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# "All Lawyers are Somewhat Suspect": Adolf A. Berle and the Modern Legal Profession

Harwell Wells\*

## ABSTRACT

Adolf A. Berle was perhaps the preeminent scholar of the modern corporation. He was also an occasional scholar of the modern legal profession. This Article surveys his writings on the legal profession from the 1930s to the 1960s, from the sharp criticisms he leveled at lawyers, particularly corporate lawyers, during the Great Depression, to his sunnier account of the lawyer's role in the postwar era. I argue that Berle's views were shaped both by the reformist tradition he inherited from Louis Brandeis and his writings on the corporation, which left him convinced that the fate of the legal profession would be determined by that of the modern corporation.

## INTRODUCTION

What did the growth of the modern corporation mean for the legal profession? In 1932, Adolf Berle, perhaps the preeminent student of the modern corporation, tried to answer this question. He already was a busy man. Immersed in a thriving corporate law practice, he was also teaching law at Columbia University, was preparing for the publication of a landmark work on the modern corporation, and within a month would become a top advisor to the next President of the United States.<sup>1</sup> Early that year, though, he took on one more task: drafting an entry for a new *Encyclopedia of the Social Sciences* on the "Modern Legal Profession."<sup>2</sup>

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\* I. Herman Stern Professor of Law, Temple University Beasley School of Law. My thanks to Charles O'Kelley, participants in the Berle X conference, Robert Gordon, and Allan Megill, who first brought the *Encyclopedia of the Social Sciences* to my attention long ago. The title quotation is from Adolf A. Berle Jr., *Book Review*, 76 HARV. L. REV. 430, 430 (1962) (reviewing BERYL HAROLD LEVY, *CORPORATION LAWYER: SAINT OR SINNER?* (1961)).

1. See JORDAN SCHWARZ, *LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA* 71-72 (1987).

2. Adolf A. Berle, *The Modern Legal Profession*, in 5 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 340 (Edwin R. A. Seligman ed., 1933) [hereinafter Berle, *Modern Legal Profession*]; see also Letter

His eventual contribution was short—only six two-column pages—and was then and since eclipsed by his great work: *The Modern Corporation and Private Property*.<sup>3</sup> But this short essay is worth a closer look. For one, it was one of the first academic studies of the modern legal profession and, in particular, the modern “law factory” in which corporate law work was done.<sup>4</sup> Beyond this, though, it presents an account of how the legal profession was changed by the modern corporation and asks what role is left for the lawyer in the modern corporate world.

### I. THE 1920S AND THE CRITIQUE OF CORPORATE LAW

While Berle is now remembered as a scholar and public figure, for much of his life he was a corporate lawyer, and a *practicing* one. He was keen to make this clear. Early on he briefly toyed with a purely academic life; after a brilliant career at Harvard College, which included earning a master’s degree in history, he thought about becoming a history professor but chose instead to enter the Harvard Law School, lured by the public stage offered by a legal career and inspired by the example of family hero Louis D. Brandeis.<sup>5</sup> After graduation, he joined Brandeis’s firm, Brandeis, Nutter & Dunbar (Berle’s father had made a call on his behalf) where he worked on a variety of matters including “a good many smaller matters of corporate law.”<sup>6</sup> He left within a year when World War I intervened and was soon sent by the government to the U.S.-occupied Dominican Republic where he was charged with untangling “a web of landholding laws that inhibited” production of sugar needed for the war effort.<sup>7</sup> After the war’s conclusion and a detour to serve in the U.S. delegation at the Paris Peace Talks, Berle returned to the United States and joined the New York law firm of Rounds, Hatch, Dillingham, and Debevoise.<sup>8</sup> At the time,

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from Alvin Johnson to Adolf A. Berle, Jr. (Jan. 30, 1932) (Container 8, Adolf A. Berle Jr. Papers, Franklin D. Roosevelt Presidential Library) [hereinafter Berle Papers].

3. See generally ADOLF A. BERLE, JR. & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (Macmillan 1933) (1932). While forgotten by corporate law scholars, the *Encyclopedia* article is still read by historians of the legal profession. See, e.g., JEROLD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 162 (1976); MARK GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 17 (1991); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 354–55 (1956); Robert Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth With Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1199 (2009) [hereinafter Gordon, *The Citizen Lawyer*].

4. GALANTER & PALAY, *supra* note 3, at 17 (one of “the earliest academic characterizations of the large law firm”).

5. SCHWARZ, *supra* note 1, at 13–15.

6. Adolf A. Berle, Oral History 22 (Berle Papers); see also MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 71–73 (2009).

7. SCHWARZ, *supra* note 1, at 19.

8. *Id.* at 45–46.

it was a fairly large New York firm with nine partners.<sup>9</sup> He soon developed a specialization as a “lawyer for sugar producers” in the Dominican Republic, Cuba, and Puerto Rico.<sup>10</sup> He struck out on his own at the end of 1923 to form Lippitt & Berle with Guy Lippitt, another expert in the Dominican Republic, and in 1933 dissolved that firm to form Berle & Berle with his brother Rudolf where he continued to practice except during periods of public service.<sup>11</sup>

Berle’s practice did not take all his time or supply all his income. In 1927 he married the wealthy Beatrice Bishop, and the couple agreed that her wealth would in part fund his public activities. But he was still a working lawyer representing corporate clients, and a fairly successful one.<sup>12</sup> He did not see practice as detracting from his teaching, legal reform efforts, and scholarship. To the contrary, Berle believed that an active corporate practice was essential to these other activities. As he wrote to one correspondent in 1928, “I hardly see how [corporate finance] can be effectively taught except by someone who leads a double life—one in a law school, another, in rather close connection with the financial machinery . . . . At least half my teaching materials are the loot of my own desk or of current financial transactions.”<sup>13</sup> He also had a hand in legal reform efforts, advising drafters who were re-writing corporation laws in several states, including Ohio, California, and Delaware (the last discussed below).<sup>14</sup>

He made his name in the 1920s with a series of law review articles criticizing recent developments in corporation law and finance.<sup>15</sup> While his exact targets varied from article to article, overall he attacked statutory developments providing an array of new corporate tools, notably “blank check stock,” which Berle believed would allow corporate management to divert corporate profits and property from shareholders to themselves. In response, he developed a legal theory, most fully stated in 1931’s *Corporate Powers as Powers in Trust*, that managers’ powers should be

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9. MARTINDALE’S AMERICAN LAW DIRECTORY 1132 (1922).

10. SCHWARZ, *supra* note 1, at 45–46.

11. *Id.* at 45, 50, 281; *see also* Albin Krebs, *Adolf A. Berle Jr. Dies at Age of 76*, N.Y. TIMES, Feb. 19, 1971, at A1.

12. SCHWARZ, *supra* note 1, at 50 (By the early 1930s, according to his biographer, Berle’s income from his law practice was a then-substantial sum of more than \$20,000 a year.).

13. Letter from Adolf A. Berle to E. Merrick Dodd (Oct. 25, 1928) (Container 7, Berle Papers).

14. *See* SCHWARTZ, *supra* note 1, at 54 (Ohio and California); Adolf A. Berle, Jr., *Investors and the Revised Delaware Corporation Act*, 29 COLUM. L. REV. 563, 563 (1929).

15. *See generally* Adolf A. Berle, Jr., *Compensation of Bankers and Promoters Through Stock Profits*, 42 HARV. L. REV. 748 (1929); Adolf A. Berle, Jr., *Non-Voting Stock and ‘Bankers’ Control*, 39 HARV. L. REV. 673 (1926); Adolf A. Berle, Jr., *Problems of Non-Par Stock*, 25 COLUM. L. REV. 43 (1925); Adolf A. Berle, Jr., *Subsidiary Corporations and Credit Manipulation*, 41 HARV. L. REV. 874 (1928); Berle, *supra* note 14.

treated as “powers in trust” “subject to equitable limitation when the power has been exercised to the detriment of [shareholders’] interest, however absolute the grant of power may have been in terms, and however correct the technical exercise of it may have been.”<sup>16</sup>

There is something odd about these articles in light of Berle’s own career. He claimed special insight into these developments because he was a working corporate lawyer, and most of the innovations he criticized were of course devised by other lawyers. Yet, with one notable exception, his articles in the 1920s rarely feature lawyers as actors. In his articles, these legal developments appear the product of impersonal, offstage forces; there is little discussion of the methods by which corporate statutes were changed or of individuals making the changes. In the rare places where actors are specified, they are more likely to be “bankers and promoters” than lawyers.<sup>17</sup> Berle does identify actors who will, he predicts, rein in the new developments, but these actors are courts, specifically the courts of equity he looks to protect shareholders’ interests. The omission of any significant discussion of lawyers may of course have been the result of scholarly convention and articles focusing on doctrine instead of personalities, but it is still striking.

There is one exception. In a 1929 *Columbia Law Review* article, Berle targeted recent amendments to Delaware’s General Corporation Law (DGCL), and he identifies the changes as the product of practicing lawyers.<sup>18</sup> As he reported in facially neutral terms (“No criticism is here directed to this fact”), the changes to the DGCL had been drafted by a self-selected

committee of New York lawyers representative of a number of the great firms whose principal business was concerned with investment banking. . . . The group represented primarily one set of interests—that of the investment bankers—and, to the extent these interests act in conjunction with corporate management’s, the latter also.<sup>19</sup>

The result, Berle contended, was to help management and harm shareholders. Yet even here, those lawyers’ responsibility is unclear. They did execute the pro-management changes—“it is obviously the design of the draftsmen to make these powers . . . untrammelled faculties of the

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16. Adolf A. Berle, *Corporate Power as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931) [hereinafter Berle, *Corporate Power as Powers in Trust*].

17. See, e.g., Berle, *Non-Voting Stock and ‘Bankers’ Control*’, *supra* note 15, at 674; see also Berle, *Compensation of Bankers and Promoters Through Stock Profits*, *supra* note 15, at 753 (mentioning “corporate attorneys” but focusing on the actions of “organizers and promoters”).

18. Adolf A. Berle, *Investors and the Revised Delaware Corporation Act*, 29 COLUM. L. REV. 563, 563 (1929).

19. *Id.*

management of corporations”—but behind these legal changes were the lawyers’ clients, the investment banking houses that seem to have demanded the changes.<sup>20</sup> One reason Berle may have identified the lawyers here was undisclosed in the article: he had been a member of the committee redrafting the Delaware statute, but his proposals had lost out.<sup>21</sup> In private he expressed more ire at the lawyers who redrafted the act. In a letter to Walter Lippmann, Berle identified the major New York firms, including the Cravath firm Sullivan & Cromwell, and Davis Polk as drafters of the law and urged Lippmann to bring the changes to light and “give it a raking over in the *World*.”<sup>22</sup> But in his published writings, Berle avoided such criticism.

## II. THE 1930S AND THE CRITIQUE OF THE CORPORATE LAWYER

### *A. The ‘Modern Legal Profession’ and the Attack on the Corporate Bar in the 1930s*

Apart from a few isolated passages, there is little evidence that Berle gave the legal profession sustained scrutiny before the 1930s, and he certainly did not take it as his subject as he would the corporation, which raises the question of why he wrote on the subject for the *Encyclopedia of the Social Sciences* at all. The answer lies in both the *Encyclopedia* itself and in the legal tradition in which Berle placed himself.

The *Encyclopedia of the Social Sciences* was intended not as a student aide or handbook but as one of the great scholarly achievements of the age.<sup>23</sup> Its creator, the Columbia University economist E. R. A. Seligman, envisioned it as a “‘synopsis of the progress’ of the social science fields” and “a center of authoritative knowledge for the creation of a sounder and more informed public opinion.”<sup>24</sup> In the late 1920s and early 1930s, when it was being assembled, it was understood to be the most “important American scholarly publication since World War I,”<sup>25</sup> and upon publication its volumes went to “nearly every school, college, and public library in the country.”<sup>26</sup> The multi-year project was generously funded by the Laura Spelman Rockefeller and Russell Sage Foundations,

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20. *Id.* at 564–65.

21. SCHWARZ, *supra* note 1, at 55.

22. Letter from Adolf A. Berle to Walter Lippmann (May 8, 1929) (Container 9, Berle Papers). I italicized “World” as it refers to the New York City newspaper that carried Lippmann’s column.

23. There are good historical accounts of the *Encyclopedia of the Social Sciences* in JOHN M. JORDAN, *MACHINE-AGE IDEOLOGY: SOCIAL ENGINEERING & AMERICAN LIBERALISM, 1911–1939*, at 165–79 (1994) and in PETER M. RUTKOFF & WILLIAM B. SCOTT, *NEW SCHOOL: A HISTORY OF THE NEW SCHOOL FOR SOCIAL RESEARCH* 65–83 (1986).

24. JORDAN, *supra* note 23, at 167–68.

25. RUTKOFF & SCOTT, *supra* note 23, at 72.

26. *Id.* at 69.

with nearly every prominent social scientist and public intellectual in the United States and Europe contributing essays (the German contributors, many who were forced to flee Germany after 1933, would become a nucleus of the famed "University in Exile").<sup>27</sup> Among the host of notables contributing essays to the *Encyclopedia* were Ruth Benedict, Franz Boas, W. E. B. du Bois, John Dewey, and Roscoe Pound.

Berle may have come to the *Encyclopedia* through his friendship with Alvin Johnson, director of the New School for Social Research and Associate Editor of the *Encyclopedia*,<sup>28</sup> or through a Columbia connection with Seligman. Whatever the exact link, Berle was first approached to contribute in 1929 when he wrote a short entry on the *American Legion*,<sup>29</sup> and then with Gardiner Means, a long one on the *Corporation*.<sup>30</sup> He was not asked to contribute his entry on the *Modern Legal Profession* until 1932, however, as part of a larger entry on the Legal Profession, which also included sections on the *Ancient and Medieval* profession by H. D. Hazeltine of Cambridge University and *Modern Legal Education* by Max Radin of the University of California at Berkeley.<sup>31</sup>

That his entry was not commissioned until 1932 mattered enormously, for it meant that Berle would be examining the legal profession, and particularly the corporate bar, at a moment the profession was experiencing profound self-doubt. As Jerold Auerbach put it, the Depression "compelled the lawyer whose public identity and professional esteem rested upon service to a restricted corporate clientele to confront the implications of his choices."<sup>32</sup> Not only the present state of the legal profession, but its evolution over the past half-century would come under scrutiny during the 1930s in a spate of analyses of which Berle's was the first.

The historical story was straightforward and confirmed by later scholars. Beginning in the 1870s a legal elite once composed of trial

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27. *Id.* at 66.

28. Berle and Johnson were friends in later life. ADOLF A. BERLE, NAVIGATING THE RAPIDS: FROM THE PAPERS OF ADOLF A. BERLE 446, 691 (Beatrice Bishop Berle & Travis Jacobs eds., 1973).

29. Letter from Alvin Johnson to Adolf A. Berle (Aug. 12, 1929) (Container 8, Berle Papers); Adolf A. Berle, *American Legion*, in 1 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, *supra* note 2, at 31.

30. Letter from Adolf A. Berle to Alvin Johnson (Dec. 19, 1929) (Container 8, Berle Papers); see also Adolf A. Berle & Gardiner Means, *The Corporation*, in 4 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, *supra* note 2, at 414. Berle was also commissioned to write the essay on *Bankruptcy* but did not complete it; after several dunning letters the assignment went instead to Berle's friend William O. Douglas. Letter from Alvin Johnson to Adolf A. Berle (Sept. 7, 1929) (Berle Papers); see also William O. Douglas, *Bankruptcy*, in 2 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, *supra* note 2, at 449.

31. See H. D. Hazeltine, *Legal Profession and Legal Education: Ancient and Medieval*, in 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, *supra* note 2, at 324; Max Radin, *Modern Legal Education*, in 9 ENCYCLOPEDIA OF THE SOCIAL SCIENCES, *supra* note 2, at 334.

32. AUERBACH, *supra* note 3, at 153.

lawyers and public figures who served a range of individuals had become one dominated by lawyers who largely served corporate clients.<sup>33</sup>

By the mid-1880s the locus of the most elite practice had decisively shifted from the courtroom to the law office and conference room. The main work of this practice was to serve as legal brokers and intermediaries between large American corporations trying to attract new capital . . . and the investment banking communities of Wall Street and Europe.<sup>34</sup>

These new corporate lawyers practiced in new ways, largely abandoning the one- or two-man offices prevalent earlier in the nineteenth century and instead forming larger law firms, which awed contemporaries dubbed “law factories.”<sup>35</sup> In 1872, New York had ten firms with four or more lawyers; by 1914, it had eighty-five.<sup>36</sup>

Well before Berle, the transformation of legal practice attracted critics.<sup>37</sup> As early as 1895 one anonymous author complained that “[the bar] has allowed itself to lose, in large measure, the lofty independence, the genuine learning, the fine sense of professional dignity and honor . . . . [I]t has become increasingly contaminated with the spirit of commerce.”<sup>38</sup> In a survey examining New York lawyers, Robert Gordon found “[b]ar association speakers and writers on ethics deliver[ing] hundreds of jeremiads between 1890 and 1920 lamenting the increasing commercialization of the bar and its growing dependence on corporate clienteles.”<sup>39</sup> Others, however, rejected the simple story of inevitable decline and sought instead to carve out a new place for the lawyer who wished to retain his autonomy and social influence in this corporate world. The one who would have the greatest influence would be Berle’s idol Louis D. Brandeis.

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33. See HURST, *supra* note 3, at 260–61; JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 1009–20* (2009).

34. Robert Gordon, *The Ideal and the Actual in the Law*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 59 (Gerard Gewalt ed., 1984).

35. HURST, *supra* note 3, at 305.

36. GALANTER & PALAY, *supra* note 3, at 15. The model for such firms was the Cravath firm, and the “Cravath model” soon became the standard. See 2 ROBERT SWAIN, *THE CRAVATH FIRM AND ITS PREDECESSORS 1819–1948*, at 1–11 (1948).

37. As other scholars have observed; see AUERBACH, *supra* note 3, at 33; GALANTER & PALAY, *supra* note 3, at 11; Robert Gordon, *The American Legal Profession 1870–2000*, in 3 *THE CAMBRIDGE HISTORY OF LAW IN AMERICA* 81, 92–93 (Michael Grossberg & Christopher Tomlins eds., 2008); Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the American Lawyer’s Role*, 8 U. CHI. LEGAL ROUNDTABLE 381, 398–99 (2001).

38. GALANTER & PALAY, *supra* note 3, at 11 (quoting AMERICAN LAWYER, 1895, at 84).

39. Gordon, *supra* note 37, at 81.



In 1905, Brandeis was asked to speak on "the ethics of the legal profession" to a student group at Harvard,<sup>40</sup> and delivered his famous speech "The Opportunity in the Law."<sup>41</sup> Here Brandeis put forward a "Progressive-Professional Ideal" for lawyers that would deeply influence Berle.<sup>42</sup> Brandeis began by acknowledging that the "lawyer has become largely a part of the business world . . . [and] by far the greater part of the work done by lawyers is done not in court at all, but in advising men in important matters, and mainly in business affairs."<sup>43</sup> This development did not, however, necessarily restrict the lawyer's role. "[A]lthough the lawyer is not playing in affairs of State the part he did, his influence is, or at all events may be, quite as important as it ever was in the United States; and it is simply a question of how that influence is to be exerted."<sup>44</sup> The present problem for lawyers, Brandeis argued, was that too many had missed, or rejected, the new role and the opportunities it offered—or at least had chosen the wrong side. "The leaders of the bar . . . have, with rare exceptions, been ranged on the side of the corporations, and the people have been represented in the main by men of very meager legal ability."<sup>45</sup> Unless lawyers changed their operations, he concluded,

[t]he immense corporate wealth will necessarily develop a hostility from which much trouble will come to us unless the excesses of capital are curbed, through the respect for law . . . . There will come a revolt of the people against the capitalists unless the aspirations of the people are given some adequate legal expression; and to this end cooperation of the leaders of the bar is essential.<sup>46</sup>

Here was the opportunity in the law, to serve not only corporations but the people who aimed to tame the new corporate order.

Brandeis provided a model for the public-spirited lawyer in the corporate age—a model it appears Berle admired—but his ideas cannot be said to have won the field.<sup>47</sup> His speech deeply affected some of the individuals who heard it—Brandeis's biographer reported that it made a "lasting impression on young Felix Frankfurter"—but it certainly did not

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40. See UROFSKY, *supra* note 6, at 201–06.

41. Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555 (1905).

42. The phrase is Robert Gordon's. Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 17 (1988) [hereinafter Gordon, *The Independence of Lawyers*].

43. Brandeis, *supra* note 41, at 557–58.

44. *Id.* at 559.

45. *Id.* at 560.

46. *Id.*

47. It should be noted that Brandeis was far from alone in his criticisms; in 1910 Woodrow Wilson gave a speech assailing the "corporate lawyer" to the American Bar Association. AUERBACH, *supra* note 3, at 34. I focus on Brandeis here because his speech appeared the best-known, and because of his ties to Berle.

transform the corporate bar.<sup>48</sup> Lawyers continued to express some unease about law becoming a business,<sup>49</sup> but in the two decades after Brandeis's speech they seem to have gotten more comfortable with it. If anything, corporate lawyers' stock rose; one historian has concluded that "[i]n the twenties corporate lawyers enjoyed unchallenged professional hegemony and unsurpassed opportunity to articulate their wishes as professional values."<sup>50</sup> That would change with the stock market crash and the Great Depression. The 1930s would see a series of blistering criticisms of the legal profession and the corporate lawyer. One of the first and most influential would be Berle's.

It is doubtful that the editors of the *Encyclopedia of the Social Sciences* realized what they would be getting from Berle. Most of its entries were written by famous scholars, but followed an outline provided by the Encyclopedia's staff,<sup>51</sup> and when he started his entry Berle was provided such an outline.<sup>52</sup> He largely ignored it. Berle's entry certainly did provide an overview of the legal profession, but it was not simply a survey of the field. His was an analysis instead distilled from the Progressive tradition inherited from Brandeis, his own work as a corporate lawyer, and not the least his experience writing *The Modern Corporation and Private Property*. Where Brandeis had looked hopefully to the future, though—his essay was after all called "The Opportunity in the Law"—Berle painted a bleaker picture. The "Modern Legal Profession" his essay described was almost unredeemable, its leaders reduced to mere adjuncts to corporations.

Berle was supposed to survey the entire legal profession, but in the entry he focused on corporate law and the "law factories."<sup>53</sup> He recognized of course that most lawyers in 1932 did not work at large corporate firms—he wrote of "the vast majority of lawyers, practicing alone or in partnership with another . . . [who] run the entire gamut from the lawyer who seeks chiefly to be a human being to the marching lawyer, who finds it necessary to make his living by dubious means."<sup>54</sup> But that was not where his interest lay. So, he began by reviewing the events that produced the new legal order, describing changes that meshed with his account of corporate

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48. UROFSKY, *supra* note 6, at 205.

49. See, e.g., JULIUS COHEN, *THE LAW: BUSINESS OR PROFESSION?* (1916); HURST, *supra* note 3, at 354.

50. AUERBACH, *supra* note 3, at 130.

51. RUTKOFF & SCOTT, *supra* note 23, at 70–71.

52. See Letter from Alvin Johnson to A. A. Berle (Feb. 10, 1932) (with attached memorandum) (Container 8, Berle Papers).

53. See Berle, *Modern Legal Profession*, *supra* note 2, at 340. Berle also compared the U.S. profession to its British and European counterparts, but I do not discuss that here.

54. *Id.* at 342.

evolution in *The Modern Corporation and Private Property*. He attributed changes in the legal profession to the economic and business developments accompanying the rise of the modern corporation. According to Berle, "the dominance of the commercial and industrial structures, the complexity of business organizations and the position of world economic leadership steadily thrust upon the legal profession problem after problem which was not originally intended to form a part of legal practise."<sup>55</sup> These changes turned the legal profession into "virtually an intellectual jobber and contractor in business matters."<sup>56</sup> They also produced the modern law firm, which further worked against the independence of lawyers. As Berle put it,

the 'legal factory'—the great corporation offices of New York and Chicago, having thirty or forty partners and perhaps two hundred or more associated attorneys, . . . [whose] tremendous overhead requires the assurance of a steady flow of a large volume of business; these institutions are . . . largely adjuncts to the great commercial and investment banks.<sup>57</sup>

(Berle, it should be noted, exaggerated the size of the new firms.<sup>58</sup>) Yet, Berle had to admit, these firms had at least one significant accomplishment: "[T]he creation of a legal framework for the new economic system, build largely around the modern corporation, the division of ownership of industrial property from control and the increasing concentration of economic power in the industrial east in the hands of a few individuals."<sup>59</sup> While these developments gave lawyers a new role, they also took one away. Seemingly inexorably, the rise of the corporations led to "the transfer some time toward the end of the nineteenth century of the responsible leadership in social development from the lawyer to the business man."<sup>60</sup>

This was not a morally neutral process. In *The Modern Corporation and Private Property*, Berle and Gardiner Means's great work, economic developments simply occur, impersonally and inexorably, as property accrues to the corporation while ownership disperses. In the *Modern Legal Profession*, in contrast, corporate growth produced the corruption of the legal profession—and "corruption" does appear the right word. Here, Berle wrote of "[t]he manipulation of the railroad builders, the oil

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55. *Id.* at 340.

56. *Id.* Robert Thompson's contribution to this symposium touches on this issue as well.

57. *Id.* at 342.

58. GALANTER & PALAY, *supra* note 3, at 17 n.62 ("The largest firms in 1933 had a roster of about seventy lawyers.").

59. Berle, *Modern Legal Profession*, *supra* note 2, at 341.

60. *Id.*

pioneers, the utilities and traction magnates, and the accompanying political corruption,” and claimed that in “defending, legalizing and maintaining this exploitative development the legal profession found its principal function.”<sup>61</sup> Here, the growth of giant corporations is presented as “exploitative,” by implication tainting those who assisted in it.

Thirty years before, Brandeis had argued that the rise of the modern corporation offered lawyers a new and positive role in society—if they would take it. Berle held out less hope, seemingly believing that the modern corporation, and the corruption it appeared to engender, only closed off opportunities. The new developments had, he admitted, produced a few men like Brandeis, who “after attaining primacy in that branch of the profession revolted from the cynicism of its views.”<sup>62</sup> For the most part, however, the corporate lawyer who wished no longer to merely serve corporate interests had to take a new path, “either to turn to his books and become a scholar or to turn to public life and go on the bench or into political office.”<sup>63</sup> And public life posed its own problems. “The common result was that after a relatively brief period of public office the lawyer returned to his profession with enhanced reputation and became a more effective servant of the evolving industrial scheme.”<sup>64</sup> Nor would the organized bar be a counterweight to these developments. In the larger cities, the bar’s cohesion had “broken down.”<sup>65</sup> In smaller cities it kept some cohesion but had “changed in character; from an organization concerned primarily with maintaining the dignity and serviceableness of a profession it has become a substantial agreement among attorneys to protect each other.”<sup>66</sup> The bar’s capacity for self-government had disappeared, leaving “no organized opinion of the bar to exercise an effective control.”<sup>67</sup> While once lawyers were seen as officers of the court and “an integral part of the scheme of justice,” they were today “the paid servant of his client, justified in using any technical lever that the law supplies in order to forward the latter’s interest.”<sup>68</sup> “The complete commercialization of the American bar had stripped it of any social functions it might have performed for individuals without wealth.”<sup>69</sup> While there were a few developments, such as the spread of legal aid offices and an increase in voluntary legal work, which pointed to “a

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61. *Id.* (emphasis added).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 343.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 343–44.

possible socialization of the profession,"<sup>70</sup> (by which he apparently meant the profession taking on new social responsibilities) he found strong forces working against this. "In the economic sphere . . . socialization of the legal profession is almost a contradiction in terms."<sup>71</sup>

In conclusion, Berle saw two possible paths for the American legal profession:

One is that the profession merely does what the institutional set up appears to demand. The other is that it can assist in transforming the underlying potentialities in ethical and economic attitudes into actual results in the form of social and legal organization. In the United States the profession has tended strongly to the former function.<sup>72</sup>

Despite his belief that "the direction of the new economic trends indicates the need for stronger intellectual guidance from the profession," he voiced little hope this would actually occur.<sup>73</sup>

Berle's was only the first of a series of attacks on the legal profession leveled during that decade.<sup>74</sup> The cause was, obviously, the Great Depression, and a suspicion that lawyers had helped usher it in. In his 1933 presidential address to the American Association of Law Schools, Yale Dean Charles Clark "reminded his colleagues that financiers and businessmen might bear the brunt of blame for the Depression, but 'at their right hands as counselors and advisers stand the ablest of the men we have instructed and we ourselves are not too far away.'"<sup>75</sup> Later that year Karl Llewellyn, drawing on a draft version of the *Encyclopedia* entry, published an essay called *The Bar Specializes—With What Results?* in which he echoed much of Berle's criticism of the modern bar.<sup>76</sup> "The most significant fact about the modern metropolitan bar," Llewellyn wrote, was that "most of its best brains, most of its inevitable leaders, have moved masswise . . . into highly paid specialization in the service of large corporations. They are the ablest of legal technicians . . . . But their main work is in essence the doing of business."<sup>77</sup> While Llewellyn acknowledged that this may have been required by the needs of the time,

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70. *Id.* at 344.

71. *Id.* at 345.

72. *Id.*

73. *Id.*

74. For instance, according to Willard Hurst, "[t]he first reliable investigations of the economics of the profession were made in the 1930s. These studies tended to confirm the new picture of the lawyer as primarily advisor, counselor, administrator of affairs." HURST, *supra* note 3, at 305.

75. AUERBACH, *supra* note 3, at 164 (quoting Charles C. Clark, *Law Professor, What Now?*, 1933 A.A.L.S. PROC. 15, 15).

76. Karl Llewellyn, *The Bar Specializes—With What Results?*, 176 ANNALS OF THE ACAD. POL. & SOC. SCI. 177, 177 n.1 (1933) (citing Berle's then-unpublished *Encyclopedia* entry).

77. *Id.* at 177.

like Berle and Brandeis he concluded that it had produced a bar that served business to the neglect of others.

[T]he fitting of law to new conditions has been concentrated on only one phase of new conditions: to wit, the furtherance of the business and financing side, from the angle of the enterpriser and the financier. It has been focused on organizing their control of others, and on blocking off control of them by others.<sup>78</sup>

The most eminent critic spoke a year later, when Justice Harlan Fiske Stone delivered the dedication of the new University of Michigan Law School building. While there is no indication that he was drawing on Berle or Llewellyn, the Justice's comments showed how widespread the belief was that corporate practice had corrupted the bar. He opened with the familiar refrain that "the Bar has not maintained its traditional position of public influence and leadership"<sup>79</sup> and laid blame for this on the corporate bar. "[T]he best skill and capacity of the profession has been drawn into the exacting and highly specialized service of business and finance," he claimed.<sup>80</sup> "At its worst it has made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations."<sup>81</sup> The failures of business so apparent by the 1930s—the corporate scandals stemming from the "failure to observe the fiduciary principle,"<sup>82</sup> "would have been impossible but for the complaisance of a Bar, too absorbed in the workaday care of private interests . . . to sound the warning that the profession looks askance upon these, as things that 'are not done.'"<sup>83</sup> Stone closed on a more upbeat note than Berle, asserting that the Bar, if inculcated by law schools with a new sense of social responsibility, still had the capacity to "exert a power more beneficent and far reaching than it or any other non-governmental group has wielded in the past," but the speech as a whole was not encouraging.<sup>84</sup> This drumbeat of criticism continued through the 1930s, culminating, at least rhetorically, in Fred Rodell's 1939 jeremiad *Woe Unto You, Lawyers!*, whose title says it all.<sup>85</sup>

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78. *Id.* at 179.

79. Harlan Fiske Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 2–3 (1934). On Stone's speech, see Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 256–57, 267 (1990).

80. Stone, *supra* note 79, at 7.

81. *Id.*

82. *Id.* at 8.

83. *Id.* at 9.

84. *Id.* at 10.

85. FRED RODELL, *WOE UNTO YOU, LAWYERS!* (1939).

### B. The Legal Profession and the Berle–Dodd Debate

Berle's essay for the *Encyclopedia* tells us a good deal about the legal profession in the 1930s, but does it tell us anything about Berle, at least the Berle who still matters, the prophet of the modern corporate order? I think it does, and in particular that it can illuminate a significant aspect of his famous debate with Harvard's E. Merrick Dodd over the purpose of the corporation.<sup>86</sup>

The debate, carried out in the pages of the *Harvard Law Review*, remains well known after over eighty years.<sup>87</sup> Berle, in his 1931 article *Corporate Powers as Powers in Trust*, argued that the near-unlimited power he believed managers wielded over shareholders should be treated in the law as power held in trust, "exercisable only for the ratable benefit of all the shareholders," and "subject to equitable limitation when the power has been exercised to the detriment of" shareholders.<sup>88</sup> Dodd, however, picked up on the point that managers had gained new powers over the corporation, and new distance from shareholders, to argue that this could be a good thing.<sup>89</sup> Freed of narrow duties to shareholders, he argued that managers should now be treated by the law as "trustees for an institution rather than attorneys for the stockholders."<sup>90</sup> Influenced by welfare capitalist programs of the 1920s, Dodd believed that if managers were given the power to direct corporate wealth to different constituencies, rather than solely to shareholders, they would use it wisely.<sup>91</sup> "Power over the lives of others," he wrote, "tends to create on the part of those most worthy to exercise it a sense of responsibility."<sup>92</sup> The managerial autonomy that Berle saw as a threat Dodd welcomed as an opportunity.

Berle's reply appeared in *For Whom Corporate Managers Are Trustees: A Note*, and for present purposes, what is most striking is the degree to which his reply draws on his experience not as a corporate theorist, but as a corporate lawyer and as a critic of the legal profession.<sup>93</sup> Indeed, on re-reading this short article it is surprising how much it talks

86. Robert Gordon has previously noted that Berle disparages lawyers in the course of his debate with Dodd. See Gordon, *The Independence of Lawyers*, *supra* note 42, at 50.

87. See, e.g., William W. Bratton & Michael Wachter, *Adolf A. Berle, E. Merrick Dodd and the New American Corporatism of 1932*, in RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 534, 556–66 (Harwell Wells ed., 2018).

88. Berle, *Corporate Power as Powers in Trust*, *supra* note 16, at 1049.

89. See E. Merrick Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1160 (1932).

90. *Id.*

91. On Dodd's views, see C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 KAN. L. REV. 77, 92–93 (2002).

92. Dodd, *supra* note 88, at 1157.

93. Adolf A. Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932).

about lawyers. The retort to Dodd begins by agreeing that the changing nature of the corporation (which he and Means were about to dissect in *The Modern Corporation and Private Property*) had produced a new class, “the great industrial managers, their bankers and still more the men composing their silent ‘control,’ [who] function today more as princes and ministers than as promoters or merchants.”<sup>94</sup> Dodd thought this new class could be trusted to administer the corporation for the benefit of many constituencies. Berle, taking on the role of wised-up practitioner who had actually dealt with such men, disagreed. Dodd, he claimed, wrote in ignorance of what the men who ran corporations were actually like. Dodd’s ideas were “theory, not practice. The industrial ‘control’ does *not* now think of himself as a prince; he does *not* now assume responsibilities to the community; his bankers do *not* now undertake to recognize social claims; his lawyers do *not* advise him in terms of social responsibility.”<sup>95</sup> To be sure, Berle continued, there were a group of lawyers who would embrace Dodd’s assertion that management be freed from duties to shareholders, but they would not do so out of concern for other corporate constituencies. “Challenge to the security holder’s claim” to corporate profits, he wrote, “has been made, less articulately but with infinitely more effect, by the handful of corporation lawyers, mainly in New York, who really determine legal control of the corporate mechanism.”<sup>96</sup> These, of course, are the same corporate lawyers whom Berle disparaged in the *Encyclopedia*:

They in fact, and sometimes in words, discard the theory that corporate managements are trustees for corporate security holders. But they know what the social theorist does not. When the fiduciary obligation of the corporate management and ‘control’ to stockholders is weakened or eliminated, the management and the ‘control’ become for all practical purposes absolute. The claims upon the assembled industrial wealth and funneled industrial income which managements are then likely to enforce . . . are their own.<sup>97</sup>

The message is clear: the practicing lawyer Berle was telling the social theorist Dodd how the world really worked.

The final section of Berle’s reply opened with the question: “What ought to be the part of lawyers and the law in this interplay of great hope and disillusioning fact?” His answer was that both their history and their training indicated lawyers were unfit to undertake wide-ranging reform.<sup>98</sup>

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94. *Id.* at 1366–67.

95. *Id.* at 1367 (emphasis in original).

96. *Id.*

97. *Id.*

98. *Id.* at 1371.



Thus far, he wrote, "lawyers have not given too good an account of themselves . . . either in theory or administration."<sup>99</sup> The New York lawyers who revised Delaware's corporate law had "cut to pieces" securities holders' private property rights. "A similar group evolved a reorganization procedure under which equity and economics may be dealt with almost at will by individuals who are not constrained to recognize either." "A lawyer and an ex-lawyer constructed the outstanding American 'investment trust' bubble."<sup>100</sup> While lawyers did have a function in the evolution of the law, it was a cautious and limited one. Their task was "widely divergent from that of the economist or social theorist. They must meet a series of practical situations from day to day."<sup>101</sup> A careful lawyer would not abandon one position, "the idea of corporate trusteeship for security holdings," in the hopes another, more desirable one might eventually emerge.<sup>102</sup> Until the law of corporate management had more fully evolved, "as lawyers, we had best be protecting the interests we know, being no less swift to provide for the new interests as they successively appear."<sup>103</sup> It is a puzzling discussion—the reader is left unsure whether Berle was warning off all social theorizing, or just lawyers' attempts at it—but it did show Berle's low opinion of the legal profession creeping into his work on corporate law.

### III. THE 1950S AND THE CORPORATE LAWYER AS A STATESMAN-ADVISOR

Then Berle moved on to other things. *The Modern Corporation and Private Property*, published in 1933, contains almost no reference to the legal profession, which should probably not be surprising.<sup>104</sup> It is at its core an account of impersonal economic forces that work to centralize wealth in giant corporations and disperse ownership of those firms. Lawyers may have helped this process along, but they did not cause it. Even as that was published, he then moved into a series of public roles, culminating in his service as Assistant Secretary of State and then Ambassador to Brazil, which diverted his energies in other directions until after the end of World War II.<sup>105</sup>

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99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1372.

104. At points attorneys do appear in the narrative, but as mere tools for corporate controllers. See, e.g., BERLE & MEANS, *supra* note 3, at 137 ("Today a promotion group goes to its attorneys . . .").

105. See SCHWARZ, *supra* note 1, at 114.

Berle did discuss the legal profession at a graduation speech given at Cornell Law School in 1938, where he gave some hint that he was still thinking about the lawyer's role. Perhaps due to his audience, much of the speech was a bland call to social responsibility in the Brandeisian vein. "The legal profession," Berle told the graduates,

must change with the times. No longer can any lawyer believe he exists to serve his client. He cannot represent a special interest to the exclusion of other considerations . . . . If his client cannot see the interest involved, . . . his lawyer must see the larger issues for him.<sup>106</sup>

But he also spoke there of legal evolution, of his belief that there was arising an "unwritten constitutional law, which shall implement and fill out the frame of government embodied in our written constitution."<sup>107</sup> This was, truth be told, an ill-defined concept; listeners would have left the speech not quite knowing how this unwritten law was to operate, except that it was somehow to involve government involvement in the new economy. Yet Berle was clear about one thing: this new body of law was "peculiarly in the custody of the legal profession."<sup>108</sup>

In the late 1940s Berle left government service and resumed his corporate law practice at Berle & Berle, as well as teaching at Columbia and the innumerable public roles which consumed his later years.<sup>109</sup> He also was a major public intellectual of the postwar era, summing up his views of the modern American corporate economy in *The Twentieth Century Capitalist Revolution* (1954).<sup>110</sup> Berle stayed true to his views concerning corporate consolidation and the separation of ownership and control, arguing that the growth of a few giant corporations in each field had produced a new kind of economy, dominated by oligopolies engaged in a form of private economic planning far removed from the *laissez-faire* capitalism of the past.<sup>111</sup> What had changed was his views on the corporation's role in society. He had come to see it as a "social institution" ready to assume the broad responsibilities it had once shunned, a change that also changed his view of corporate management. In the Berle-Dodd debate he had insisted that present-day corporate managers were not to be trusted, and should not be confused with Renaissance princes;<sup>112</sup> in the *Modern Corporation* he and Means had speculated that management

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106. Adolf A. Berle, Jr., *The Lawyer's Part in Social Change*, 23 CORNELL L.Q. 515, 518 (1938).

107. *Id.*

108. *Id.*

109. SCHWARZ, *supra* note 1, at 281.

110. ADOLF A. BERLE, JR., *THE 20<sup>TH</sup> CENTURY CAPITALIST REVOLUTION* (1954) [hereinafter BERLE, 20<sup>TH</sup> CENTURY].

111. *See id.* at 25–29, 32–35.

112. *See supra* text accompanying notes 84–100.

might in the future “develop into a purely neutral technocracy, balancing a variety of claims by various groups”<sup>113</sup>—but in the *Twentieth Century Capitalist Revolution* it seemed this future had arrived. In a surprising about-face, Berle conceded that Dodd had the better view in their debate, and that management’s powers should be used not merely for shareholders, but “held in trust for the entire community.”<sup>114</sup>

Berle’s new view of the corporation—as assuming social responsibility, as unavoidably involved in making decisions that would affect its communities, as locked in complex accommodations with government and labor<sup>115</sup>—led to a new view of the possibilities open to the corporation’s lawyers. In 1956 he spoke to the New York Bar Association on the “Changing Role of the Corporation and Its Counsel.”<sup>116</sup> Over the past half-century, Berle informed his audience, the corporation had shifted from a “method of conducting private business to a quasi-public institution on which the country had come to rely for certain services,” a development which meant the in-house lawyer had to “change his function and position” as well.<sup>117</sup> Once the in-house lawyer had been “regarded almost with contempt—he was the ‘tame’ lawyer whose standing was lower than the supposedly free, independent practitioner.”<sup>118</sup> As the corporation became a quasi-public institution, though, one that was “institutionally a part of the political life of the country,” it became the counsel’s task to help navigate the new political waters and recognize the political developments that would impinge on the corporation and limit its activities.<sup>119</sup> The in-house counsel could play a public role by predicting the trend of legal doctrine as well as its present-day status. “It is the task of the in-house counsel of organizations . . . to judge precisely the legal implications of these emerging situations . . . to be sensitive to them, to forecast their possibility, and to deal with them before they come up.”<sup>120</sup> Twenty years before, Berle had blamed the rise of the modern corporation for diminishing the lawyer’s role and corrupting the legal profession; now he argued that it instead made it possible for lawyers to assume a new and more significant public role. In a strange inversion of Brandeis’s *The Opportunity in the Law*, it was now the lawyer employed by the

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113. BERLE & MEANS, *supra* note 3, at 356.

114. BERLE, 20<sup>TH</sup> CENTURY, *supra* note 110, at 169.

115. Berle appeared to adopt John Kenneth Galbraith’s views of “countervailing powers” as explaining much of American politics during this period. *See id.* at 191.

116. Adolf A. Berle, *The Changing Role of the Corporation and its Counsel*, 10 RECORD OF N.Y.C.B.A. 266 (1956).

117. *Id.* at 266 (order reversed).

118. *Id.* at 267. One wonders what his audience made of this.

119. *See id.*

120. *Id.* at 275.

corporation, rather than the one opposed to it, who would handle “the relations between the corporation and its industry and the community represented by some branch of government.”<sup>121</sup>

Berle had become comfortable with the corporation—and the corporation lawyer. His 1950s work reflected a larger societal consensus that the large corporation had been successfully tamed and was the key to widespread economic prosperity and even social comity.<sup>122</sup> And as the corporation’s public image improved, so did the corporation lawyer’s. Mark Galanter and Thomas Palay have noted that “the period of the late fifties and the early sixties was the one in which the portrayal of lawyers in the popular media was unprecedentedly favorable.”<sup>123</sup> Lawyers themselves were eager to embrace this new image and new role. Robert Swaine, in his 1949 history of the Cravath firm, anticipated this development when he wrote that the corporate lawyer had gradually taken on new roles, so that “[t]oday the American lawyer deals with the problems of his business clients on a much broader basis, considers substance as more important than form and attempts to relate legal problems to their political, economic and social implications.”<sup>124</sup> Robert Gordon has pointed to broader intellectual developments that also contributed to this change, writing that in the postwar period

a group of lawyers and legal academics—including Lon Fuller, Willard Hurst, Harvard ‘Legal Process’ scholars Henry Hart and Albert Sacks, and corporate lawyer Beryl Harold Levy—theorized, from hints dropped by such Progressive lawyers as Brandeis and Adolf Berle, the role of the new corporate legal counsel as a ‘statesman-adviser’.<sup>125</sup>

Berle confirmed and expanded on his views a few years later in his 1962 review of Beryl Levy’s *Corporation Lawyer: Saint of Sinner?*, a work intended to explain the corporate lawyer to a popular audience.<sup>126</sup> Levy was a corporate lawyer and friend of Berle’s,<sup>127</sup> and parts of the book

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121. *Id.*

122. See, e.g., BENJAMIN C. WATERHOUSE, *THE LAND OF ENTERPRISE: A BUSINESS HISTORY OF THE UNITED STATES* 159–60, 173–77 (2017).

123. GALANTER & PALAY, *supra* note 3, at 20 n.1.

124. Quoted in HURST, *supra* note 3, at 356.

125. Gordon, *The Citizen-Lawyer*, *supra* note 3, at 1192–93. My understanding of the developments in this paragraph and the next draws on Gordon’s account.

126. See generally Adolf A. Berle, *Corporation Lawyer: Saint or Sinner? The New Role of the Lawyer in Modern Society*, 76 HARV. L. REV. 430, 430 (1962) [hereinafter Berle, *Book Review*] (book review). Levy’s book is also insightfully discussed in Gordon, *The Citizen-Lawyer*, *supra* note 3, at 1193–94.

127. He had taken Berle’s Corporate Finance class at Columbia. BERYL HAROLD LEVY, *CORPORATION LAWYER: SAINT OR SINNER? THE NEW ROLE OF THE LAWYER IN MODERN SOCIETY* 127 (1961).

embody Berle's ideas. His historical account of the corporate bar's development fit well with Berle's. "Shortly after Franklin D. Roosevelt's inauguration," Levy wrote, "the bar was inclined to be rather severe with itself when it paused to take inventory of the disasters of the depression."<sup>128</sup> Today, though, he found lawyers "in far better repute."<sup>129</sup> What changed? After a brief summary of the growth of the "law factories," Levy's account culminated in the postwar America sketched out by Berle, where large corporations "cannot be said any longer to be run in a narrow and exclusive sense for the corporation's own family of employees and customers or even its stockholders."<sup>130</sup> This gave corporate lawyers a new role. If the head of a giant corporation had become "a sort of statesman-of-business . . . by the same token his legal counselor is a sort of statesman-advisor."<sup>131</sup>

In Berle's review he largely adopted Levy's conclusions while still getting in some jabs at the legal profession. He reiterated his view that from the 1890s to the 1930s corporate lawyers "often were[] little more than highly paid, powerful mercenary agents of great technical competency."<sup>132</sup> They succeeded merely by serving the moguls, and Berle pointed to Swaine's history of the Cravath firm—"[a]n unconsciously cynical book"—as proof of this.<sup>133</sup> Yet since that era corporate lawyers, at least those at the "upper range" had taken on a new role, now operating "in that no-man's land where law, economics, and political science meet, and where new law is daily crystallizing."<sup>134</sup> He reiterated that the corporation's postwar position as a "vital part of the public structure of the economic republic" created new opportunities for lawyers.<sup>135</sup> Corporations were now being held to new standards, to a developing "inchoate law affecting corporations holding market power, or on which the community has come to depend for some economic function."<sup>136</sup> While this new law, which appeared as an amalgam of public policy and public opinion, was not always on the books, "[t]he moment these principles are seriously infringed, the state predictably intervenes."<sup>137</sup> (Berle's example of the working of this "inchoate law" was the steel crisis of 1962, when

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128. *Id.* at 169 n.6. (citing in support both Berle's Encyclopedia essay and Stone's 1934 Michigan speech).

129. *Id.* at 171.

130. *Id.* at 134.

131. *Id.* at 149.

132. Berle, *Book Review*, *supra* note 126, at 430.

133. *Id.* at 431.

134. *Id.*

135. *Id.* at 433.

136. *Id.*

137. *Id.* at 432; see Elizabeth Pollman, *Quasi Governments and Inchoate Law: Berle's Vision of Limits on Corporate Power*, 42 SEATTLE U. L. REV. 617 (2019) (discussing such "inchoate law").

steelmakers attempted to raise prices and were forced to retreat after a public outcry and political pressure.<sup>138</sup>) It was the job of the “top range corporate lawyer” to anticipate such problems and head them off. Lawyers, at least the best ones, were in this account responsible for advising clients on both “explicit corporation law” and the “inchoate law” increasingly imposed on the corporations that had become public entities. This would ultimately make the corporate lawyer, and particularly the in-house counsel, a “legal and economic statesman as well as corporate employee.”<sup>139</sup>

Berle still criticized some aspects of the corporate law firm, but like much social criticism in the 1950s his focused more on the institution’s social effect on its workers than on its larger political impact. In discussing Levy’s book he asked whether the Wall Street firms did not “accomplish a terrible waste of many of the ablest and best trained young minds American legal education produces,”<sup>140</sup> and at best hoped that the new opportunities offered them might “in time redeem the bulk of the corporation bar from the profitable but usually undistinguished bondage in which most of it lives.”<sup>141</sup> The main threat he now saw from the corporate bar was the threat it posed to young lawyers.

#### CONCLUSION

Berle’s views of the legal profession had changed sharply over the past three decades. The harsh critique of the *Encyclopedia* is largely gone, replaced by an ambivalent conclusion that welcomes the lawyer-statesman while regretting the drudgery of many corporate lawyers’ lives.<sup>142</sup> Looking back over his writings on the legal profession, we also get a clearer sense of why he never studied the legal profession in the way he did the corporation. In Berle’s accounts, the fate of the legal profession was always determined by that of the corporation. Causation was one-way; the corporate economy changed and the legal profession changed in response. In the 1930s he explained that the legal profession was hopelessly degraded because it had become subservient to corporations. In the 1950s his views of the legal profession changed because his views of the corporation had changed; the possibility had opened up for lawyers to become “statesman-advisors” because corporations had assumed a new prominence, making their leaders “corporate statesmen.” In each case

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138. See Berle, *Book Review*, *supra* note 126, at 432. On the 1962 conflict between the industry and the Kennedy administration, see MEG JACOBS, *POCKETBOOK POLITICS: ECONOMIC CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 361–62 (2007).

139. Berle, *Book Review*, *supra* note 126, at 433.

140. *Id.* at 431.

141. *Id.* at 433.

142. This might explain, though, why Berle stayed at his own small law firm.

lawyers played a subordinate role; their profession always at the mercy of larger business and economic forces.<sup>143</sup>

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143. Whether Berle was right is a question for another paper. One might point out, though, that once the corporation's place in the larger economy eroded, so did whatever esteem the corporate lawyer briefly held.