Professionalism and Monopoly of Expertise: Lawyers and Administrative Law, 1933–1937

Ronen Shamir

This study situates the response of various segments of the bar to the New Deal era of administrative expansion in the context of contemporary theories of the legal profession. I focus on the theoretical formulations of a market monopoly approach, a functionalist approach, and a systems approach to the study of professionalism and professional competition. I consider each approach in light of two foundational prisms: (1) the stratified composition of the bar necessarily leads to a corresponding variation in the response to changes in the legal environment; (2) at the elite level of the profession, there is considerable attention to changes that affect the law as a system of knowledge and as a resource around which lawyers establish their professional legitimacy as exclusive experts. I draw attention to the strategic mechanisms that lawyers invoked in order to deal with the inter- and intraprofessional competition that accompanied the expansion of the regulatory state.

I present here a study of the politics of lawyers and of the bar's collective strategies of response to change. The study analyzes the response of various segments of the American bar to the development of administrative law during the early New Deal (1933–37). Positing this development as a strong measure for the expansion of state powers, this analysis clarifies the conditions under which lawyers tend to either resist or support state-building processes.[1] I situate the bar's response to the development of administrative law in the context of three theoret-

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[1] In speaking about the role of lawyers I chiefly refer to the actions of a limited circle of activists who articulated their response to the growth of the administrative process through public speeches, articles, and voluntary activities in various bar associations. In short, I mainly discuss a professional elite whose public visibility and voice were perceived as the voice of the legal profession as a whole. It is important to keep in mind, however, that most lawyers in private practice were not involved in such activities. The group was small, mostly (but not exclusively) composed of successful partners in corporate law firms, whose financial security and social standing allowed them to engage in activities that transcended their immediate commitments to clients. Thus, even the national American Bar Association, which began as an elite association,

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ical models that offer alternative perspectives for analyzing the political economy of lawyers. By situating the "story" in this theoretical context, I try to demonstrate the strengths and weaknesses of each theoretical perspective. Nonetheless, my intention is not to judge the merits of each theory against the others. Rather, I attempt to show that by situating the case in the context of these theories, the story may be told from different angles. The picture that emerges from this multifaceted analysis is a complex elaboration on the relationship between knowledge and power in the life of the legal profession.

The New Deal serves here as a case, or phase, in which well-established legal arrangements, with their ever present strong claim to justice, were momentarily challenged and suspended by a reform-driven administration that sought a supplemental foundation for justice in law. The social and economic reforms of the New Deal, communicated through the language of law, opened a space for what Derrida (1990:955) calls an "anxiety-ridden moment of suspense." This moment, as we shall see, dramatically exposed a complex tension between law as a system of knowledge and lawyers as its self-appointed guardians.

Two principal arguments, or foundational prisms, run throughout the text. I start with the premise that law, whatever its sources are, is largely developed, shaped, interpreted, manipulated, and invoked by that specialized group of experts we know as lawyers. Law may be conceived of both in terms of the language by which the state communicates its authority and in terms of a body of knowledge, a resource, by which lawyers construct and reproduce their claims to exclusive expertise (with all the economic, social, and political rewards that ensue).

I argue that this knowledge/power dimension of law is an important element in the political economy of at least some segments of the bar and that, consequently, lawyers evaluate changes in the organization and character of the legal system in light of the prospective effects of such changes on the internal and external conditions of their professional lives. I try to show that lawyers' response to the development of administrative law can be explained independent of their ideological dispositions toward the politics of the New Deal and independent of their commitment to clients that may have resisted the policies of the New Deal for their own economic reasons.[2]

The second foundational prism is that the bar is stratified. The considerable variation in the relative social status, wealth, and political power among American lawyers necessarily leads

had only 27,000 members in the 1930s, out of a total population of 160,000 lawyers (roughly 16%).

[2] This, of course, is an analytical distinction. Lawyers, like other social actors, are obviously motivated and affected by a complex set of pressures. I here consciously focus on one particular set of pressures—market and status considerations.

to variation in the response of differently situated lawyers to changes in the legal environment. I here build on Heinz and Laumann's (1982) by now classic observation that the American bar is composed of two "hemispheres" of lawyers whose nature of practice, socioeconomic and ethnic background, education, and clientele differ considerably. The most basic distinction is between lawyers who are partners in law firms that cater to corporate clients and lawyers who work as solo practitioners or in small partnerships and cater to individual clients.

Although they are a minority in comparison to the vast number of solo practitioners, it is this group of corporate lawyers, predominantly partners in big law firms, who first established and then controlled the major American bar associations. Traditionally, the voice of this elite was more often than not presented as the voice of the profession as a whole (Auerbach 1976). This is not surprising given that the overwhelming majority of lawyers in private practice are too busy with economic survival to engage in the politics of the bar and to be actively concerned with the long-range interests of the profession. It is mainly economically secure lawyers who can dedicate time and energy to public activities and to projects that transcend the immediate demands of clients (Gordon 1984).

I argue that the difference between the hemispheres of the bar also finds expression in the politics of response to legal change. In a nutshell, I posit that solo practitioners are more driven by market considerations than are the bar's elite. The latter, in contrast, are more concerned with the image and status of the profession and with the character and organization of the legal system. I will try to show, in short, that solo practitioners are driven by "market anxiety," while established corporate lawyers tend to be driven by "status anxiety." Let it be immediately said, however, that elite lawyers are not free from market considerations. On the contrary, the organization of the market for legal services is very much on their minds. Nonetheless, I try to show that the market position of elite lawyers predisposes them to a social-action orientation different from that of solo practitioners. In the New Deal, this meant that solo practitioners were inclined to support measures that would have resulted in the outright exclusion of nonlawyers from practice in administrative arenas, while the upper echelons of the bar were inclined to be more concerned with the form and character of administrative practices and with the overall relationship between the administrative and judicial apparatuses of the state.

Having presented these two foundational prisms, I now move to provide the general historical and theoretical background needed to situate the response of the bar to the New

Deal in the context of the relationship among lawyers, law, and the state.

The New Deal in the Law: General Comments

The New Deal marked the most significant shift in American history from a relatively "weak" federal state to the modern regulatory state. The increased power of the federal administration and the flood of legislation it pushed through Congress were often justified in terms of a national emergency and the need to pull the nation out of the deep economic depression that followed the financial collapse of 1929.

The tidal wave of statutory legislation that accompanied the New Deal by no means represented a consistent political and economic program; rather it was a series of experiments worked out under "a variety of pressures and forces pushing the government in all . . . directions. The result was an amalgam of conflicting policies and programs, one that might make some sense to the politician, but little to a rational economist" (Hawley 1966:viii). Yet the overall impact of this legislative agenda placed the federal government as a key redistributive player in the economy and as a major coordinator of the market.

Some of these measures introduced unprecedented liabilities on industry and finance. Although it is hard to speak about an organized, conscious, and well-coordinated vanguard of capitalists who either "planned" the New Deal (thereby rationalizing capitalism) or conspired to undermine it (see Skocpol 1980 for a discussion of such versions), it is clear that many of these reform efforts were opposed by leaders of industry and finance. A substantial part of this opposition was played out in legislative and judicial battles. Congressional hearings prior to legislation and attempts to mobilize the courts to undermine efforts to enforce legislation naturally placed prominent lawyers as the visible enemies of some key New Deal statutes. Thus, the representation of industry and finance by elite corporate lawyers often served as the major factor that explained the hostility of the latter to the New Deal (Auerbach 1976; Irons 1982).

Clients' expectations are an important, perhaps often a decisive, factor in shaping the attitude of lawyers to social change. Yet it seems to me that an approach that attributes the actions of lawyers solely to the demands of clients risks an exaggerated reduction that fails to distinguish the role of lawyers in their direct capacity as legal counsel from their role as professionals who are concerned with their own distinct interests.

I suggest that the open hostility of many bar leaders to the New Deal cannot be simply explained in terms of subservience

to clients who were supposedly unified in their opposition to the administration's plans. First, it appears that lawyers often played an important role in shaping the expectation of clients and in promoting their clients' decisions to actively disobey unfavored laws.[3] Second, there is strong evidence that the response of many lawyers to the New Deal transcended their clients' concerns. For example, criticism of the National Industrial Recovery Act by the formal organs of the American Bar Association and by lawyers who spoke against the law in various public forums had little to do with corporate interests. In fact, big business supported the enactment of the law and benefited from its substantial relaxation of antitrust legislation, a goal long sought by big industry.[4]

Finally, subservience to clients can hardly account for the fact that some lawyers' activities in opposition to New Deal legislation far exceeded strict obligations to clients. A network of prominent lawyers not only challenged New Deal legislation in courts and in Congress but also wrote articles in popular and professional publications, addressed numerous audiences, and mobilized the American Bar Association to produce reports and resolutions in which the legal philosophy of the New Deal was condemned. The readiness of some lawyers to engage in such public activities and to openly challenge an administration that enjoyed wide public support indicates that lawyers had their own distinct concerns about the legal direction of the New Deal.

Auerbach (1976) thus argues that the elite of the bar also worried about the growing powers of government lawyers and, in particular, about the new mobility patterns of minority lawyers (i.e., Jews and Catholics) who ascended to prominence through the enhanced opportunities for governmental legal service. I suggest that at the root of these perceived challenges to the prominence and prestige of elite lawyers, however, lay deeper concerns about the administration's novel concept of the role of law in society. The hostility toward the new state-sponsored legal elite, in other words, was part of a larger hostility toward sweeping structural changes in the organization of the legal system.

The New Deal was based on an intensive effort to introduce statutory rules and administrative regulations as primary

[3] Consider, for example, John Foster Dulles's advice to his clients to simply avoid and resist "with all your might" the Public Utility Holding Company Act. See Lisagor & Lispius 1988.

[4] The fact that the NIRA was favored by many major industrial groups and at the same time abhorred by many lawyers is clearly manifested in ABA reports that, on the one hand, acknowledged the business advantages of the law and, on the other hand, lamented its constitutionality and the vast discretionary powers it delegated to the National Recovery Administration that administered it. See American Bar Association 1933a:339–45; Wood 1934; Smith 1934; Miller 1934.

sources of law, at the direct expense of the common law–based judicial process. This effort marked an important departure from traditional ways of doing legal business in the United States and signaled the relative decline of the federal judicial system as the main engine of legal development. The legal system, in short, moved from "cases to causes"; a "legislative frenzy" that began in the Progressive era reached full maturity with the coming of the New Deal, when America had become "a nation governed by written laws" (Calabresi 1982). The novelty of this legislative program was that

> unlike earlier codifications of law, which were so general that common law courts could continue to act pretty much as they always had, the new breed of statutes were specific, detailed, and "well drafted." Again, unlike the codes, which were compilations of the common law, *the new statutes were frequently meant to be the primary source of law.* (Ibid., p. 5) (My emphasis)

Further, most of the new legislative measures only outlined general principles. The task of administering these laws was delegated to administrative agencies that were expected to put teeth into them through intensive regulation and enforcement mechanisms. These administrative bodies produced yet another major source of law, administrative law, by acting in the capacity of regulators and adjudicators. Thus, administrative bodies with vast discretionary powers such as the National Recovery Administration, the Securities and Exchange Commission, and the National Labor Relations Board, to mention a few, became central arenas of legal activity to which lawyers had to adjust.

The reliance on the administrative process not only shifted whole classes of controversy, previously subject to the jurisdiction of courts, to administrative arenas; there was also a tendency to allow administrative bodies to adhere to informal methods of rulemaking and adjudication. Many of these administrative bodies, in the early years of the New Deal, did not obey traditional judicial procedures and rules of evidence and even permitted lay practitioners to appear before them; above all, their actions were not subjected, either formally or practically, to judicial review.

These changes had a profound impact on lawyers in private practice. On the one hand, it was clear that the intensive federal regulation effort opened up new potential markets and could enhance the demand for legal services. Further, the new wave of legislation and the administration's complex regulatory schemes encouraged the creation of law firms that specialized in Washington's new administrative labyrinth and contributed to the ever growing specialization and size of existing firms.[5]

[5] For such perceptions see an article in the *New York Times* ("Confusion Feared over Vague Codes"), 23 Sept. 1933, p. 7; Jackson 1934.

On the other hand, it became clear that the New Deal was based on a new legal philosophy that threatened established patterns of legal development. Traditional notions of the "autonomy of law" were based on the idea that appellate courts dictated the pace and direction of legal change on a case-by-case basis. Lawyers, in their capacity as legal counsel, could take an active part in setting the agenda of courts and defining the scope of the issues that were brought before them. In other words, lawyers who played a central role in determining the direction of legal development in a court-centered legal system now faced the threat of a movement to a legal system in which they played a lesser role.

Further, the informal methods of the administrative process and the participation of nonlawyers in this system threatened to compromise the professional image of lawyers, their exclusive control over the market for legal services, and advantages that stemmed from their familiarity with judicial procedures.[6]

The response of the bar to these perceived opportunities and threats, then, is the story I try to unfold. I do so, as I wrote earlier, by situating the story in the context of three theoretical models. This theoretical context is briefly outlined in the following section.

The Political Economy of Lawyers: A Tale of Three Models

A paradigm of power sets the tone for the theoretical approach that I here refer to as the "market monopoly" model. It asserts that the primary aim of occupational groups in a capitalist society—in fact, the defining characteristic of professions—is to control the market for their services (Larson 1977). The basic questions this model posits thus concern the strategies professional elites invoke in order to (1) establish exclusivity in given areas of practice and (2) expand their control over new areas of work.

Richard Abel applied Larson's approach to the analysis of the American legal profession (Abel 1981, 1989a, 1989b), and it is this application that I treat here as a prototypic example of the market monopoly model. Yet I also discuss a contribution by Christine Harrington (1983), because she both offers an important revision of Abel's original formulations and invokes the model to explain the bar's response to the development of administrative law (the topic under consideration here).

Abel's major contribution has been to demonstrate the way in which American lawyers developed a set of strategies whose

[6] Max Radin, "The Courts and Administrative Agencies," Minutes of the Judicial Section of the American Bar Association, July 1935 (unreleased version, typescript); Verkuil 1978.

purpose was to control the number of lawyers, to autonomously regulate the competition among practicing lawyers, and to exclude other "disqualified" competitors from areas of work in which lawyers sought to enjoy a monopoly of practice. Abel (1989b) conceptualizes these set of strategies by speaking, on the one hand, about lawyers' efforts to control the "production of producers" (i.e., controlling the number and "quality" of newcomers) and, on the other hand, about their efforts to control the "production by producers" (i.e., regulating competition among lawyers and excluding outside contenders).

Another dimension of the model, however, provides that lawyers not only engage in defending and regulating established areas of practice but also seek to enhance the demand for legal services and to embrace new opportunities for practice.[7] One key factor that ensures a growing demand for legal services involves the "progressive legalization of social life" (Abel 1981:1134). In his treatment of the state as a force that introduces new legal "technologies," however, Abel concentrates on the effort of the weaker segments of the legal profession (urban solo practitioners) to encourage the development of subsidized legal aid services. Nevertheless, it seems to me that the implicit assumption here is that the general expansion of state powers through increased reliance on statutory intervention and administrative regulation creates precisely such "legalization of social life" and a corresponding growth in the demand for legal services. In other words, the market monopoly model relies on the tacit assumption that lawyers will try to embrace the new professional opportunities that result from such growth.

The market monopoly perspective, in short, effectively subverts the homogeneous and collegial image that lawyers strive to present, by focusing on the internal stratification within the legal profession and the resulting unequal distribution of material and nonmaterial benefits among its members. Furthermore, it also demonstrates that the market for legal services is at least to some extent a matter of successful professional construction of given fields of practice in terms of their exclusive expertise, thus undermining the unproblematic conception of legal work as an objective phenomenon of the market's complexity.

[7] The need to enhance the demand for legal services is particularly important when the profession's control over the production of producers is weakened with the shift from legal apprenticeship to formal legal education as the primary vehicle of entry to the bar, a shift that dramatically increases the number of practicing lawyers (Abel 1989a). Abel thus talks about "demand creation" in the 1970s, when the profession witnessed a further expansion of university education, the entry of women, and a further growth of the state. In some respects, however, the proliferation of law schools, the entry of immigrants, and the growth of the state in the 1930s were also conducive to similar developments.

In 1987, with the publication of *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment,* Terence Halliday assumed the unpopular task of critiquing the monopoly thesis as a "new orthodoxy" (p. 349). In this article, I label Halliday's approach "functionalist" simply because his work is consciously situated within a tradition that has, since Durkheim's *Professional Ethics and Civic Morals* (1957), tended to address questions of professionalism from a perspective that asks about the contribution of professionals to social integration and to the stabilization of the social, economic, and political order.

Halliday's work challenges the "market monopoly" model's assumption that, in their relations with the state, lawyers are only interested in appropriating privileges through a state-granted monopoly. Halliday (1987:351) distinguishes between two phases of professionalization and argues that the attempt to monopolize the market for legal services characterizes the legal profession only in its early "formative" years. As the legal profession reaches maturity and its control over the market for its services becomes an established fact, it moves "beyond a preoccupation with monopoly, occupational closure, and the defense of work domains" (p. 347).

In their "established" stage, lawyers become sensitive to their civic responsibilities and to their capacity to contribute to solutions of human problems that lie within their domain. The civic responsibilities of the legal profession, says Halliday, find expression in the profession's ability and willingness to nurture "contributory relations" with the state (p. 353); lawyers shape legal development in ways that facilitate an ever growing legal rationalization by contributing to the upgrading of the state machinery and by modifying "the constitution to facilitate the problem-solving ability of the state" (p. 361).

Halliday, in contrast to earlier models in the theoretical tradition that he continues, does recognize the reality of the stratified bar and incorporates it into his analysis. On this point, Halliday uncovers what he considers as an inherent weakness of the monopoly model: In analyzing the *internal* politics of the bar (e.g., standards of entry, ethical codes, etc.), the monopoly model emphasizes the dynamics and consequences of the bar's elite politics of stratification. Yet in treating lawyers' professional dispositions toward the market for legal services in general, the monopoly model's advocates tend to assume internal professional cohesion that "in other sections of their discussions, they have been at pains to deny" (p. 350). In the monopoly model's "narrative," all lawyers appear to be equally geared toward devouring potential areas of work, with little or no variation among different segments of the bar. Halliday, in contrast, argues that there are situations in which one segment of the bar seeks market control while another is ready to disman-

tle it (e.g., "established" lawyers who embraced no-fault laws; ibid.).

In what follows, I argue that the major strength of Halliday's approach does not lie in the concept of "contributory relations" but in its opening the way for a more sensitive discussion of the relationship between the stratified location of various lawyers within the bar and their respective professional dispositions toward various areas of existing or potential practice.

The third perspective I examine was methodically formulated by Andrew Abbott in *The System of Professions* (1988). The fundamental strength of Abbott's model is that it establishes a strong theoretical link between a given profession's "knowledge" and its ability to control the market for its services. In this model, the study of a profession cannot be undertaken independently of the activities of other professions because all occupational groups are situated within a "system" in which there is ongoing interprofessional competition over turf, a competition largely played out in the domains of competing systems of knowledge that claim to provide better or more effective solutions to various "problems."

Central to Abbott's model is the concept of "jurisdiction." A jurisdiction is a sort of *authorized* area of market control that is established when particular social problems are associated with particular forms of solutions and with a more or less exclusive groups of experts who are capable, or perceived as capable, of providing the solutions. The thrust of the argument is that in order to establish a jurisdiction, professional work must be perceived as requiring more than a direct connection between tasks to be performed and people capable of performing them. An unambiguous relationship between a problem and its solution diminishes the ability of professionals to prevent the routinization of their work and the dissolution of their distinct identity as a bounded community of experts. "Simple" problems and obvious solutions are not conducive to the monopolization of expertise and lead to the "deprofessionalization" of practice. Central to a profession's ability to sustain a jurisdiction, therefore, is the development of an abstract and theoretical system of knowledge that transcends the particularities of practice and provides scientific legitimacy to actual practice.

This formulation marks the most important difference between Abbott's model and the market monopoly thesis. In Abel's approach, the theoretical knowledge of lawyers is not much more than an auxiliary ideology whose purpose is to enhance the social status of lawyers (Abel 1981:1164).[8]

[8] As we shall see, Harrington does outline a market monopoly model that comes

The intricate ways in which the ideology of law as a science may become a strategy of invading new areas of practice, or a condition that affects the way lawyers respond to changes in the legal environment, are not incorporated into Abel's analysis. Abbott, in contrast, argues that the relationship between knowledge and practice complicates the market monopoly model's expectation that professions tend to uncritically engage in monopolistic practices. Professions, says Abbott (1988), cannot just grow as they please: "No profession can stretch its jurisdiction infinitely. For the more diverse a set of jurisdictions, the more abstract must be the cognitive structure binding them together. But the more abstract the binding ideas, the more vulnerable they are to specialization within and to diffusion into the common culture without" (p. 80).

In what follows, I show that Abbott's theoretical model provides useful conceptual tools to interpret the political economy of at least some segments of the bar. Nonetheless, I also show that the application of the model to the present case requires modifications, mainly because Abbott's model overemphasizes interprofessional competition and downplays the significance of intraprofessional competition within the profession's jurisdiction.

Equipped with the basic theoretical formulations of these models, I examine the perspectives which they allow for telling the case of administrative law.[9]

Market Monopoly and the Case of Administrative Law

How well does this model explain the response of lawyers to the enhanced reliance on statutory rules and administrative regulation in the New Deal? The theoretical expectation of the model is that lawyers will try to monopolize new areas of work in which they practice. In the vocabulary of the market monopoly model, we may thus speak of the expansion of administrative practices as an enhanced demand for legal services—a de-

closer to recognizing the importance of knowledge as a resource that affects lawyers' response to change. Nevertheless, Harrington retains the vocabulary of "ideology."

[9] A short note on methods is in order. The determination of the profession's response is based on a systematic research and seriatim reading of various historical sources and secondary materials. I systematically searched the available relevant materials (reports and proceedings) of the American Bar Association, the Association of the American Law Schools, and 12 local bar associations, among them the New York State Bar Association, the Association of the Bar of the City of New York, the New York County Lawyers Association, and the Chicago Bar Association. In general, I discovered fully elaborated discussions about the developments in administrative law at the federal level mainly at the American Bar Association and the New York State Bar Association. The discussion, therefore, heavily relies on these sources. In addition, I learned about the attitude of lawyers to administrative law through congressional hearings, popular publications, and professional periodicals which I read seriatim. Citations to these many sources appear throughout the text.

mand that resulted not from a conscious strategy of lawyers but, rather, from a new "technology" introduced by the state. As previously mentioned, some lawyers clearly recognized that the administrative process opened a new arena for professional opportunities. Along with the recognition that new professional opportunities were created, however, came concerns about fierce competition from lay practitioners who were allowed to practice before administrative bodies.

Complaints about the destructive effects of lay competition came, almost exclusively, from the weaker segments of the bar—solo practitioners and small firm lawyers. One indication that lay competition was mainly the concern of such lawyers became evident with the submission of the Chenoweth-Whitehead brief to the ABA. The brief, signed by 58 lawyers, bitterly complained about the practices of the Veterans' Administration. The brief warned against the de facto exclusion of lawyers from representing clients who sought veterans' benefits and urged the ABA to effectively act in ways that would ensure the livelihood of lawyers. Of the 58 lawyers who signed the brief, only 6 practiced law in firms with four members or more; 28 lawyers were solo practitioners and 24 were members of small partnership firms (Chenoweth & Whitehead 1934; also see Robinson 1935).

In general, complaints about overcrowding—too many lawyers and too little work—and its ruinous effects on the profession's economic security ran rampant in professional circles throughout the 1930s and were particularly prevalent among solo practitioners and small firms in urban areas. As one New York solo practitioner put it: "In this city [where] 30,000 retail grocers employed 30,000 lawyers, there is now one lawyer representing the entire 30,000 in the chain" (Miller 1936).[10] The fierce competition that resulted led lawyers to strengthen their struggle against the "unauthorized practice of law" by nonlawyers and to search for new areas of legal work. Under such circumstances, it was hard to tolerate competition from nonlawyers in the growing field of administrative practice. The New York State Bar Association, for example, heard the complaint of one New York solo practitioner, Benjamin Miller:

> [M]any more lawyers are beginning to feel . . . that there is more unlawful practice of law by laymen before governmental and administrative bureaus than all the title companies and insurance companies and all the other people that we claim are taking away a lot of business from the lawyers. . . . [W]hatever little business there possibly could be in the proper representation of the public before governmental administrative bureaus, to allow the conditions to continue as

[10] Auerbach (1976) also portrayed a profession whose upper echelons flourished and lower echelons lived at subsistence levels.

> they are, I think we are doing ourselves great harm and the public a great injustice. (Ibid.)

Thus, it seems that the growing competition with laypersons mostly affected the less economically secure segments of the profession. Combined with the prevailing concern of the times that the profession was overcrowded and that lawyers already faced fierce inter- and intraprofessional competition, such lawyers had a stake in attempts to "reform" the administrative process by excluding nonlawyers from administrative practice.

Complaints were followed by some concrete action. In 1935, Senator Wagner introduced a bill (the "Wagner bill") that sought to exclude laypersons from practicing before administrative bodies by providing that such practice would be the exclusive domain of lawyers. The bill was referred to the Senate Committee on Judiciary in May 1935 and was adversely reported by it and "indefinitely postponed" on 30 July 1935 (U.S. Senate, S.2944, 74th Cong., 1st sess., 1935).

Solo practitioners were the most enthusiastic supporters of the Wagner bill. In fact, the Wagner bill had been sponsored by the Federal Bar Association of New York, New Jersey, and Connecticut (FBA), a small lawyers' association that catered to the needs of solo practitioners. Members of the FBA who were also members of the American Bar Association (ABA) and the New York State Bar Association (NYSBA) were at the forefront of support for the Wagner bill and tried to exert pressure on these larger bodies to support the bill.

One such solo practitioner, Henry Weinberger, thus argued that "by lawyers only being permitted to practice before these departments can the liberties and rights of individuals and of the people be best protected" and did not shy away from declaring that lawyers had a right to demand exclusivity in administrative practice because it was "a monopoly approved by the common law . . . [and by] the American people" (American Bar Association 1936a:209). It was the efforts and voices of such "forgotten" solo practitioners as Benjamin Miller, William Robinson, G. W. Reed, Henry Weinberger, Abner C. Surplus, and Meyer Kraushaar that compelled the American Bar Association to adopt a position in regard to the Wagner bill (ibid., pp. 203–25).

The ABA's spontaneous response to the Wagner bill had been supportive. At the ABA's annual meeting in August 1936, when the Wagner bill already had little chance to survive, the ABA's General Assembly nonetheless unanimously resolved to favor "the restriction of practice before departments, bureaus, commissions or other executive or administrative agency of the United States to attorneys at law (American Bar Association 1936b:134).

Such response seems to fit well, indeed being a most straightforward example, within a market monopoly perspective. Lawyers identified a new market for legal services and tried to directly monopolize it by obtaining state-granted mandate for exclusive rights of practice. Yet the ABA response did not end with an unqualified approval of the Wagner bill. The ABA's initial resolution in support of the Wagner bill was opposed by a coalition of prominent corporate lawyers in both the ABA and the NYSBA. Leaders of the bar like Julius Henry Cohen of the Association of the Bar of the City of New York (ABCNY), Henry Saxe of the NYSBA, and William Ransom and John Davis of the ABA used an almost altruistic rhetoric in resisting the Wagner bill and its implications. John Davis, for example, a senior partner in the Wall Street firm of Davis, Polk, Gardiner and Reed, argued against the attempt "to put the profession in the attitude of endeavoring to achieve a monopoly in the transactions with the Government of the United States."[11] Efforts by solo practitioners like Weinberger and Miller to save the original resolution were abortive. Not one single corporate lawyer stood to speak in favor of monopolizing administrative practice, and the original resolution was effectively killed when it was referred to unsympathetic committees. ABA President William Ransom informed the General Assembly that the Federal Bar Association, the sponsor of the bill, was only a small organization not affiliated with other organizations of the legal profession, thus alluding to the low significance of solo practitioners' organizations;[12] and Julius Henry Cohen, speaking before the New York State Bar Association, accused the Federal Bar Association of attempting to "swamp" the state bar with views that the latter did not share (New York State Bar Association 1937:213).

The theoretical question, therefore, concerns the ability of a market monopoly model to offer a plausible explanation to the fact that the leaders of the bar resisted the attempts to directly monopolize the practice before administrative bodies. Abel's general model, which speaks in terms of creation of demand and in terms of the efforts to control the production by producers, does not seem to anticipate such a case. A promising solution to this problem, however, is suggested by Harrington (1983). In her study of the bar's response to the emergence of administrative law, she suggests that the organized bar adopted a conscious strategy that sought to gain monopoly *over* the practice of administrative law, not simply a monopoly *to* practice before such bodies.

By "monopoly over the practice" Harrington refers to the

[11] American Bar Association, Minutes of the House of Delegates, p. 84 (Aug. 1936) (typescript).

[12] Ibid., pp. 84–92.

efforts of the bar's leaders to judicialize the administrative process: to subject the administrative field to judicial standards of practice and procedure, to "rationalize" and "formalize" administrative decisionmaking, to separate the "fact-finding" powers of administrative bodies from their "law-finding" and adjudicatory functions, and, in general, to subject administrative decisions and regulations to comprehensive judicial review by federal courts.

These efforts, about which I will speak at more length in what follows, are not in dispute. The ABA dedicated most of its energies to imposing judicial norms and practices on the administrative arena. In 1934, the ABA created a special committee on administrative law, thus indicating the high priority of the subject on the association's agenda. The major operative proposal of this committee during its first years of existence was to support legislation that would have subjected administrative bodies to orderly judicial review. As an initial step, the ABA endorsed the Logan bill, which proposed to establish an administrative court with jurisdiction over several administrative bodies (U.S. Senate, S.3787, 74th Cong., 2d sess., 1935). In endorsing the Logan bill, the ABA had in mind an administrative court which in itself would be "subjected to judicial review to the full extent permitted by the Constitution" (American Bar Association 1934b:540).

Harrington thus reads the bar's emphasis on judicial review as a practice of "monopolization from above" and preserves the basic paradigm of the market monopoly model: The primary concern of lawyers is to take over and control potential markets. But Harrington does modify the logical structure of this paradigm. In contrast to Abel's model which assumes that the legal profession first establishes market control and only then moves to justify it by invoking a relevant ideology, Harrington argues that in the case of administrative law, lawyers "needed to first establish ideological justifications for [their] dominance in the field" (p. 12).[13] This strategy was needed, says Harrington, because the profession lacked the special body of knowledge needed to assert its "intellectual superiority" in the field: "The existence of an administrative practice not yet professionalized posed ideological rather than market barriers for the legal profession" (ibid.).

Harrington's approach is insightful insofar as it takes us a considerable step away from a crude market control model and closer to a theoretical model that is more sensitive to the link between professional knowledge and professional practice as a key factor in understanding the political role of lawyers. Yet

[13] Abel rejects the reading of his thesis as if market control always predates ideology. This, he says (commenting on a draft of this article), is not needed by the theory but is rather a question of concrete history.

Harrington's elegant solution to the fact that elite lawyers did not try to directly monopolize the right to practice before administrative bodies suffers from several empirical and theoretical shortcomings.

First, it is noteworthy that Harrington's analysis does not mention Wagner's exclusionary bill and the support some members of the bar gave it. Harrington's theoretical problem had not been founded on the observation that elite lawyers not only opted for "monopoly for above" but actually resisted the efforts of others to monopolize the field "from below." Her narrative, therefore, carries the (certainly unintentional) implication that the organized bar was unified behind a single strategy of response.

Thus, ironically, Harrington's "solution" succeeds at the expense of the apparent success of Abel's model to anticipate the actions of those lawyers who did seek a direct monopoly to practice. In talking about "ideological barriers," Harrington's model cannot account for the actions of lawyers who, ideology aside, were only too happy to consolidate their hold on a vast market for legal services. This, however, is not a grave theoretical problem once we combine Abel's and Harrington's versions of the monopoly model. We may then plausibly argue that elite lawyers are monopolizing new markets by "ideological means" while weaker segments of the bar, who are concerned with actual competition, tend to invoke crude methods of direct statutory exclusion.

The second, and more fundamental, obstacle to accepting the formulations of the market monopoly model has to do with the paradigm that underlies it and the subsequent conceptualization of the bar leaders' actions in terms of an "ideology." Indeed, Harrington seems to take "ideology" more seriously than does Abel. For Abel, lawyers' ideology represents a mechanism of justification and status enhancement for an already established monopoly. Harrington grants "ideology" a more active role, suggesting that it can actually be an effective strategy of monopolizing a yet uncontrolled area of practice.

Yet the concept of ideology, in the sense granted to it in the monopoly model, strongly suggests that lawyers' conception of law is not much more than the manipulation of ideas for the sake of controlling and colonizing new areas of practice: Ideology is the instrument and the exploitation of new professional opportunities is the goal. This type of vocabulary prevents the monopoly approach from treating the "knowledge" of lawyers as a professional resource which, at the level of the professional elite, may serve not as a mechanism of seizing new opportunities but, on the contrary, as a cognitive block that may prevent or deter lawyers from entering uncharted areas of practice.

To begin with, it is hard to accept the idea that the bar lead-

ers' assertion of "intellectual superiority in the field" was but a first stage in a monopolizing campaign. The demand for judicial review of administrative decisions, for example, cannot be understood as a step on the way to market control because the strongest advocates of administrative judicialization were those who already enjoyed de facto market control in the administrative arena. Simply, there were no serious competitors who could challenge the ability of elite corporate lawyers to handle the complex regulatory schemes of the major federal administrative agencies of the New Deal.

Moreover, we should read the demand for the judicialization of administrative practice in a broader context than that which is provided for in Harrington's analysis. The bar leaders' operational proposals to judicialize the field were but a small part of a very aggressive campaign against the merits of the administrative process and its effect on the rule of law. Elite lawyers, in fact, were as much engaged in efforts to undermine the further expansion of the administrative process as they tried to "reform" it.

These lawyers, acting in the capacity of legal counsel for corporate clients and speaking on behalf of the legal profession through public speeches, articles, and reports of bar associations, perceived the administrative process as a threat to the centrality of federal courts in the resolution of disputes. Consequently, they condemned the expansion of the administrative process as a destruction of the federal judicial system, as an undermining of the constitutional principle of separation of powers, and as a step in the direction of a virtual dictatorship. The activities of these lawyers with respect to the administrative process, therefore, involved vigorous attempts to "judicialize" the administrative machinery in order to save the federal judicial system from decline.

Thus, the declared purpose of the ABA's Committee on Administrative Law was to "bring controversies back into the judicial system" (American Bar Association 1934b:549). Clarence Martin, the ABA's president in 1933, spoke of the administrative field as a "cancerous growth" that threatened the cherished federal judicial system (U.S House of Representatives Committee on the Judiciary 1934:120), and others described it as part of a plan to destroy federal courts and establish a "super government here, with a super constitution'ism of administrative agencies and quasilegislative tribunals" (p. 159; also see American Bar Association 1934a).

Of course, it is possible to read the bar leaders' principled hostility to the growth in administrative law as part of a strategy whose ultimate purpose was to monopolize the field. Yet such insistence risks ignoring the fact that the response of lawyers was at least in part shaped not so much by a desire to monopo-

lize a new field but by an interest in preserving the hegemony and centrality of courts in the resolution of disputes. If this was indeed the case, it seems that we should strive to go beyond a monopoly model that thinks of the profession in terms of an imperialist organ.

The decisive conceptual turn I believe is needed here has to do with a reformulation of the problematic under discussion. The market control model insists on formulating the question in terms of "opportunities": of asking about the actions of lawyers who tried to monopolize the administrative field. An alternative formulation, however, is and should be in terms of "threats": of asking about the dangers that lawyers identified with the growth of administrative practice. This reformulation involves more than discussing the two sides of the same coin because it leads to a consideration of the conditions under which lawyers will be inclined to resist, rather than embrace, expanded professional opportunities; conditions under which lawyers will tend to defend their existing jurisdiction, rather than penetrate a new one.

In sum, the market control model, both in Abel's and Harrington's versions, did not prove sufficient to deal with several questions. Both Abel's general account and Harrington's specific exploration failed to explain the fact that two segments of the bar, solo practitioners on the one hand and elite corporate lawyers on the other, pushed for different and conflicting strategies of response. The model's focus on monopolizing strategies could fairly anticipate and explain the response of solo practitioners but had been less successful in explaining the more complex response of elite lawyers. The further away we get from crude methods of market control, the more we need to be sensitive to the intricate links between lawyers' knowledge and professional practices. The monopoly model tended to underestimate the significance of these links and, in Harrington's concrete analysis, did not sufficiently situate the "reform" efforts of lawyers in the larger context of judicial "defense."

Halliday's Functionalist Theory

The major thrust of Halliday's model is that the American legal profession enjoys occupational maturity and market security that allows it to dedicate more attention to civic responsibilities and less attention to market considerations. Thus, for example, Halliday documents the relative decline in the importance of professional committees that deal with ethics and unlawful practice and the growing importance of committees that deal with judicial reforms and local and federal legislation. In this progressive model, major emphasis is placed on reading the activities of organized bars as a contribution to the state

machinery of justice. Lawyers not only look at the state as a source of state-granted monopolies of practice but are actually concerned with improving and shaping the judicial and legislative apparatuses of the state.

How well can this model of professionalization explain the different strategies that lawyers invoked as a response to the expansion of the administrative process? Halliday's model seems to have a significant vitality when it is applied "inwardly"—when the legal profession as a whole is not conceptualized as one that moved from an early formative stage to a mature established one, but when it is considered in light of the split between those lawyers who opted for a direct monopolization of administrative practice and those who resisted it. The model's major weakness, on the other hand, is that it consciously ignores the correspondence between lawyers' contribution to the state and their contribution to the well being of the legal profession.

As mentioned earlier, the drive to directly monopolize the market for administrative services came from the weaker and less influential segments of the bar, mainly solo practitioners and small firm lawyers. In contrast, the more influential and economically secure segments of the bar, predominantly partners in prosperous corporate law firms (who also dominated the ABA), were less inclined to seek statutory exclusion of nonlawyers and were more concerned with the judicialization of administrative practice. To put it in Halliday's terms, we may plausibly argue that solo practitioners, compared with corporate lawyers, were in a less secure market position and thus were compelled to invoke strategies that aimed at direct market control.

Such concerns, however, were not shared by the corporate lawyers who dominated the institutional organs of the bar. The corporate elite of the profession did not suffer from the material effects of competition with lay practitioners. Unlike practice before administrative bodies like the Veterans Administration, practice before the Securities and Exchange Commission, for example, still called for a high level of professional competence and intimate familiarity with a labyrinth of financial regulations. On the contrary, big corporate law firms prospered under the growing demand for legal services stimulated by New Deal legislation (Auerbach 1976). As much as big corporate firms were less worried about collection agencies, insurance companies, and banks that often threatened the livelihood of the lower echelons of the bar, they also were less troubled by administrative practice by lay practitioners. Consequently, corporate lawyers tended to view the attempts of solo practitioners to abruptly and unabashedly monopolize administrative practice as distasteful, crude, and unwarranted.

For corporate lawyers, the administrative process created a problem of *form*, a problem of a field that evaded traditional methods of adjudication and dispute resolution, and not a problem of market control. In Halliday's conceptual vocabulary, we may thus speak of the upper echelons of the legal professions as consisting of established lawyers who thought in terms of "improvement" and "rationalization" of the administrative process.

A good example in support of such line of reasoning is provided by the efforts of the bar's leaders to ensure greater certainty in the process of administrative regulation. The ABA's Committee on Administrative Law developed a systematic critique of administrative bodies for their failure to ensure an orderly publication of rules and decisions. "The lawyer," a report of the committee complained, "must look to the President's executive orders and to the releases and announcements of the several administrative agencies for accurate and up-to-date knowledge of the existing state of the law" (American Bar Association 1933b:421).

Rush C. Butler, who chaired the ABA's Committee on Commerce, had been more outspoken: "In these days of legislative frenzy . . . it is impossible under most favorable circumstances for men of affairs to keep themselves advised as to the law applicable to their respective businesses. Even lawyers who are supposed either to know the law, or to know where to find it, are in constant confusion" (Butler 1934:99).

Accordingly, the ABA's Committee on Commerce expressed grave concerns about the "uncertainty" of law that the administration's experiments created. In its report for 1934, that committee urged Congress to enact a statute requiring the publication of every "rule, regulation, or order entered by any executive officer or administrative board" (American Bar Association 1934a). Similarly, the report of the ABA's Special Committee on Administrative Law contained two proposals to that effect: that administrative regulations "should be made easily and readily available at some central office" and that administrative decisions should be periodically published (American Bar Association 1934b).

The important point about these efforts was that on this particular issue of "certainty," the bar leaders were able to create and present a unified front of lawyers who often differed on other issues. In particular, the call for certainty met the approval of the Association of American Law Schools (AALS), an organization of law teachers that often expressed opinions in sharp conflict with those of the ABA.

The AALS made public its own recommendation that "the Federal Government should provide for the compilation, publication, and indexing of existing Federal executive orders and

regulations" (Association of American Law Schools 1934:154). This impressive coalition of lawyers probably contributed to the fact that Congress passed legislation which made it mandatory to publish administrative regulations (Federal Register Act of 1935). In Halliday's terms, therefore, we may thus describe the call for orderly publication of administrative regulations as one indication of the contributory relations that the upper echelons of the bar established with the state.

Still, we need a considerable stretch of the imagination in order to argue that the overall response of elite corporate lawyers to the expansion of the administrative process was based on a "contributory" orientation. Corporate lawyers saw the enhanced strength of administrative bodies, and the general strengthening of the executive branch of government, as a dangerous trend that had to be stopped and tamed. In particular, a strong federal state which intervened in the market through a complex machinery of regulatory bodies was perceived as a direct threat to the authority and centrality of the judicial machinery of the state (Verkuil 1978).

The primary rationale that government lawyers and legal academics used to justify the shift to administrative methods was that the judicial machinery could not handle and effectively solve many of society's problems. The administrative process, in contrast, was described as a rational and effective way for implementing policy. Thus, for example, Attorney General Robert Jackson argued that courts were not able to provide satisfying solutions to burning social and economic problems while administrative bodies could be counted on to invoke informed rules and decisions. Jackson reviewed classes of controversy that were withdrawn from the courts in search of more efficient justice and argued that the shift to administrative methods aimed at reducing areas of social and economic uncertainty (Jackson 1934; also Arnold 1934).

In contrast to Halliday's assumption, the rationalization of the existing order and the search for methods that would increase the efficiency of the state in providing solutions to social and economic problems were not advocated and supported by corporate lawyers but by law professors and academics who were by and large identified with the Legal Realist movement or, at the very least, with its spirit. It was this particular segment of the bar that developed "contributory relations" with the state during the New Deal by promising to bring legal expertise to the service of the state (Frankfurter 1935).

Corporate lawyers, on the other hand, were determined to discredit the efforts of legal academics and to describe the shift from judicial to administrative tribunals as destructive of the judicial system and as an affront to the idea of the rule of law. There was consensus among corporate lawyers and the leaders

of the bar that the rise of administrative practices came at the direct expense of the judicial system (Jackson 1934; Fox 1935:376; Franklin 1934:501). Thus, the ABA's Special Committee on Administrative Law (American Bar Association 1934b:549) stated:

> Having in mind these tendencies to attempt to remove large fields of legal controversy from the jurisdiction of the courts and to place them under administrative machinery, to deprive administrative tribunals of safeguards necessary to the exercise of judicial functions, to reduce and so far as possible to eliminate effective judicial or independent review, and to employ indirect methods of adjudication, the committee believes that it is not going too far to state that the judicial branch of the federal government is being rapidly and seriously undermined and, if the tendencies are permitted to develop unchecked, is in danger of meeting a measure of the fate of the Merovingian kings.

As a corrective to this state of affairs, the bar leaders promised to block the "invasion of judicial powers" (ibid., p. 539). Their main effort was a search for mechanisms that would ensure that administrative decisions were subjected to strict and comprehensive judicial review and that all administrative bodies would be stripped of judicial powers in general (Thacher 1935).

On a different front, the bar's leaders launched a bitter attack on the law professors who asserted themselves as the new elite and threatened to destroy the rule of law (e.g., Ransom 1936:23; Miller 1934:350; Beck 1933b:49). Charles Clark of Yale Law School, in response, complained that the bar's leaders distanced themselves from academia because law professors were "suspected in this country" (Clark 1935).[14] This type of rhetoric and action does not fit Halliday's theoretical model. Rather than contributing to the administration's efforts to revitalize the legal system, the leaders of the bar consciously sought ways to undermine them.

Curiously, Halliday qualifies his own model in ways that render it, on the one hand, more compatible with the actions of the bar's elite during the New Deal and, on the other hand, less conceptually comprehensive. Halliday (1987:358) asserts that the most important contribution of American lawyers to the American legal system lies in their efforts to facilitate the transition to a "more purely autonomous legal system." Borrowing from Nonet and Selznick's (1978) conception of autonomous law as a a system in which law and politics are formally sepa-

[14] It is interesting to note that the American Liberty League, an anti–New Deal organization that included many lawyers, published a report that was supposed to show that many academics resisted the New Deal reforms. The report listed the names of nearly 200 academics, yet none of them were law professors (American Liberty League 1936:2–23).

rated and procedural fairness replaces political purpose as the foundation of law, Halliday (p. 359) argues that the legal profession "has the will and the ability to advocate a general transformation of the legal system toward autonomous law."

At the same time, Halliday admits that "the profession has steadfastly resisted any further transformation of law in the direction of responsive law" (p. 358). By responsive law Halliday refers, following Nonet and Selznick, to a legal system that resides on a "higher" stage of legal evolution than autonomous law. In such system, law becomes open to pragmatic and functional demands and is driven by the purpose of solving concrete problems even at the expense of established patterns of formal legalistic rules and procedures (Nonet & Selznick 1978:116).

In fact, Nonet and Selznick's "responsive law" is consciously based on the Legal Realist conception of law. At no other time in American history had the Realist vision of law achieved so much influence on state policies as it did during the New Deal. Given that Halliday recognizes the inherent resistance of lawyers to such legal tendencies, his general model of lawyers cannot explain the role of the legal profession in one of America's most crucial periods of change.

Lawyers, says Halliday, are inclined to invoke legalistic rhetoric when faced with "law on the offensive." Such rhetoric, in the name of the rule of law and an autonomous legal system, thus becomes the heart of Halliday's model of lawyers who perform "civic responsibilities." In other words, the assertion that lawyers contribute to the state through their commitment to the idea of autonomous law a priori limits the generalizability of his model. Lawyers contribute to the state only under *particular* conditions and not as a result of their own professional evolution toward a more responsible social role.

Further, the recognition that lawyers are only concerned with the development of a particular form of law—autonomous law—does suggest that self-serving interests (i.e., market monopoly) and not a general sense of civic responsibility are behind this commitment. Halliday's model would have been much more convincing if it could have shown that lawyers' commitment to public service transcends their commitment to any particular legal arrangement and has to do with serving the general demands of society. Apparently, this is not the case.

Finally, Halliday qualifies his own model in another significant way. The legal profession, says Halliday (p. 370), "will commit its monopoly of competence and its organizational resources to state service, *so long as the substance of its service does not directly erode the general control of the market the profession has attained*, although it may be prepared to roll back monopoly in certain areas" (emphasis mine). This last statement qualifies Halliday's

model in a way that compels us to turn again to a market control model. In practical terms, Halliday's own qualification suggests that whenever the self-serving interests of lawyers are in conflict, or are perceived to be in conflict, with the demands of the state, the former set of interests will take the upper hand. If this is the case, the model loses much of its vitality; state service then becomes an occasional by-product of the profession's effort to secure its market monopoly under historically specific and contingent legal-political arrangements.

At any rate, Halliday's findings concerning the strong commitment of lawyers to a formal legalistic order underscore the need to rely on a different theoretical perspective—one that analyzes the intimate relationship between the profession's system of knowledge and its response to social change.

Abbott's System of Professions

Abbott's theory offers a perspective that emphasizes the relationship between a given profession's core theoretical knowledge and its response to potential changes in its jurisdiction. From this perspective, the prime concern of (at least) the more "enlightened" segments of a profession (i.e., its elites) is to defend the integrity of its theoretical knowledge. Telling the story with Abbott's framework in mind, therefore, requires a more in-depth consideration of the meaning of the concept of administrative law and its relationship to the profession's traditional conception of law.

The concept of administrative law may acquire two different and conflicting meanings. One meaning refers to that body of law which is produced by administrative bodies when they act in the capacity of regulators and adjudicators. In this sense, the rulings and judgments of administrative bodies are regarded as a valid source of law that grows and develops at its own pace and through its own methods.

This way of thinking collides with a second meaning that considers administrative law as that body of law which is produced by courts when they pass on the validity of administrative practices, determine the duties and rights of administrative bodies, the scope of their jurisdiction, and the remedies available to those who are affected by administrative action.

These two meanings of administrative law respectively reflect what Arthurs (1985) describes as two conflicting paradigms of law: the "pluralist paradigm" and the "centralist paradigm." The pluralist paradigm conceives law as stemming from a multitude of sources that may be diverse in methods, "content, causes, and effects" (p. 3). The centralist paradigm, in contrast, postulates law as a *singular*, objective, and formal system which "exists as a thing apart from society, politics, or eco-

nomics" (p. 1). This system is organized around, and oriented to, the judicial process, and it is on this paradigm that the professional knowledge of lawyers is traditionally based: "For most lawyers," writes Arthurs (p. 6), "administrative law is not the law of the administration; it is the law directed *against* the administration, the law by which reviewing judges ensure that the administration does not overreach."

From this perspective, the expansion of the administrative process in the New Deal marked a shift from a centralist to a pluralist paradigm of law and signaled the administration's clear preference for the latter. In Abbott's terms, we may thus describe the growing reliance on administrative methods as a form of practice that escaped the paradigmatic core on which lawyers traditionally based their jurisdictional claims. The development of a new source of law, at the direct expense of the judicial system, threatened to undermine both the market and status privileges that the professional elite enjoyed.

Indeed, it seems that it was precisely in this way that the administrative process was perceived by both its supporters and adversaries. As we have seen, lawyers on both sides of the debate recognized that the administrative process advanced at the direct expense of courts and that administrative methods escaped traditional ways of doing legal business and resolving disputes in America. The paradigmatic struggle was aptly described by Carl McFarland (1934), who won an ABA award for an article in which he articulated the implications of these two differing conceptions of the administrative process:

> [T]here seem to be two theories of the relations of courts to administrative agencies in Anglo-American law—the "one treats the justice dispensed by courts and the social control exercised by administrative tribunals as parts of a single system of law in which the courts wield ultimate authority" while "the other recognizes a dual system of public administration of justice and seeks a division of function." (Ibid., p. 612)

McFarland, like many other interested observers, did not fail to note that the leaders of the American bar were predominantly disposed to prefer the first "theory" of administrative law, namely, that of a single centralized system of law. The uncontrolled stretching of the profession's jurisdiction, precisely because lawyers (and especially elite lawyers) enjoyed a de facto market control in the administrative arena, threatened to expose the profession's theoretical knowledge to what Abbott (1988:88) called a "diffusion into the common culture." The development of an administrative process that challenged the traditional paradigm of law as a singular system at whose apex stood appellate courts threatened the scientific image of law and undermined the ability of lawyers to control the pace and direction of legal development. Hence came the organized

bar's calls to bring controversies back into the judicial system and to block the invasion of judicial powers I described in the preceding sections.

On a more immediate and concrete level, the administrative process threatened to compromise the asserted distinct professional identity of lawyers. The fact that administrative agencies tended to disregard judicial procedures and rules threatened to reduce the image of lawyers to that of mere orators who acted in the capacity of hired "mouthpieces" for clients. Practicing in a field that purposefully escaped legalistic methods posed lawyers with the danger of losing their identity as professional experts because, as Abbott (1988:103) puts it: "expert action without any formalization is perceived by clients as craft knowledge, lacking the special legitimacy that is supplied by the connection of abstractions with general values."

This danger was particularly grave during the New Deal because the general public's discontent with powerful financial and industrial interests affected also those lawyers who acted on their behalf. Throughout the New Deal, lawyers had to defend themselves against charges that they were too closely identified with their powerful commercial clients and insufficiently concerned with the "public interest." These accusations culminated in 1934, when Supreme Court Justice Harlan Stone (1937:6–7) openly charged corporate lawyers with becoming the "general manager[s] of a new type of factory" at the "service of business and finance."

Ironically, many of those who accused lawyers of commercialization were also among those who looked to the administrative process as a promising way of escaping the firm grip of the judicial process. Yet the unintended consequence of the shift to administrative methods was that it served to highlight and expose the symbiotic relationship between lawyers and their clients. Informal administrative methods, in short, undermined the "asymmetry" between lawyers and clients which was based on lawyers' "differential knowledge of normative codes, conventional procedures, and interpretive techniques" (Larson 1989:434).

It is in this light that we should appreciate the trepidation of lawyers at the casual and informal procedures that were established by the New Deal's administrative agencies. For many lawyers, the form and character of the administrative process was simply "startling" (Robinson 1935:278). Charles Whitman, a senior partner in one of Wall Street's leading firms and a leading member of the bar, thus spoke with alarm about the removal of many legal problems from judicial forums and argued that it would compel lawyers to commercialize and thereby lose their distinct professional identity (Whitman 1934).

The response of elite lawyers to the expansion of the administrative process thus fits Abbott's assumption that professionals will be reluctant to embrace new areas of practice that do not succumb to the profession's body of theoretical knowledge and that blur the distinction between the profession and the general common culture.[15]

Still, it should be kept in mind that Abbott's model concerning the relationship between knowledge and practice is best fit to describe the activities of elite lawyers. As we have seen, and as Abbott's own discussion of the legal profession demonstrates (1988:247-79), jurisdictional battles at the lower end of the profession seldom revolve around issues of "theoretical knowledge" and are much more geared toward actual control of practice. The strength of Abbott's model, in short, lies in its sensitivity to the actions of professionals who can afford to be concerned with the long-range interests of the profession.

Moreover, Abbott's "universal" model of professionalism does not consider some important elements concerning the specific and particular properties of the American legal profession. These properties must be identified to clarify the relationship between the legal profession's unique type of knowledge and its defense of the judicial system. At a more general level, it was this particular type of legal knowledge that shaped the general attitude of the bar's elite to the growth in the strength of a federal centralized state.

In Abbott's theoretical model, prime importance is given to the academic segments of professions. The model assumes, and quite rightly so in the general case, that the professions' theoretical and abstract knowledge is produced and generated by academics whose detachment from practice allows them to develop systematic and abstract propositions. Thus, academic producers of professional knowledge are assigned two primary tasks. First, they are responsible for the selection and training of new professionals and hence for the creation of a symbolic bond between practical work and scientific abstraction. Second, and probably more important, academic work provides professions with the compelling legitimacy of science in general as a manifestation of rational activity which is geared toward the solution of human problems:

[15] The story of lawyers' response to the expansion of the administrative process also confirms Abbott's (1988:88) assumption that "the more abstract the binding ideas, the more vulnerable they are to specialization within." The ABA's failure to unite the bar behind a call to create an administrative court was largely due to the fact that lawyers who specialized in practicing before some administrative agencies were reluctant to lose their competitive advantages vis-à-vis other lawyers. On the resistance of several lawyers and the Customs Bar Association to the Logan bill see American Bar Association 1936a:200–225; Harrington 1983.

> Academic knowledge legitimizes professional work by clarifying its foundations and tracing them to major cultural values. In most modern professions, these have been the values of rationality, logic, and science. Academic professionals demonstrate the rigor, the clarity, and the scientifically logical character of professional work, thereby legitimating that work in the context of larger values. (Abbott 1988:54)

But the unique features of the professionalization of lawyers in America was that the development of the idea of "law as a science" followed a different path from that which was followed in the civil law world. In the American common law system, the claim that law was a science (i.e., a closed, gapless, consistent, and systematic system of rules) and that it had to be treated as an autonomous system was based on the centrality of courts in producing and developing legal knowledge. Courts, not academia, were the source from which the profession derived its legitimacy. The development of legal knowledge was brought about through the incremental process of the case-by-case method, in the course of which judges created "abstract" doctrines and established legal principles (Horwitz 1977, 1992).

The historical centrality of courts in the American legal system was a unique feature of what Skowronek (1982) called a "state of parties and courts": a relatively weak centralized government that allowed the federal judiciary an almost exclusive prerogative to develop the American legal system (also see Horwitz 1977). This particular arrangement provided lawyers in private practice with some of their most useful claims for professional autonomy.

The professionalization of lawyers in America was thus based on a core ideology that not only portrayed law as a science but also situated the judiciary as the producers of this scientific knowledge. The idea of judgeship as a symbol, says Botein (1984), played an important role in the process by which lawyers articulated their ideology of professionalism and expert authority. Federal judges stood at the summit of professional hierarchy and provided the legal profession with a most effective symbol of disinterested public service.

Further, since courts were reactive institutions whose agenda was determined by the nature of disputes that lawyers brought before them, the case-by-case system ensured the gatekeeping functions of lawyers and their ability to play an active part in controlling the scope and pace of legal development. Consequently, a legal system at whose center stood judicial producers of legal knowledge situated American lawyers in a particularly powerful position.

Whereas Abbott's model expected academics to function as the producers of the profession's theoretical knowledge, this

role in American law was assumed by the federal judiciary. Consequently, lawyers' hostility toward the growth in administrative methods reflected their interest in protecting this particular "scientific" site of theoretical production. This observation leads to another important difference between Abbott's general model and the particular case of the legal profession in the New Deal. Abbott's model emphasizes interprofessional competition, the classic case being that of a contending profession that invades the jurisdiction of an incumbent profession. Yet the case of administrative law involved intraprofessional competition combined with a threat from the federal state itself. The threat to the profession's theoretical knowledge came from within the profession: from legal academics who challenged the hegemony of courts in the legal system and granted intellectual legitimacy to the administration's experiments in administrative law.

These legal academics, who by and large shared the Legal Realist vision of law, proposed to revolutionize the legal order on which lawyers had based their claims to professional autonomy in the previous 60 years. Their advocacy of a new paradigm of law effectively incorporated into the New Deal's reliance on administrative methods was based on a direct attack on the merits of the judicial process. Legal Realism, with its challenge to the idea of a self-referential scientific law, exposed the uncertainty of the judicial process and, with it, the fragile cognitive foundation of the profession of law (e.g., Arnold 1934; Frank 1930).

When the boundaries of traditional legal discourse began to disintegrate, the bar leaders invoked strategies whose purpose was to defend judicial supremacy. Viewed from this perspective, it is also understandable why the efforts of elite practitioners were not initially aimed at imposing judicial procedures on administrative agencies but were rather focused on the idea of judicial review. The strategy, in other words, was aimed at the preservation of judicial authority as much as it was oriented toward the monopolization of a new professional market.

In sum, the theoretical knowledge on which the intellectual authority of the legal profession had traditionally been based was challenged and undermined from within the legal profession by academics who did not enjoy the central position in the professional hierarchy that has been assigned them in Abbott's general model. In the case of American law and the American legal profession, therefore, Abbott's model may be applied with two important qualifications. First, the profession's theoretical knowledge was produced by appellate courts, not by academics. Hence the vehement defense of the judicial system by lawyers who perceived the administrative process as a threat to the centrality of courts. Second, the threat to the profes-

sion's established knowledge came from within the profession, by legal academics who challenged the centrality of courts in the American legal system. Thus, an intraprofessional perspective, rather than an interprofessional one, best captures the strains and struggles around the development of administrative law practice.

Conclusion

My intention has been to situate some of the activities of lawyers in the New Deal era in the context of contemporary theories of the legal profession and, on a more general level, to account for the efforts of various professional segments of the legal profession to facilitate or resist the expansion of the modern American regulatory state.

The decision not to tell the "story" as a straightforward unfolding of events stems from my position that the "meaning" of a story is always embedded, implicitly or explicitly, within a theoretical model. This, in turn, means that I do not want to conclude with definitive evaluations of the merits and shortcomings of each model or with a construction of a new synthetic narrative. The beauty, and perhaps for some the agony, of social theory is that each model could offer some evidence to support its version of "reality," each allowed me to construct the story from a different perspective, and none of them allowed me to tell the story as a "whole" (probably because there is none).

What can we say, then, about the case I have considered? I view the three theoretical models I have discussed as equipped, in principle, with theoretical tools that enable them to accept the essential distinction between a financially secure professional elite and a professional "working class" whose prime concern is with economic survival in an ever growing competitive market. Accordingly, the response of this latter professional segment to the practical opportunities that came with the expansion of the administrative arena could have been fairly anticipated by all three models. Faced with an interprofessional competition over a field that promised to supply a considerable amount of legal work, lawyers sought ways to usurp the new field of opportunities by excluding "unqualified" contenders. Such practices are a built-in component of the market monopoly thesis, are expected from professional segments not yet financially and professionally established in Halliday's evolutionary model, and are the very nature of a system in which professions fight over turf in Abbott's system of professions thesis.

The theoretical problem, therefore, concerns the three models' treatment of the profession's elite. Was this elite con-

sciously engaged in a sophisticated attempt to control a new market from above as the market monopoly would suggest? Or was the elite's response to the expansion of the administrative state characterized by an effort to contribute to the rationalization and improvement of a chaotic legal order as Halliday's model (see also Gordon 1984) would suggest? Or, conversely, was the elite engaged in an effort to defend its jurisdiction from unwarranted invasion by a new system of knowledge as Abbott's model would suggest?

The implicit message of the market monopoly model is that different segments within the bar share the same basic tendency to take over and control new areas of practice. Thus, the practices of those lawyers who fought for the judicialization of administrative practices were conceptualized as no more than a sophisticated version of monopolization. While this perspective contributes to our general understanding of the forces at play, it tends to set aside profound differences of perception, and subsequent courses of action, that separate the two hemispheres of the bar. Thus, for example, the monopoly model could not explain why the leaders of the bar not only fought for judicial review but also actively resisted and undermined the attempt to control the administrative field by excluding nonlawyers. When monopolization is perceived as the single most important factor in determining the response to new areas of practice, it is hard to understand why monopolization from above and from below are not compatible.

We can better understand this apparent paradox by looking at the elite's response as a defensive, rather than as an offensive, strategy. The leaders of the bar responded to what seemed to them as a relentless attack on their own secured and monopolized jurisdiction—the judicial arena. It was the threat to the legitimizing core of the legal-professional paradigm, with its potential undermining of the power, prestige, and influence of the professional elite, which triggered the vehement hostility that these lawyers displayed toward unregulated administrative practices.

Abbott's model, on the other hand, does see professional response as changing in light of the implications of such change for the profession's body of theoretical knowledge. In that, the model allows us to think of the elite's response as a defensive mechanism. Yet Abbott's model is primarily geared to evaluating interprofessional competition. Under such "normal" conditions, the model assumes cooperation between practitioners and their academic "knowledge producers": mutual resistance to outside threats and a more or less coordinated effort to incorporate new jurisdictions.

The unique situation I considered here, however, involved a threat from within; while the lower segment of the bar suf-

fered from interprofessional competition, the upper echelons of the bar responded to a perceived intraprofessional competition with legal academics and legal experts at the service of the state (many of whom were legal academics on leave; see Kalman 1986). For the bar's elite, the competition was not over clients but over the very authority to define what legal practice was, to shape legal doctrine, to influence the "legal direction" of the state, and, ultimately, to decide where the nation's legal "brain trust" was located.[16]

Inter- and intraprofessional competition are two distinct conditions that do not necessary lead to corresponding strategies that can be determined a priori. In the most general and tentative terms, and on the basis of the particular case I have considered here, however, it is possible to outline some relationship between different types of competition and corresponding types of response.

There are two typical forms of interprofessional competition. One is that in which a contending profession invades established areas of work which are controlled by an incumbent profession. This is the case, for example, when banks, insurance companies, or real estate agents appropriate some forms of "legal work." The second type of interprofessional competition occurs when there is a new area of practice not yet fully controlled by either party. Such interprofessional competition may be thought of as a race between parties over who will be the first to control this new space for professional activities. It was this second type of competition that lawyers faced in the administrative arena. Corresponding to the hemispheric split within the bar, those lawyers who suffered most from the economic effects of the depression had a stake in defining administrative practice as a "natural" legal domain and to eliminate the competition with nonlawyers in this still loosely structured field.

Intraprofessional competition, on the other hand, involves a different type of threat. At stake here is the dominance, or at least the secure position, of particular professional segments within the professional hierarchy. Again, this type of competition may be thought of in two analytically distinct ways. A direct intraprofessional competition is the typical condition that each lawyer experiences as a result of an ongoing competition for clients. A second type of intraprofessional competition involves an open struggle for influence and prestige within the professional hierarchy. Such competition, while rare, is nevertheless extremely destructive of a profession's sense of unity. It was this type of intraprofessional competition that the leaders

[16] Leon Green (1934), then Dean of Northwestern University Law School, proudly asserted that the New Deal allowed academics to become the "lawyers' brain trust."

of the bar experienced during the New Deal: a group of academic jurists who, with the blessing of the administration, advanced a new thesis, a new juristic paradigm, that shook the traditional theoretical foundations of the professional jurisdiction. Consequently, these lawyers sponsored defensive strategies whose purpose was to contain the new paradigm and to preserve a status quo which served them well.

Thus, it may be clearer now why elite lawyers not only insisted on judicializing the administrative field but also actively resisted the attempts to exclude lay practitioners from the field. What at first look from a monopoly perspective like contradictory practices become understandable: To exclude lay practitioners would have implied that the bar unconditionally accepted the validity and prominence of new methods and techniques for making law and surrendered some of its prerogatives to a new legal elite that could now legitimately define the boundaries of legal practice.[17] Relatively undisturbed by direct market competition, elite lawyers were primarily concerned with the paradigmatic and practical shift that threatened their established source of authority, prestige, and professional aura—the centrality and hegemony of appellate courts as the producers of legal knowledge. Worse still, as we have seen, this shift signaled the emerging authority of academics and government lawyers as new leading carriers of legal science.

The terminology I have invoked here may be easily incorporated into both the market monopoly and Abbott's system of professions model. Both models, despite their different orientations, insist on establishing a link between the practices of lawyers and their distinct interests as an occupational group. But can we accommodate this perspective with Halliday's model? In general, it seems that Halliday consciously refuses to attribute the practices of lawyers vis-à-vis the state to their own market interests. Yet as we have seen, he also recognized that elite lawyers were prone to defend and improve the "rule of law." If we take this contention as a point of departure, the results are not as remote from the other models as they at first seem to be.

To make this point, let us look at the logic of Robert Gordon (1984) who, like Halliday, speaks of the "ideal interests" of lawyers in contrast to their material interests. These, in general, concerned lawyers' interest in promoting the image of lawyering as a public calling that contributed to the improvement of the legal order for the general benefit of society. The essence of the ideal, Gordon tells us, consisted in the wish to

[17] For example, consider the logic of J. Henry Cohen, one of the bar's leaders, who explained his reluctance to support the Wagner bill by arguing that it would allow the legislature, rather than the profession, to define the scope and meaning of legal work (New York State Bar Association 1936:236).

develop a legal "science." The purpose, he goes on to say, was to create a bridge between actual professional practices that grew ever more distant from "pure" law and a belief in their obligation to a universal legal order. While Halliday speaks of an altruistic impulse to contribute, Gordon (p. 53) speaks of a psychological need of elite lawyers to "live in comfort" with themselves.

The overlooked element in this perspective is that the "improvement of legal science" is in itself a result of a particular conception of law. Law as a science is not an objective term that exists out there as an unchanged ideal type. Those lawyers who wanted to "improve" law as a science were at the same time defining what law as a science meant, in contrast, as we have seen, to an emergent conception of a new legal science that was put forward by the advocates of administrative law. In short, a particular view of law as a science is essentially the basis of legitimacy for lawyers' control over their market, and this perspective, I believe, is shared by all the models which I discuss. Lawyers may be well intentioned, and some of them are surely committed to ideal visions of law as the guardian of social harmony. Still, we have yet to come up with a case in which lawyers put their ideal interests before their own material and status considerations.

The story that I have told, in sum, reflects the multifaceted relationship between lawyers' power and lawyers' knowledge. I could have forced the materials into one theoretical perspective, yet I argued against it. I chose three models that are often treated in the literature as canonical propositions. The fate of such classics is that their complexity often disappears while their basic orientation remains. These basic orientations—monopoly, responsibility, knowledge—in turn allow for new narratives to appear. My intention here was to create such narrative without constructing a coherent picture. Fragments remain, if only because we have yet to resituate the complexity of events in the larger economic-political context. Elite lawyers in the New Deal were sensitive not only to the demands of clients but also to the grave consequences of asserting themselves as an oppositional vanguard vis-à-vis a popularly elected government, surely not a typical stance for lawyers. Such resituation, however, goes beyond the scope of this essay.

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