

# COMMENTARY

## PRIVATE CAREER-BUILDING AND PUBLIC BENEFITS: REFLECTIONS ON “DOING WELL BY DOING GOOD”

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#### I. WILKINS’S PROJECT AND ITS IMPORTANCE

David Wilkins is engaged in a wonderfully interesting and valuable project.<sup>1</sup> His is a fascinating story, one very well told and with a wealth of lessons, some inspiring and others rather grim, for lawyers in present-day practice. The great strength of this work derives from Professor Wilkins’s welcome departure from the genre of most writing about the legal profession that takes the form of armchair speculation. Like my co-commentator Bryant Garth, Professor Wilkins has ventured out into the real world and has talked to lawyers—many of them—and obviously has convinced them to trust him enough to tell him the

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1. David B. Wilkins, *Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1 (2004) (examining in detail the current trends in public service work by black corporate lawyers and noting the benefits that a cultivated public service persona can provide to a lawyer in today’s highly competitive legal market).

unsparing and sometimes bitter truths about their lives and work.<sup>2</sup> He is a sensitive and careful observer and a skillful narrator.

It seems to me that there are two overlapping themes in his work. One is largely personal and might be called “professional mobility strategies for marginals.” It is about how outsiders can survive and put together a satisfactory life in a world they never made, a world of institutions managed by people whose ethnicity, background, and social status is very different from their own. I would like to use some of the vantage points of history to compare aspects of the story Professor Wilkins tells to those of some upwardly mobile marginals of the past: poor white country boys, Jews, and women.

The other theme is social. It is an account of the relationship of private practice careers in law to public involvements—social service, pro bono work, bar association activity, civic engagements, and public service—and of the harmonies and dissonances between the public and private spheres. Do public involvements tend to promote careers in private practice, or do they impede or derail them?

The key points of Professor Wilkins’s Address may be found in the intersection of these two themes. When private and public careers are symbiotic, or mutually reinforcing, lawyers can convert the currency of experience in one into success in the other, public involvements into private career opportunities, and professional success into public position and influence.<sup>3</sup> When mutual reinforcement is lacking, private careers are blighted, public engagements are stunted or cut off, and the public sector and the bar alike are deprived of the talent and perspectives they most need.<sup>4</sup> There are some notable successes in Professor Wilkins’s stories, but there are also some notable disappointments. And he ends on a rather downbeat note, questioning whether, under current practice conditions, the successes are likely to be repeated.<sup>5</sup>

As Professor Wilkins suggests, doing well by doing good (or, more neutrally, by engaging in pro bono practice and civic and public affairs) is an old story. In antebellum Massachusetts, for example, almost half the lawyers in the

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2. See, e.g., *id.* at 40–43.

3. *Id.* at 5 (highlighting the importance of public service connections in creating a successful private law career).

4. *Id.* at 7–18 (describing the realization of public service’s potential benefits as dependent on a myriad of individualized factors).

5. *Id.* at 79–80 (asserting that today’s highly competitive legal market suffocates most attempts by private lawyers to do pro bono or other public service work).

state sought elective political office.<sup>6</sup> Why? In part, the answer is that politics brought public exposure; a young lawyer could make speeches, show off his oratorical talent, and, best of all, meet party notables.<sup>7</sup> Similarly, young lawyers would take on criminal defense pro bono—the more spectacular the crime, the better, because it gave them a great opportunity to gain trial experience and to show off their stuff in front of juries and the large public audience.<sup>8</sup>

The young Daniel Webster, a farmer's son, started practices in towns in Massachusetts and New Hampshire.<sup>9</sup> His first big break came when a big Boston creditor hired him based on his local reputation to do debt collections in the countryside.<sup>10</sup> When he moved to Boston, his first tactical approach to fame was to get involved in Federalist Party politics, which was dominated by Boston's mercantile and banking elite—who were always on the lookout for fresh legal and political talent to represent their interests in Washington.<sup>11</sup> Webster combined being their lawyer with being their U.S. Representative and then their Senator, introducing bills in Congress that favored their interests.<sup>12</sup> He convinced Congress to set up a claims commission to adjudicate maritime claims and then represented claimants before the commission.<sup>13</sup> An extravagant fellow always on the verge of bankruptcy, he lived off his clients-constituents' fees, campaign contributions, and loans.<sup>14</sup> He also married into a rich and well-connected mercantile family; next to politics, marriage was

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6. See GERARD W. GAWALT, *THE PROMISE OF POWER: THE EMERGENCE OF THE LEGAL PROFESSION IN MASSACHUSETTS, 1760–1840*, at 68 (1979).

7. *Id.* at 72 n.10; see also Norman W. Spaulding, *The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics*, 71 *FORDHAM L. REV.* 1397, 1398 (2003).

8. Spaulding, *supra* note 7, at 1448.

9. 2 *THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS: THE BOSTON PRACTICE* 3 (Alfred S. Konfesky & Andrew J. King eds., 1983) [hereinafter *PAPERS OF DANIEL WEBSTER*]; see also Robert W. Gordon, *The Devil and Daniel Webster*, 94 *YALE L.J.* 445, 447 (1984) [hereinafter Gordon, *Devil and Daniel Webster*] (reviewing *THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS: THE NEW HAMPSHIRE PRACTICE* (Alfred S. Konfesky & Andrew J. King eds., 1982), and *THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS: THE BOSTON PRACTICE* (Alfred S. Konfesky & Andrew J. King eds., 1983)).

10. Gordon, *Devil and Daniel Webster*, *supra* note 9, at 447–48.

11. *Id.* at 453–54.

12. See, e.g., *PAPERS OF DANIEL WEBSTER*, *supra* note 9, at 334–35 (describing a time when Webster was a member of a Senate committee and represented parties with claims before the committee).

13. *Id.*

14. Gordon, *Devil and Daniel Webster*, *supra* note 9, at 453 (“[H]is early success at the bar had accustomed him to extravagance, large parties and country-houses; he speculated foolishly, borrowed recklessly, and always had to take on new cases to pay his debts.”).

probably the most important route to client networks in Senator Webster's milieu.<sup>15</sup>

Cut to New York City after 1900. New York was then, and still is, a magnet for ambitious young lawyers.<sup>16</sup> If they lacked capital or family connections to bring to a law partnership, the fastest path upward was to attend one of the new meritocratic law schools, preferably Harvard or Columbia, do well academically, get on law review, and grab the attention of the Dean, who would steer them to one of the major law firms that was beginning to adopt the "Cravath system" of recruiting high-achieving young men as paid associates.<sup>17</sup> The young William O. Douglas rode the rails from Yakima, Washington, arriving in New York City without a dime.<sup>18</sup> Dean Stone of Columbia became Douglas's patron and arranged for tutoring jobs to help pay his way.<sup>19</sup> Douglas was only second in his law school class, so he did not get a Supreme Court clerkship, but Stone did recommend him to the Cravath firm.<sup>20</sup>

So merit (or to be more precise, high law school grades) could get one in the door. But as an outsider, how could a lawyer meet clients? In New York, among other cities, one means was through engaging in civic and philanthropic work and reform politics.<sup>21</sup> At the start of his career, Adolf Berle, a business lawyer who was to become the century's most influential writer on corporate law and a member of FDR's Brain Trust, volunteered at a New York settlement house whose board of governors included many of the

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15. *Id.* at 453–54 ("Webster was not unmindful of the advantages of family connections. He calculatingly married into an influential mercantile family after his first wife's death, and his daughter married into the leading mercantile family of Boston . . .").

16. *See, e.g.*, Wayne K. Hobson, *Symbol of the New Profession: Emergence of the Large Law Firm, 1870–1915*, in *THE NEW HIGH PRIESTS, LAWYERS IN POST-CIVIL WAR AMERICA* 3 (Gerard W. Gawalt ed., 1984).

17. *See, e.g.*, WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 144–45, 148, 150 (1974) (describing Douglas's travels down this path, becoming an editor for the Columbia Law Review, graduating second in his law school class, and eventually joining the Cravath firm); *see also* JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 23–24 (1976) (defining the Cravath system of recruiting, developed by Paul Cravath, whereby "[n]ew recruits followed a carefully prescribed path: college (perhaps Phi Beta Kappa); Harvard, Yale, or Columbia law school; preferably a law review editorship"); MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 9–10 (1991) (describing the Cravath system); Hobson, *supra* note 16, at 19.

18. DOUGLAS, *supra* note 17, at 127, 133–34.

19. *Id.* at 135, 139–40 (describing Douglas's relationship with Justice Stone).

20. *Id.* at 135–50.

21. Wilkins, *supra* note 1, at 27.

wealthiest families in the city.<sup>22</sup> Berle's biographer said that in the 1920s

[i]t seemed that everyone [in liberal New York circles] knew everyone else worth knowing through elite reform organizations to which they all belonged—the Civic Club, the Foreign Policy Association . . . the National Child Labor Committee, the Women's Trade Union League, the National Consumers League, and the American Association of Labor Legislation.<sup>23</sup>

The key fact about this milieu was that certain wealthy families and business interests patronized liberal or progressive reform causes and needed bright young staffers to do the front-line work of organizing, drafting, and pushing for legislation.<sup>24</sup> The staffers could do good and meet clients at the same time.<sup>25</sup> Stories like Berle's were repeated many times.<sup>26</sup>

The connections often worked the other way too: business law experience was a ticket to public prominence. Consider the Wall Street lawyers who directed American foreign policy for most of the last century—lawyers such as James Coolidge Carter, Elihu Root, Henry Stimson, Dean Acheson, John J. McCloy, William J. Donovan, John Foster Dulles, and Cyrus Vance, among many others.<sup>27</sup> They had access to those public posts

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22. JORDAN A. SCHWARZ, *LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA* 38–39 (1987).

23. *Id.* at 40. It must be noted, however, that what ultimately freed Berle from the economic demands of law practice to engage full-time in writing, reform politics, and government service was his marriage to a wealthy woman, Beatrice Bishop. *Id.* at 48–49.

24. Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 267–68 (1990) [hereinafter Gordon, *Corporate Law*] (advancing that the “first generation of Progressive law reformers” not only acted as general counsel for the public interest groups in which they participated, but were also involved in lobbying and legislative drafting).

25. For a contrary view cautioning young lawyers against charitable involvements as a way to meet clients, see the delightfully cynical *Hints to Law Students* by J.K. Hayward of the New York Bar. J.K. Hayward, *Hints to Law Students*, 2 YALE L.J. 236 (1892). Hayward advised against trying to get connections through a Masonic lodge, church, or high society because these do not bring in business. *Id.* at 240–41. Wealthy people join such societies to be uplifted by the company of idealistic people but do not want such people handling their legal business; in litigation “[a client] wants all weapons used known to the law; and he wants a lawyer who will use them all, without scruple and he does not wish to have his sharp practice exposed in the presence of the brethren.” *Id.*

26. For example, Florence Kelley, who eventually became a celebrated public interest lawyer litigating (with Louis Brandeis and Felix Frankfurter) the legality of wages and hours legislation, got an early boost to her career by working at Chicago's famous settlement house, Jane Addams's Hull House, where she came into contact with the networks of Chicago's progressive political movements. KATHRYN KISH SKLAR, *FLORENCE KELLEY AND THE NATION'S WORK* 177, 205 (1995).

27. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 42 (1988) [hereinafter Gordon, *Independence of Lawyers*] (listing Root, Stimson, Acheson, McCloy,

largely because of experience and contacts gained in private practice. Especially in the earlier part of the century, lawyers were among the few Americans who traveled and did business with foreigners.<sup>28</sup> They represented foreign investors in American companies, American enterprises investing abroad, and the American banks that underwrote those investments and loans to foreign governments. They negotiated contracts and concessions and repayment of war debts with foreign governments,<sup>29</sup> helped build the systems of international law and commercial arbitration that protected their clients' investments,<sup>30</sup> and were both on close personal terms and accustomed to dealing with government officials, businessmen, and bankers from all over the world.<sup>31</sup>

When their party was out of power and the lawyer-statesmen returned to practice, they brought their enhanced "experience, visibility, and contacts," to use Professor Wilkins's apt terms, back to the law firms as magnets for attracting and retaining clients.<sup>32</sup> Their public experience and standing also probably improved their capacity to give independent counsel to business clients, for example, to warn them when corporate actions focused on short-term profit-seeking might worsen the company's position in the long run by provoking hostile public or regulatory responses.<sup>33</sup>

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Dulles, and Vance as lawyers in Wall Street's international business establishment that helped build "national security and foreign policy structures of the twentieth century").

28. See, e.g., VIRGINIA KAYS VEENSWIJK, *COUDERT BROTHERS: A LEGACY IN LAW: THE HISTORY OF AMERICA'S FIRST INTERNATIONAL LAW FIRM 1853-1993*, at 119-20, 122 (1994) (portraying some of the international transactions conducted by the Coudert law firm at the turn of the twentieth century); NANCY LISAGOR & FRANK LIPSIUS, *A LAW UNTO ITSELF: THE UNTOLD STORY OF THE LAW FIRM SULLIVAN & CROMWELL* 39-52, 61-68, 77-95, 119-59 (1988) (describing the international contacts and clientele of Sullivan & Cromwell).

29. VEENSWIJK, *supra* note 28, at 119-20, 122 59 (detailing examples of the international practice of the Coudert firm); LISAGOR & LIPSIUS, *supra* note 28, at 39-52, 61-68, 77-95, 119-59 (detailing examples of the international practice of the Sullivan & Cromwell firm).

30. Gordon, *Independence of Lawyers*, *supra* note 27, at 43 (stating that the lawyers who directed international business in the early twentieth century were able to do so in a manner that continued to protect their clients and conform to their ideologies).

31. *Id.* at 37 (asserting that Wall Street lawyers created contacts through their experiences in Europe and with foreign financial communities); see also VEENSWIJK, *supra* note 28, at 30 (describing briefly contacts created by the Coudert law firm with the French and Spanish governments and international bankers); LISAGOR & LIPSIUS, *supra* note 28, at 119-42 (detailing Sullivan & Cromwell's contacts with the German government and business clients in the Nazi era).

32. Wilkins, *supra* note 1, at 21-30 (employing Professor Wilkins's phrase for the benefits received by lawyers from public service participation).

33. *Id.* at 25-28 (observing that lawyers' involvement in public service can become an important resource for developing clients, particularly for lawyers with experience in

At its best, the system of careers built on movement between private and public lives could produce benefits across the board, creating both personal career benefits to the lawyers concerned and a supply of lawyers with broad experience, a sense of social responsibility, and a relatively cosmopolitan outlook on public and client service.<sup>34</sup> So in many ways it was an admirable system. It was also comparatively meritocratic—a system of careers open to talent—and became more so as law school standing gradually supplanted apprenticeships obtained through family connections as the main gateway to starting jobs in law firms.<sup>35</sup> In the most important commercial cities, such as New York and Chicago, where access to elites was relatively open, unknown young men from the provinces could reasonably aspire to the top ranks of professional status.<sup>36</sup>

But the system also was notoriously very exclusionary. As a practical matter, it excluded most aspirants of humbler than upper-middle or middle-class origins because they were unlikely to be able to afford seven years of higher education.<sup>37</sup> Indeed, one of the main motives behind the organized bar's campaign to raise

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governmental institutions and regulations who can leverage connections for potential private clients); *see also* AUERBACH, *supra* note 17, at 21–23 (explaining that the corporate law firm explosion necessitated a breed of lawyers with an acceptable level of social, religious, ethnic, and social capital to service the changing business environment); Donald W. Hoagland, *Community Service Makes Better Lawyers*, in *THE LAW FIRM AND THE PUBLIC GOOD* 116–18 (Robert A. Katzmann ed., 1995) (noting that a lawyer's demonstrated abilities in community service activities have been recognized in the greater business community).

34. *See* Robert A. Katzmann, *Themes in Context*, in *THE LAW FIRM AND THE PUBLIC GOOD* 7, 11 (Robert A. Katzmann ed., 1995) (asserting that law firm participation in community service results in increased morale, better skilled lawyers, and a better sense of how to provide legal services).

35. AUERBACH, *supra* note 18, at 27–28 (recognizing that corporate law firms accepted the standardized rankings of law student performance and supported a movement toward a professional meritocracy); *see also* RICHARD L. ABEL, *AMERICAN LAWYERS* 5, 11 (1989) (commenting that apprenticeships served as the primary preparatory tool for new lawyers until replaced by law schools in the early twentieth century).

36. AUERBACH, *supra* note 17, at 6 (describing the effects of the 1930s depression, including a dislocation that temporarily undermined the professional elite and produced opportunities for lawyers whose social origins had previously prevented them from joining the profession's upper echelons); *see also generally* ABEL, *supra* note 35, at 4–6 (noticing the unprecedented growth of the legal profession in the twentieth century while maintaining the profession's social and economic standing).

37. AUERBACH, *supra* note 17, at 25 (revealing that as demand for participation in the legal profession increased, the restrictive barriers to access became arduous). The restrictive measures excluded the most impoverished as “[t]he financial expense of undergraduate and legal education, in addition to the substantial loss of income during the seven years required to earn two degrees” concentrated access to the legal profession in the wealthy. *Id.* at 28–29; *see also* ABEL, *supra* note 35, at 85 (analyzing increased barriers to access, such as prelegal and legal education, as contributing to the exclusion of lower-class aspirants to the profession).

educational requirements for admission to the profession was to keep out immigrant lawyers,<sup>38</sup> and as the bar gradually closed down part-time legal education, the class background of lawyers narrowed.<sup>39</sup> “Horatio Alger” stories of poor boys like William Douglas rising to the top were actually quite unusual.<sup>40</sup> Above all, of course, the system excluded women and members of ethnic and racial minorities: the upper ranks of the profession were limited to white males, preferably Protestant and native-born.<sup>41</sup> Even when young Jewish men and, much more rarely, women and blacks made their way onto the first rungs of the meritocratic ladder—elite law schools, law review, and high class standing—almost none of them were hired at major law firms until the 1970s.<sup>42</sup> The stories are legendary: Justices Ruth Bader Ginsburg and Sandra Day O’Connor, the black lawyers Raymond Pace Alexander, John Francis Williams, and William T. Coleman Jr.—all stars of their law school classes—were among the many brilliant lawyers turned away from every law firm in the cities where they first applied.<sup>43</sup>

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38. AUERBACH, *supra* note 17, at 102–29.

39. ABEL, *supra* note 35, at 88.

40. Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93, 153 (1995) (recounting Justice Douglas’s childhood struggles before venturing to New York to attend Columbia Law School and ultimately becoming a U.S. Supreme Court Justice); see also Laura Krugman Ray, *Autobiography and Opinion: The Romantic Jurisprudence of Justice William O. Douglas*, 60 U. PITT. L. REV. 707, 719–20 (1999) (reviewing Justice Douglas’s own account of his travels east toward New York as a poor young man).

41. ABEL, *supra* note 35, at 109, 111 (surveying the effect of entry barriers designed to exclude women, racial minorities, and people of certain ethnoreligious backgrounds, often by devaluing potential employment opportunities). Although native-born Anglo-Saxon white males dominated the legal profession in the nineteenth century, ethnoreligious minorities nevertheless gained entry into the profession, but discrimination and restricted access to firms forced many to seek employment opportunities in government and small-firm or solo practice. *Id.* at 6; see also AUERBACH, *supra* note 17, at 25–29, 210–11 (noting that Anglo-Saxon Protestant firms disguised prejudicial hiring under the guise of academic achievement). Jewish and new-immigrant lawyers were also often reduced to practicing in small and solo firms. AUERBACH, *supra* note 17, at 50. Black lawyers too were concentrated in solo practice, a likely consequence of a history of racism and poverty. *Id.* at 210–11.

42. AUERBACH, *supra* note 17, at 21–22, 25, 29–30 (noting that as the restrictive barriers to the legal profession increased, women and ethnic and racial minorities were even more excluded from the professional elite, regardless of academic achievement). The opportunity to join a prestigious firm was determined primarily by social origin combined with race, gender, and ethnicity. *Id.* at 30; see also ABEL, *supra* note 35, at 85–108 (surveying the effect of entry barriers into the large corporate firms (ethnicity, class, gender, and race) on women and minorities).

43. See AUERBACH, *supra* note 17, at 29–30 (chronicling the subordination of academic success, including law review participation, of Jewish, women, and black law students to the predominant entry criteria of white, male, and Christian students at the prestigious law firms); see also, e.g., SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW* 199 (2003) (“I graduated near the top of my class . . . [and] interviewed with several law



Indeed, the exclusion of blacks and women from the upper bar was so pervasive before the 1970s that it hardly raised an eyebrow except among those who suffered from it.<sup>44</sup> The most glaringly visible exclusion was that of Jewish men because the number of affected lawyers was so large. A 1939 report on Jewish lawyers in New York practices found that they made up over half the total number of lawyers in the city, but few of them had jobs in corporate law firms either at the beginning or end of their careers.<sup>45</sup> As late as 1960, Jerome Carlin's study of social stratification in New York City's bar concluded that "a Jewish lawyer who achieved high academic standing (that is, was selected for staff of law review) in an Ivy League school has no better chance of being in a large firm than a Protestant lawyer who did not 'make law review' and who attended a non-Ivy League school."<sup>46</sup> The exceptions mostly held jobs in firms that served specifically Jewish clienteles, such as banking houses and department stores, and the occasional liberal firm founded by a mixture of Gentile and Jewish partners, such as Paul Weiss Rifkind Wharton & Garrison.<sup>47</sup>

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firms in California but received no job offers—other than . . . [a] job as a legal secretary."); Raymond Pace Alexander, *Blacks and the Law*, 43 PENN. B. ASSOC. Q. 61, 63 (1971) (describing Raymond Pace Alexander's emergence within the black bar elite after his graduation from Harvard Law School and development of his own civil rights practice in Philadelphia); Carol Pressman, *The House that Ruth Built: Justice Ruth Bader Ginsburg, Gender and Justice*, 14 N.Y.L. SCH. J. HUM. RTS. 311, 311–14 (1998) (observing that Justice Ginsburg received no employment offers from law firms following graduation from Columbia Law School despite a law review membership and graduating first in her class); Winkfield F. Twyman, *A Critique of the California Civil Rights Initiative*, 14 NAT'L BLACK L.J. 181, 185 (1997) (detailing the tribulations of William T. Coleman Jr., who after graduating first in his class at Harvard Law School, becoming the first African-American editor of the Harvard Law Review, and clerking for Supreme Court Justice Felix Frankfurter, was still excluded from every law firm in Philadelphia).

44. See ABEL, *supra* note 35, at 99 (demonstrating that black lawyers were largely excluded from the profession until the 1960s); AUERBACH, *supra* note 17, at 3–4 (observing that the product of over one hundred years of professional history created remarkable differences between lawyers and that such differences have largely been ignored by the professional elite as acknowledgement could potentially question the "fairness of the adversary process").

45. Melvin M. Fagen, *The Status of Jewish Lawyers in New York City*, 1 JEWISH SOC. STUD. 73, 100–04 (1939). I found out about this study in a fascinating and detailed paper on antisemitism in the New York Bar. See Lawrence E. Mitchell, *Gentleman's Agreement: The Antisemitic Origins of Restrictions on Stockholder Litigation* (Nov. 16, 2003) (paper presented at annual meeting, American Society for Legal History).

46. JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 31–32 (1966).

47. Fagen, *supra* note 45, at 98–104 (explaining that in a 1939 report, almost eighty percent of Jewish lawyers employed by other lawyers or law firms were employed by Jewish lawyers or law firms that were primarily Jewish). Interestingly, the same report found that fifty-five percent of the Jewish lawyers in New York City had a clientele that comprised mostly Jewish people or corporations. *Id.* at 98.

Blocked from the conventional pathway to success, big firm transactional practice on behalf of corporate clients, what did marginal lawyers do to advance in their profession? Their motto might have been, “if you can’t join ‘em, sue ‘em”: The usual choice of occupation was litigation representing the other side from the elite bar’s corporate clients.<sup>48</sup> This was often routine personal injury work—tort plaintiffs’ suits against railroads and streetcar companies or workers’ compensation claims—but could also be fairly complex litigation such as derivative suits or proxy fights against corporations.<sup>49</sup> Labor law was often a Jewish specialty as well, attracting lawyers from immigrant socialist families to the workers’ cause.<sup>50</sup> Jewish, black, and women lawyers also dominated what we now call public interest and cause lawyering—civil rights work such as that done for the NAACP Legal Defense Fund’s campaign against Jim Crow (e.g., Charles Hamilton Houston, Thurgood Marshall, Sadie Alexander)<sup>51</sup> and for equal rights for women (e.g., Alice Paul, Pauli Murray, Ruth Bader Ginsburg);<sup>52</sup>

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48. ABEL, *supra* note 35, at 3, 105 (stating that seventy-three percent of blacks in private practice were solo practitioners serving clienteles composed primarily of individuals).

49. *Id.* at 181 (observing that most solo practitioners are engaged in limited types of work, including real estate, trusts and wills, personal injury, and corporate and commercial law for small businesses).

50. AUERBACH, *supra* note 17, at 218 (describing the large-scale entry of minority-group lawyers, particularly Jewish lawyers, into the field of labor law in the 1930s).

51. Charles Hamilton Houston was Vice Dean of the Howard Law School and the chief lawyer for the NAACP during its long campaign against Southern segregation. GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 72, 131 (1983). Thurgood Marshall was Hamilton’s student and successor as head NAACP litigator and eventually was a Justice of the U.S. Supreme Court. *See* MARK V. TUSHNET, *MAKING CIVIL RIGHTS: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961*, at 14–18, 26–27, 314 (1994). Sadie Alexander was a leading civil rights lawyer in Philadelphia. Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T. M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925–1960*, 87 CORNELL L. REV. 1405, 1406 (2002) [hereinafter Mack, *A Social History*].

52. Alice Paul was a leader in the movement to pass the Nineteenth Amendment and the unsuccessful first Equal Rights Amendment for women. *See generally* CHRISTINE A. LUNARDINI, *FROM EQUAL SUFFRAGE TO EQUAL RIGHTS: ALICE PAUL AND THE NATIONAL WOMAN’S PARTY, 1910–1928* (1986). Pauli Murray was a feminist and civil rights advocate who was one of the principal forces in bringing about legal enforcement of equal employment rights for women. *See* PAULI MURRAY, *PAULI MURRAY: THE AUTOBIOGRAPHY OF A BLACK ACTIVIST, FEMINIST, LAWYER, PRIEST, AND POET* 362–68 (1989) (noting that Murray spent several years on the board of directors of the ACLU and was a founding member of the National Organization of Women, among other activities). Before being appointed to the Supreme Court, Ruth Bader Ginsburg was “the nation’s foremost legal advocate of equal rights for women[, having] argued six seminal gender discrimination cases before the Supreme Court in the early 1970s.” Christopher E. Smith & Kimberly A. Beuger, *Clouds in the Crystal Ball: Presidential Expectations and the Unpredictable Behavior of Supreme Court Appointees*, 27 AKRON L. REV. 115, 135–136 (1993).

work promoting and defending labor legislation against hostile courts, such as the National Consumers' League campaigns for the eight-hour day (e.g., Florence Kelley, Felix Frankfurter, Louis Brandeis);<sup>53</sup> and civil liberties work promoting free speech and free religious exercise and defending radicals, dissenters, and persecuted faiths from repression (e.g., Carol Weiss King, Morris Ernst).<sup>54</sup>

Cause lawyering was hardly the pathway to economic success; it paid very little, and able lawyers made severe financial sacrifices to undertake it.<sup>55</sup> But it was a path upward in other ways, to respectability and status. The courtroom, especially in a high-profile case, was one of the few places where a black, woman, or Jewish lawyer could appear on a plane of equality with white Protestant males and know courtroom decorum would ensure they would be treated with respect.<sup>56</sup> The black lawyer Raymond Alexander of Philadelphia, although a Harvard Law School graduate, could not get a job with any law firm or gain admission to any bar association except the association for black lawyers.<sup>57</sup> He could not rent office space downtown or, when in a Southern city like Washington, D.C., eat at the restaurant across from the courthouse or hang out at the bar with the other trial lawyers.<sup>58</sup> But in court he was called Mr. Alexander and was treated by the judge and court personnel as

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53. On the role of Kelley, Frankfurter, and Brandeis and the legal campaigns to protect Progressive minimum-wage and maximum-hours legislation from hostile courts, see JOSEPHINE GOLDMARK, *IMPATIENT CRUSADER: FLORENCE KELLEY'S LIFE STORY* (1953), MICHAEL E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 72-75* (1982), and PHILLIPA STRUM, *LOUIS BRANDEIS: JUSTICE FOR THE PEOPLE* 114-31 (1984).

54. Carol Weiss King was a notable human rights lawyer. ANN FAGER GINER, *CAROL WEISS KING: HUMAN RIGHTS LAWYER, 1895-1952*, at ix (1993) (chronicling Weiss's career fighting for the underdog and defending the "truly dispossessed"). Morris Ernst is recognized for fighting against censorship and for sexual rights. SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 66, 83-86 (2d ed., Southern Illinois Press 1999) (noting that Ernst "pushed the ACLU into the fight against censorship of literary works" and was "not embarrassed by sex and believed that personal freedom extended into the realm of private sexual relations").

55. ABEL, *supra* note 35, at 165 (commenting that young lawyers are most vulnerable to the greatest economic losses); Fagen, *supra* note 45, at 73-74 ("[T]he practise of law had become . . . a dignified road to starvation." (internal quotation marks omitted)).

56. See, e.g., Kenneth W. Mack, *From Race Uplift to Racial Liberalism: The Alexander Firm and the Invention of the African American Civil Rights Lawyer, 1923-60*, at 11 (March 12, 2004) (unpublished manuscript, on file with the Houston Law Review) ("Northern black lawyers reported that they encountered little prejudice in the courtroom itself, and even Southern ones reported a surprising degree of comity.").

57. See *id.* at 10-11, 14.

58. See *id.* at 14, 24-25.

equal to the white lawyer on the other side; he could cross-examine white witnesses, display his talents, and win cases.<sup>59</sup>

The breakthrough moments for lawyers at the margins of their profession have come when their causes were institutionalized in government programs—through legislation creating regulatory agencies or rights to sue (preferably with provisions for lawyers' fees)—and turned into regular sources of lawyers' businesses and jobs.<sup>60</sup> For marginals, the New Deal and the judicial and legislative encoding of new civil rights during the Rights Revolution of the 1960s for labor, minorities, women, the disabled, gays and lesbians, and others have been epochal events.<sup>61</sup>

The most important institutionalization of the marginal's cause was the New Deal, which turned out to be a vast employment program for lawyers—not only government lawyers, but lawyers for client groups and constituencies needing to deal with the new government agencies.<sup>62</sup> The New Deal's hiring policies mostly expanded, though in some ways limited, social mobility for marginals.<sup>63</sup> A huge number of new positions opened up.<sup>64</sup> New Deal agencies managed to hire most lawyers outside civil service requirements (which gave strong preferences for veterans and for geographical distribution) and bypass congressional patronage for noncivil service appointments.<sup>65</sup> For the top positions, the New Dealers used much the same

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59. See *id.* at 11, 23–24.

60. Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075, 2083 (1993) (discussing the New Deal, the jobs it created for lawmakers, and the increase in caselaw interpreting New Deal statutes); Gordon, *Corporate Law*, *supra* note 24, at 268–69 (recounting that key players in the New Deal such as Felix Frankfurter staffed many new jobs created by the New Deal and drafted some of the legislation creating those jobs).

61. Gordon, *Corporate Law*, *supra* note 24, at 268–69 (explaining how young lawyers interested in public interest work would work on New Deal legislation, in jobs created by that legislation, in labor law practices, and for the NAACP); Gordon, *Independence of Lawyers*, *supra* note 27, at 71 ("The great political movements in which lawyers have played a big part in [the twentieth] century, from the New Deal to Civil Rights and Women's movements and beyond, have in fact drawn disproportionately from groups marginal to the dominant culture: Jews, blacks, and women.").

62. Peter Irons has called the federal government "the nation's largest law firm" during the New Deal era. PETER H. IRONS, *THE NEW DEAL LAWYERS* 26–27 (1982).

63. AUERBACH, *supra* note 17, at 5 (discussing the existence of opportunities for minorities to surmount obstacles in the legal field and substantiating the traditional assumption that legal careers can be "avenues of social mobility").

64. *Id.* at 6, 173 (advancing the notion that the New Deal attracted lawyers because of the personal and professional possibilities it afforded).

65. *Id.* at 225 (observing that only one quarter of government lawyers were civil service appointees, which represented a break from the patronage tradition and resulted in the development of merit system for attorney recruitment).

meritocratic criteria as big firms, except that they discriminated much less against Jews, Catholics, women, blacks (occasionally), and lawyers with overtly left-wing political views.<sup>66</sup> The best record for a job applicant was a high grade average from an elite Northeastern law school and the recommendation of a law professor, preferably Felix Frankfurter.<sup>67</sup> This was a great system for marginals who had somehow made it to Harvard, Columbia, or Yale, but who would never be hired by a Wall Street firm. It was not so good for lawyers without elite credentials—protégés of congressmen, most graduates of Washington, D.C. area law schools, graduates with only a year or two of college and law degrees from unaccredited law schools, and women law graduates who had often been admitted to civil service in nonlegal positions such as stenographers but were eligible to rise through the ranks.<sup>68</sup>

For many lawyers, however, the main reason for joining the government was not employment opportunities—it was the challenge of the cause.<sup>69</sup> More than half of the leading lawyers of the New Deal came out of corporate practice, taking a big pay cut and often risking their relationships with anti-New Deal business clients.<sup>70</sup> Some of them were law professors who had already left, or shunned, corporate practice.<sup>71</sup> The New Deal offered a chance to do something important, glamorous, and in tune with their political convictions.<sup>72</sup> Many of these lawyers thought they were severing their ties with the world of private

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66. *Id.* at 173, 185 (demonstrating that Jewish lawyers who possessed the necessary credentials for professional elite status found respect and employment at New Deal agencies).

67. Justice Frankfurter “most directly put his stamp on the New Deal lawyers . . . [, and] his former students far outnumber[ed] those from other schools and occup[ie]d the most influential New Deal legal positions . . . .” IRONS, *supra* note 62, at 8.

68. For a fascinating account and analysis of access routes to New Deal legal positions, see Daniel Ernst, *The Recruitment of New Deal Lawyers: State, Party and Profession* (2003) (unpublished paper).

69. AUERBACH, *supra* note 17, at 189–90 (asserting that such lawyers were ideologically motivated by a reformist ethic that transcended self-interest).

70. See Jerrold S. Auerbach & Eugene Bardach, “*Born to an Era of Insecurity*”: *The Career Patterns of Law Review Editors, 1918–1941*, 17 AM. J. LEG. HIST. 3, 17, 20 (1973) (asserting that two-thirds came from private practice in 1933 and fifty-seven percent in 1934–1935).

71. AUERBACH, *supra* note 17, at 174 (offering testimonial evidence establishing that law professors found novel satisfactions in New Deal agencies that were not available in practice or teaching).

72. Book Note, *The Relevance of Moral Agendas*, 109 HARV. L. REV. 846, 849–50 [hereinafter *Moral Agendas*] (reviewing RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* (1995)) (recognizing that the New Deal sparked idealism rarely witnessed in the history of the American Bar Association); see also AUERBACH, *supra* note 17, at 173, 183–86 (observing that New Deal lawyers found their work exciting and of great historical impact).

business lawyering by crossing over to the government side.<sup>73</sup> But of course, as the federal government's functions and agencies expanded, the expansion created large new domains of practice for lawyers—tax, antitrust, regulation of securities, public utilities, power, and labor relations, among others.<sup>74</sup> The New Deal lawyers found they had acquired capital—Professor Wilkins's “experience, visibility, and contacts”—that they could convert to private practice.<sup>75</sup> After the war, many of the principal New Deal lawyers, like Tommy Corcoran and James Rowe or Thurman Arnold and Abe Fortas, became founders of Washington, D.C. firms and represented corporate clients before agencies such as the SEC that they had written the legislation to create and had originally staffed.<sup>76</sup>

Others, like the Jewish labor lawyers, stayed with the cause and went from the National Labor Relations Board into jobs representing labor in unions or labor-side law firms.<sup>77</sup> But even these relatively self-denying cause lawyers were propelled into professional prominence as their cause of organized labor flourished in the 1950s and 1960s.<sup>78</sup> During this period, union general counsel had the status of foreign ministers negotiating general policies affecting wage rates and working conditions in vast industries; cause lawyers were routinely invited to join

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73. AUERBACH, *supra* note 17, at 174 (claiming that lawyers who chose to leave their practices to work for the government did so without looking back).

74. The New Deal Legislation affected virtually every economic activity of the nation. *See generally* AUERBACH, *supra* note 17, at 221, 225 (asserting that the profusion of New Deal agencies in areas like securities regulation and labor increased the volume and complexity of work for lawyers); FREDERICK E. HOSEN, *THE GREAT DEPRESSION AND THE NEW DEAL: LEGISLATIVE ACTS IN THEIR ENTIRETY (1932–1933) AND STATISTICAL ECONOMIC DATA (1926–1946)*, at viii–ix (1992).

75. Wilkins, *supra* note 1, at 24.

76. IRONS, *supra* note 62, at 298–99.

In 1981, at least half of the partners in most of the Washington “insider” firms had worked for two years or more in federal agencies. In Arnold and Porter, thirteen of the fifty-seven partners came from the Justice Department, most in the Antitrust Division, and twenty of the remaining partners had worked in other agencies. Half of the fourteen partners in Tommy Corcoran's firm had worked in the SEC . . . Federal law practice has become a form of taxpayer-subsidized graduate education, with the benefits reaped by corporate clients.

*Id.* at 299.

77. AUERBACH, *supra* note 17, at 218, 222–24 (observing that firms and unions realized the expertise former NLRB lawyers could provide to their clients).

78. *See, e.g.*, GILBERT J. GALL, *PURSuing JUSTICE: LEE PRESSMAN, THE NEW DEAL, AND THE CIO* 305 (1999). Organized labor represented almost one-third of all workers during this period. *See* NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 100 (2002). Labor scholars were also “at the forefront of the legal academy.” Cynthia Estlund, *Reflections on the Declining Prestige of American Labor Law Scholarship*, 23 COMP. LAB. L. & POL'Y 789, 789 (2002).

boards and commissions setting national government policies,<sup>79</sup> and in liberal administrations, these lawyers were appointed to Cabinet posts and even (in the case of labor lawyer Arthur J. Goldberg) to the Supreme Court.<sup>80</sup> The princes of the civil rights bar—such as Thurgood Marshall, who had spent decades crisscrossing the South with great patience and in great obscurity, and who for minimal pay had defended blacks accused of crime and brought civil rights test cases<sup>81</sup>—by the 1960s had finally achieved fame, appointment to boards of corporations, universities, hospitals, and federal judgeships.<sup>82</sup>

This brief comparison of some of the experiences of marginal lawyers in the past to David Professor Wilkins's accounts of the interaction between public service and private practice in the careers of present-day black lawyers suggests the following concluding reflections: (1) Does public service help marginal lawyers get ahead, or does it hinder them? and (2) Does trying to "do well by doing good" have beneficial or harmful social effects? Let me make a few points under both of these headings.

## II. DOES PUBLIC SERVICE HELP OR HINDER?

On the whole, I think the historical experience of past marginal groups confirms most of Professor Wilkins's somewhat ambiguous observations about the utility of public service (government work, civic involvement, pro bono practice) as a mobility strategy.

Sometimes public service jobs add value to private practice, sometimes they do not, and sometimes they detract. Acquiring contacts in government or business networks is obviously always of ephemeral value; the results are beneficial only while the contacts are still in place. Also, public service has to be service that law firms value: the wrong kind of service can be a poison pill. Former prosecutors get access to lucrative white-collar

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79. See, e.g., GALL, *supra* note 78, at 305 (describing how Arthur J. Goldberg moved from general counsel of the CIO, USWA, and the merged AFL-CIO to Secretary of Labor, Associate Justice of the U.S. Supreme Court, and U.S. Ambassador to the United Nations).

80. See AUERBACH, *supra* note 17, at 221 (noting that Justice Goldberg was the first labor lawyer to be appointed to the Supreme Court). Justice Goldberg was counsel to the Nation's trade unions before becoming the Secretary of Labor and ultimately sitting on the United States Supreme Court. See DAVID L. STEBENNE, ARTHUR J. GOLDBERG: NEW DEAL LIBERAL 308–10 (1996).

81. AUERBACH, *supra* note 17, at 215 (discussing the rise of the black civil rights lawyers).

82. See JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 519–22 (1994) (describing careers and honors of former NAACP Legal Defense Fund lawyers).

defense work,<sup>83</sup> and former SEC staffers become corporate securities lawyers.<sup>84</sup> Service on the staff of the National Labor Relations Board, however (at least in a Democratic administration), might give a lawyer access to labor-side law firms and to jobs in the general counsel's offices of unions;<sup>85</sup> but it is almost unheard of for lawyers in those jobs to cross the tracks to represent management.<sup>86</sup> This limitation presumably exists because labor-side work proclaims a kind of ideological commitment that corporate law firms and their clients think is inconsistent with representing their interests.<sup>87</sup> In some fields like tort litigation, representing defendants and representing plaintiffs have become such distinct specialties that lawyers rarely change sides.<sup>88</sup> One would like to know more about other legal specialties, such as employment discrimination and environmental law: Do lawyers who have worked for the EPA or the Sierra Club cross the tracks? Would law firms welcome them if they tried?

As Professor Wilkins notices in passing, but perhaps could do more to emphasize, the leverage value of public sector work for private practice depends enormously on a variable background factor: the importance to corporate clients of the state, that is, the power of governments to affect their fortunes through favors (grants, subsidies, concessions, contracts, leases, tax exemptions, and loopholes) and adverse action (regulation, takings, taxation, revocation of licenses or privileges).<sup>89</sup> It is interesting to speculate whether a lawyer's insider experience is more valuable to clients dealing with a cooperative (business-friendly) or adversarial state administration. On the one hand,

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83. KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 22 (1985) (documenting the movement of former U.S. Attorneys into white-collar criminal defense).

84. SUSAN P. SHAPIRO, *WAYWARD CAPITALISTS: TARGET OF THE SECURITIES AND EXCHANGE COMMISSION* 141-42 (1984); see also Mark A. Sargent, *A Future for Blue Sky Law*, 62 U. CIN. L. REV. 471, 496 & n.94 (1993).

85. See generally JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD* (1974).

86. Gordon, *Independence of Lawyers*, *supra* note 27, at 55 (discussing how various practices are segregated into different bars).

87. *Id.* ("The plaintiff's bar sees itself as the populist champions of the little person against the corporate system, the defendant's bar as the preservers of corporate stability and prosperity.").

88. This is a big change from the nineteenth century. Until the 1880s, lawyers who represented railroads in tort cases also represented tort plaintiffs suing railroads in other cases. See WILLIAM THOMAS, *LAWYERING FOR THE RAILROAD* 38-60 (1999). The railroads began, however, to insist on exclusive loyalty to their interests, leaving it to a specialized (and often immigrant, ethnically distinct) plaintiffs' bar to represent the injured. *Id.*

89. See Wilkins, *supra* note 1, at 27-28.



clients dealing with a business-friendly state are likely to value lawyers who can serve as conduits to the friendly regime, that is, lawyers of the same party or ideology as the regime's. On the other hand, these clients need less legal help to begin with because they can count on their friends in power (often their own former lawyers) without having to lobby or fight them. Perhaps they will most need legal help in negotiating or litigating with adverse regimes and, for that purpose, may most highly value lawyers who have experience or credibility with those regimes.

Professor Wilkins also notes that the heaviest demands on the time and talent of lawyers who belong to marginal groups are likely to come from those groups' causes.<sup>90</sup> Black lawyers are called upon to do work for black organizations, nonprofit and charitable institutions, economic enterprises, and civil rights causes.<sup>91</sup> This work is time-consuming but rarely leads to economic rewards.<sup>92</sup> Black professionals are still deriving their largest share of business from black clienteles.<sup>93</sup> This is a tribute to group solidarity; I doubt if there is any other ethnic group except Jews whose successful members maintain so many ties to less fortunate members of the group. But it is also a reminder of how racially segregated American society remains fifty years after *Brown v. Board of Education*.<sup>94</sup> Precisely because the groups are marginal, involvement with their causes rarely yields much private career enhancement.<sup>95</sup>

To generalize the last point further, practice niches or career paths tied to ascriptive identities such as race, sex, or ethnicity can be especially perilous. A lawyer hired or promoted because of his ability to broker or mediate relations with others who look like him—for example, as a black lawyer to appeal to black juries or to deal with a black city administration or black-owned

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90. See *id.* at 47.

91. *Id.* (mentioning the tendency of "churches, hospitals, educational institutions, civil rights organizations, and community economic development groups" to seek support from black lawyers).

92. See *id.* 84–85 (stating that pro bono work can be a "mixed and risky undertaking" and that lawyers face "increasing pressure to justify their public service in financial bottom line terms").

93. See Richard G. Hatcher, *Towards a New Form of Local Government: The Urban Common Market*, 7 DEPAUL BUS. L.J. 253, 296 (1995) ("As a general proposition, black lawyers service only black clients . . .").

94. 347 U.S. 483 (1954).

95. See, e.g., ROBERT GRANFIELD, MAKING ELITE LAWYERS 206–07 (1992) ("High status within the legal profession is typically associated with complex legal, technical issues, not ones that involve human, emotional concerns. Status attainment within the legal profession, therefore, contributes to a general withdrawal of lawyers from service to the greater public.").

business—may be trapped in that role and denied other chances to prove his merit.

Another upward-mobility ladder that marginal lawyers have historically climbed to success is marriage.<sup>96</sup> Lawyers from poor or immigrant families could marry up the economic ladder and across ethnic lines and thus acquire new status and business contacts.<sup>97</sup> Professor Wilkins's study does not mention the marriage ladder, I expect, because few black lawyers had opportunities to marry up; whites held most of the wealth and business connections, and until recently few blacks could or did marry whites. Women lawyers of any ethnicity, however, could usually improve their career prospects by marrying and forming partnerships with male lawyers.<sup>98</sup>

One of Professor Wilkins's most striking conclusions from his case studies is that private benefit from public involvements, when it comes about, is often a serendipitous and unexpected result.<sup>99</sup> By and large his lawyers, like the lawyers who initially joined the New Deal, labor, civil liberties, and civil rights movements, do not choose public involvements primarily for instrumental or opportunistic reasons.<sup>100</sup> If a black lawyer simply wanted to rise very quickly in his profession, for example, he would probably do best to join the Federalist Society and attach himself to conservative political causes, with their many connections to law firm partners, high posts in conservative administrations, and prospects of a federal judgeships at an early age; but my observations over the years of African-American law students at the schools where I have taught leads me to think that very few choose this route, despite its obvious temptations.<sup>101</sup> On the other hand, the lawyers in Professor Wilkins's study who do choose public or nonprofit service primarily in the hope of

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96. See, e.g., GAWALT, *supra* note 6, at 174–76 (discussing that lawyers marrying the daughters of other lawyers would “solidify their social position relative to other occupational groups”).

97. *Id.* (discussing the “increasingly self-perpetuating nature of the legal profession”).

98. Virginia Drachman, *Women Lawyers and the Quest for Personal Identity in Late Nineteenth-Century America*, 88 MICH. L. REV. 2414, 2434 (1990) (“[W]omen lawyers who were married to lawyers usually found that their husbands not only shielded them from public disapproval but provided them with a secure and welcoming place to work.”); see also Mack, *A Social History*, *supra* note 51, at 1470–71.

99. See Wilkins, *supra* note 1, at 47–48 (explaining that one lawyer unexpectedly obtained many contacts through his public work).

100. See, e.g., *id.* at 42–45.

101. I hasten to say that I do not think opportunism, as opposed to genuine conviction, is the only reason an African-American lawyer would attach himself or herself to conservative causes, only that, if opportunism were a strong motive, even if only one motive among many, one would expect to see this happening more often.

private career benefits seem to make bad bets as often as good ones.<sup>102</sup>

### III. DOES IT MATTER WHETHER LAWYERS CAN DO WELL BY DOING GOOD?

Obviously it matters to the lawyers involved if their careers are promoted or derailed by public, civic, or pro bono service. But does it matter to society? A profession structured so that lawyers can move easily from private practice to public involvements and derive career advantages from doing so would seem to yield some significant public benefits.

The most obvious one is that such a system helps to channel a pool of talent into civic activity and public office. This has been especially important in the United States, which has never had a tradition of highly paid independent civil servants, but has counted on volunteers from the private sector to occupy elective office and political appointments to government posts, as well as to staff study and investigative commissions and reform movements.<sup>103</sup> The system has arguably produced a more broad-based and less parochial corps of public servants than one recruited (as in Europe or Japan) from insular cadres of mandarins.<sup>104</sup>

Public service, in turn, often has virtuous feedback effects on private practice. Lawyers with significant public service and civic engagements have a wider view of the world than those whose whole career is spent clocking hours in the building. They often have international as well as political experience.<sup>105</sup> They are more likely to have an appreciation for the positive value of regulation and for the importance of maintaining the public infrastructure of capitalism. Because such lawyers have experience representing people on the other side of the table and habitually dealing with groups with interests differing from business interests, they often have some insight into how adversaries, governments, or diverse publics are likely to

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102. See, e.g., Wilkins, *supra* note 1, at 36–38 (noting the difficulties a black lawyer experienced when he lost his government contacts).

103. See AUERBACH, *supra* note 17, at 27 (recounting a Harvard professor's advice to Frankfurter while he was a student that most young men have a right to think of their material needs and that a government job is unlikely to satisfy such needs).

104. Compare JOHN A. ARMSTRONG, *THE EUROPEAN ADMINISTRATIVE ELITE* (1973), with BYUNG CHUL KOH, *JAPAN'S ADMINISTRATIVE ELITE* (1989).

105. See Wilkins, *supra* note 1, at 27 ("Lawyers who work in high-level positions inside regulatory agencies establish relationships with politicians and career bureaucrats that are of enormous potential value to private clients seeking to procure government business or avoid government regulation.").

perceive and react to what their business clients do.<sup>106</sup> The added authority and prestige they derive from public experience may also give them a certain detachment from and elevated standing in dealing with business clients, which is conducive to giving objective advice that clients may need, even if they do not always want to hear it.<sup>107</sup> Their public-regarding reputations may also enhance their credibility as reputational intermediaries for clients needing to be certified as trustworthy in their dealings with investors, regulators, or the public.<sup>108</sup>

Of course, the easy symbiosis of public and private careers is not always an unmixed blessing for the public interest. If the upside of the revolving door is the infusion of private practice with the consideration of the public interest and the supply of high-grade private talent to the service of the state, the evident downside is the danger of systematic corruption of the public sphere by people who seek to manipulate public power and milk taxpayers' money on behalf of private interests and who see public service as simply an extension of their private representations. It is hard to be unequivocally enthusiastic, for example, when one observes that high-level appointments in the Departments of Energy and of the Interior are held by lawyers and lobbyists for prominent grazing, mining, and energy interests,<sup>109</sup> or that officials whose public functions involve awarding defense contracts or advising on policies subsidizing or deregulating industries are at the same time negotiating for jobs with the interested private parties.<sup>110</sup>

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106. Hoagland, *supra* note 33, at 104–24 (asserting that communication skills developed during community legal service enhance a lawyer's ability to serve the needs of all client types).

107. *See id.* at 110–12 (“I’m sure pro bono work has improved my ability to deal with the emotional content of commercial disputes and negotiations.” (quoting a Rocky Mountain-area lawyer)).

108. *See id.* at 116 (observing that public service work enables lawyers to have a broader knowledge of the needs and expectations of the entire public, which in turn facilitates social changes, thereby elevating the reputation of lawyers in the community).

109. *See, e.g.* MotherJones.com, Behind the Curtain, at [http://www.motherjones.com/news/feature/2003/09/ma\\_534\\_01.html](http://www.motherjones.com/news/feature/2003/09/ma_534_01.html) (Sep./Oct. 2003) (documenting occupation of high-level posts in the George W. Bush Administration at Interior and Agriculture Departments and Environmental Protection Agency of former industry lobbyists).

110. *See, e.g.*, Robert Pear, *Health Industry Bidding to Hire Medicare Chief*, N.Y. TIMES, Dec. 3, 2003, at A1 (describing how Medicare Administrator Thomas A. Scully was negotiating for a private sector job with several firms in the healthcare industry while supervising passage of recent Medicare legislation through Congress); Walter Pincus & Christopher Lee, *Perle Resigns as Pentagon Panel Chairman; Facing Conflict-of-Interest Questions, Advisor Says He Doesn't Want to Be a Distraction*, WASH. POST, Mar. 28, 2003, at A06 (stating that conflict-of-interest questions go beyond Richard Pearle, key advisor to the Department of Defense, and finding that ten of the thirty members of the advisory board are executives or lobbyists with private companies that have lucrative contracts

However, on the whole, I think America's long experience with temporary public service by lawyers on leave from practice has shown that business lawyers are entirely capable of distinguishing public from private roles and serving the public roles responsibly and zealously, even if that means crossing their former and possibly future clienteles. They do not always behave so honorably, of course, but they often do, and when they do, both public and private sectors are enriched.

If that is right, Professor Wilkins is therefore clearly correct to suggest—and to be disturbed by the implications—that recent trends in law firm practice generally work against the productive synergy of private careers and public involvements.<sup>111</sup> Increasing pressure on all firm lawyers, partners as well as associates, to bill hours to paying clients monopolizes their time and penalizes their outside involvements by damaging their prospects for promotion and compensation.<sup>112</sup> Fear of losing business leads firms to take a broad view of “positional conflicts” and to forbid members of the firm from taking on work on behalf of pro bono or public interest clients whose causes might offend or annoy business clients of the firm.<sup>113</sup> The norm that lawyers should serve unpopular, underrepresented, and poor clienteles has always been more rhetoric than reality, but as much reality as exists is fatally undermined by policies that cement all lawyers' time and loyalties to favored paying clients.

Law firms used to have “minders and grinders” as well as “finders”; in addition to lawyers who served the firm by making rain and bringing in clients, firms employed—and valued—others whose contribution was serving these incoming clients.<sup>114</sup> The clients were clients of the firm, not of particular partners, and firm members' efforts served them in different ways.<sup>115</sup> For example, the brilliant but antisocial tax lawyer could contribute his share by doing superb legal work out of sight in the back office. As is well known, most firms have now reorganized compensation, promotion, and power in the firm to favor business-getters; thus, as with billable hours, any outside efforts

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with the Department of Defense and other government agencies).

111. Wilkins, *supra* note 1, at 2–9.

112. *Id.* at 5–6 (explaining that associates and partners have an enormous pressure to spend virtually all their waking time billing paying clients).

113. *Id.* at 6 (observing that even firms with an active pro bono practice prefer representing death penalty appeals and welfare hearings instead of environmental groups or consumer class actions).

114. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 52–53 (1991) (noting that lawyers who are responsible for bringing in business have a new ascendancy over their colleagues).

115. *Id.* at 5.

that do not immediately promise to yield new clients are discouraged.<sup>116</sup> Much legal work is now so specialized that lawyers have increasingly little knowledge or capacity to contribute much to activities outside their practice specialty, even if they wanted to and had the time to do so.<sup>117</sup>

These trends, as Professor Wilkins concludes, are discouraging because there are important stakes in the survival of opportunities for doing well by doing good and for advancing private careers through public, civic, and pro bono involvements.<sup>118</sup> Such involvements have often provided upward-mobility ladders for marginal lawyers—pathways to distinguished careers for people who enter the profession without recognized credentials, contacts, or other advantages.<sup>119</sup> The positive links between doing good and doing well are not just important to increasing job opportunities and career satisfaction. They are vital to lawyers' adequate performance of the professional role of counseling private clients and the public role of serving the republic.

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116. *Id.* at 52 (recognizing that “eat what you kill” compensation formulas emphasize business getting over all other activities).

117. ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 172, 186 (1988).

118. Wilkins, *supra* note 1, at 82 (asserting that “[t]he historic connection between the elite bar and public service seems likely to continue to be a cornerstone of [efforts to attract talented young people to both arenas]”).

119. *Id.* at 9 (explaining that black lawyers use public service as a means of gaining private sector opportunities by acquiring experience, visibility, and contacts).