterling, and the interpersonal relations that were of great import at the firm's founding also laid the groundwork for the future of the firm.

## B. Reed Smith Shaw & McClay

The preorganizational history of the Reed Smith Shaw & McClay firm begins at about the same time Shearman and Sterling established their New York City firm. In the history of this firm, men by the names of Philander C. Knox and James H. Reed played the roles par-

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40. *Id.* at 17-21.

41. *Id.* at 19.

allel to those of Thomas G. Shearman and John W. Sterling.

Knox began his legal career by studying law in the office of a lawyer from his hometown (Brownsville, Pennsylvania). However, at the request of a mutual friend, he was soon taken into the office of H. B. Swope, the United States Attorney in Pittsburgh.<sup>42</sup> This friend was the first identifiable interpersonal relation of significance in the emergence of the future firm of Reed Smith Shaw & McClay.

Swope was certainly not as well known or as well respected as David Dudley Field, but he played a similar role. It is interesting to note that Knox, at the time of his attachment to Swope, is depicted by Ralph Demmler (the historian of Reed Smith Shaw & McClay) in much the same way that Earle depicted the young Shearman at the time of his alliance with Field: "Knox had no money; his family were of moderate means; since his home had been in Brownsville, he had few friends in Pittsburgh."<sup>43</sup> Again, from such a description, imminent success and imminent development of a law firm seemed unlikely. But as with the case of Shearman, Knox's association with a "connected" man enabled him to succeed. Also, like Shearman, Knox was of substantial help to his more powerful colleague, and benefited accordingly. Thus when Knox was admitted to the bar in 1875, he became the Assistant United States Attorney in Pittsburgh.

James Reed's legal career began in the office of his uncle, David Reed, a rather prominent Pittsburgh attorney. With his uncle serving as preceptor, James Reed "read the law."<sup>44</sup> When Swope died in 1875, David Reed succeeded him as United States Attorney. One of Swope's duties that David Reed assumed was the preceptorship of Knox. In 1877, David Reed died and James H. Reed and Philander C. Knox founded the law firm of Knox & Reed.

The setting for this founding was a Pittsburgh resurging from the depression caused by the Panic of 1873.<sup>45</sup> From the beginning the firm represented coal mines. These clients produced much litigation arising from property damage and miners' injuries. Also, the firm developed a large river boat clientele. Demmler accounted for this by noting that Knox came from Brownsville, a river town.<sup>46</sup> By the end of the law

42. R. DEMMLER, *supra* note 21, at 8.

43. *Id.* at 6.

44. This was the usual path to the bar in this period. It was much later that the law school became preeminent. (Knox did attend law school briefly in addition to reading the law.)

45. Unfortunately, no written records exist of the work the partners did in the first two years of the firm's existence. Thus, initial relations with clients are lost. However, Demmler was able to summarize client relations of approximately the first decade. R. DEMMLER, *supra* note 21, at 12.

46. *Id.* at 15.

firm's first decade, fee payers included famous super capitalists—conspicuous were the names of Andrew Carnegie and Andrew Mellon.<sup>47</sup>

The founding of the firm Knox & Reed (much later it assumed the name Reed Smith Shaw & McClay) had much in common with the founding of Shearman & Sterling. First, their origins can be traced to a well-connected office. Second, the foundings demanded that the partners had a congenial relationship (this was particularly significant in the founding of Shearman & Sterling). And third, both firms were associated with super capitalists from the beginning which assured the emergent law firms of economic success.

In concluding this section, something must be said about the importance and the obvious limitations of case studies. It is apparent that the founding of law firms is intertwined with a network of actors that determine the moment of the founding, the personnel of the emergent firm, and the likelihood of success of the new organization. Beyond this, the network of actors determine much of the future work of the organization. A major client can determine the type of work and many of the future clients of a law firm. This is because of two underlying factors. First, a client of great significance will single-handedly provide enough work to assure that a firm is financially secure. (Note the litigious maze of the Dreadful Decade.) And second, the publicity from serving such clients and the expansive contacts of these clients result in a growing network of contacts for the emergent firm.

These case studies reveal that the founding of particular law firms can be traced to unique interpersonal relations, and that these relations were extremely important in determining the future of the newly founded law firm. Eminent lawyer, congenial partner, and powerful client all contributed to a new organization. Yet these studies only examine individual actors and not the society in which these actors worked. Thus, the question of why law firms emerged in the late nineteenth century remains unanswered. It is this question that the structural-technological analysis of Section III addresses.

### III. THE STRUCTURAL-TECHNOLOGICAL EXPLANATION

In his voluminous and ground-breaking work, *The Growth of American Law*, James Willard Hurst presented the first contemporary history of the development of American law and of the American bar.<sup>48</sup> Two of Hurst's accomplishments are especially relevant to this article.

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47. *Id.* at 14.

48. J. HURST, *supra* note 4.

First, he depicted the late nineteenth century as an enormously significant watershed in the history of the American legal profession. And second, he identified and began to analyze how social, economic, political, and legal factors contributed to this watershed. These two achievements stimulated further research that is important to a study of law firms. Together, Hurst and his disciples have presented analyses derived from studying broad social-structural and technological changes in American society. This type of analysis is referred to in this work as the structural-technological school. The task here is to sort through the structural-technological school's significant findings and present those factors that are of greatest utility in explaining the emergence of law firms in late nineteenth century America.<sup>49</sup>

The structural-technological school's general findings are that in the late nineteenth century important changes occurred in the law, in the structure of the legal profession, and in the society in which the profession was set. This article is concerned solely with a particular structural change in the profession — the emergence of law firms. Yet before delving into the structural and technological developments underlying this change, it is important to note that the emergence of law firms was only one of three extremely significant structural changes in the legal profession during the years 1870-1900. As Hobson observed, three major organizational changes in the legal profession transpired in the period extending from the late nineteenth century until the early twentieth century. These were the development of large law firms, the growth in number and importance of law schools, and the growth in number and size of local, state, and national bar associations.<sup>50</sup>

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49. From the outset, it must be observed that although the structural-technological school produced a relatively large quantity of literature analyzing the late nineteenth century legal profession, this literature left the concerns of this article relatively untouched. The main thrust of the structural-technological school's work was to delineate important changes that occurred in the legal profession as a whole. The cumulative result of the literature was a resounding consensus that the late nineteenth century was indeed a watershed in the history of the American legal profession. Although this consensus is of great importance to this work, a detailed account of its derivation is not of much interest here because this work deals with only a fraction of the legal profession — those lawyers who grouped together to organize the first law firms. Therefore, only those factors that are useful in explaining the emergence of law firms are studied. Of course, many of the same factors that are important in studying the legal profession in general are of equal importance in studying law firms. Yet, the distinctiveness in analytic approaches cannot be discounted.

50. Hobson, *supra* note 15, at 76. Hobson concentrated on the years from 1890 to 1930, and thus for Hobson the main concern was the establishment of these new structures in the "organizational society" of early twentieth century America, not explaining their emergence. (However, in his thoroughly researched dissertation he did make some effort to discuss the emergence of these new legal organizations.)

Hobson was one of the few structural-technological analysts to study the development of the law firm as a new and important legal organization. In the structural-technological literature, there is an abundance of information on how and why bar associations and university legal education developed. On the other hand, similar material on law firms is in short supply. In this section, an attempt is made to apply the broad analytical themes uncovered by the structural-technological scholars to a particular area of research that these same scholars left barren. When the research is concluded, one is left with a convincing awareness that the law firm was a functionally appropriate response to changes in late nineteenth century American society. However, questions about the sufficiency of the functionalist perspective arise.

In a structural-technological explanation of the emergence of law firms, five broad social developments of the late nineteenth century assume great importance: (1) the law changing to meet the developmental goals of nineteenth century America; (2) the rise of corporations and the response of government; (3) the expansion of the field of finance; (4) technological change and an attendant ideology of science; and (5) the changing conception of organizations. Although these developments have been discussed in some detail in various research, no encompassing structural-technological work deals exclusively with the task of applying these social developments (as well as less elucidating factors) to an explanation of the emergence of law firms. The main goal of this section is to glean from numerous works the factors which helped to explain the emergence of law firms. The five social developments outlined above are the most crucial structural-technological reasons for explaining why, when, and where law firms emerged, but other factors that add to the explanation are included where appropriate.

#### A. The Change in the Law

In his award winning book, *The Transformation of American Law*, Morton J. Horwitz argued that from 1780 to 1860 the American legal system underwent fundamental changes to meet the developmental goals of nineteenth century America.<sup>51</sup> For Horwitz, the key question was who benefited from this transformation. According to Horwitz, entrepreneurial and commercial groups reaped the spoils of the transformation and thus won a disproportionate share of wealth and power. The key question here is how this "transformation of American law" contributed to the emergence of law firms in the United States.

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51. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* 11 (1977).

Horwitz distinguished nineteenth century law from its eighteenth century counterpart by "the extent to which common law judges came to play a central role in directing the course of social change."<sup>52</sup> The new role of judges began evolving in the late eighteenth century and by the 1860s had culminated in what Horwitz called an "instrumental conception of law."<sup>53</sup> Horwitz summarized this evolution as follows:

Law was no longer conceived of as an eternal set of principles expressed in custom and derived from natural law. Nor was it regarded primarily as a body of rules designed to achieve justice only in the individual case. Instead, judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change. And from this changed perspective, American law stood on the verge of what Daniel Boorstin has correctly called one of the great "creative outbursts of modern legal history."<sup>54</sup>

Horwitz conceded that in its early stages, the instrumental concept of law aided entrepreneurs' innovative and socially productive schemes, but he concluded that by 1860 the law no longer embodied the moral sense of the community—it had become a facilitator of individual desires. Horwitz did not believe that the instrumental use of the law codified a consensus of the objective needs of society.<sup>55</sup> Although Horwitz's indictment is important, what is essential here is that it was precisely this instrumentalism that provided the requisite setting for the new legal organization of the law firm.

Horwitz mentioned Boorstin's "creative outburst" description because Boorstin recognized that the dynamic center of this outburst was, not accidentally, American commerce and industry.<sup>56</sup> By understanding the needs of the rapidly transforming American society, innovative nineteenth century lawyers such as the Massachusetts Chief Justice Lemuel Shaw made the common law a strong ally of industrial progress.<sup>57</sup> By the end of the nineteenth century, lawyers' "creative outbursts" had forged a strong alliance between the elite of the legal profession and commercial interests, and this relationship played a

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52. *Id.* at 1.

53. *Id.* at 1-30.

54. *Id.* at 30. See also D. BOORSTIN, *infra* note 56.

55. *Id.* at xvi.

56. D. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 35 (1965).

57. *Id.* at 41.



tremendously significant role in the emergence of law firms. The instrumental conception of law was a necessary precondition of this alliance.

A law wedded to industrial progress demanded far different attributes of its lawyers. Law became functional, leaving less room for decisions based on legal technicalities. A codification movement grew (mainly through the efforts of David Dudley Field, who, as noted in Section II, was a central figure in the founding of the Shearman & Sterling firm). The lawyers of the period acknowledged the age as "eminently practical,"<sup>58</sup> and this transformation in the conception of law was reflected in the nature of legal work.

As derivation from natural law and the primacy of justice in the individual case declined in importance, so too did the skills of lawyers in achieving these ends. By the late nineteenth century, the eloquent advocate was an anachronistic description of a lawyer. John S.H. Frank in an address to the Grafton and Coos Bar Association in 1888 noted this decline in eloquence at the bar: "The Bar is no longer the arena of forensic declaration. Crowds are no longer attracted to the court house to listen to the impassioned utterances and imposing periods of the orator."<sup>59</sup> Frank stressed the decline in importance of impassioned oratory. He maintained that even Daniel Webster, a man with few rivals in the power of eloquence, would not have monopolized the business of the courts of late nineteenth century America.<sup>60</sup> The establishment of an instrumental conception of law and its associated alliance with the commercial sector of America irreversibly altered a large percentage of the lawyers' work and by the end of the nineteenth century, the Webster ideal type of lawyer had become obsolete.

Horwitz made additional perceptive observations. He supplied convincing evidence in support of his hypothesis that a crucial choice of the antebellum period was to promote economic growth primarily through the legal, not the tax, system. Horwitz maintained that this choice had major consequences for the distribution of wealth and power in American society.<sup>61</sup>

After outlining changes in the conception of property, the principle of compensation, the guarantee of monopoly, the conception of contract, and the development of commercial law, Horwitz stated that not only had the law established legal doctrines that maintained the new

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58. Frank, *An Address to the Grafton and Coos Bar Association*, 1 GRAFTON & COOS B.A.J. 547 (1888).

59. *Id.* at 537.

60. *Id.* at 539.

61. M. HORWITZ, *supra* note 51, at xv.

distribution of economic and political power, but it actively promoted a legal redistribution of wealth against the weakest groups in society.<sup>62</sup> Horwitz recounted the major advantages of creating an intellectual system which gave common law rule the appearance of being self-contained, apolitical, and inexorable. In the last few pages of his book, Horwitz stated that in the late nineteenth century there was a movement away from an instrumental conception of law and towards an apolitical formalist conception. This disguised the redistributive and political functions of law and at the same time reflected the ideas of the period—science, objectivity, and professionalism.

During the post-Civil War era, instrumental law achieved an alliance with commercial interests and was well on its way to formalizing and legitimizing this alliance. The soldiers of this battle were far removed from the Webster ideal. A new type of lawyer was called forth with a new conception of the law. (However, the majority of the legal profession was not drastically affected by the establishment of the business-lawyer alliance. Outside of the commercial centers, legal practice evolved at a slow pace. The elite, big-city lawyers were most affected by the changes outlined above.) The new conception of the law and the flourishing of a new ideal type of lawyer—one who had superior technical legal skills and knowledge of the intricacies of America's immature, but fast growing, business community—were necessary conditions for the late nineteenth century emergence of law firms in the American legal profession.

## B. Robber Barons, Corporations, and the Response of Government

The rise of corporations and the response of government regulation greatly contributed to the emergence of the first law firms and securely established these new organizations in American society. As Lawrence M. Friedman noted in his ambitious work, *A History of American Law*: "The rise of the business corporation, in the 19th century, generated huge controversy, and manufactured enormous quantities of law. By 1870 corporations had a commanding position in the economy. They never lost it."<sup>63</sup> The strong relationship among robber barons, corporations, and the new law firms is an essential aspect of the explanation of the emergence of law firms in the American legal profession.

As previously noted, the late nineteenth century provided the legal profession with a new conception of the law which arguably contrib-

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62. *Id.* at 254.

63. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 466 (1973).

uted to a transformed role for the lawyer. The transition of the lawyer from advocate to counselor was also intertwined with a transition in the type of lawyers' clients. As law became supportive of developmental ends, clients with such goals came into closer contact with the law and lawyers. Despite the period's attempt to establish formalized and apolitical legal institutions, critics of the new business-lawyer association arose. A late nineteenth century law journal noted that when the common people observed the strong alliance between businesses and the legal profession, "they began to distrust the power of the courts as agencies for the attainment of rights and the redress of wrongs, and [ceased] to respect lawyers and judges as the ministers of justice."<sup>64</sup> Despite such growing complaints about the commercialization of the profession, emergent law firms forged a powerful link in the new alliance of business and law. This relationship was usually initiated before a law firm came into existence, and the firm's founding tended to be clearly and strongly related to events surrounding its corporate clients.

### 1. *The Robber Barons*

The beginning years of the first law firms were closely tied to a new type of client.<sup>65</sup> Hobson referred to these men as entrepreneurs or investment bankers. Most history books have opted for the term robber barons. To understand how these infamous but dynamic men contributed to the emergence of law firms, it is useful to return to one of the case studies.

When the law firm of Shearman & Sterling was established in 1873, Jay Gould promised Shearman that he would take his legal business to the new firm.<sup>66</sup> This promise was a significant factor in the decision of Shearman and Sterling to break off from the Field office. Gould was more than a rich client that assured the new firm a few large fees. At the time of the establishment of Shearman & Sterling, there were sixty-three cases pending involving Jay Gould. One year later the figure had risen to ninety-seven.<sup>67</sup> Gould was an example of the new type of client. He was an entrepreneur attempting to stretch the increasingly developmentally oriented law to its limit. Inevitably, the prodigious ambitions of these men resulted in an abundance of litigation.

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64. *The Commercialization of the Profession*, 3 AM. LAW. 85 (1895).

65. Hobson, *supra* note 15, at 142.

66. W. EARLE, *supra* note 11, at 20.

67. *Id.* at 69.

The robber barons of the nineteenth century wielded economic power of immense magnitude. The capital reserves of these super capitalists allowed them to pursue extremely ambitious economic goals, and their pursuit of these goals inevitably clashed with similarly directed men or other members of American society. Thus lawyers were called in to settle litigation as it arose. When the quantity of litigation reached the volume of Jay Gould's, one lawyer became unable to handle properly all of the client's affairs (along with serving the needs of other clients). Natural divisions of labor resulted and the first firms, complete with formal agreements, emerged. As Reed Smith Shaw & McClay historian Ralph Demmler observed, lawyers came together by the necessity of having manpower and capability to deal with the legal problems of their clientele.<sup>68</sup> Lawyers who previously had merely shared office space began to share the legal work of their clients, and the informal law office was formalized into the law firm.

Although robber barons played a large role in the emergence of many of the first law firms, the corporation provided the fertile ground for the emergence and growth of the vast majority of law firms.<sup>69</sup> As the corporation achieved economic dominance in America, lawyers were increasingly called upon to organize and advise the new business organizations. Robert Swaine noted, "As trade and industry passed from individual into corporate ownership, lawyers who in earlier days were seldom called into business transactions until litigation had broken out, were summoned to organize the new corporations and supervise their security issues."<sup>70</sup> Legal work was shifting away from the Webster advocate ideal.

## 2. *The Growth of Corporate Law*

The summoning of lawyers to the aid of corporations resulted in the rapid expansion of the field of corporate law. Two features distinguished this expanding field. First, it involved intricate dealings that often blurred the distinction between business and law, and second, much larger sums of money were involved. Corporations realized large profits on transactions which were essentially designed by lawyers. Thus, the new "corporation lawyer" became highly sought after and

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68. R. DEMMLER, *supra* note 21, at 3.

69. Swaine, *The Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A. J. 89 (1949). Robber barons often controlled corporations. The distinction here is between the narrowly controlled corporations of the 1870s and corporations with wide public ownership of stock. Such public corporations became prevalent in the 1880s.

70. *Id.* at 91.

rewarded. For the corporation lawyer, the ability to negotiate in the conference room and draft a good document became far more important than persuasive oratory.<sup>71</sup> For the profession as a whole, the corporate clients with their lucrative fees attracted unprecedented numbers of lawyers into the corporate field. This, in turn, led to more detailed legal definitions of corporate problems and resulted in increased litigation. The increased volume of court decisions led to a need for even more lawyers.<sup>72</sup> The corporation thus set in motion a phenomenon that linked the growth of law firms to the growth of corporations.

The robber barons were transition figures in the change from an individualist to a corporate capitalist economy. The huge sums of capital with which these men were involved resulted in unprecedented volumes of legal work that helped call into being some of the first law firms. With the establishment of the corporation as the dominant feature of the American economy, the field of corporate law rapidly expanded. Corporate law called into being the corporation lawyer, and a whole new form of legal organization, the law firm, to serve the new corporate clients. Why law firms were needed to properly serve the immense new corporate clients is further clarified by examining the interrelationships of government, corporations, and lawyers.

### 3. *Government Regulation*

Government intervention in the private economy increased the volume and complicated the nature of corporate legal work, thus strengthening the need for the law firm's particular capabilities. The discussion below is merely a cursory examination designed to complement the preceding functionalist argument.

During the 1870s, the robber barons fought tawdry battles over the stock market, the economy, and the corpses of railroad corporations.<sup>73</sup> The Erie Wars fought by the clients of Shearman & Sterling (Gould and Fisk) were a vivid example of the financial mismanagement and public corruption of the robber barons. The big corporations, which were still dominated by men like Gould and Fisk, seemed able to buy and sell lawmakers and thus control the law.<sup>74</sup> As Friedman stated:

The halls of legislation were transformed into a mart in which the price of votes was niggled over, and laws, made to order, were bought

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71. *Id.*

72. M. ZALD, *OCCUPATIONS AND ORGANIZATIONS IN AMERICAN SOCIETY* 27 (1971).

73. L. FRIEDMAN, *supra* note 63, at 447.

74. *Id.* at 447-48.

and sold. The courts were corrupted, too. Justice was a whore of the rich. In New York, judges like George Barnard and Albert Cardozo did what the robber barons wished: issued injunctions for a price, sold the public interest down the river out of ignorance or greed.<sup>75</sup>

As previously noted, the alliance with the commercial world did not pass uncriticized in the legal profession. Contemporary critics cried out at the new alliance perceiving it as a "deplorable tendency."<sup>76</sup> However, reaction outside the profession was swifter and more consequential.

The decade of the 1870s, in addition to being noted for the exploits of the robber barons, was also the period when the Granger movement in the United States peaked. This Midwestern-based movement attempted to bring under control the farmers' enemies—railroads, warehouses, and grain elevators. Throughout the post-Civil War period, the American public became more aware of the tremendous power and the increasingly suspect business practices of the robber barons of the railroad industry. This led the Granger's to establish commissions in an attempt to curb the railroads' excesses. Local and state commissions were relatively ineffective and a push for a federal railroad commission grew. The result of the Granger movement was the founding of the Interstate Commerce Commission (I.C.C.) in 1887.<sup>77</sup>

The founding of the I.C.C. symbolized the growing response of government intervention in late nineteenth century American society. Corporations and the lawyers who served them were faced with an increasing amount of regulations. The work of the lawyers grew more complex and the legal needs of the corporations became more voluminous.

The growth of corporate trusts in the 1880s and the cries from the countryside to do something about them led to the second crucial, and permanent, entry into business regulation.<sup>78</sup> In 1890, the Sherman Antitrust Act became law. This legislation provided a clear statement that restraints of trade were against public policy and not enforceable in court. A multitude of court cases resulted. The industrial giants were willing and able to enter into battle with the government.<sup>79</sup> As the law was interpreted by the legal process, it provided huge additions to the fields of administrative and corporate law.

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75. *Id.* at 448.

76. *The Commercialization of the Profession, supra* note 64, at 84.

77. L. FRIEDMAN, *supra* note 63, at 394.

78. *Id.* at 405.

79. *Id.* at 408.

The one group that clearly benefited from the growing government regulation of the late nineteenth century was the lawyers. The lawyers who benefited the most were those who were best able to deal with the expanding legal needs of American business. Typically, these were the lawyers who had been involved with the complicated affairs of the corporations' founding entrepreneurs. The rise of corporations, and the response of government regulation, increased the volume, and more importantly, the substance, of legal work. This contributed to the emergence of new law firms and the expansion of existing firms.

#### 4. *The Geographic Distribution of Law Firms*

The increased legal work that was generated in the late nineteenth century called into being the necessary organization to deal with it. Therefore, the geographic location of the emerging firms was strongly correlated with the extent of corporation development in the various regions of the country. Hobson's compilation of the distribution of large firms by city clarifies this phenomenon.<sup>80</sup>

At the turn of the century, sixty-four law firms in New York City had legal staffs larger than four, while in Chicago there were twenty-three such firms.<sup>81</sup> All other cities lagged significantly behind New York City and Chicago in law firm emergence. These data are not surprising because at the time New York City was the nation's undisputed corporate center, with Chicago a distant second.<sup>82</sup> The corporation-law firm relationship, as well as the resulting geographic distribution of law firms, is further elucidated by examining the field of finance.

### C. The Development of Finance

James Willard Hurst got right to the heart of the issue of finance by observing that in the late nineteenth century, ambitious lawyers found that the centers of power were closer to finance.<sup>83</sup> When discussing the legal profession's relationship with the railroad industry Hurst stated: "The distribution of the most influential new law business re-

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80. See *supra* tabulation p. 596 .

81. Hobson, *supra* note 15, at 168.

82. There were anomalies in the correlation between commercial development and law firm emergence. For example, Philadelphia's population in 1903 was more than double Boston's, yet it had fewer than half as many "large" law firms. *How the Cities Grew*, in THE WORLD ALMANAC & BOOK OF FACTS 1980 196 (1979). Hobson suggested that the predilection for an aristocratic demeanor among the elite of the local bar helped explain Philadelphia's relatively slow rate of large law firm emergence. See Hobson, *supra* note 15, at 178-82.

83. J. HURST, *supra* note 4, at 298.

sponded to a shift in the center of gravity in the economy. Railroad mergers and railroad finance were the avenue to a whole new field of corporate counseling."<sup>84</sup> Industry and finance gave direction to the growth of new types of law business after 1870, and this development paralleled the growing specialization of law practice.<sup>85</sup> But as one commentator contended, it was the genius of lawyers that elevated corporations to their dominant position.<sup>86</sup> This same commentator stated that corporate strength and growth were dependent on brilliant legal "fictions."<sup>87</sup> These legal "fictions" were in actuality the imaginative financial constructs of lawyers. As the field of finance became subtler and more complex, lawyers began to specialize in this lucrative area to serve their corporate clients. This increased the propensity of existing firms to hire more lawyers and of individual practitioners to band together so they could adequately serve the complex affairs of corporations. By the 1890s, many of the most ambitious lawyers were actively pursuing the field of finance.

Within just a few decades, the business lawyer was elevated to the highest status.<sup>88</sup> This was in striking contrast to the situation even as late as 1868, when John Sterling, balancing his prospects with a Mr. Hill or the Field & Shearman firm, mused:

At Hill's I should grow as fast as my nature was capable of developing, from the trying of small cases to the conduct of larger ones, while at Field's from the immensity of issues involved I should be always in the background. At Mr. Field's, I must in reality be for years an office lawyer and where was there ever to be an opportunity of becoming anything else.<sup>89</sup>

With the growth of corporate law and the field of finance, the glamour of a career as an independent advocate paled.

Hurst noted that the centers of the developing field of finance were "in a handful of great cities east of the Mississippi."<sup>90</sup> This is not surprising because the clients who demanded such financial service as

84. *Id.*

85. *Id.* at 297.

86. Foster, *Lawyers, Professionalization and Politics: Ideology and Organization in the American Bar, 1870-1920*, at 248 (1976) (dissertation, Univ. of Wash.) (available on Univ. Microfilms Int'l, Ann Arbor, Mich.).

87. *Id.*

88. J. HURST, *supra* note 4, at 297. Hurst noted that the first symbol of this change was that for a generation after the Civil War, to be general counsel of the railroad was to hold the most widely esteemed sign of professional success.

89. W. EARLE, *supra* note 11, at 28.

90. J. HURST, *supra* note 4, at 298.



mergers of businesses, railroad affairs, stockholders' suits, and bond issues were located in these areas. Of course Wall Street, with its proximity to financial institutions and commercial organizations, became the financial as well as law firm capital of the nation. However, "little Wall Streets" appeared in smaller cities throughout the nation.<sup>91</sup> Corporations and their financial needs and services may have been concentrated in New York City, but they were by no means exclusively a phenomenon of New York City.

In sum, the developing field of finance was strongly associated with the growth of corporations. This burgeoning field was dominated by lawyers who utilized their collective brainpower in the service of corporations. These same lawyers, who were closely allied with the rapidly growing corporate sector, were stimulated to organize into firms and enlarge existing firms to improve the services they offered to their powerful, and highly lucrative, clients.

#### D. Technological Advancement and the Ideology of Science

Technological developments of the late nineteenth century also played a role in fostering the development of law firms in the American legal profession. New technologies affected law offices in two ways. First, there were inventions that directly aided or changed day-to-day legal work. And second, the rapid development of technology in general contributed to an ideology of science that had both direct and indirect influences on the American legal profession.

Law offices of the 1870s were simple and plain. Office machinery was minimal. Clerks, if there were any, were generally unpaid. Overhead was low. Yet during the 1870s, the two office machines that have had the greatest effect on offices around the world first became available. The typewriter, invented in 1868,<sup>92</sup> was generally marketed by 1878.<sup>93</sup> In addition, in 1876 the first Bell telephone patent was awarded, and by 1877, the first telephones were available to the public.<sup>94</sup>

The law office without the typewriter was well depicted by Walter K. Earle in his description of the Shearman & Sterling office of the late 1870s:

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91. L. FRIEDMAN, *supra* note 63, at 553.

92. *Inventions and Scientific Discoveries*, in THE WORLD ALMANAC AND BOOK OF FACTS 1980 599 (1979).

93. W. EARLE, *supra* note 11, at 25.

94. *Id.* at 26.

Everything in writing had to be handwritten, and all outgoing communications had to be copied in the copybooks. . . . One day's output of outgoing letters meant late hours for the clerk. Also, all legal papers had to be handwritten. Papers such as deeds and wills presented no difficulty. But not so with long pleadings, petitions and briefs in lawsuits, particularly when there were a number of parties each of whom had to be given copies.<sup>95</sup>

Without the telephone, if lawyers wanted to talk with someone outside the office, they had three choices—arrange a meeting, send a telegram, or send a messenger. Clerks and messengers were common members of law offices because their relatively unskilled labor was necessary.

New office technologies increased the overhead costs of law offices. However, the increasing need for books, which were the lawyers' tools, caused even greater cost increases.<sup>96</sup> Hurst dated the revolution in the cost of legal service as sometime after the 1870s. He noted that before this date, lawyers did not need many books because the intricate web of administrative regulation had not been woven. Hurst reported, "After the '70s the printed sources of the law became a flood."<sup>97</sup> An expensive law library became an essential component of the complete law office.

Growing overhead costs resulting from new technology and more extensive law libraries provided strong incentives for lawyers to draw together into firms that could take advantage of economies of scale. If the sheer growth of the law did not propel a lawyer toward the specialist fostering firms, then perhaps the ever-growing overhead costs that faced the individual practitioner who attempted to serve all of his clients' needs would.

Technological change of the late nineteenth century must also be seen in a broader perspective. This was the age of Darwin. The people of America were acquiring a great faith in science. Even learned men of the period viewed the natural sciences with indiscriminating enthusiasm as the model for the study of all phenomena.<sup>98</sup> This ideology was clearly manifested by members of the legal profession.<sup>99</sup>

When Christopher Columbus Langdell became Dean of Harvard Law School in 1870, he applied his personal belief in science to the legal profession. Langdell contended that law was a science, and that

95. *Id.*

96. J. HURST, *supra* note 4, at 308.

97. *Id.*

98. *Id.* at 261.

99. See Adams, *Law Under Inequality: Monopoly*, in *CENTRALIZATION AND THE LAW* 64 (M. Bigelow ed. 1906). Adams observed, "The law is an example of Darwin's generalization of natural selection." *Id.*

all available materials of the science were available in books. Thus, he stressed the case method and translated the idea into the prevailing method of a whole legal curriculum.<sup>100</sup> Langdell raised standards, hired James Barr Ames, the first career law teacher (Ames had no experience in practice), and in general greatly expanded the influence of the law school in the American legal profession. (During the period 1870-1900, while the number of lawyers increased by 85 percent, the number of law school trained lawyers increased by 169 percent.)<sup>101</sup>

The growth in the acceptance of law school as a way to the bar necessarily corresponded with a reduction in unpaid law clerks. As Mayer Zald observed, the growth in legal education was paralleled by a growth of office technology.<sup>102</sup> Therefore, staff reductions did not significantly hurt larger offices that were able to replace unpaid labor with capital investment. On the other hand, the necessity of capital investment favored a law firm type of organization that could share expenses and take advantage of economies of scale.<sup>103</sup>

For purposes of this study, technological change in late nineteenth century America was significant on two levels because the emergence and expansion of law firms was associated with advances in office technology and with the growing acceptance of an ideology of science.

### E. Concepts of Occupational Organization

All of the societal changes discussed in this section had a relatively direct effect on the emergence of law firms. Yet during the years of the late nineteenth century, there were many rapid social developments. These elements of change were a series of tiny events that were gross only in their cumulative effect.<sup>104</sup> Throughout the period under study, American society became more urban, more closely linked through advances in transportation and communication technology, and more industrial. Profound changes in the demographic, economic, and geo-

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100. J. HURST, *supra* note 4, at 264.

101. Auerbach, *Enmity and Amity: Law Teachers and Practitioners, 1900-22*, 5 PERSPECTIVES IN AMERICAN HISTORY 573 (1971).

102. M. ZALD, *supra* note 72, at 25.

103. The law school's influence on the emergence of law firms should not be overemphasized. However, the effect of the rise of university legal education on already established firms was significant and continued to grow in significance throughout the twentieth century. Yet such a discussion is not particularly relevant to the explanation of the emergence of law firms. Educational backgrounds of lawyers have been relatively well studied. See E. SMIGEL, *THE WALL STREET LAWYER* (1969) for a particularly interesting work. Also, most law firm histories report the educational backgrounds of the firm members. In these works, unlike Smigel's work, there is little attempt to analyze the relationship between law school attendance and law firm membership.

104. L. FRIEDMAN, *supra* note 63, at 295.

graphic structure of the nation resulted.<sup>105</sup>

Broad societal change brings about new ideologies. The late nineteenth century has been labeled as the time of the "Go-Getters,"<sup>106</sup> "the Gilded Age," "the factory age," "the age of money," and as "the age of the robber barons."<sup>107</sup> Taken collectively, these appellations provide insight into the changing ideology of the period.

As go-getters, factories, money, and robber barons exerted their influence, the American cultural hero—the frontier individualist—was weakened. In 1893, Frederick Turner, in his famous essay entitled *The Significance of the Frontier in American History*, announced that the idea of the open frontier was irrevocably dead.<sup>108</sup> The unchecked belief in unlimited growth and unlimited resources was no longer a dominant public opinion. By the end of the nineteenth century:

if one can speak about so slippery a thing as dominant public opinion, that opinion saw a narrowing sky, a dead frontier, life as a struggle for position, competition as a zero-sum game, the economy as a pie to be divided, not a ladder stretching out beyond the horizon.<sup>109</sup>

A basic ideological transformation had occurred.

The response to the changed society was seen in the nature of organizations. In the early part of the century, DeTocqueville had been surprised at the propensity of Americans to form groups. But organizations in the last half of the nineteenth century were much more than clubs and societies:

Noticeably, many strong interest groups developed—labor unions, industrial combines, farmers' organizations, occupational organizations—to jockey for position and power in society. . . . People joined together in groups not simply for mutual help, but to exclude, to define an enemy, to make common cause against outsiders. Organization was a law of life, not merely because life was so complicated, but also because life seemed so much a zero-sum game.<sup>110</sup>

These organizational impulses were not solely motivated by functionalist necessity. This is evidenced by the fact that the same "interest groups" that actively pursued "occupational organizations" often pursued favorable licensing legislation.<sup>111</sup>

105. See Z. MILLER, *THE URBANIZATION OF MODERN AMERICA* 63 (1973).

106. D. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 3 (1973).

107. L. FRIEDMAN, *supra* note 63, at 296.

108. *Id.*

109. *Id.*

110. *Id.* at 296-97.

111. For an excellent discussion of the pursuit of licensing legislation by occupational groups

During this period, the legal profession also established occupational organizations to pursue professional goals. Throughout the 1870s, various local bar associations were founded in response to the perceived need of raising the standards of professional conduct and admission to the bar. The Association of the Bar of the City of New York was formulated in the context of the scandals of the Tweed regime,<sup>112</sup> and similarly, the Chicago Bar Association was founded to drive "disreputable shysters who . . . disgrace the profession" out of the profession.<sup>113</sup> This organizational activity culminated in the founding of the American Bar Association in 1878.

The legal profession's organizational responses paralleled other occupational groups of the day. Hobson accurately commented that the emergence of law firms, the growth of university legal education, and the establishment of bar associations were part of a greater trend towards organization in American society.<sup>114</sup> Yet Hobson also stated that lawyers were reluctant to accept the bureaucratic structure of the law firm.<sup>115</sup> By assuming that lawyers reluctantly formed law firms, Hobson implied that the emergence and expansion of law firms was a purely functionalist phenomenon. For Hobson, lawyers were reluctant to bureaucratize, so they accepted organizational changes in the workplace only as necessary. Following this line of reasoning, the emergence of law firms is explained as an appropriate functional response to a change in the demand for legal services.

With an alternative analytic approach, the organizational impulse of the late nineteenth century American legal profession can be interpreted very differently. The functionalist or structural-technological school that Hurst and Hobson represent maintains that the emergence of law firms was a necessary and inevitable result of changed social conditions. However, the development of market oriented occupational organizations in the late nineteenth century raises questions concerning the sufficiency of the structural-technological explanation. Magali Sarfatti Larson approached the explanation of professional groups' organizing impulses from a heavily supply-side perspective. Larson claimed that occupational groups organized to gain market power.<sup>116</sup>

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see Friedman, *Freedom of Contract and Occupational Licensing, 1890-1910: A Legal and Social Study*, 53 CALIF. L. REV. 487-534 (1965).

112. See generally T. HOLTON, PREFACE TO LAW: THE PROFESSIONAL MILIEU 32 (1980).

113. H. KOGAN, THE FIRST CENTURY: THE CHICAGO BAR ASSOCIATION 1874-1974 15 (1974).

114. Hobson, *supra* note 15.

115. *Id.* at 152.

116. M. LARSON, *supra* note 18, at xvi.

While Larson concentrated on professions as a whole, her supply-side analytic perspective can be effectively utilized in a study of law firms.

Although the structural-technological explanation provides a convincing explanation of the emergence of law firms, it fails to examine whether the emergence and proliferation of law firms may be partially explained by the entrepreneurial drives of lawyers. By concentrating on the market for legal services, essential research questions can be approached. Were lawyers organizing into law firms because of self-interested desires to protect their market? And how, if the robber barons and the corporations were so vicious in their pursuit of vertical monopolies, did the law firms maintain their economic independence?

Certainly, the social-structural and technological developments discussed in this section are an integral part of any explanation of law firm emergence in the American legal profession. However, entrepreneurial aspirations of lawyers cannot be ignored if a complete understanding of the emergence of law firms is to be achieved. In the following section, the supply-side perspective is used to complete the explanation of the emergence of law firms in American society.

#### IV. THE MARKET FOR LEGAL SERVICES AND THE ECONOMIC INDEPENDENCE OF THE EMERGENT LAW FIRMS: THE SUPPLY-SIDE PERSPECTIVE

Among the hyperbolic quotations found on the back cover of Magali Sarfatti Larson's book, *The Rise of Professionalism*,<sup>117</sup> there is one statement that is useful in expressing why the subject matter of this section is imperative to a comprehensive explanation of the emergence of law firms. According to the *British Journal of Law and Society*,<sup>118</sup> after the publishing of *The Rise of Professionalism*, "it will henceforth be impossible to write seriously about the sociology of lawyers without attempting to grasp and employ her [Larson's] analytic framework—or at least respond to it."<sup>119</sup> Although this statement is exaggerated, its basic assertion is well founded. In a study of the legal profession, analyses that do not respond to Larson's market oriented analytic framework are unavoidably myopic. In this section, Larson's innovative perspective is applied to the study of law firms.

In the beginning of her book, Larson noted that most sociologists viewed the professions as independent or neutral vis-a-vis the class

117. M. LARSON, *supra* note 18.

118. Publisher of M. LARSON, *supra* note 18.

119. M. LARSON, *supra* note 18, at back cover (statement by commentator).

structure, and they viewed the acceleration of professionalization as an instance of the complex process of modernization.<sup>120</sup> Larson brazenly challenged this consensus:

My intention is to examine . . . how the occupations that we call professions organized themselves to attain market power. I see professionalization as the process by which producers of special services sought 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. In other words, the constitution of professional markets which began in the nineteenth century, inaugurated a new form of structured inequality.<sup>121</sup>

For Larson, collective goals assumed paramount importance. Social-structural and technological explanations of professional organizational emergence, with their emphasis on the demand for professional services, played a minor role in her radical analysis. She concentrated on the supply of marketable services and hence, in her work, the organizations studied are examined as they affect their outside environments (usually other organizations), not as functional responses to broad social-structural and technological developments. For this reason, Larson's analytic framework is referred to in this work as the supply-side perspective.

Although the structural-technological school's findings provide the principal foundation of the explanation of the emergence of law firms, the structural-technological explanation is not sufficient by itself. Organizational theorist Charles Perrow described the main problem with the heavily demand-side, overly functionalist, structural-technological analysts:<sup>122</sup> "[They have] seen the organization as adaptive to and dependent upon the environment. [They have] not considered the other possibility, which, for the important organizations in our society, is at least equally possible: that the environment has to adapt to the organization."<sup>123</sup> According to Perrow, the entrepreneurial drives of the supply-side view should be an important aspect in the study of organizations.

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120. *Id.* at xiv, xvi.

121. *Id.* at xvi.

122. Perrow actually referred to these analysts as members of the "institutional school." His definition of the institutional school varies somewhat from the structural-technological definition used in this article. However, for purposes here, these slight differences are insignificant compared to the benefits derived from keeping the sociological jargon down to a bearable level.

123. C. PERROW, *supra* note 17, at 198.

In Larson's work, the supply-side perspective was applied to the broad topic of the process of professionalization as well as to the specific example of the legal profession. Although Larson rarely discussed the law firm directly, her unusual perspective is invaluable for approaching particular research questions concerning the emergence of law firms.

#### A. The Market For Legal Services

A number of difficulties arise in an analysis of the market for legal service of the late nineteenth century. First, this work examines only those lawyers who came together to form the first firms, and these lawyers represented a small elite portion of the legal profession. Thus, the lawyers who established the first law firms serviced a market that shared little in common with the majority of the lawyers of the period. Second, the services that were marketed by the lawyers of the emergent firms were themselves in a period of rapid transformation and growth.<sup>124</sup> Whole new fields such as finance were being developed by lawyers. It was increasingly difficult to distinguish between what was and what was not a legal service, and more importantly, legal services that were created by lawyers and legal services that were simply responses to demands for clients became indistinguishable. However, despite the difficulty in describing the detailed composition of the legal services market, useful analyses can be made.

The lawyer's market is his clients, and the status and prestige of a particular lawyer is largely dependent on his clients.<sup>125</sup> Thus, the lawyer's client represents something greater than a mere market unit which buys legal skills.

An ambitious lawyer is attracted to the market that assures elite status. As Hobson noted, during the late nineteenth century such distinctions depended on the types of practice, the social class of clients, the location of the law office, the size of income resulting from the practice, and increasingly, the size of the law firm, and the type of legal training.<sup>126</sup> All of the above were clearly affected in a positive direction (from the ambitious lawyer's standpoint) by the growing alliance of legal practitioners and business interests. Thus, the corporation provided the perfect marketing target for a lawyer, or more likely a group of lawyers, who had lofty financial and status aspirations.

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124. See *supra* text accompanying notes 48-116.

125. Hobson, *supra* note 15, at 88.

126. *Id.*



### 1. *Collective Action Law Firm Emergence*

The law firm provided a functionally efficient organizational response to the needs of growing corporate clients. Thus, a clear incentive existed for lawyers to organize into law firms in order to attract corporate clients that assured high status. Such a conscious *collective action* emergence differed sharply from a *functional response* emergence.

The emergence of the Philadelphia firm of Dechert Price & Rhoads, as described by firm historian Robert V. Massey, Jr., appears to be an example of the collective action emergence model. Massey noted that Wayne MacVeagh, one of the founders of the firm "came to Philadelphia in 1875 to arrange a transfer of his practice from Harrisburg. [His] first move was to look for a likely Philadelphia partner. By that time he had begun to feel the impact of postwar expansion."<sup>127</sup> From the above passage, one can glean that MacVeagh saw the establishment of a law firm as a useful vehicle that would enable him to assume an important role in the "postwar expansion."

In *The Rise of Professionalism*, Larson saw the process of professionalization as a "collective mobility project."<sup>128</sup> For Larson, the "professional project" of social mobility was considered a collective project because only through a joint organizational effort could occupational roles be created—or redefined—that would bring the desired social position to their occupants.<sup>129</sup> She stated that through the upgrading of an occupation, prestige is attached to professional roles, and by extension, to their occupants.<sup>130</sup> Using her analytic framework, the law firm can be seen as a vehicle to achieve such occupational upgrading. Because of its utility in serving the powerful corporate client that assured a lawyer high prestige, the law firm was an attractive organization to a lawyer—regardless of his clients' functional requirements at the time.

The above argument views the law firm as an entrepreneurial manifestation of a few highly motivated individuals. In some instances this perception is correct, but it must be tempered by the realization that the legal services market was not a static entity that could be controlled in proportion to one's aggressive economic actions. During the late nineteenth century, the profession as a whole faced serious challenges to its market position.

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127. R. MASSEY, *DECHERT PRICE & RHOADS* 14 (1975).

128. M. LARSON, *supra* note 18, at 66-79. Although Larson's collective mobility project referred to the much larger social unit of a profession, her emphasis on collective entrepreneurial aspirations can be effectively related to the smaller social unit of the law firm.

129. *Id.* at 67.

130. *Id.*

## 2. *Threats to the Market for Legal Services*

The market for legal services in the late nineteenth century was under both direct and indirect threats. By the 1880's, competition from outside the profession became significant.<sup>131</sup> Newly established title guaranty companies began to cut into profitable real estate transactions, large interstate concerns started to handle the collection of debts, and, by the turn of the century, trust companies took on broader responsibilities for estates and trusts, and certified public accountants won increasing business.<sup>132</sup> As Hurst pointed out, in each case of encroachment by laymen one of two things was likely to be true: "(1) a particular job, by practice and tradition, had come to be done by lawyers and laymen . . . or (2) the work in question was new with no pre-emptions fixed by usage or custom."<sup>133</sup> The encroachment of lay competition forced lawyers to become increasingly aware of the importance and frailty of their market position.

By the beginning of the 1870's, many lawyers had perceived a need to take action. For the legal profession, the founding of local, state, and national bar associations manifested the profession's growing concern with the market for legal services. Although the stated purposes of these new associations were primarily the maintenance of the honor and dignity of the profession and the elimination of "disreputable shysters" from the profession,<sup>134</sup> there were far more significant forces driving lawyers into these organizations. As Lawrence Friedman noted:

The crisis in the profession was more than a crisis in decency. There was also, obscurely, a business crisis. The characteristic response of any trade group to a threat of more competition was to organize and fight back. At the meeting of the New York bar, "for the purpose of forming an Association," James Emott complained that the profession had lost its independence. "We have become simply a multitude of individuals, engaged in the same business." And the objects and the methods of those engaged in that business are very much dictated by those who employ them . . . . In union, it was hoped, there would be strength against the outside world.<sup>135</sup>

Between the years of 1870 and 1878, eight city and eight state bar

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131. J. HURST, *supra* note 4, at 319.

132. *Id.* at 319-20.

133. *Id.* at 320.

134. H. KOGAN, *supra* note 113.

135. L. FRIEDMAN, *supra* note 63, at 562.

associations were founded in twelve different states.<sup>136</sup> This organizational activity culminated with the founding of the American Bar Association in 1878. The bar association movement was a clear example of individual lawyers organizing to achieve supply-side objectives. Once the elite lawyers of the bar association movement recognized that they were "simply a multitude of individuals, engaged in the same business," the organizing impulse was a natural outgrowth in the attempt to collectively achieve goals that would benefit the individual professional.

The legal profession in the period 1870-1900 was faced with increased lay competition as well as a growing realization that the power balance between lawyer and client appeared to be shifting towards the rapidly developing and prospering robber baron-corporate clients. The founding of bar associations, although symbolically important, had questionable utility in maintaining a secure market for the legal profession. Other occupations faced challenges to their markets during this historical period by resorting to occupational licensing. However, this was not a viable alternative for the legal profession. As Friedman noted, such "friendly" licensing was heavily dependent on the absence of organized economic adversaries.<sup>137</sup> The legal profession did not fall into this category, and thus, the legal profession needed more useful tools than occupational licensing or the newly founded bar associations to provide lawyers with a secure independent market for their legal skills.

### *3. Corporate Practitioners in the Late Nineteenth Century: A Transformed Elite*

For the majority of legal practitioners in the late nineteenth century, the sheer growth of the market for legal skills and related matters ensured a reasonable standard of living. The general practitioner may have been increasingly performing the same services as his lay competitors, but this was a result of the change in volume and type of legal work and not a result of an identifiable loss of clients to lay competition. The individual practitioner continued to serve the same type of client with similar services throughout the period. The same cannot be said of the new business lawyers of the expanding cities.

The business lawyer was faced with a completely new type of client—the large corporate concern. This new client brought about the

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136. *Id.* at 563.

137. Friedman, *supra* note 111, at 518-23.

boardroom counselor ideal type of lawyer.<sup>138</sup> It was functionally logical for this new type of lawyer to organize the first law firms to serve the growing corporate clientele. These firms emerged in a setting of increasing awareness of lay competition and the growing acknowledgment of the dangers of a commercialized profession. Business lawyers of the period realized that there was a need for "stringent corrective influences" to fight deprofessionalizing and commercializing influences.<sup>139</sup> For the elite of the profession, the bar association movement was one response to this concern. However, for a growing number of corporate practitioners the law firm provided a secure market and professional status and prestige.

Robert T. Swaine, in his voluminous study of the Cravath firm, noted that during the 1880's, an increasing number of consolidations of small businesses from individual ownership and management into publicly held corporations occurred.<sup>140</sup> The legal and business problems surrounding this activity were growing in complexity. Swaine stated, "It was inevitable that for their solution those lawyers should be retained who had already achieved high professional position in other fields."<sup>141</sup> Thus, the high status achieved by the business lawyers of the period often did not translate into a rise in status of individual lawyers, but merely a transition of duties of the existing legal elite. The ascendancy of the business lawyer resulted in a transformed legal elite, not a new legal elite. Certainly, some lawyers who had built their reputation on advocacy may have found it difficult or impossible to become a respected business lawyer, but the key point is that the legal elite of the late nineteenth century recognized that the corporate client provided opportunities to improve and solidify their already enviable position.

The Seward, DaCosta & Guthrie firm manifested this pattern. This prestigious predecessor of the Cravath firm was one of the oldest continuously practicing New York firms of the 1880's. During the post-Civil War period members of the firm rapidly recognized the benefits to be derived from serving corporate clients. The firm found that corporate law was: "much more profitable than the old [areas of practice]. . . . Clarence Seward found that the legal engineering of corporate consolidations, railroad reorganizations and security issues, out of

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138. See *supra* text accompanying notes 59, 60, 63 and 64.

139. *Deprofessionalizing the Practice of Law*, 3 AM. LAW. 132 (1895). Although the need for corrective measures was vehemently expressed in this article, no specific recommendations were made.

140. R. SWAINE, *supra* note 20, at 369.

141. *Id.* at 370.

which bankers and market operators were realizing large profits, afforded more lucrative fees than those obtainable in [other areas of] practice."<sup>142</sup> Advantageously situated, elite lawyers of the late nineteenth century actively pursued corporate practice with their new organization of the law firm.

#### 4. *The Reality of the Lawyer-Corporation Relationship*

With a vision of a legal market consisting of countless demands for corporate consolidations, it is easy to arrive at the functional explanation of law firm emergence. But this image of the late nineteenth century business world fails to account for the fact that robber barons and corporations executed disproportionate power over the economy, as they ruthlessly pursued vertical monopolies. To quote historian Zane Miller:

This first generation of American organization men put together a new kind of business organization of unequalled size, complexity, and productive capacity. This institution, the vertically integrated corporation, combined the major economic processes—the acquisition of raw materials, manufacturing, packaging, marketing, and finance—into one centralized bureaucracy, whose chief operating principle was efficiency. Though relatively few in number, the vastly powerful new corporations had a dominant influence in the economy.<sup>143</sup>

Yet, it was precisely these powerful clients that provided the emergent law firms with both a secure market and the immense prestige that was derived from the maintenance of economic independence.

The debate in the late nineteenth century legal profession concerning the growing commercialization of the profession showed that many lawyers of the day had come to realize the precariousness of the lawyer-corporation relationship. Some lawyers believed that the "spirit of commerce" that "contaminated" the profession was deplorable and often subversive of legal rights.<sup>144</sup> Others noted that the "growth of great mercantile fortunes . . . lowered the relative importance and dignity of the bar."<sup>145</sup>

Despite the growing strength of corporations and the increasing reality that the legal profession was bureaucratizing to accommodate them, the elite lawyers were never willing to see themselves as purely

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142. *Id.* at 371.

143. Z. MILLER, *supra* note 105, at 66.

144. *The Commercialization of the Profession*, *supra* note 64, at 84-85.

145. Bryce, *supra* note 5, at 357.

spokesmen for corporate interests. Even the most business oriented lawyers of the day attempted to hold onto the image of the independent lawyer serving a variety of clients.<sup>146</sup> Hobson stressed that such conceptions were rooted in the social realities of a more individualistic age, and that they helped explain the legal profession's ambivalence in establishing appropriate organizational structures for the increasingly organizational society of the period.<sup>147</sup> Although Hobson's observations are worthy of note, his analysis neglected the striking fact that the business lawyers, despite their alleged ambivalence toward appropriate organizational structures, maintained a significant degree of economic independence from their powerful clients.

The examination of the market for legal services provides evidence that supply-side concerns contributed to the emergence of law firms in the American legal profession. Lawyers acted to protect and/or secure their markets, and the law firm played an important collective role. But the question remains, how did law firms maintain their economic independence from the vertical monopolizing impulses of the rapidly growing corporate clients?

## B. The Economic Independence of the Emergent Law Firms

The maintenance of economic independence by law firms of the late nineteenth century can be explained by four closely related factors that involved the supply of legal services: (1) the attainment of the commodity of experience by business lawyers; (2) the development of a network of personal connections by the emergent firms; (3) the ability of independent lawyers to invoke the attorney-client privilege (the rule that forbids disclosure of information to a third party without the client's consent); and (4) the slow realization by commercial interests that legal services were a necessary factor input of production.

### 1. *The Commodity of Experience*

The specialized experience that the first business lawyers attained is best described as a commodity because corporate clients sought out and bought specialized legal services when they had a particular demand that needed to be fulfilled. This commodity was comprised of both legal experience and a knowledge of a powerful client's intimate business affairs. The lawyers of the emergent law firms gained the commodity of experience even though they were seldom called into business

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146. Hobson, *supra* note 15, at 91-93.

147. *Id.* at 436.

transactions until litigation had broken out.<sup>148</sup>

The entangled affairs of Jay Gould provided a clear example of how lawyers, in this case Thomas Shearman and John Sterling, gained the commodity of experience. Gould retained Field & Shearman (Sterling was a clerk in the office at the time) when the "Erie Wars" began.<sup>149</sup> Before the lawyers became involved, Cornelius Vanderbilt, Daniel Drew, James Fisk, Gould, and more were entangled in a legal and moral maelstrom. It was left to the lawyers to unravel the mess. The Erie Wars enabled Thomas Shearman and John Sterling to become intimately knowledgeable of the affairs of Jay Gould and provided the firm of Shearman & Sterling with the invaluable commodity of experience.

## 2. *The Importance of Personal Connections*

Personal connections helped the first business lawyers maintain economic control of the commodity of experience. As the complexity of corporations' legal needs increased, so too did the network of necessarily involved parties. For example, government officials developed important relationships with corporate legal counsels because of increased government regulation. For the business lawyer, new roles evolved. As Larson noted:

The expanding role of government and the growth of legislation affecting the corporation meant, in turn, that one major function of the legal elite became that of guiding their clients through lobbying or negotiation. In sum, the elite of the profession provided services that were not strictly (and often not even remotely) legal services for a class of particularly powerful and wealthy clients.<sup>150</sup>

The law firm histories do not stress (or often do not mention) the importance of personal connections. However, "who you know" was important for the business lawyers during the late nineteenth century because the corporations' needs and desires were taking the law and the legal profession into new areas. As Larson noted, "Elite practice . . .

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148. Swaine, *supra* note 69, at 91.

149. W. EARLE, *supra* note 11, at 14.

150. M. LARSON, *supra* note 18, at 14. The importance of the awareness of proper channels and access to these channels must not be underestimated. Glaring examples of useful personal connections are seen in law firm histories. For example, Reed Smith Shaw & McClay co-founder Philander Knox had powerful connections in government. The support he enjoyed contributed to his 1901 appointment as Attorney General of the United States by President McKinley. See R. DEMMLER, *supra* note 21, at 28-29.

became increasingly characterized by 'connections.'<sup>151</sup> Lawyers who were able to tap their own resources of acquaintances to perform specific services were in an extremely favorable position. The knowledge of who could help, combined with a positive personal connection, provided a potent weapon for maintaining economic independence. As the role of business lawyers diversified, the need for specialists capable of "navigating legal and political labyrinths" increased.<sup>152</sup> By obtaining the appropriate experience and connections early on, the lawyers of the emergent law firms were in a strong economic position vis-a-vis their corporate clients.

### 3. *The Attorney-Client Privilege and the Advantage of Independent Counsel*<sup>153</sup>

Historically, the concept and the function of the attorney-client privilege has been an important part of American law. The privilege was established to promote freedom of consultation between legal advisers and their clients.<sup>154</sup> The establishment of a rule prohibiting compelled disclosure by legal advisers lessened the public apprehension about consulting with an attorney. The attorney-client privilege may be invoked when the nature of the lawyer's advice is "legal."<sup>155</sup> However, it has never been easy to distinguish legal from nonlegal advice.

In a period when the distinction between what was and what was not legal work was increasingly blurred, the economic independence of law firms helped to sharpen the distinction between legal and nonlegal advice. During the late nineteenth century, significant controversy arose concerning what information could be kept confidential under the attorney-client privilege.<sup>156</sup> The mere existence of this controversy provided a strong incentive for many clients to make special efforts to seek out attorneys whose work would be deemed as legal. The economic and physical distance of law firms gave the work of the law firm lawyers the appearance, if not the reality, of being purely legal in nature.

As a result of the ruthless business practices of the monopolizing corporate clients, the attorney-client privilege assumed great importance. The privilege often could be invoked to "block the proof of mis-

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151. M. LARSON, *supra* note 18, at 126.

152. J. AUERBACH, *supra* note 2, at 38.

153. The discussion of the attorney-client privilege in the context of law firm emergence was inspired by a conversation with Professor David Rosenberg of Harvard Law School.

154. C. McCORMICK, *McCORMICK ON EVIDENCE* § 87 (3d ed. 1984).

155. *Id.* at 208.

156. J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § VIII, at 545-90 (1961).



deeds,"<sup>157</sup> or at least the unethical activities of the members of the expanding corporations. On the other hand, because of the inevitable nonlegal contact that occurs within the bureaucracy of a corporation, hired lawyers would have had a far more difficult time invoking the privilege.

The attorney-client privilege provided protection for both the corporate entity and for the individual members of the corporation. Because the distinction between legal and nonlegal work was ambiguous, independent lawyers were better able to invoke the privilege. Thus, the attorney-client privilege provided a strong incentive for corporations to retain independent legal counsel in the most crucial business matters.

#### 4. *Legal Services in the Production Process*

The robber barons' first business contact with lawyers usually occurred after litigation was initiated. The handling of these tangled affairs provided the lawyers involved with valuable personal connections and the commodity of experience. Swaine observed that the new corporate clients relied on lawyers familiar with their affairs, and when special services were needed, these clients tended to let the lawyers obtain the necessary assistance.<sup>158</sup> As the need for specialized assistance increased, so too did the lawyers' need for additional legal staff.

Not all corporations fell into the pattern described above. As early as the 1880's, there were lawyers who were paid comparatively meager wages who formulated legal schemes that resulted in huge profits for their employers. In Daniel Boorstin's discussion of the Standard Oil Trust, he noted that Rockefeller's ingenious lawyer, Samuel C.T. Dodd, was paid a "moderate salary."<sup>159</sup> However, as Boorstin went on to state, "His [Dodd's] widely copied innovations eventually provided much of the essential legal framework for the growth of big business between the Civil War and the opening of the twentieth century."<sup>160</sup> Thus, some corporations did begin to impinge on the economic independence of the business lawyer. Dodd received no huge fees for the profitable services he rendered. He was a salaried employee of the Standard Oil Company of Ohio.

Why then were men like Shearman, Sterling, Reed, Smith, Shaw, McClay and Cravath able to maintain their economic independence?

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157. *Id.* at 578.

158. Swaine, *supra* note 69.

159. D. BOORSTIN, *supra* note 106, at 417.

160. *Id.*

What distinguished them from Dodd? This phenomenon is arguably explained by a combination of certain lawyers' early development of the commodity of experience and useful interpersonal relations, and also by how corporations viewed the supply of legal services. Corporate clients differed in the value they placed on the attorney-client privilege, and they differed in their conceptions of the role legal services played in the production process.

Dodd was an "ingenious legal metaphysician," and as a result of his careful studies of the infant oil industry he probably was knowledgeable of the affairs of the Standard Oil Company,<sup>161</sup> but Dodd did not have as much to offer John D. Rockefeller as Shearman and Sterling had to offer Jay Gould, or Philander Knox and Judge Reed had to offer Andrew Carnegie. These law firm lawyers obtained the commodity of experience at an early stage. They were aware of the intricacies of their clients' business problems, and their clients had grown to rely upon them.<sup>162</sup> More importantly, the law firm lawyers had been involved with the network of men who had the greatest impact on their clients' interests. As Demmler observed, Shearman and Sterling had acquired the confidence of a number of men who came in contact with the firm because of some association with Gould or Fisk.<sup>163</sup> Similarly, Knox's political ties worked to his advantage when performing legal work for his many corporate clients. The bureaucratic setting of the corporation did not provide Dodd with equivalent opportunities. The lawyers of the law firms cultivated the experience and interpersonal network that made their aid superior from their clients' viewpoint. In short, the law firm lawyers were able to develop marketable qualities because their corporate clients valued the advantages of independent legal services and/or they failed to recognize at a sufficiently early stage that legal services were a necessary factor input of production.

The independent law firms represented a number of large corporations. At first, the law firms were largely dependent on one corporation or robber baron, but they diversified their clientele to a point where they were able to maintain a steady and varied load of corporate work. Initially, corporate clients sought out legal services when and only when they perceived a need for them. Although the firm of Shearman & Sterling spent a large percentage of its first few years dealing with

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161. *Id.*

162. Demmler's depiction of the Carnegie-Reed relationship helps to clarify the distinction. Carnegie considered Judge Reed to be an effective executive as well as a fine lawyer. *See* R. DEMMLER, *supra* note 21, at 22-26.

163. *Id.* at 19.

the affairs of Jay Gould and James Fisk, neither Shearman nor Sterling ever became mere employees of these robber barons. On the contrary, the growing reputation of the firm brought in many new clients who approached the firm regarding a variety of problems. This raised the value of Shearman & Sterling's commodity of experience and personal connections to a level that made it improbable for one monopolizing corporation to buy out or absorb the firm.

Gould needed Shearman to deal with the complicated aftermath of the Erie Wars. On the other hand, Rockefeller used Dodd to avoid and overcome legal difficulties. The difference is significant. Rockefeller's use of Dodd's services was equivalent to the recognition that legal services were a necessary factor input of production. Gould's choice to use independent legal counsel helped to assure Shearman & Sterling's economic independence.

### 5. *Summary*

In the beginning of big business development, most corporate leaders turned to lawyers only in times of extreme need for legal services. This allowed certain lawyers to develop a specialized knowledge base (the commodity of experience) as well as useful personal connections. As corporate business increased in volume, lawyers increasingly were forced, for functional reasons, to draw together into firms and expand existing firms to serve these lucrative clients' demand for legal services. Law firms were able to remain independent and develop a diverse clientele because many corporate clients valued the advantages to be derived from independent legal counsel (the attorney-client privilege) and/or they did not initially perceive that legal services were a necessary factor input of production. The additional experience and connections that were developed by serving a variety of clients made the value of law firms so high that it was economically infeasible, in a short-run time horizon, for corporations to "buy out" corporate law firms, or to establish equivalent in-house legal departments.

By the time corporations began acting to secure in-house legal counsel, the law firm's economic independence was secured. Most corporations even included an "out-of-house" economically independent legal counsel in an important decision making position.<sup>164</sup> Law firms had monopolized the supply of the best corporate legal talent,<sup>165</sup> and be-

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164. At his death John W. Sterling was a trustee or director of 18 corporations. See W. EARLE, *supra* note 11, at 190-91.

165. The monopolization of talent quickly took the form of systematic recruitment. "The

cause of the financial stakes involved, it made economic sense for corporate clients to retain the most effective lawyers possible. By the end of the nineteenth century, the most effective business lawyers were found in law firms.

In the twentieth century, the corporate law department became increasingly significant. However, these departments tended to deal only with routine legal work. In the most important matters, a private law firm was generally consulted. In the concluding section of this work, the emergence of law firms in the American legal profession is studied as a comprehensive whole, and some data concerning lawyers and law firms in the twentieth century are studied.

## V. A FINAL GLANCE AT THE LAW FIRM

The late nineteenth century was a watershed in the history of the American legal profession. Hurst stressed that in the 1870's a "revolution . . . in the nature of law practice,"<sup>166</sup> a "fundamental change in legal education,"<sup>167</sup> a "revolution in the cost of legal service,"<sup>168</sup> and a "revived" effort at "formal organization of lawyers" began.<sup>169</sup> Similarly, Hobson saw the late nineteenth century as the period when the development of large law firms, the growth in number and importance of law schools, and the growth in number and size of local, state, and national bar associations irreversibly transformed the profession.<sup>170</sup>

This work explains one organizational phenomenon that was set in motion during the late nineteenth century—the emergence of law firms. Few generalizations have been made concerning the social actors involved. The case studies of the first section reveal that Thomas Shearman and James Reed both came from well connected backgrounds, and in Section IV, it is argued that the new business lawyer elite was not entirely new at all, but initially comprised those lawyers who had already achieved high professional positions in other fields of the law.<sup>171</sup> However, these comments do not provide a sufficient

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Cravath System," instituted by Paul D. Cravath, provided the first systematic recruitment by the law firms of the "best" legal talent. By the beginning of the twentieth century, it was widely emulated. Although a discussion of law firm recruitment patterns is relevant to a study of law firms, it is not essential for an explanation of law firm emergence. See J. AUERBACH, *supra* note 2, at 23-26; E. SMIGEL, *supra* note 103; R. SWAINE, *supra* note 20, at 657-58.

166. J. HURST, *supra* note 4, at 342.

167. *Id.* at 260.

168. *Id.* at 308.

169. *Id.* at 288.

170. Hobson, *supra* note 15, at 76.

171. R. SWAINE, *supra* note 20, at 370.

description of those who made up the first law firms. According to Jerold S. Auerbach:

Only lawyers who possessed "considerable social capital" could inhabit the corporate law firm world. Born in the East to old American families of British lineage, they were college graduates (a distinct rarity) who followed their fathers into business and professional careers. They . . . restricted access to those who presented proper ethnic and social credentials . . . . [D]oors to particular legal careers required keys that were distributed according to race, religion, sex and ethnicity . . . . [M]obility was not a ladder whose rungs all could climb.<sup>172</sup>

A cursory glance at any law firm history strongly supports Auerbach's statement. However, what is most striking is that proper "social capital" remained a necessity into the 1970's.

In the final chapter of Shearman & Sterling's law firm history, Earle catalogued the partners of the firm as of June 30, 1962. The chapter included brief biographies of the thirty-seven partners as well as thirty-five of the partners' pictures. (The remaining two partners' pictures were included earlier in the book.) All thirty-seven of the partners were white and male. Thirty-three attended at least one Ivy League school, and twenty graduated from Harvard Law School. In addition, twenty-eight of the partners attended private secondary schools.<sup>173</sup>

On the surface, prestigious educational backgrounds justified a seemingly meritocratic makeup of large law firms. However, as Auerbach perceptively noted, "Social filters . . . functioned at antecedent and subsequent stages to deplete drastically the pool from which the Law Review meritocracy, and law firms partners, were chosen."<sup>174</sup> In sum, even as late as 1962, a firm like Shearman & Sterling was a restricted organization.

By the 1970's, the large law firms' requirement of a "proper" social background appeared to be declining in importance. However, the status of the members of the large corporate law firms remained unchanged. From the first hesitant emergence of corporate law firms in the 1870's until the present, the members of the major corporate law firms have maintained their position at the pinnacle of the legal profession. But this is a static perception of the legal profession that ignores what has been going on within the non-firm majority of the American

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172. J. AUERBACH, *supra* note 2, at 21-22.

173. W. EARLE, *supra* note 11, at 353-425.

174. J. AUERBACH, *supra* note 2, at 28.

bar.

To be an elite of anything there must be non-elites to maintain the position of the elites. Therefore, changes that occur within the non-elite sector of the legal profession are crucial to members of even the most prestigious corporate law firms.

Throughout this article, the emphasis has been solely on the elite corporate lawyers of the legal profession. In conclusion, it is fitting to broaden the analysis and examine the non-elite sector of the profession. Social stratification of the American bar has been a historical fact since the earliest periods of American history. In the pre-Civil War years, an important distinction of elite lawyers was their skill in oratory. By the early twentieth century, the basis of stratification had significantly changed. The ascendancy of the corporate lawyers of the law firms coincided with an increase of lawyers from eastern and southern European backgrounds. The ethnic and religious difference of the "new-immigrant metropolitan solo practitioners" prohibited them from entering the elite world of the corporate law firms.<sup>175</sup>

The immigrant solo practitioners had little in common with corporate lawyers. In fact, the difference was so salient that in 1921 Alfred Z. Reed, in his report on legal education, sponsored by the Carnegie Foundation, suggested that the bar be separated into two grades of lawyers.<sup>176</sup> Reed also suggested that the bar offer two types of bar exams, one for business lawyers and one for solo practitioners.<sup>177</sup> Reed recognized the reality of the socially stratified American bar, and he defined the key strata of the early twentieth century bar as the elite corporation lawyers and the individual practitioners.

Reed's two-tiered perception of the American bar was correct when placed in its historical context. In the 1920's, the bar could be usefully bifurcated into the elite business lawyers of the urban law firms and the individually practicing majority. By 1924, at least ten cities had law firms containing a minimum of twelve lawyers or seven partners.<sup>178</sup> But even as late as 1954, the majority of lawyers were still practicing without partners.<sup>179</sup>

Throughout the post-World War II era, the percentage of law firm associated lawyers continued to grow and that of individual practition-

175. *Id.* at 62.

176. A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 416-20 (1921).

177. *Id.* at 418.

178. Hobson, *supra* note 15, at 166. New York City alone had thirty-four such firms, and Chicago had seventeen.

179. *Lawyers—Selected Characteristics: 1948 to 1970*, *supra* note 1.

ers sharply declined. (These numerical trends are not indicative of trends in status.) The following tables illuminate these trends (figures show percentage of the legal profession):<sup>180</sup>

PARTNERS OR ASSOCIATES<sup>181</sup>

1948	1951	1954	1957	1960	1963	1966	1970	1980
26%	26%	26%	25%	26%	30%	31%	33%	35%

INDIVIDUAL PRACTITIONERS<sup>182</sup>

1948	1951	1954	1957	1960	1963	1966	1970	1980
56%	54%	53%	47%	41%	38%	36%	33.5%	33%

The above tables also reveal a fascinating structural change in the post-World War II legal profession. In 1948, 82% of the legal profession either was an individual practitioner or worked with a law firm, but by 1980 only 68% of the profession fell into these two categories. By 1980, the basis for Reed's two-tiered view of the profession had been destroyed. Yet, as the individual practitioner continued to decline in numerical importance, another segment of the legal profession was growing significantly.

As the following table displays, between 1948 and 1980 the percentage of non-firm salaried lawyers more than quadrupled:

SALARIED LAWYERS (PRIVATE INDUSTRY)<sup>183</sup>

1948	1951	1954	1957	1960	1963	1966	1970	1980
3%	6%	7%	8%	9%	10%	10%	11%	14%

The above figures suggest that the return to a two-tiered legal profession is a possibility.<sup>184</sup> The new distinction among lawyers would be whether or not a lawyer is a non-firm salaried lawyer or a lawyer with

180. This information was compiled from the STATISTICAL HISTORY OF THE UNITED STATES, *supra* note 1. To find the percentages for 1948, it was necessary to estimate the total number of lawyers in the United States. However, this estimate was extrapolated by comparing the total number of lawyers to the number of reporting lawyers (to the *Martindale-Hubbell Law Directory*) of all succeeding years. The percentage difference between "all lawyers" and "lawyers reporting" remained relatively constant throughout the years listed. Thus, the extrapolation is probably quite accurate.

181. *Lawyers—Selected Characteristics: 1954 to 1980*, *supra* note 1, at 177; *Lawyers — Selected Characteristics: 1948 to 1970*, *supra* note 1, at 416.

182. *Id.*

183. *Id.*

184. *Id.* By 1980, law firm lawyers, individual practitioners, and salaried lawyers made up only 82% of the profession. The remaining part of the profession contained the government lawyers, the judges, and the retired and/or inactive lawyers. Historically, the percentage of government lawyers in the legal profession has increased significantly.

a private firm. (It is interesting that by 1980, over nine percent of the legal profession worked for the government.<sup>185</sup> If one considers these lawyers as non-firm salaried workers, then fully 23% of the legal profession worked as a non-firm salaried employee by 1980.)<sup>186</sup>

In the 1980's, the organization of the law firm is numerically stronger than ever. However, as the individually practicing lawyer becomes increasingly anachronistic, the non-firm sector of the legal profession is strengthening its affiliation with powerful organizations outside the jurisdiction of the profession. The growth of the salaried lawyers of industry and government are moving the legal profession towards a revised two-tiered bar.

The business lawyers of the emergent law firms of the late nineteenth century achieved elite status by displacing the Webster ideal type of lawyer. The ascendancy of corporate lawyers, as Auerbach noted, marked "a critical turning point in the emergence of the modern American legal profession."<sup>187</sup> With the help of the lawyers' organization, the law firm, the corporate lawyers successfully served powerful clients, maintained economic independence, and achieved tremendous power and prestige.

One of the explanations of the emergent law firms' ability to maintain economic independence was that the emergent law firms were able to maintain their economic independence from monopolizing corporations because businessmen were slow to recognize that legal services were a necessary factor input of production. Once corporations recognized the need for comprehensive legal services, it was not economically feasible, in the short term to buy out or effectively replace law firms.

The tremendous rise of the salaried lawyer in the post-World War II period raises questions about the long-term market of law firms. The extensive client diversity and impressive talent pool<sup>188</sup> of the present-day firms appear to assure continued economic power for some time to come; additionally, independent counsel can still be an important legal advantage. But in a long-term perspective, the economic viability of the

185. *Id.*

186. Associates of large law firms are also salaried employees. As private firms grow in size and in-house legal departments grow in sophistication, large firm associate positions may increasingly resemble the non-firm salaried lawyers in terms of status, salary, and sophistication of the work experience.

187. J. AUERBACH, *supra* note 2, at 38.

188. However, as early as the 1960's it was noted, "Industry and government have become much more effective adversaries for the law firm recruiter." See Gayle, *Recruiting, Training, and Managing Young Lawyers—from a Large Firm Viewpoint*, in PARTNERSHIP PROBLEMS AND NEW DEVELOPMENTS IN LAW OFFICE EQUIPMENT I (1967).



corporation oriented law firm may be challenged by the non-firm salaried lawyer.

If the ascendancy of the corporate lawyer marked the emergence of the modern American legal profession, then the rise of the salaried lawyer may signify a new watershed. Law firms emerged for social-structural, technological, and entrepreneurial reasons. The functional factors appear to supply the greatest part of the explanation of law firm emergence; however, the entrepreneurial drives of the elite law firm lawyers were undeniably significant. In the United States of the 1980's, entrepreneurial drives and self-interested concerns for the market may still be alive and well in the legal profession, but questions about the long-term prospects of corporate law firms arise in the face of the unprecedented growth in importance of the non-firm salaried lawyer.