

# *Large Law Firms and Professional Responsibility*

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## THE DOUBLE IMAGE OF THE LARGE FIRM

THE large business law firm, built around the promotion to partnership tournament, was invented a century ago.<sup>1</sup> It is, in a Darwinian sense, a success story. In spite of intermittent contractions, large firms are flourishing. There are more of them, they are bigger than ever, they command a bigger share of an expanding market for legal services. The large law firm is also a success in a deeper sense, as a social form for organizing the delivery of comprehensive, continuous high-quality legal services. Like the hospital in the practice of medicine, the large firm has become the standard format for delivering complex high-quality services. Many features of its style—specialization, team-work, continuous monitoring on behalf of clients, representation in many forums—have been emulated in other vehicles for delivering legal services. The specialized boutique firm, the public interest firm, the corporate law department—all model themselves on the style of practice developed in the large firm. From its original American embodiment, the large firm device has been adapted by lawyers in Canada,<sup>2</sup> Australia,<sup>3</sup> and Britain<sup>4</sup> and is spreading rapidly in many other countries.<sup>5</sup>

In its American setting, the large law firm has had an ambivalent relationship to legal ethics and professional responsibility. On the one hand the large law firm has been esteemed not only for its technical performance but as a

<sup>1</sup> On the emergence and spread of the tournament device that undergirds the large law firm, see M. S. Galanter and T. M. Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (University of Chicago Press; Chicago, 1991).

<sup>2</sup> R. J. Daniels, 'Growing Pains: The Why and How of Law Firm Expansion', *University of Toronto Law Journal*, 43 (1993), 147-206.

<sup>3</sup> O. Mendelsohn and M. Lippman, 'The Emergence of the Corporate Law Firm in Australia', *University of New South Wales Law Journal*, 3 (1979), 780-98.

<sup>4</sup> R. G. Lee, 'From Profession to Business: The Rise and Rise of the City Law Firm', *Journal of Law and Society*, 19 (1992), 37-48; J. Flood, 'Megalaw in the U.K.: Professionalism or Corporatism? A Preliminary Report', *Indiana Law Journal*, 64 (1989), 569-92.

<sup>5</sup> Y. Dezalay, 'The *Big Bang* and the Law: The Internationalization and Restructuration of the Legal Field', *Theory, Culture & Society*, 7 (1990), 279-93; Y. Dezalay, 'Territorial Battles and Tribal Disputes', *Modern Law Review*, 54 (1991), 792-809. See generally A. Tyrrell and Z. Yaqub, *The Legal Professions in the New Europe* (Blackwell; Oxford, 1993).

setting for the most elevated professionalism. A generation ago, Jerome Cariin studied the New York bar and found that large firm lawyers not only had the largest incomes, served the most affluent clients, and were the best trained and most technically skilled lawyers, but that they experienced

maximum pressure to conform to distinctively professional standards, as well as the more ordinary ethical norms; at the same time they are insulated from pressures to violate [those professional standards].<sup>6</sup>

In technical skill, collegiality, and probity, the large firm seemed to provide a venue for the most exemplary professionalism. In his foreword to Cariin's book,<sup>7</sup> Geoffrey Hazard noted that ironically the traditional badges of the profession—an independent general practice rendering personal service to all sorts of people—were no longer the marks by which the truly 'professional lawyer' was identified.

But there is an other hand. Coupled with this high regard is a long tradition of reproach of the large firm for abandoning the professional calling and becoming a mere business. Before the turn of the century there was already a sense that the profession had compromised its integrity and, by too close embrace of business, its identity. In 1895 the *American Lawyer* complained that:

[T]he typical law office ... is located in the maelstrom of business life ... in its appointments and methods of work it resembles a great business concern ... the most successful and eminent of the bar are the trained advisors of business men . . .

[The bar] has allowed itself to lose, in large measure, the lofty independence, the genuine learning, the fine sense of professional dignity and honor . . .

[F]or the past thirty years it has become increasingly contaminated with the spirit of commerce which looks primarily to the financial value and recompense of every undertaking.<sup>8</sup>

After the turn of the century, John Dos Passes complained:

From 'Attorneys and Counselors at Law' they became agents, solicitors, practical promoters, and commercial operators . . . Entering the offices of some of the law firms in a metropolitan city, one imagines that he is in a commercial counting-room or banking department.<sup>9</sup>

<sup>6</sup> J. Cariin, *Lawyer's Ethics—A Study of the New York City Bar* (Russell Sage Foundation; New York, 1966), 168-9.

<sup>7</sup> *Ibid.* at xxiii.

<sup>8</sup> *American Lawyer*, 'The Commercialization of the Profession', *The American Lawyer*, editorial, (Mar. 1895), 84-5>'(This is not the intense monthly that has since 1979 chronicled (and cheered on) rapid change in the world of large law firms, but a long extinct legal newspaper of the same name, published in New York from 1893 to 1908.) 'Bar' is used here not in the English sense, but in the American sense of the entire body of legal professionals.

<sup>9</sup> J. DOS Passes, *The American Lawyer: As He Was—As He Is—As He Can Be* (The Banks Law Publishing Co.; New York, 1907), 46.

It was not only a distinctive ambience that was lost, but the connection with the pursuit of justice:

It may . . . safely be said that the prevailing popular idea of the lawyer, too often justified by facts is, that his profession consists in thwarting the law instead of enforcing it ... The public no longer calls them 'great' but 'successful' lawyers ... It is the common belief, inside and outside of the profession, that the most brilliant and learned of the lawyers are employed to defeat or strangle justice.<sup>10</sup>

The frenetic pace and intense specialization of the large firm repelled many established lawyers.<sup>11</sup> But others were more sanguine about the changes. In a 1904 address to the New York State Bar Association, a lawyer observed unapologetically:

The law business is not what it used to be. This expression 'law business' itself marks a certain change. This business side of the profession has assumed paramount importance and the profits of the business are our most practical concern.<sup>12</sup>

By the 1930s, the scale and stability of the large law firms was recognized in the pejorative phrase 'law factory'.<sup>13</sup> Describing the bar in 1933, Karl Llewellyn observed that corporate practice had become 'itself a business . . . [with] a large staff, a highly organized office, a high overhead, intense specialization'. These firms attracted the 'ablest of legal technicians' and fostered a 'lopsided' business perspective that ignored the wider public functions of the bar.<sup>14</sup> Specifically, critics deplored the distributive implications of the development of the large firm. A. A. Berle ascribed to it the abandonment of the notion that the lawyer 'was an officer of the court and therefore an integral part of the scheme of justice' and its replacement by a notion of the lawyer as 'paid servant of his client . . . [T]he complete commercialization of the American bar has stripped it of any social functions it might have performed for individuals without wealth'.<sup>15</sup>

This grim assessment was shared by Chief Justice Harlan Fiske Stone, who described '[t]he successful lawyer of our day . . . [as] the proprietor or general manager of a new type of factory, whose legal product is increasingly the result of mass production methods'.<sup>16</sup> Stone deplored the commercialization and deprofessionalization of the large firm lawyer:

<sup>10</sup> *Ibid.* at 130-1.

<sup>11</sup> W. Hobson, *The American Legal Professional and the Organizational Society 1890-1930*, (Garland Publishing; New York, 1986).

<sup>12</sup> E. P. White, 'Changed Conditions in the Practice of Law', *The American Lawyer*, 12(2) (Feb. 1904), 52.

<sup>13</sup> This term is used by Karl Llewellyn in a 1931 book review, *Columbia Law Review*, 31 (1931), 1218. In a 1932 New Yorker profile of Paul Cravath, the author notes that '[t]he blasphemous youngsters just out\*' of law school refer to [the Cravath firm] ... as 'the factory' and it does have, indeed, the efficiency and production of a first-rate industrial plant.' M. Mackaye, 'Profiles: Public Man', *New Yorker*, 7(46) (1932), 23.

<sup>14</sup> K. Llewellyn, 'The Bar Specializes-With What Results?', *Annals*, 167 (1933), 179.

<sup>15</sup> A. A. Berle, 'Modem Legal Profession', *Encyclopedia of the Social Science*, 5 (1933), 343.

<sup>16</sup> Stone, 'The Public Influence of the Bar', 48 (1934), *Harvard Law Review*, 6.

More and more the amount of his income is the measure of success. More and more he must look for his rewards to the material satisfactions derived from profits as from a successfully conducted business, rather than to the intangible and indubitably more durable satisfactions which are to be found in a professional service more consciously directed toward the advancement of the public interest . . . [I]t has made the learned profession of an earlier day the obsequious servant of business and tainted it with the morals and manners of the marketplace in its most anti-social manifestations.<sup>17</sup>

Thus the large firm was felt to be profoundly at odds with professional traditions of autonomy and public service.

In its stable 'Golden Age' around 1960, inhabitants and observers regarded the large firm world as sadly declined from an earlier day when lawyers were statesmen and served as the conscience of business.<sup>18</sup> Echoing laments that have recurred since the last century, partners complained to sociologist Erwin Smigel that law was turning into a business.<sup>19</sup> No longer, another observer reflected, did young associates regard themselves as servants of the law and holders of a public trust: 'they are too busy fitting themselves for existence in the 1950's, when efficiency, accuracy, and intelligence are the only values to be sought'.<sup>20</sup>

As large firms have grown and multiplied, despondency about the decline of law practice from its virtuous and collegial past has intensified. Within the legal profession itself, many share the sense that law has freshly descended from a noble profession infused with civic virtue to commercialism.<sup>21</sup> In the most erudite and theoretically sophisticated account of decline, the Dean of the Yale Law School counsels idealistic young lawyers to stay clear of large firms, whose 'harshly economizing spirit' and 'increasingly commercial culture' is inimical to the commitment to public service that is the hallmark of professional identity.

<sup>17</sup> Stone, 'The Public Influence of the Bar', 48 (1934), *Harvard Law Review*, 6-7.

<sup>18</sup> On the 'Golden Age' see Galanter and Palay, *supra* note 1 at ch.3.

<sup>19</sup> E. Smigel, *The Wall Street Lawyer: Professional Organization Man* (Indiana University Press; Bloomington, 1969), 303-5.

<sup>20</sup> M. Mayer, 'The Wall Street Lawyers: Part II: Keepers of the Business Conscience', *Harper's Magazine*, 212 (1269) (1956), 56.

<sup>21</sup> The latest entry is S. M. Linowitz with M. Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (Charles Scribner's Sons; New York, 1994). The most scholarly is A. T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press;

Cambridge, 1993). The most dyspeptic is P. M. Brown, *Rascals: The Selling of the Legal Profession* (Benchmark Press; New York, 1989). The literature is vast. See, eg. A. M. Adams, 'The Legal Profession: A Critical Evaluation', *Dickinson Law Review*, 93 (1989), 652. C[T]he . . . most pervasive manifestation of the change in the legal climate is the decline of professionalism and its replacement with commercialism.); N. Bowie, 'The Law: From a Profession to a Business', *Vanderbilt Law Review*, 41 (1988), 741; L. Caplan, 'The Lawyers' Race to the Bottom', *N.Y. Times*, (6 Aug. 1993), A-29. The bar's 'official' account of the danger of commercialization is the ABA Commission on Professionalism, *In the Spirit of Public Service* (1986) (known as the Stanley Report, for Chair Justin Stanley).

<sup>22</sup> Kronman, *supra* note 21, at 378-9.

Distress about lost virtues has been a recurrent companion of elite law practice since the formation of the large firm a hundred years ago.<sup>23</sup> The 'earlier day' when virtue prevailed lies just over the receding horizon of personal experience. Lawyers' sense of decline reflects the gap between practice and professional ideology: in the flesh, working life is experienced as more mundane, routine, business-like, commercial, money driven, client dominated, and conflict laden than it is supposed to be. It is easy to believe that the way it is supposed to be is the way that it used to be.<sup>24</sup>

#### THE TROUBLE WITH LAWYERS

So we find a curious double image in which large firm lawyers embody the professional ideal of technical proficiency and service to clients, at the same time that the firm is seen as betraying other aspects of professionalism. Complaints within about the loss of collegiality and the abandonment of public-spiritedness are matched by misgivings without about the effects of large firm lawyering. For even as large firms solve the problem of providing quality legal services to large entities, they raise problems of access to justice. By efficiently assembling great concentrations of talent and resources, and placing them at the service of the powerful economic actors (and occasional rich individuals) who can afford their fees, large firms accentuate the disparity in ability to use the legal system.<sup>25</sup>

In a complex, highly technical system that requires individualized service by highly trained and expensive specialists, there is a major problem of providing legal service to the poor and disadvantaged—and to individual persons generally. In Britain the chief means of addressing this disparity is provision of legal aid; in the United States the emphasis is ready access through the contingency fee. But even if individuals obtain competent lawyering to address those predicaments the remedy of which generates a fund of cash, they are unlikely to obtain the co-ordinated strategic use of the legal system that is afforded the corporate clients of large law firms.

In short, one of the persistent and important critiques of the large American law firm is that it does too much for the rich and too little for the poor. This is part of a wider critique that faults the legal profession for abandoning its obligation to promote justice. This 'public justice' critique, most prominent in the 1960s and 1970s, was manifest in Ralph Nader and the

<sup>23</sup> Galanter and Palay, *supra* note 1, at 11, 36; R. Gordon, 'The Independence of Lawyers', *Boston University Law Review*, 68 (1988), 43.

<sup>24</sup> Lawyers are not the only legal actors beguiled by a nostalgic reconstruction of the past. See M. S. Galanter, 'The Life and Times of the Big Six: Or, The Federal Courts Since the Good Old Days', *Wisconsin Law Review*, 1988 (1988), 921 (describing the misperception by Supreme Court Justice of change in Federal Court dockets).

<sup>25</sup> M. S. Galanter, 'Why the "Haves" Come Out Ahead...', *Law & Society Review*, 9 (1974), 95.

consumer movement, the access to justice movement, the establishment of the federally-funded Legal Services Program, and the development of public interest law. Its high-water marks were a 1978 speech by President Jimmy Carter, reproaching the legal profession for its betrayal of justice in favour of seeking advantage for its paying clients, and the report of the American Bar Association's Kutak commission seeking to revise the rules of professional conduct by accentuating the public duties of lawyers and limiting their license for adversarial combat.

During the 1980s this 'public justice' critique was eclipsed by a very different attack on the legal profession.<sup>27</sup> Lawyers were seen as the promoters and beneficiaries of excessive legalization and runaway litigation. They were depicted as parasites whose predations unravel civil society and undermine the economy. This predator view reached a crescendo in the final years of the Bush administration, with Vice-president Dan Quayle leading the charge with the assertion that America had seventy per cent of the world's lawyers and that they were undermining the country's economic competitiveness. Attacks on predatory lawyers and crazy lawsuits emerged as a major theme in the losing Republican presidential campaign of 1992.<sup>28</sup>

The anti-lawyer campaign resonated with elite groups: business people, doctors, politicians, and media pundits concurred on the unwholesome effects of lawyers. The flavour of this is manifest in a widely repeated story:

A doctor, a lawyer, and an architect were arguing about who had the smartest dog. They decided to settle the issue by getting all the dogs together and seeing whose could perform the most impressive feat.

'Okay, T-Square', ordered the architect, and T-Square trotted over to a table and in four minutes constructed a complete scale model of Chartres Cathedral out of toothpicks. The architect slipped T-Square a cookie, and everyone agreed that it was a pretty impressive performance.

'Hit it. Sawbones,' commanded the doctor. Sawbones lost no time in performing an emergency Caesarian on a cow. Three minutes later the proud mother of a healthy little heifer was all sewn up and doing fine. Not bad, conceded the onlookers, and Sawbones got a cookie from the doctor.

<sup>26</sup> The background and reception of the Carter speech and the Kutak report are recounted in M. S. Galanter, 'Predators and Parasites: Lawyer Bashing and Civil Justice', *Georgia Law Review*, 28 (1994), 638-43. The Kutak proposals aroused fierce opposition from various sectors of the bar and were vitiated at a series of ABA meetings in 1982 and 1983.

<sup>27</sup> The 'public justice' critique retains some vitality. Indeed one of the public's chief complaints is that lawyers have abandoned the pursuit of justice. Hart Survey, *infra* note 33, at Table 10.

<sup>28</sup> M. S. Galanter, 'News from Nowhere: The Debased Debate on Civil Justice', *Denver University Law Review*, 71 (1993), 77-113.

'Your turn, Loophole' said the lawyer. Over went Loophole, smashed the cathedral, mangled the calf, screwed the other two dogs, took their cookies, and went out to lunch.<sup>29</sup>

Mirroring their masters, the other dogs are constructive, creative, helping; the lawyer's dog is destructive and predatory—it not only contributes nothing, but destroys the contributions of the others, appropriates their deserved rewards, and violates them 'personally'. This captures some of the intense resentment of lawyers by elite groups. The media reflected (and fostered) wide-spread popular disdain for lawyers. One symptom of this is a tidal wave of jokes about lawyers, exemplified by the story recounted above, riddles like 'What do you call 60,000 lawyers at the bottom of the sea?' (Answer: a good start!), and a book of cartoons entitled *Dead Lawyers and Other Pleasant Thoughts*.<sup>30</sup>

Anti-lawyer humour itself became a political issue in the Spring of 1993 when the president of the California Bar Association blamed lawyer bashing for encouraging attacks on lawyers like the mass murder in a San Francisco law office by a disgruntled client.<sup>31</sup> Although few rallied to his proposal to treat attacks as 'hate speech', the profession is desperately concerned to mend its reputation.<sup>32</sup> Two recent public opinion surveys portray the contours of public disapproval.<sup>33</sup> The National Law Journal poll documents a decline in public regard for lawyers since 1986, while at the same time the portion of the population using lawyers' services increased sharply. People are generally satisfied with their own lawyers. Indeed, although many respondents said they were charged too high a fee, most said they were more satisfied than dissatisfied with their lawyer's performance.<sup>34</sup>

But when viewed in the aggregate, lawyers are held in low regard. Almost three-quarters of the population thinks that the United States has too many lawyers.<sup>35</sup> Only forty per cent of the public hold a favourable attitude toward lawyers—less than half the percentage that think well of teachers or pharmacists. Only stockbrokers and politicians are rated lower. The respondents

<sup>29</sup> This story can be found in many collections of lawyer jokes. This version is adapted from B. Knott, *Truly Tasteless Lawyer Jokes* (St Martin's Paperbacks; New York, 1990), 4-5. To 'eat [someone's] cookies' is to vanquish that person. J.E. Lighter, *Random House Dictionary of American Slang*, (Vol 1; Random House; New York, 1994), 695.

<sup>30</sup> Wiley, *Dead Lawyers and Other Pleasant Thoughts* (Random House; New York, 1993).

<sup>31</sup> J. Hiscock, 'Lawyer Dying for a Laugh', *Daily Telegraph*, (7 July 1993), 12.

<sup>32</sup> D. O'Briant, 'Open Season on Lawyers', *Atlanta Journal and Constitution*, (9 July 1993), ('The American Bar Association recently decided to allocate a half-million dollars for a public relations blitz to polish the tarnished image of lawyers.')

<sup>33</sup> The ABA commissioned a comprehensive survey of public attitudes towards the standing of attorneys. Results were published in G. A. Hengster, 'Vox Populi: The Public Perception of Lawyers: ABA Poll', *American Bar Association Journal*, (Sept. 1993), 60. The survey, conducted by telephone with 1,202 adult participants, was carried on by Peter D. Hart Research Associates, Inc., Jan. 1993 (Hereafter Hart Survey). The National Law Journal poll surveyed 815 people in mid-July. Results were published in R. Sambom, 'Anti-Lawyer Attitude Up', *National Law Journal*, (9 Aug. 1993), 1. <sup>M</sup> Sambom, *supra* note 33, at 20. <sup>35</sup> *Ibid.* at 1.

<sup>36</sup> Hart Survey, *supra* note 33, at Table 1.

thought lawyers were smart and good problem solvers, but greedy, successful money-makers, lacking in both honesty and compassion.<sup>37</sup> But in view of the historic affinity of lawyers with the powerful and wealthy, this profile of public attributes is quite surprising. For it is the top people who are most negative about lawyers: those with higher incomes, and more education, and more direct experience with the legal system.

Americans who are more critical than average tend to be more establishment, upscale, and male. The higher the family income and socioeconomic status, the more critical the adults are.

Pluralities of college graduates feel unfavorably toward lawyers, while pluralities of non-college graduates feel favorably.

By and large those who see lawyers in a more favourable light than average tend to be downscale, women, minorities and the young.<sup>38</sup>

Quite a reversal from an earlier day when lawyers were seen as part of the establishment and supporters of the status quo!

#### PROFESSIONAL RESPONSIBILITY AND THE PRO BONO OBLIGATION

It is in this context that we turn to the most recent developments in professional responsibility and their relation to large law firms. Large firms rarely engage in the characteristic sins of the smaller practices—the abuse of clients by peculation, neglect, or incompetence. Although there is some client grumbling about excessive staffing and high fees, the typical misdeeds of large firms are not lack of zeal, disloyalty, or under-performance. Instead, subservience to the valued client may tempt them to 'over-perform', leading to a compromise of obligations to other parties and to the larger legal system.<sup>39</sup> In the aftermath of the collapse of many savings and loan associations, regulators have pursued large law firms for being uncritically co-operative with the schemes of their financial clients. From 1989 to 1993, regulators brought over ninety cases against law firms.<sup>40</sup> In a 1992 proceeding that shook the upper reaches of the profession, Kaye Scholer, a Wall Street firm, paid a forty-one million dollar settlement rather than face seizure of its assets that would have threatened its

<sup>37</sup> Hart Survey, *supra* note 33, at Table 7.

<sup>38</sup> *Ibid.* at 4-5. (The order of the sentences in the above quotation have been changed from the original format.)

<sup>39</sup> D. Wilkins, 'Who Should Regulate Lawyers?', *Harvard Law Review*, 105 (1991), 819-20 usefully explicates the distinction between 'agency' problems, (eg, inattention, negligence, defalcation) and 'externality' problems (ie, lawyers and clients acting together to harm others—frivolous pleadings, misrepresentations of clients' financial positions, and other misdeeds that harm others or the legal system rather than the client).

<sup>40</sup> H. Weinstein, 'Attorney Liability in the Savings and Loan Crisis', *University of Illinois Law Review*, 1993 (1993), 53.

very existence. The following year Jones Day Reavis & Pogue, the second largest United States firm, paid a record fifty-one million dollars to settle government claims that it helped conceal fraud by convicted financier Charles Keating.<sup>41</sup> In each of the above instances, the case was resolved by a consent decree that set out stiff new rules for the respective firm's banking practice. Large law firms are on notice that major difficulties may ensue if they are insufficiently critical and detached from their corporate clients.

The assault here comes from government regulators who can move aggressively in the prevailing atmosphere of scorn for lawyers. At the same time there is pressure from **within** the profession to address the problems of access and disparity by embracing the notion of mandatory *pro bono* service. In February 1993 the American Bar Association's House of Delegates modified its model ethical rule commending *pro bono*, to provide that every lawyer 'should aspire' to devote fifty hours a year to *pro bono publico* service, of which a 'substantial majority' should go to the poor and to organizations that help the poor.<sup>42</sup> Since the enforceable ethical rules are enacted by the courts and bar in each state, this provision is not enforceable as such, but it provides a powerful push for bar groups to consider how to implement *pro bono* requirements. Four state bars had enacted such 'hours' obligations before the ABA pronouncement and a fifth enacted one by mid-1994. Like the ABA rule, all provided 'should' rather than 'shall': they were ethical obligations but not enforceable through the disciplinary process. A few local bars, in which membership is voluntary, have imposed *pro bono* requirements as a condition of membership.<sup>43</sup>

The idea of mandatory *pro bono*, which has been around for the last twenty years or so, appeals to those who share the public justice critique of the profession. Joining these supporters are many who are alarmed by external attacks on the legal profession. Mandatory *pro bono* commends itself for its equalizing thrust and its display of professional *noblesse*.

The supporters of mandatory *pro bono publico* service seem to be reading public opinion accurately. Almost three-quarters of the respondents to the aforementioned 1993 National Law Journal poll thought lawyers should be required to spend some of their time on community service—a sharp increase since the 1986 poll.<sup>44</sup> Other survey data suggests that this is a passive low intensity preference: when asked to volunteer a change that would improve the legal system only five per cent proposed equalizing access to justice or

<sup>41</sup> S. Terry, 'Paying the Price and Bearing the Burden', *Washington Post*, (26 Apr. 1993), F7.

<sup>42</sup> American Bar Association, ABA Model Rules, Rule 6.1. The rejection of earlier attempts to mandate a specific amount of *pro bono* service is detailed in E. F. Lardent, 'Mandatory *Pro Bono* in Civil Cases: The Wrong Answer to the Right Question', *Maryland Law Review*, 49 (1990), 92-9.

<sup>43</sup> Telephone interview with B. V. Groudine, Assistant Committee Counsel, American Bar Association Standing Committee on Lawyers' Public Service Responsibility, (26 Aug. 1994).

<sup>44</sup> Samborn, *supra* note 33, at 22. 73% of the respondents favoured a mandatory requirement, up from 55% in the 1986 poll.

expanding *pro bono* services.<sup>45</sup> Still, hearing about lawyers providing free legal service to the needy ranked highest among items improving respondents' opinion of the profession.<sup>46</sup>

Of course this notion of an obligation to devote a portion of one's time to public service applies to **all** lawyers, not just to lawyers in large firms. But there is a substantial connection between large firms and support *for pro bono*. Large firms have had the most visible *pro bono* programmes—and large firm lawyers have been the most enthusiastic and outspoken supporters of the concept.<sup>47</sup> The amount of *pro bono* activity by law firms is uneven among firms of all sizes, but media accounts suggest that generally there is more *pro bono* among the largest firms and the amount is increasing.

To test this impression, we matched the *American Lawyer's* annual surveys of *pro bono* activity (available since 1990) with the *American Lawyer* reports on firm size, revenues, and estimated profits and with our own data set on firm growth rates.<sup>48</sup> In general we found that *pro bono* activity was positively related to the size and economic performance of the firm. We used four measures of *pro bono* activity (total hours of *pro bono* activity for the firm, the number of lawyers providing twenty or more hours of *pro bono* service during the year, hours per lawyer engaged in *pro bono* work, and the percentage of lawyers at the firm who reported twenty or more hours of *pro bono* activity). *Pro bono* activity, as measured by each of these four measures, increased between 1990 and 1993. In the fifty-nine firms for which complete data were available for both 1990 and 1993, total hours of *pro bono* work increased forty-five per cent. This resulted from more lawyers contributing more hours each: the number of attorneys reporting twenty or more hours of *pro bono* activity increased by over sixty per cent while the average hours per attorney increased by almost one-third. The percentage of attorneys at these firms who contributed twenty or more hours increased by thirty-four per cent (but still totalled less than forty per cent of lawyers at these firms). Overall, *pro bono* activity grew faster than the size, revenue, or profits of these firms. In general the level of *pro bono* activity was positively related to firm performance.

Thus the data suggest that the larger the firm and the greater its gross

<sup>45</sup> Hart Survey, *supra* note 33, at 28.

<sup>46</sup> In the ABA survey 43% said such information improved their opinion of lawyers 'a lot' and another 27% reported 'some' improvement. At the other end of the scale, only 17% and 39% reported similar effects from learning that '[l]awyers help defend the average person from unjust actions by big business or the IRS [Internal Revenue Service].' *Ibid.* at 31.

<sup>47</sup> One of the most trenchant critics of mandatory *pro bono*, noting that its strongest support comes from the upper strata of the legal profession, argues that large firms will be the real beneficiaries of such programmes. J. R. Macy, 'Mandatory *Pro Bono*: Comfort for the Poor or Welfare for the Rich', *Cornell Law Review*, 77 (1992), 1119-21.

<sup>48</sup> The detailed results are presented in M. S. Galanter and T. M. Palay, 'The Public Service Implications of Firm Size and Structure', in Robert Katzmann, ed. *The Law Firm and the Public Good* (Brookings Institution Governance Institute; Washington, 1995).

revenues the more willing it is to encourage or permit *pro bono* activity. Why should this be? Some would argue that large firms, or at least some of them, have been the site of a long tradition of public service, even though that tradition is presently in some disarray. Conceding that 'public service' is a category far broader than '*pro bono*' as currently understood, it is evident that *pro bono* work by large firms has been neither typical nor continuous.

The present *pro bono* surge is not the large firms' first encounter with expectations of organized *pro bono* work. In the late 1960s there was a great contraction in the supply of talented associates. The Vietnam War draft diverted law graduates to other occupations in which they could obtain deferments. Simultaneously, when 1960s activism induced disdain for corporate practice among students seeking work in poverty law and public interest law, the percentage of elite law graduates entering private practice fell precipitously.<sup>49</sup> Confronted by criticism that their work was unfulfilling and inimical to the public interest, many firms acceded to demands that recruits be able to spend time on '*pro bono publico*' activities.<sup>50</sup> In 1970 the *Wall Street Journal* reported that 'now it's common for [the big corporate law firms] to permit their attorneys to spend substantial portions of their time in noncommercial work'.<sup>51</sup> But just a few years later, this commitment had largely dissipated,<sup>52</sup> only to be rekindled in the 1980s, when 'voluntary *pro bono* programs enjoyed an unparalleled level of support, funding and growth'.<sup>53</sup>

We submit that there are structural reasons why large firms find regular organized *pro bono* service more congenial than do their smaller counterparts. On the whole, large firms with hundreds of lawyers can adapt readily to the *pro bono* obligation by appointing partners (or retaining outside specialists) to manage it, and assigning staff to deal with the logistical problems of finding and screening suitable cases. A large volume of *pro bono* work projects a favourable image of public service at the same time that it provides both an asset for recruitment of young lawyers and regular opportunities for development of professional skills such as trial advocacy. Smaller firms, unable to enjoy similar economies of scale in organizing their *pro bono* work, find it considerably more disruptive and burdensome.

The large firm setting is home to the most intense efforts to institutionalize *pro bono* obligations. In May 1993 the American Bar Association launched its 'Law Firm *Pro Bono* Challenge' calling on the five hundred largest law firms in the country—that is, roughly all firms with more than

<sup>49</sup> Galanter and Palay, *supra* note 1, at 56, n.122.

<sup>50</sup> J. Berman and E. Cahn, 'Bargaining for Justice: The Law Student's Challenge to Law Firms', *Harvard Civil Rights-Civil Liberties Law Review*, 5 (1970), 16-31.

<sup>51</sup> C. Falk, 'Many Lawyers Take Up Political, Social Causes on their Firms' Time', *Wall Street Journal*, (20 May 1970), 1.

<sup>52</sup> S. Tisher, L. Bemabei, and M. Green, 'The Sad State of *Pro Bono* Activity', *Trial*, 13(10) (1977), 43-6.

<sup>53</sup> Lardent, *supra* note 42, at 90.

seventy lawyers—to contribute an amount of time equal to three to five per cent of the firm's total billable hours each year. This effort was resoundingly endorsed by Attorney General Janet Reno. By late May some 155 law firms had signed on.<sup>54</sup> Some of the largest firms declined to participate on the ground that the programme's definition of *pro bono* work was too restrictive and objected to the requirement that a law firm commit a percentage of its total hours rather than a fixed number.<sup>55</sup> Unlike the American Bar Association Model Rules, which declares the obligation of individual attorneys, the Challenge includes an undertaking to modify firm arrangements by eliminating barriers to *pro bono* work and nurturing 'a firm culture in which *pro bono* service is a routine and valued part of each individual's professional life'.<sup>56</sup> A year after the Challenge was issued, the total number of signatory firms was 164, only slightly higher than the initial sign up.<sup>57</sup> Subsequently, news about the programme has been sparse.

If *pro bono* were to become mandatory for all lawyers, it would very likely include arrangements for making *pro bono* obligations transferable. That is, there would be a market in which lawyers could arrange to pay others to discharge their obligation, or be paid to do *pro bono* work for others.<sup>58</sup> Existing legal services offices would be strengthened and a whole new category of *pro bono* providers might appear. But it seems likely that most large firms would operate their own *pro bono* programmes, with long term effects that no one can predict.<sup>59</sup>

So, to summarize, we have a curious situation in which lawyers are under attack by elites, but are seen as flawed yet useful champions by the poor and less advantaged. Major regulatory initiatives promise to make large firms hold themselves more independent of their major business clients—at the very time that these clients are trying to reduce their dependence on outside law firms and gain more control over costs. And, finally, the large law firms, embracing *pro bono* representation of the poor, are the leading edge of the profession's initiative in redefining itself as a vehicle of public justice.

We do not argue that such service is a necessary and inevitable feature of the large business law firm—a claim which its history surely falsifies. But neither is it incompatible—at least from the point of view of the lawyers in those firms. It remains to be seen how their clients will react and how they will respond to client pressures.

<sup>54</sup> W. J. Dean, 'The ABA's Challenge to Law Firms', *New York Law Journal*, (24 May 1993), 3.

<sup>55</sup> D. Knox, 'Was *Pro Bono* Challenge Too Challenging?', *American Lawyer*, (June 1993), 26.

<sup>56</sup> Dean, *supra* note 54.

<sup>57</sup> W. J. Dean, 'Highlights of the 1994 Conference', *New York Law Journal*, (6 May 1994), 3.

<sup>58</sup> D. Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press; Princeton, 1988) 277-89; M. S. Galanter and T. M. Palay, 'Let Firms Buy and Sell Credit for *Pro Bono*', *National Law Journal*, (6 Sept. 1993), 17-18; M. Coombs, 'Your Money of Your Life: A Modest Proposal for Mandatory *Pro Bono* Services', *Boston University Public Interest Law Journal*, 3 (1993), 215-38; Linowitz, *supra* note 21, at 161-2.

<sup>59</sup> Katzmann, *supra* note 48.

## PRO BONO ABROAD?

As the American style large firm spreads around the globe, it is an open question whether the *pro bono* gene will manifest itself elsewhere. Our interviews of lawyers in large London solicitors firms from 1990 until 1994 elicited little sense of distress about the increasingly commercial character of law practice. Interviewees unselfconsciously spoke of 'the law business'. For the most part they were quite sanguine about recent changes and free of expressions of nostalgia about lost professional virtue. There was no sense that the profession was under attack. And there was hardly a glimmer of interest in expansive *pro bono* activity, although inquiry revealed that several of the firms we visited had substantial *pro bono* programmes. Such interest, where it exists, remains low key, valued more as a recruiting device than a bulwark protecting professional identity from attack. Perhaps we failed to ask the right questions, but we detected no counterpart in the London large firm world to the American sense that large firms might have a special obligation to remedy serious deficiencies in access to justice. In May 1994, a Law Society working party firmly rejected any mandatory contribution of legal services or compulsory financial support.<sup>60</sup>

Perhaps this should not surprise us, for legal aid for the poor was firmly institutionalized in Britain as a state responsibility prior to the emergence of large firms. And lawyers there have not been subjected to withering attack by elite groups and broader public opinion. But these contrasts, in turn, are located in a world in which many forces are driving the legal systems of the industrialized nations in a common direction.<sup>61</sup> The development in England of the large law firm is in itself a striking instance of such convergence. So before we take the present divergence on *pro bono* as permanent, it is useful to recall that in their 'Golden Age' in the 1950s and early 1960s no one would have predicted that the thrust for strong *pro bono* commitment in the United States would come from the large firms.

Of course we don't know how the present spurt of interest in incorporating *pro bono* into the large firm will play out. Lawyers are adaptive and the large law firm has proved a resilient form. Is it resilient enough? The question is nicely put in one of the few lawyer jokes that depicts the world of the large firm:

A senior partner at a major New York law firm . . . was asked by the Manhattan Chamber of Commerce to address its membership.

<sup>60</sup> Law Society, *Solicitors Serving Society: A Report of the Pro Bono Working Party* (The Law Society; London, 1994).

<sup>61</sup> M. S. Galanter, 'Law Abounding: Legalisation Around the North Atlantic', *Modern Law Review*, 55 (1992), 1-24.

Accepting months in advance, he forgets about the engagement until, cleaning off his desk late one Friday evening, he notices the date scheduled in his calendar for the following Monday. With a big week-end at the beach house on tap, there's no time to write a speech.

Instead, he calls in a bright young associate.

PARTNER: Smith, I have to address the Chamber on Monday night and because of a client commitment all week-end, I can't do it myself. You'll have to write it for me. Have it on my desk by noon Monday.

ASSOCIATE: But sir, my girlfriend and I have reservations at -

PARTNER: On my desk at noon. No ifs, ands, or buts.

Comes Monday at 12, the speech is delivered, freshly typed and bound in a neat plastic folder. The partner, on his way to a client meeting that will last until the evening, stuffs the speech in his brief-case without reading it. Later that night, standing before the audience of 500 business executives (many clients and potential clients), he delivers the speech, which turns out to be a literary pearl filled with humorous anecdotes, wonderful insights, and bright observations on the law, business, and modern society. Near the end, it reaches a crescendo that has the audience on the edge of its seats.

'Before I leave you tonight,' the partner reads, 'I want to share with you my ultimate vision for using the law not only to resolve disputes, but to create a new chapter in the history of mankind. A chapter of unparalleled peace and prosperity world-wide. To accomplish this, I will suggest that—he turns the page, curious himself to read this remarkable plan, only to find, in capital letters, IMPROVISE, YOU SON OF A BITCH.<sup>62</sup>

<sup>62</sup> M. Stevens, *Power of Attorney: The Rise of the Giant Law Firms* (McGraw Hill; New York, 1987), 179-80.