THE AMERICAN LEGAL PROFESSION AND THE ORGANIZATIONAL SOCIETY 1890–1930

Wayne K. Hobson

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Wayne K. Hobson
California State University, Fullerton

PREFACE

The legal profession, like much of the rest of American society, was transformed between 1890 and 1930. This study examines the shifting professional ideology of the American bar elite as it reacted to and shaped the new professional environment. It focuses on the leadership of three institutions central in the bar's transformation: the large law firm, the law school, and the bar association. It also evaluates the adequacy of the "organizational synthesis," the reigning paradigm in studies of turn-of-the-century professionalization movements. The legal profession fits that paradigm less well than do such professions as medicine or engineering. Most professions experienced heightened power and influence in these years. Many leading lawyers, however, believed that the political programs and ideological currents of the progressive era, including the ideology of professional modernization, directly challenged their historic cultural and political influence. Therefore, professional modernizers in the legal profession, especially bar association activists and many leading law professors, had to contend with those who were suspicious of the ideology of professional modernization.

In the years since 1977, when this Garland edition was originally written, legal historians have greatly added to

our understanding of both legal history proper and the history of the legal profession. In addition, there have been a number of excellent and pathbreaking studies on the history of other professions, especially medicine and higher education. However, there is as yet no new synthesis reinterpreting the history of the legal profession. I believe the data and analysis provided in this book remain a reliable guide to understanding the professional ideology and self-image of leading lawyers in the crucial turn-of-the century years.

Were I to completely revise this text, I would shift my focus to reflect the contributions of this new research. I would now interpret the bar elite's professional ideology as a response to a crisis of cultural authority the bar faced in these years rather than as a response to structural changes in the profession. Both contexts are important, and both are considered in the book as written, but I now think the cultural context needs more emphasis than the structural context. The legal profession suffered a crisis of cultural authority because law was not able to benefit from the professions' general rise to cultural authority in the late 19th and early 20th centuries. Leading lawyers certainly experienced great power and social authority in these years, but the cultural authority of the profession suffered (to use Paul Starr's useful distinction between social and cultural authority).

This crisis of authority stimulated major divisions among leading lawyers. I now see a competition among at

least five major groups of leading lawyers to define or redefine the bar's professional ideology in the 1890-1930 period: (1) advocates of a liberal culture professional ideal; (2) conservative constitutionalists; (3) professional modernizers; (4) liberal modernizers; (5) pragmatic modernizers. As the perspective of each of these groups was shaped, debated, accepted, rejected, or modified, a new ideology of legalism was in the making, which, by the 1930s, would help the profession regain a significant measure of cultural authority, but on an altered basis.

I have not yet completed my analysis of these divisions within the bar elite. I have published a revised version of this book's chapter five in a book of essays on the history of the legal profession edited by Gerard W. Gawalt, The New High Priests; Lawyers in Post Civil War America. (Westport: Greenwood Press, 1984). That revision does not alter the basic argument of chapter five, but does incorporate new research and provides data on large firm growth at five year intervals rather than the ten year intervals presented here.

I want to thank my dissertation adviser, Barton J. Bernstein of Stanford University, for helping me formulate the original topic, for retaining faith in it and me, and for providing shrewd and sound strategic and tactical advice on a wide range of matters throughout the period of research and writing. His colleague David Tyack provided great encouragement and very helpful advice on conceptualization and writing style. Stanford University's Weter Fellowship

funded my first year of research, and a Faculty Research Grant from the California State University, Fullerton, Foundation provided travel funds at a crucial stage.

Finally, it is a pleasure to acknowledge the contributions provided by my wife, Nancy Hobson. She not only believed in the value of my work throughout, but also lent her editorial skill to improve my sometimes crude efforts when taking pen to paper. If any infelicities remain, I am sure it is because I have indulged a stubborn streak and occasionally failed to take her advice.

Laguna Beach, California
October 1986

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THE MODERN LEGAL PROFESSION: AN INTERPRETATION

CHAPTER 1

SOCIAL CHANGE AND THE ORGANIZATIONAL SOCIETY

Historians have long recognized the period between 1890 and 1920 as one of transition, as the beginning of our own time, the modern era. The exact nature of the transition has been the subject of considerable disagreement. Until recently, and to a certain extent still, the focus of attention has been on the emergence of the positive state liberal tradition, which was thought to be the most distinctive feature of the period. Hence, the years 1900-1920 have been denominated the "progressive era," and a seemingly endless search for the essence of the era and for the archetypal progressive has dominated historical writing about the period.

Recently, with the revival of social history and a growing skepticism about the liberal tradition, a new conception of the transition period has emerged. As yet, this new conception is understood only in general terms and it has not completely dissociated itself from the study of progressivism, as perhaps it could not. One historian has named the new conception the "organizational synthesis," noting thereby the main theme, which is

the emergence of an "organizational society."[1] According to this conception, the period between the 1890s and 1920s was the time when American society shifted from a predominantly localistic, individualistic, moralistic, or community orientation to a more universalistic or bureaucratic orientation. The period was characterized by a "search for order," a search whose direction was regulated primarily by the dynamic introduced into American society by industrialization. Island communities were broken up. New social environments, such as large cities, and new linking institutions, such as large corporations, professional associations, and trade unions, were created. The dominant American ideology and social forms changed from emphasizing laissez faire and individualism to emphasizing bureaucratic structures and groups. Specialization of function came to characterize public roles.

The leading sector in these changes was the new middle class, composed of professionals, elite businessmen, agriculturalists, and labor leaders. Systematization and rationalization were at the heart of their occupations. They came to identify with their occupational

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[1]Louis Galambos, "The Emerging Organizational Synthesis in Modern American History," Business History Review 44 (Autumn 1970), 279-290.

role rather than with status, ethnic, political party, or other non-occupational affiliations, and they behaved accordingly. That is, they acted as the agents of new scientific knowledge and technology. They sought to institutionalize that knowledge and technology by creating more universalistic and bureaucratic organizations and forms of social, political, and economic life.[2]

As one of the leading proponents of this new conception emphasizes,

> This view of social change between the late 1890s and the Depression of 1929 differs from traditional accounts. While older views focus on the differences between private and public impulses, this stresses the similarities between them; while older views stress the difference between profit-making and non-profit-making

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[2]Robert Wiebe and Samuel P. Hays have produced the most influential work constructing the organizational synthesis. See Wiebe, The Search for Order 1877-1920 (New York, 1967), 111-223; Hays, "The Politics of Reform in Municipal Government in the Progressive Era." Pacific Northwest Quarterly 55 (October 1964), 157-169; Hays, "Political Parties and the Community-Society Continuum," in Walter D. Burnham and William N. Chambers, The American Party Systems (New York, 1967), pp. 152-181; Hays, "The Social Analysis of American Political History, 1880-1920," Political Science Quarterly 80 (September 1965), 373-394; Hays, "The 'Shame of the Cities' Revisited: The Case of Pittsburgh," in Herbert Shapiro, ed., The Muckrakers and American Society (Boston, 1968), pp. 75-81; Hays, "A Systematic Social History," in George A. Billias and Gerald N. Grob, American History; Retrospect and Prospect (New York, 1971), pp. 315-366; Hays, "Introduction--The New Organizational Society," in Jerry Israel, ed., Building the Organizational Society, Essays on Associational Activities in Modern America (New York, 1972), pp. 1-16.

> activities, this emphasizes their similarities. New forms of social organization were all-pervasive, affecting business and government and profit-making enterprise and non-profit-making service institutions in medicine, education, and welfare. More important, while older views are based upon the orderly arrangement of evidence about ideologies into opposing categories and forms of political conflict, the view presented here is concerned with evidence about people in context, their environment, their relationships with others, their perceptions of their world, their values.[3]

That is, traditional accounts have over-emphasized ideological and partisan political conflicts and divisions. The task of the organizational synthesis is to point out the major dimensions of social structural change, which have been neglected in traditional accounts, and to show how such structural change has shaped cultural change.

An interpretation of the transition period which has many affinities with the organizational synthesis is the "corporate liberal interpretation" constructed by New Left historians.[4] Like the organizational

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[3]Hays, "The New Organizational Society," p. 13.

[4]Gabriel Kolko, The Triumph of Conservatism (New York, 1963); James Weinstein, The Corporate Ideal in the Liberal State: 1900-1918 (Boston, 1968) are two variants of the standard corporate liberal interpretation. One of the few attempts to deal explicitly with professionals in terms of this interpretation is David W. Eakins, "The Origins of Corporate Liberal Policy Research, 1916-1922: The Political-Economic Expert and the Decline of Public Debate," in Israel, ed., Building the Organizational Society, pp. 163-180.

synthesis, the corporate liberal interpretation argues that the essential thrust of twentieth-century liberalism has been to construct and legitimize an elitist bureaucratic society and polity. But in contrast to the organizational synthesis, the corporate liberal interpretation relies on explicit concepts of power and ideology. It argues that an amalgam of leading businessmen, professionals, and trade unionists came to think of the social order in terms of "a kind of syndicalism based on organizing, balancing, and co-ordinating different functional groups."[5] This syndicalism, or corporate liberalism, served the needs of industrial capitalism; it did so by creating bureaucratic structures which rationalized social and economic relations, thereby eliminating ruinous competition, and by creating an illusion of the progressive amelioration of social ills, which co-opted radical dissent. According to this interpretation, the main actors knew what they were doing and fully intended the results, although they might have used different terms to describe their intentions and behavior.

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[5]William Appleman Williams, The Contours of American History (Cleveland, 1961), p. 358.

A wide variety of historians are coming to agree that the effect of bureaucratic and other liberal reforms may have been as the corporate liberal interpretation asserts.[6] However, the evidence that the reformers were class-conscious in their intentions, at least during the transition period, is more dubious, at least in the sweeping sense that those presenting the corporate liberal interpretation usually argue. In addition to the problem of interpreting liberal intentions, there is the problem of accommodating the rhetoric and behavior of powerful conservatives, like leading lawyers and many leading businessmen, to the corporate liberal thesis.

It is not clear that those writing from the perspective of the corporate liberal interpretation have succeeded in going beyond one of the major points established by the organizational synthesis: In structural

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[6]Stanley P. Caine, The Myth of a Progressive Reform; Railroad Regulation in Wisconsin 1903-1910 (Madison, 1970); Elinor M. Gersman, "Progressive Reform of the St. Louis School Board, 1897," History of Education Quarterly 10 (Spring 1970), 3-21; William H. Issel, "Modernization in Philadelphia School Reform, 1882-1905," Pennsylvania Magazine of History and Biography 94 (July 1970), 358-383; Roy Lubove, "Workmen's Compensation and the Prerogatives of Voluntarism," Labor History 8 (Fall 1967), 254-279; Grant McConnell, Private Power and American Democracy (New York, 1966) make this point for a variety of reforms. So, too, do most of the essays in Israel, ed., Building the Organizational Society.