

THE TYRRELL WILLIAMS MEMORIAL LECTURE

The Tyrrell Williams Memorial Lecture was established in 1948 by the family and friends of Tyrrell Williams, a distinguished member of the faculty of the Washington University School of Law from 1913 to 1946. Since its inception, the Lectureship has provided a forum for the discussion of significant and often controversial issues currently before the legal community. Former Tyrrell Williams Lecturers include some of the nation's foremost legal scholars, judges, public servants, and practicing attorneys.

Robert B. McKay, a former dean and professor of New York University Law School, lifelong legal scholar, and public interest advocate, delivered the 1990 Tyrrell Williams Memorial Lecture on the campus of Washington University in St. Louis, Missouri. The legal community was saddened by Robert McKay's unexpected death on July 13, 1990.

THE RISE OF THE JUSTICE INDUSTRY AND THE DECLINE OF LEGAL ETHICS

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INTRODUCTION

I wish I could have known Tyrrell Williams for whom this Lectureship is named. Unfortunately for me, our professional careers were consecutive rather than concurrent. Professor Williams left law teaching in 1946, before I finished law school, and four years before I entered law teaching. He must have been the kind of law teacher, in that less hurried day, whom we would now call a role model for students and fellow-teachers alike. I am honored to address, in his name, problems that we sometimes think unique to our time, but which must have also troubled Tyrrell Williams. I refer to problems in legal education, the general ill repute of the legal profession and its accelerating move toward commercialism, and the decline in legal ethics. These are the issues to which I

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direct your attention, from the perspective of a new decade and a looming new century.

It is a special pleasure for me to address this subject at Washington University School of Law, not only because it is one of America's fine law schools, but because I believe that St. Louis, as a major center of commercial activity, is an especially appropriate location for this topic.

St. Louis is also special for a person born in Wichita and educated originally at the University of Kansas. Kansas City was the natural target for those of us in Lawrence during the 1930s, and it was widely, and I suspect accurately, regarded as wicked at that time. Yet St. Louis evoked a different image—sophisticated, vaguely “Eastern,” and probably unattainable for a mere Midwesterner. The nearest I actually got to St. Louis while at the University of Kansas was to Columbia, Missouri in the late 1930s, once for a debate conference and once to see Kansas University in its usual football ignominy. To “make it” in St. Louis is something special for a former Kansan.

In more recent decades, I have of course discovered the charms of both cities; but, oddly, I now have more professional contacts in St. Louis: several members of the Washington University and St. Louis University faculties, Senator Tom Eagleton, John Shepard, Bill McAlpin, Bob Hetlage, your former Dean Hiram Lesar, and your absent but loyal son Bill Webster. These are the kind of lawyers I am about to urge as the proper role models for the profession of the future.

The issues I intend to discuss have received principal attention on the East and West Coasts where the megafirm is said to have set the pace. But I warn you that right here in River City—St. Louis—and across the state in Kansas City, the issues are virtually the same as those in New York City or Los Angeles.

By my calculations, St. Louis and Kansas City each claim at least five law firms of 100 to nearly 350 lawyers, as well as a large number of firms between 50 and 100 lawyers. The Washington University Law School bulletin describes all firms over 50 lawyers as “large firms.” I agree. I assert that each of those firms, however powerful, however rich, however prestigious, is at risk. If the large firms are at risk, how much more so are the smaller firms, which are in danger of being consumed by merger or acquisition, or left stranded by defections of entire divisions of their practice. At least one Chicago law firm now has a presence in St. Louis; and Kansas City is no longer a stranger to St. Louis law firms.

My friends, I am worried about the present health and the future well-

being of a profession that has allowed many of us to do interesting, personally profitable, and possibly even useful things. Certainly, the law has been good to me. I come to criticize and complain, but not as an apostle of apocalypse. There is, I believe, hope of salvation, which will require all of us to join hands in what must ultimately lead to collective action in the name of—I do not shy from the word—justice.

As you may now suspect, my message is cast in contradictory terms. I take my theme from the famous opening lines of Charles Dickens' cautionary parable about the French Revolution: "It was the best of times, it was the worst of times."¹ The same is true of the legal profession.

Legal education has never been more apparently prosperous. But one wonders whether tuition can continue to rise to unchecked heights of student debt, and whether it is acceptable for students to view law school as a place of repose between the competition for admission to the school of choice and the competition, following soon after, for placement in the firm of choice at previously unimagined rates of compensation.

The profession has similarly never offered more remuneration for lawyers—on the average. But for every million-dollar income, what about those at the other end of the scale? What about billable hours and quality of life?

The organized bar has developed a conscience in recent decades—at least about the large issues. But what about mounting greed and increasing insensitivity to ethical concerns? What, in short, about law as a business, no longer a profession?

These are the issues I want to discuss with you. First, however, it may be useful to reflect on this phenomenon we call the legal profession in these United States.

THE RISE OF THE LEGAL PROFESSION

Law has been an essential element of every organized society; its presence is well documented in the Greek and Roman states. Individuals charged with defending and applying the law have played important roles in all organized societies. Throughout history, those individuals, whom we now call lawyers, have always been more needed than loved. The notion of a profession, as a group phenomenon with rules and regulations, came much later, followed much more recently by an organized

1. C. DICKENS, *A TALE OF TWO CITIES* 3 (Random House 1950).

bar in which lawyers come together to discuss matters of common interest and to take joint action in defense of professional concerns.

During the colonial period in America, the received law was British common law, which gradually adapted to the new conditions of a different society. There were, of course, courts and lawyers, but lawyers were of little importance other than as land conveyancers or debt collectors. Indeed, many disputes eligible for judicial resolution were in fact handled outside the courts by referees in a process that we would now call arbitration.

We know that lawyers were important to the increasing resistance to British rule from the 1760s through the Revolution, and during the Constitution-making period from 1787 to 1791. But the first great surge of lawyer significance in the world of commerce came after 1790 when the legal profession began to rise to a position of political and intellectual domination. By 1830, when the young Alexis de Tocqueville traveled in the United States, he recognized this phenomenon in the now-familiar comment:

If I were asked where I place the American aristocracy, I should reply without hesitation, that it is not composed of the rich who are united together by no common tie, but that it occupies the judicial bench and bar.²

This early rise of an elite class of legal professionals was for a time deflected by Jacksonian democracy, which eliminated qualifications for the practice of law in a number of states. The Lincoln-Douglas debates in the 1850s, however, demonstrate that lawyers were once again regarded as important members of the community. The ascendance of the legal profession commenced after the Civil War and has never been seriously challenged since that time. With the industrialization of America and its emergence as a major force on the world scene, lawyers became increasingly important in a world of steel, oil, railroads, and new combinations of businesses into trusts and monopolies.

As early as 1870, lawyers began to think of themselves, not merely as individuals engaged in a common endeavor, but as members of a profession that would benefit from common action. The Association of the Bar for the City of New York was the first to recognize the power of joint effort. The New York City Bar Association was originally designed to deal with perceived corruption in City government, but it soon became recognized for its potential benefits across a broad spectrum of common

2. A. DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 328 (H. Reeve Trans. 1961).

interests. Lawyers in other cities and other states soon followed the lead of the New York City lawyers, and by 1878 the growing network of state and local bar associations sensed the advantage of a national organization. The appropriately named American Bar Association (ABA) was formed at Saratoga Springs, New York, in August 1878, on the call of fourteen men from twelve states who convened the first meeting in a "comfortable," filled courtroom. From this modest beginning, the ABA gradually gained strength in numbers and influence: its membership in 1990 includes more than 365,000 lawyers; it has an annual expense budget of about 100 million dollars; and it has considerable influence on law-related matters.

State and local bar associations pursued a similar course of growth in numbers and influence during the late nineteenth century and at an accelerating rate in the twentieth century. In addition to state and local bar associations organized within the boundaries of political entities, there are now hundreds, perhaps thousands, of bar associations that represent racial, ethnic, gender-based, and special interest aggregations.

It is interesting, and perhaps revealing, to consider the objectives of the early efforts to bring lawyers together. The Section of Legal Education and Admissions to the Bar was established in 1878 in recognition of the inadequacy of legal education. This section has been increasingly active in raising the standards required of ABA-approved law schools.

The expressed interest in legal education was not, however, quickly carried over to efforts to define standards of ethics, professional responsibility, or lawyer discipline. The ABA did not promulgate even the most rudimentary Canons of Professional Ethics until 1908. The Canons were recommended for state adoption, but they were moralistic in tone, largely hortatory, gave little guidance on difficult questions, and were scarcely any basis for discipline. Nevertheless, the Canons remained the only tool for ethical guidance for sixty-two years.

The Canons were replaced in 1970 by the Model Code of Professional Responsibility, with its nine Canons, Disciplinary Rules and Ethical Considerations—a clumsy vehicle, but clearly an improvement over the earlier Canons. Within a few years, every state except California adopted the new Code in some form, nearly all with few changes. Surprisingly, despite the wide acceptance of the Code, sufficient dissatisfaction was expressed to justify another attempt beginning in 1977, and culminating in the adoption of the Model Rules of Professional Conduct in 1983. A number of the proposals of the Kutak Commission, which would have

restricted lawyer confidentiality, required written fee agreements, and enlarged whistle-blowing opportunities, were modified or rejected. The final product was more precise in language and more coherent in form, but it was not substantively different from its predecessor. The lawyer instinct for preservation of the widest latitude for freedom from external regulation prevailed once more. To update the Model Rules to meet current commercial demands, the ABA House of Delegates authorized in February 1990, an amendment to approve the purchase and sale of law firms, including goodwill.³

The Model Rules did not experience the same easy acceptance as did its predecessor, the Model Code. Although more than half the states adopted the format of the Model Rules within the first five years of its promulgation, changes were common, some no more than minor modifications of language, but some quite substantial. A minority of the states, including such important commercial states as California and New York, did not accept even the format of the Model Rules. The ideal of near uniformity of professional responsibility standards throughout the nation has been shattered and seems unlikely to be retrieved in the predictable future.

The story of the American Bar Association is marred in other respects as well. For many decades the American Bar Association was a white-male enclave, long resisting the admission of women and denying the admission of blacks until 1952. It is extraordinary that the legal profession, while insisting on its own right of self-regulation, should fail for so long to recognize the necessity for a single profession with right of access open to all. The senseless discrimination was corrected long ago, but the scars were a long time healing.

Finally, in this recital of the profession's slow or incomplete reaction to conceded problems, is the question of lawyer discipline. At least since 1908 the professional obligation of lawyers had been defined in the Canons, Codes, or Rules; but at best, imperfectly. The state of disciplinary enforcement was not examined from a national perspective until 1970. In that year, the ABA Commission on Evaluation of Disciplinary Enforcement pronounced the situation substantially flawed.

SO WHAT IS A PROFESSION?

The legal profession, as we proudly proclaim it, is in the first instance

3. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.17 (1990).

an aggregation of lawyers. But it is unlike aggregations of gardeners, funeral directors, journalists, or engineers. The point of differentiation is in two commonly agreed-upon ingredients of a profession. First, membership in a profession is limited to those who satisfy specified educational and licensure requirements; thus, professions are said to be learned. Second, professions have the power of self-regulation, at least as to standards of ethical conduct and discipline. Accordingly, law, medicine and other disciplines in the health care field, theology, and accounting, for example, are professions. But business, journalism, and food preparation are not. The case for differentiation of the legal profession is even stronger. Unlike accounting and the health care disciplines, the legal profession has a more compelling claim to the status of profession. The legal profession alone is almost entirely free of external regulation by executive or legislative fiat. Qualifications for admission to law school are fixed by lawyers and law teachers in conformance with standards recommended to the ABA House of Delegates by the Council of the ABA Section of Legal Education and Admissions to the Bar. Admission to practice is determined by rules generally promulgated by lawyers in, or responsible to, the state's high court. The rules that govern lawyer conduct are drawn by lawyers and principally enforced by lawyers. The structure has been appropriately described as a system of professional cradle to professional grave regulation of lawyers, by and for lawyers.

If the capacity for self-regulation is truly the hallmark of a learned profession, surely another ingredient must be added. Justification for reposing the potent power of self-governance in a profession cannot be rooted primarily in the self-interest of lawyers. The larger reason must be that some public interest warrants self-regulation. The deeper public interest inheres in the necessity for lawyer independence. The legal profession has argued through the years that the public interest, not the private interest of lawyers, is served by allowing lawyers the extraordinary privilege of writing and enforcing their own rules of self-governance. The corresponding obligation of the lawyer is stated in the first paragraph of the Preamble to the Model Rules of Professional Conduct: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."⁴ And the eleventh paragraph states: "The legal profession's relative autonomy carries with it special responsibilities of self-government. The

4. MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (1983).

profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."⁵

The question that naturally arises is this: Does the profession faithfully adhere to this manifestly correct credo? Keeping that question in mind as the overriding consideration, I turn now to a consideration of the contemporary shape of the legal profession and, to the extent foreseeable, its future. I begin with a series of conundrums about the current state of the legal profession as a vital part of the social order:

Are there too many lawyers or too few?

In a time of increasing social concern on the part of the organized bar, why is it that individual lawyer morality is said to be declining?

As legal education improves, why is student lack of interest on the increase?

As lawyers' income rises dramatically, why are more lawyers dissatisfied, some even to the point of leaving the law?

Now that nondiscrimination principles are firmly in place to govern the legal profession, why do women and minorities still consider the law inhospitable?

In a profession as prosperous as the legal profession, why are so many individuals denied needed legal services?

In return for the privilege of self-governance, why is lawyer discipline so poorly enforced?

The time has come to examine these questions and to review the state of the legal profession.

EXPLOSION IN THE LEGAL PROFESSION

In the three decades between 1960 and 1990, the number of lawyers in the United States approximately tripled to more than 750,000 in 1990, and it will surely rise to 1,000,000 before the turn of the century. Why? In some ways it is unsurprising that there should have been this sudden, almost belated burgeoning of lawyer population. The proportion of lawyers to the population declined during the 1930s, and the actual number of lawyers declined during the first half of the 1940s—the World War II years. The blip of returning veterans provided brief acceleration, but did not endure. By 1953, American law schools reported the lowest number of law students of any year between 1946 and the 1980s and presumably

5. *Id.*

thereafter. Law generally was not viewed as a promising career. Law firms, essentially stagnant, made few offers and, when they did, made them at less than exciting salaries. Recall that the starting rate for young associates in the highest paying firms was only \$8,000 even in the late 1960s, until Cravath, Swaine & Moore suddenly upped the ante to \$15,000 in 1968. There was, indeed, no discernible demand for lawyers for almost four decades preceding that date, which obviously meant that business for existing lawyers, even in the so-called major firms, must have been less than exhilarating.

What happened to convert the doldrums of the 1950s and 1960s to the go-go years that immediately followed? Undoubtedly, pressures had been building over time, but the avalanche launched by Cravath's bid to outdistance the competition had not been anticipated. James W. Jones, a partner at Washington's Arnold & Porter, one of the most venturesome of the new breed of firms, attributes the resurgence of interest in law to four factors, each of which tells part of the story.

First is the "increasing complexity of the matters that lawyers must handle on behalf of their clients."⁶ Manifestly, this did not change overnight. Beginning as early as 1933, the days of the New Deal, new legislation, new rules, and new court decisions imposed new demands for legal assistance to solve commercial and even personal problems. The expansion onto the international scene compounded the complexity. The trend continued and accelerated sharply in the 1980s with the emphasis on mergers and acquisitions and, when those failed, an emphasis on bankruptcy or other restructurings. In brief, lawyers proceeded to center stage as advisers to business and to government.

Second "is the growth of a new spirit of entrepreneurship Particularly in the so-called 'high tech' fields, entrepreneurs have started thousands of new business enterprises"⁷ which have an obvious impact on the legal profession. In 1975, for example, 1,400,000 new businesses were formed, contrasted with only 90,000 new businesses in 1950.

Third is "the increasing complexity and instability of corporate America In 1976 American industry spend [sic] some \$177 billion in hostile takeover bids, a sum that for the first time in our history, exceeded the amount spent on acquisitions of new plants and equipment."⁸

6. Jones, *The Challenge of Change: The Practice of Law in the Year 2000*, 41 VAND. L. REV. 683, 684 (1988).

7. *Id.* at 685.

8. *Id.*

Fourth is “the impact of the growing consumer consciousness in the United States.”⁹ Mr. Jones also suggests that consumer awareness has triggered increased scrutiny of lawyers’ work, increased competition over fees, and increased advertising for legal services.

All the above points, individually and collectively valid, add up to the proposition that lawyers are present more than ever at the center of the private and public sectors of American society and at the intersection of the two worlds where they meet and sometimes clash.

THE DEMAND FOR LAWYERS

We live in a society in which there is one lawyer for every 320 residents—by the year 2000, one lawyer for every 250. There are several law firms with more than 1000 lawyers and several hundred law firms with more than 100 lawyers; the prevailing mood favors further expansion. To satisfy the seemingly insatiable appetite for more of the same, it has become common to hire 20, 50, 75, even 100 new talents to feed the demands of each of these firms each year. Entering associate salaries for a few firms top \$80,000, and yet why do the salaries continue to escalate? The answer is simple: The legal factories’ need for lawyers willing to work endless hours, conjoined with their belief that the supply of talent is limited, has created a pricing competition that appears to recognize no end.

The high pay and competition for bodies in the great firms in the urban centers has a ripple effect on the medium-size firms in the same cities, and a corresponding impact on every firm in every city, town, and village in the country that seeks to compete in the national market. The squeeze is particularly difficult for medium-size firms, 25 to 50 lawyers, which ordinarily profess to be full-service firms, but lack the revenue stream to pay top dollar. Because their practice appears less glamorous and provides a lower rate of compensation, these firms no longer compete in the first round for the alleged stars. Small firms, under 25 lawyers, generally pick up what is left; even that may be preferable to government offices and public interest organizations, which must rely in large part on candidates who are willing to accept the less tangible rewards of public service *and* who are not burdened by debt that is payable only with a private practice income.

9. *Id.* at 686.

LIFE ON THE FAST TRACK

The Law Firm Partners

In current legend, the elite of the legal profession are the law firm partners, particularly those in the so-called major firms. Consider the way it was for a partner in a major firm, and the way it has become. Through at least the 1960s, a partner was one of a few dozen at most, and fellow partners, who were probably not women or minorities, were lifelong friends and coworkers. There may have been differences among the partners, but collegiality was the rule. The possibility of one or more partners defecting to another firm, or of a partner being involuntarily removed from the partnership were the remotest of prospects. The few new associates each year were individually trained and mentoring was common. Telephone, typewriter and duplicating equipment were the only supplements to human skill and library resources. Clients could be billed with a single figure based upon the "worth" of the services rendered. None of the above is to suggest that a quarter of a century ago a partner's life was untroubled or unhurried, but at least it was largely predictable.

Consider how different the present is for partners in the so-called majors firms. Partners range from the former few dozen to several hundred. Collegiality in the old sense is impossible. A lawyer cannot know all the partners by name and may not even know which are partners, associates, paralegals, or visitors. The firm of course, is, divided into various specialized areas of practice, with an earnest effort to coordinate the work of all into a coherent whole. Of necessity, associates and most partners are assigned to ever-narrower areas of specialization; the law has become too complex to deal with as a whole.

The mounting pay offered to associates and demanded by partners, as well as the rising cost of all other services, requires careful attention to the bottom line. In short, the practice of law has become a business not unlike other businesses. Consider the consequences:

The pressure for production measured by billable hours mounts visibly for partners and associates.

Collegiality and firm loyalty suffer—frequently because of the risk of lateral transfers away from the firm by individual attorneys or by whole divisions.

Pro bono service becomes a luxury to be denied or at best doled out sparingly.

Non-legal business ventures are acquired for the income they produce.

Firms of consultants or technical experts are associated with law firms, which can then refer clients to these experts.

More capital is needed for expansion, or a move to new quarters, or even to meet current obligations. Partnership debt beyond reasonable expectation of fee generation has scuttled more than one firm.

Law firm dissolution becomes common. Even profitable middle-size firms that lose a crucial lawyer or division and are no longer diversified enough to claim full-service status have succumbed to absorption or dissolution. The record is long and troublesome.

Law Firm Associates

The law graduates selected by top-dollar firms are likely to find truth in the old axiom that money isn't everything. Partners in many of the most prestigious firms worry that associates, carefully nurtured while in law school and often lavishly entertained during summer clerkships, do not remain. The firms should worry. Associates who leave before they become "profitable" commonly give the following reasons.

The old style of one-on-one mentoring has virtually disappeared. Neither partners nor associates can afford to spend time in mentoring that is not readily chargeable to a client. The substituted in-house training is often excellent, but it lacks the personal touch once common even in major firms.

The demand for billable hours, frequently 2000 to 2200 per year, forecloses the amenities of family life and normal recreational pursuits. In one firm it is reported that the competition among associates has become so intense that the associates on their own initiative strive for 3000 hours. Recall the perhaps, but not certainly, apocryphal story of the lawyer who was able to bill 27 hours in one day by flying from the East Coast to the West.

The demand for billable hours forecloses *pro bono* activities¹⁰ except for the minority of firms that permit *pro bono* service and credit such time to billable hours. Even in firms so motivated, associates cannot be sure that *pro bono* activities are regarded as favorably as hours billed to a paying client.

The deficiency noted in the "quality of life" is somewhat hard to iden-

10. Rule 6.1 of the Model Rules of Professional Responsibility encourages lawyers to provide *pro bono* services. The rule states: "A lawyer should render public interest legal service." (reprinted in S. GILLERS & R. SIMON, JR., REGULATION OF LAWYERS 150 (1989)).

tify in precise terms, but, nonetheless, it is real to many beginning lawyers. Ultimately, it is this intangible factor, perhaps a composite of all the other problems, that causes many to seek what they hope will be a more reasonable life style in public service, in a corporation, in a smaller firm, or outside the law.

Women have found additional difficulties in traditional big-firm practice. Practice requirements impose strains upon a marriage, even without children, and are a strong disincentive to beginning a family for those seeking to grasp the brass ring of partnership. Law firms in which women associates are departing in large numbers are beginning to adopt flex-time schedules and to make provisions for child care. But the problem is far from solved.

Unmarried women feel the pressure to remain single, if only because work schedules are not conducive to normal social relationships. All women still find an absence of role models in what continues to be a relatively small number of women partners.

Minority lawyers also have special problems because of a lack of role models among the partners and an unspoken expectation among many senior partners that they will not perform as well as their white counterparts. Affirmative action, as the professed policy of most law firms, does have its negatives.

Law Firm Personnel Other than Partners and Associates

However large or small a law firm, a variety of support personnel is likely to exceed the number of lawyers. First, there are the "other lawyers," those who are neither partners nor associates. Heading this category are the "counsel" or "of counsel," typically retired partners who retain some rights of compensation, office space, and secretarial assistance, although the category now includes lawyers who are brought in to serve specialized client interests. The other nonpartner, nonassociate lawyers are those who may have a kind of tenured status as senior attorneys or who may be on short- or long-term contract with specified duties, or even strictly temporary attorneys who are marketed as such by services comparable to those that place temporary secretaries or receptionists. It remains to be seen how the many-layered law firm will meet the needs of the future.

Paralegals are typically experts in a narrow specialty of the law, not uncommonly, more skilled within their area of expertise than the lawyers who provide the supervision required by rules of professional responsibility. In some departments, indeed in some firms, paralegals may exceed

the number of lawyers. Because paralegals do work that must otherwise be done by lawyers, but at greatly reduced cost, they have become indispensable to the practice of law in major and not-so-major firms. The skilled executive secretary is sometimes the equivalent of a paralegal through long experience, but without the formal title.

The library was long regarded as the laboratory, the heart and soul of any legal operation. Perhaps it still is, but unquestionably library research in the once-traditional way has given substantial ground to the new technology of research by computer—Westlaw, Lexis, and other systems. The dependence on technology necessitates that electronic experts be on staff or readily available to advise on problems or to make repairs. Even the once humble, but now electric, executive typewriter and the newly complex telephone console require frequent servicing of a highly technical nature. Reporting of billable hours does not materialize into client charge sheets without compilation and analysis, which suggests the need for personnel to bring this mass of data into some kind of order. Additionally, because important communications need to be transmitted by overnight mail, by FAX, or by hand, arrangements must be made for preparation, delivery, and receipt of such communications.

Law firms are not only involved in the direct output of the law business, they are also social organizations and providers of food, drink, and meeting room space to accommodate the needs of individuals who work other than nine-to-five schedules. Accordingly, the need for in-house food service may result in more or less elaborate dining facilities and catered meals for visitors. Physical exercise facilities for lawyers confined to their desks beyond what were once regarded as normal hours may also be supplied.

Add to the above the need for cleaning personnel, internal and external messengers, security personnel, and child care providers. It quickly becomes apparent that the large law firm is inescapably, for better or worse, a business, which requires business-like methods if it is to succeed.

OTHER COMPONENTS OF THE JUSTICE INDUSTRY

Much attention has been given thus far to the situation of the large firm. No one should be misled by this preliminary allocation of space to an impression that most lawyers practice in only large law firms. While the proportion of single practitioners and law firms of two or three lawyers, once the majority of all lawyers, is declining as a proportion of the

total, even now, close to half of all lawyers in the United States practice alone or with one or two others.

Let us assume that among all lawyers in private practice, thus omitting corporate lawyers, public service lawyers, judges, law teachers, and those not in law-related activities, 150,000 to 200,000 are in firms with 50 or more lawyers. Despite its minority status, this is the group that shapes private practice and is influential on other parts of the profession as well. Even though some individual and small-firm practitioners with a highly specialized practice will occasionally handle major litigation, and some plaintiffs' lawyers will win enormous judgments, most sole and small-firm practice is neighborhood practice, serving the needs of individuals in real estate, small businesses, wills, personal tax matters, government disputes, and minor criminal matters. This is the traditional law practice; indispensable to societal needs in the administration of justice, but not centrally involved in the reshaping of law as a business. What occurs in the large firms has a drastic and definable impact on all other aspects of the legal profession, including legal education, public service, corporate legal departments, the judiciary, and the delivery of legal service to the poor and to the middle class. To those considerations I now turn.

LEGAL EDUCATION

For present purposes I skip over the humble origins of American legal education. Little more than a cottage industry from colonial times to the late years of the nineteenth century, the Civil War eclipsed legal education almost entirely. Serious legal education was not revived until the late decades of the nineteenth century, when the American Bar Association recognized its importance with the creation of the Section of Legal Education and Admission to the Bar. Shortly thereafter Christopher Columbus Langdell introduced the Socratic method, which has been the boon and bane of legal education ever since.

Surprisingly, the demand for entry into the profession of law was so low in the 1950s that a committee of the ABA warned that not enough people wanted to become lawyers. Within less than a quarter of a century Derek Bok, President of Harvard University and a former dean of Harvard Law School, made a quite different point:

However aggressive our schools and colleges are in searching out able youths and giving them a good education, the supply of exceptional people is limited. Yet far too many of these rare individuals are becoming lawyers at a time when the country cries out for more talented business executives,

more enlightened public servants, more inventive engineers, more able high school principals and teachers.¹¹

What happened to cause this dramatic shift from too few to too many lawyers—at least among those self-selected from “the brightest and the best”? Let me attempt an answer, although some puzzling imponderables remain.

The first part of the answer is that for ten years after 1959, the year of the lament about too few law students, the number of law students enrolled in J.D. programs in ABA-approved law schools increased from 36,686 in 1958-59, to 59,498 in 1968-69. The more than sixty percent increase was aided by the first-substantial influx of women, from a little more than 1100 in the earlier year to more than 4000 in the later year—very few minority students in either year—and by the increase in the number of member schools from 129 to 138.

The really dramatic increase in the number of law students began in the late 1960s and continued without interruption through the academic year 1982-83 when 121,791 J.D. candidates enrolled in 172 ABA-approved law schools. The combination of forty-four newly approved schools, more than 45,000 women students, and more than 12,000 minority students produced a vast increase in the total number of law students, but caused a decline in the number of white male students. The interest of white male applicants did not decline, indeed it actually increased in number, but the competition intensified even for the larger number of available seats. In brief, credentials for law study increased substantially along with the increase in numbers.

During the three years after the peak of 1982-83, the number of applicants declined more than twenty percent, but the decline of those actually enrolled was only two to three percent. Thereafter, the numbers climbed quickly back to the previous high. No fully comprehensible reasons explain the reduced applications in the early 1980s or the return to peak numbers in the late 1980s. It is more important to understand the fourfold increase in applicants to American law schools between the mid-1950s and the early 1980s. Part of the explanation lies in the sudden attraction of women to legal education and the considerably smaller rise in minority numbers.¹² Moreover, the more than forty new law schools approved by the ABA in less than thirty years added substantial num-

11. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 573 (1983).

12. Women occupied about 43 percent of law schools in 1989-90. Minorities now account for about 10 percent of the law school population.

bers. But that explanation is both insufficient and too mechanical. The number of approved law schools remained nearly static during the 1950s. The sudden jump in the next two decades suggests that universities and colleges correctly assessed that the next wave of demand would be for legal education, and law schools were established because of that judgment. Women may have been recruited for a time, more in the spirit of welcoming them to the law than as an affirmative action gesture; and minorities were, and are, recruited actively by all law schools, most of which have established affirmative action programs.

It is important to identify the impulse behind the interest in opening new law schools and the sudden desire of women and, to a lesser extent minorities, to seek this new objective of legal education. The answer must be that new opportunities were seen. As law became regarded as an increasingly vital force in society, whether in civil rights, the environment, or in the consummation of important business deals, interest in law as a career increased sharply. The natural impulse to be where the action is was certainly fueled by the dramatic increase in pay scales announced by Cravath, quickly accepted by other New York City firms, and almost as quickly spread about the country, although on a diminished basis. In every community, the impact was considerable. Corporate legal departments raised their pay rates, although generally not to the generous level of the firms at the leading edge. Even government agencies and public interest organizations were forced to increase salaries somewhat, but the near parity they once had with pay rates for new associates was shattered, never to be recovered.

Meanwhile, legal education took advantage of its new prosperity in a number of ways. Barely adequate physical facilities were replaced or enlarged, sometimes in elegant fashion, in what has been appropriately described as an edifice complex. Law teacher salaries, which had often been shamefully low, were increased to respectable, if not munificent, levels. Student-teacher ratios were reduced, in most cases below thirty to one, the number that has now emerged as the maximum permitted by ABA-approved law schools. Clinical legal education, once regarded by many faculties as too expensive, has emerged as an important feature in virtually every law school. Professional responsibility training is now mandated for all law students. More electives and more seminars have been added to each law school curriculum. Law libraries have been elevated from a once-adequate 20,000 to 30,000 volumes and limited services to a median approaching 200,000 volumes plus a phalanx of

computers and other technical services, all supported by a staff that may rival in size the law faculty itself. With an influx of applications that run to more than 8,000 each year in a few schools, and the increasingly complex task of choosing among large numbers of qualified applicants, admission staffs have necessarily been enlarged substantially to apply increasingly complicated formulas of choice. Finally, placement offices, once confined to a well-intentioned lady with no special training, have become new centers of industry with a diversified regime of placement specialties.

It can now be said without reservation that American legal education is stronger than it has ever been and, I believe, quite the best in the world. Why then the malaise, the uncertainty about objectives, the new uneasiness in relations between faculty and students?

If the prosperity of legal education is based on the increased demand for legal education and the concomitant ability or necessity to raise tuition to levels far beyond any inflation index, and if the increased demand is based on the opening of the profession to the historically excluded classes of women and minorities and upon sharply increased need for law-trained people in the major firms, we circle back around to the triggering influence of the major firms. They have defined the task, fixed the rules, and determined the conditions of labor, including compensation and billable hours. It is perhaps too much to say that the whole apparatus, from legal education through every form of practice, depends on the large firm's somewhat uneasy structure. But at least we can say that collapse or serious damage to that imposing structure would have serious implications for every element of the legal profession. The ripple effect on the way down would be no less dramatic than the impact occasioned by the abrupt rise of great aggregations of lawyers within the new megafirms.

If indeed, as here suggested, American legal education is better than ever, why do not the brighter-than-ever-before students acknowledge that fact with grateful appreciation? Perhaps it is the high tuition, which has soared to more than \$15,000 a year in some private institutions, with others not far behind. Perhaps it is the \$40,000 to \$50,000 debt which burdens many students upon graduation. Perhaps it is the fact that some law schools still have classes on Friday, and most schedule afternoon classes Monday through Thursday, thus interfering with convenient work schedules for hourly pay rates that in some urban centers rise to \$40 an hour. Whatever the reasons, the fact remains that many of the

most able law students are bored with lectures, sullen when confronted with the Socratic methods, and unwilling to admit preparation even for seminars of choice. Admittedly, this is the extreme scenario, but common enough to reduce class attendance significantly and class participation to the few who are willing to accept the scorn of the many.

Why is this? Who is to blame? Students assert—not without justification—that many faculty members are preoccupied with their own out-of-school practice or consulting, while others are so intent upon their own scholarship that they consider out-of-class student encounters to be intrusive. Meanwhile, faculty members lament student indifference, as manifested in nonpreparation and nonparticipation.

As a special irony, students as a whole participate in more extracurricular activities than ever before. The traditional faculty complaint for a number of decades has been that law review students considered themselves too busy for mere class preparation and attendance. Now, some law schools have multiple journals, numerous moot court teams that participate in the more than two dozen national competitions, an ever-expanding number of student organizations, and the substantial demands of clinical programs. Law students are by no means idle; they are busier than ever, but not necessarily in the traditional business of in-class interaction between student and teacher.

Law faculties, despite the number who actively engage in practice, have in some ways become more ingrown. Doctrinal research and writing about substantive issues of law, along with speculative inquiry into the tangles of procedure, find less favor in tenure pursuits and with faculty colleagues generally. The fashion runs more to the empirical and to the theoretical—the more abstract the better, it sometimes seems. Critics argue that law teachers are increasingly talking to each other—and perhaps only to a subset at that—rather than to a profession that still needs guidance in the multiplying list of unsolved problems. The one thing that is clear is that the academy and the practicing bar are moving farther apart rather than drawing strength from interaction.

GOVERNMENT SERVICE AND PUBLIC INTEREST ORGANIZATIONS

As the private bar advances to new and higher levels of economic prosperity, the one area of the legal profession left distinctly behind is public service, including government service and public interest organizations. As recently as 1967, compensation for beginning public interest lawyers was not substantially different than that offered to new associates at pres-

tige firms. Accordingly, until that time graduating law students had a real choice, and public interest organizations competed on an essentially level playing field. Beginning in 1968, however, the widening margin between the most sought-after private opportunities and the best of the not-for-profit opportunities foreclosed a realistic choice to those forced to the higher pay by outstanding debt or, not unreasonably, by the desire for the rewards that only money makes possible. Call it greed if you will, but the instinct for financial rewards is deeply ingrained in our culture. Condemn the phenomenon we should not; understand and deal with it we must.

CORPORATE LAW DEPARTMENTS

The number of lawyers in corporate law departments approximately tripled between 1960 and 1990, but that was no more than the increase in the total lawyer population. Thus, the corporate share of the total lawyer population remains at about ten percent of the total. That is, however, a very substantial number, perhaps 75,000, which is more lawyers than there were in the entire United States between about 1910 and 1920. What has changed is not the ratio of in-house corporation lawyers, but their importance. This group of lawyers may have benefited more than any other category as a result of the increase in the total number of lawyers and the dramatic run-up in compensation of lawyers in major firms. The in-house lawyers have benefited in three ways. First, as out-of-house lawyers' fees to corporate clients increased, sometimes exponentially, corporations became more cost conscious and increasingly asked their in-house counsel to take over some or much of the responsibility. Thus, corporate counsel have moved substantially away from the more mundane task of hiring other lawyers and monitoring their performance into the realm of active practice. Second, this development has made corporate counsel positions more attractive to new lawyers and has made increasingly possible a new ability to persuade private law firm associates *and* partners to make lateral transfers. The previously described disaffection within private law firms, particularly amongst women and minorities, has in many cases made easier the task of persuasion, particularly with the promise of more regular hours. Finally, in-house counsel benefited from the general boost in compensation as their salaries rose like ships with the rising tide.

ACCESS TO JUSTICE

The discussion thus far has focused on lawyers who are members of the legal profession. It is time to think about those to whom the legal profession has made a commitment of service in the cause of justice. We need not, I suppose, worry too much about major corporate clients and economically privileged individuals, although they too are increasingly concerned about mounting costs and lengthening delays in the system. These organizations and individuals can often opt out of the judicial system by utilizing alternative dispute resolution mechanisms such as arbitration, mediation, or some form of private judging. But what about those who are less prosperous, individuals and small businesses who may or may not be able to avoid the judicial process if they seek relief or who may be required to defend against a more powerful adversary, whether it be the government or some private interest?

The prospects are not favorable and appear to be worsening. We know that the vast majority of criminal defendants must accept representation by a public defender, legal aid lawyer, or other defense counsel at the government's expense. While that representation is often excellent, the pressure upon government-paid defense counsel is often intolerably burdensome, frequently resulting in ill-thought-out plea bargains as to guilt or sentence. As drug-related crime continues its tragic escalation, the all-too-usual response of government is to provide additional resources for police, prosecutors, and prisons, but seldom for judges and almost never for defense counsel.

On the civil side, matters are in some respects worse because of the absence of a constitutional right to counsel. Poor people—and the not so poor—must rely on the limited right of representation provided by offices of the federally funded Legal Services Corporation, the largesse of private organizations with limited means, or the *pro bono* efforts of individual lawyers. Unfortunately, none of these alternative routes to representation is sufficiently supported to deal with the mounting demands arising from housing evictions, homelessness, welfare problems, AIDS, and the myriad problems of the poor, which in some ways are no less complicated than the problems of the rich. Consider the impediments to civil representation. The Legal Services Corporation, never generously funded, has for a decade been held hostage to an Administration hostile to the very idea, and kept alive only at the insistence of Congress, but without budget increases to keep up with inflation. Private legal aid organizations, always in need of more funds, are unable to pick

up the slack, and *pro bono* representation lags for the reasons previously discussed.

Although the ABA and state and local bar associations have striven to keep the Legal Services Corporation alive and to urge *pro bono* participation, the effort to date has been manifestly insufficient. Access to justice is an acknowledged obligation of the bar, which is unlikely to be fulfilled until the government is persuaded that the primary obligation is to the public or until mandatory *pro bono* representation is accepted by a reluctant bar.

Now consider the middle class, which is ineligible for free representation, unlikely to incur legal expenses for preventive purposes, and accordingly sometimes burdened with serious legal problems. Some help is available to this group through prepaid legal service plans, sometimes paid by employers as a fringe benefit. Ordinarily, these programs offer representation in preparing wills, helping with tax questions, and direct representation in some kinds of litigation. In addition, neighborhood law offices, on the model of Jacoby and Meyers or Hyatt Law Services, provide relatively routine legal services at low, fixed charges. However, millions of people remain unprotected by prepaid plans and are not within easy reach of the few low-cost firms.

The legal profession cannot escape the obligation to deal more effectively with the problems of the majority of Americans who do not have adequate representation and are thus denied access to justice. As former President Jimmy Carter once observed, "Ninety percent of the lawyers serve ten percent of the people."¹³

The charge thus laid upon the legal profession may seem undeservedly heavy. Yet it is hard to deny that a profession that claims independence from external regulation and asserts the right of self-governance must bear a substantial responsibility for assuring that effective representation is available to all. It is accordingly time to look at the profession through the lens of the organized bar, including its claim that independence of the bar is an essential ingredient of the delivery of justice.

THE ORGANIZED BAR AND THE INDEPENDENCE OF LAWYERS

Although the concept of bar associations as collectives of lawyers is more than a century old, like so much else about the legal profession,

13. Address by President Jimmy Carter, Los Angeles Bar Association 100th Anniversary Luncheon (May 4, 1978) (reported by Washington Post, May 5, 1978, David S. Broder).

contemporary manifestations of the organized bar have their origins in the last few decades—the admission of women and minorities, and the current objectives that go beyond the more parochial interests of lawyers as members of the legal profession. These new horizons of national, state, and local bar associations are particularly apparent upon examination of their action agenda. The American Bar Association, for example, has not only taken the lead in the fight to preserve the Legal Services Corporation and an active role in the battles against crime and drugs, but has aggressively defended civil rights, international human rights, gun control, the homeless, environmental interests, and has sought payment of the United States' delinquency on United Nations dues. The same can be said for such urban bar associations as the Association of the Bar of the City of New York, the Los Angeles County Bar Association, the Chicago Bar Association, and many other state and local bar associations. Somehow, in recent years these and many other issues of national and international import have been found to be within the policy jurisdiction of the legal profession through its bar association representatives.

This is not to suggest that the organized bar has relinquished its primary concern for matters that affect the profession. The current buzzwords include: (1) "competence," which ranges from legal education, through admission to the bar, to continuing legal education and discipline; (2) "professionalism," which includes training of professionalism in law school and thereafter, plus the individual and collective obligations of the profession; and (3) "outreach to the public," which is more an effort to assist the public to understand the role of lawyers than an effort to polish the tarnished reputation of the legal profession. Bar associations, of course, pursue many goals that relate directly to lawyer interests, such as limitations on the right to counsel, inroads on the privilege against self-incrimination, and restrictions on the protection against search and seizure. Above all, the organized bar is zealous in its defense of the privilege of self-regulation, which is the proudest symbol of the independence of the legal profession and of individual lawyers. Because no other profession has been granted so nearly complete an exemption from external regulation, justification must be found—and is so located—in the need for the independence of lawyers and judges in their quest for justice for their clients and for the system as a whole. In order to make a convincing case for such seemingly self-interested aspects of self-governance as professional independence, it is necessary to establish that this unique privilege does indeed serve the public interest. This ob-

jective is served by insisting upon quality legal education, appropriate standards for admission to the bar, and appropriate principles of professional responsibility, all of which are enforced by rigorous application of the disciplinary process. Hence, as previously suggested, the interest of the profession in competence and professionalism, defined to include all the elements of an upright public service profession, is rooted in the crucial necessity of proving meritorious performance in the public interest.

THE CRITICS OF THE PROFESSION

The effort to serve the public interest has not been altogether successful. The unsurprising difficulty is that the need to satisfy the public interest mandate runs head-on into the very self-interest that triggers the insistence upon the privilege of self-regulation. The self-regulation shoe pinches when lawyers are told they must engage in continuing legal education or *pro bono publico* service or submit to random audits. Many, perhaps most, lawyers object to requirements that fee arrangements be reduced to writing or that client confidences about plans for future wrongdoing be disclosed. The public does not understand why a profession should be given the privilege of self-governance if it fails to impose these requirements on its members. Even more vehement is the criticism of the profession for its disciplinary process, which not only essentially excludes the public, but also denies it knowledge of the workings of the process. Various consumer organizations, such as HALT, Ralph Nader's Public Citizen, and various civil rights and legal services organizations are increasingly critical of the extent to which the organized bar protects what are perceived to be lawyers' interests in the name of serving the public interest.

The critics are not limited to individuals and organizations outside the profession. Former Chief Justice Warren E. Burger and former United States Courts of Appeal Chief Judges Irving Kaufman and David Bazelon have complained about the lack of competence in representation of both civil and criminal clients. Harvard's President Derek Bok has argued that the profession, while failing to serve an important public interest, attracts a disproportionately large share of "the best and the brightest" students, who are lured by the presumed financial rewards.

THE DEEPER CONCERNS

The legal profession can probably outlast its external critics, as it has

done many times before, at least so long as it makes reasoned responses to the complaints about the failures of competent service to clients, particularly as manifested in the inadequacies of the discipline system. More serious, although less clearly articulated by the self-appointed external critics, is the mounting evidence that the entire system is in danger of major disruption. Ironically, the indications of trouble appear most notably in that section of the profession that has changed most dramatically and appears to be the greatest success story of an increasingly prosperous profession. I refer specifically to the large firm syndrome, which has so substantially changed the nature of the profession. This change has occurred even though the law firms so denominated are fewer than a thousand, and the partners, associates, and assorted law-related personnel probably amount to fewer than 200,000 individuals. Their numbers, however, are far outweighed by their significance as the economic barometers and the pace-setters for the profession.

It is entirely clear, as I have sought to demonstrate, that many law schools, enlarged in numbers and expanded in student body, depend to a considerable degree on the apparently insatiable demands of the major firms for the annual crop of warm bodies. Once upon a time, and not so long ago, the needs of the then large firms, small by present standards, were met by only a few law schools. Now, more than fifty law schools place a quarter to a half or more of each graduating class in the now 500 to 1000 large firms, and the ten to fifteen percent who initially go to judicial clerkships are likely to end up in a similar large-firm practice. The mid-size and small law firms and the public service organizations are left with the second, third, or fourth choices.

American law schools are far from displeased with this situation. Law school deans are more inclined to report their placement success with major firms than their placements with government, public interest organizations, or small firm practices. If that major employment bonanza should suddenly disappear or diminish to a significant extent, law schools and their students would panic. In that event, it would be likely that the now-heightened interest in law school admission would decrease sharply. Ironically, law school enrollment would not likely decrease correspondingly. All private law schools and most public law schools are heavily dependent on current tuition income to finance enlarged and ever more expensive faculty and staff, to support the all-devouring appetite of library and technology, and to maintain their imposing physical structures. So long as the number of applicants exceeds the number of

budget-driven places in a first-year class, justification is likely to be found to fill nearly all those seats. The principal downside would be two-fold: (1) there would be fewer of "the best and brightest" in most law schools; and (2) law students would return to earlier complaints about the failure to secure their first-choice placements.

The consequences of such a shift in placement opportunities would not be all bad. The now-disadvantaged market competitors—small firms, government, and public interest organizations—would move up the scale of consideration to frequently preferred positions. The law schools would be forced accordingly to report with pride the public interest service being rendered.

The obviously crucial question in relation to this mixed-result scenario is this: How likely is the prospect of a diminished future for the large firm? No sure answer is possible, but there are indications of potential problems.

The break-up and ultimate bankruptcy of Finley Kumble, once the fourth largest firm in the nation, is undoubtedly a special case and may even have deserved its fate. Yet there is a lesson. The not unnatural projection for a prosperous and fast-growing enterprise is to identify growth itself as the cause of the prosperity. More than a few law firms believe that continued and rapid expansion is the key to future success. If that phenomenon does indeed become a generally accepted principle, the projected result might be a legal landscape of ten to twenty megafirms that would dominate the legal profession as the Big Six, once the Big Eight, now dominates the accounting profession. However wonderful that might or might not be for the behemoths of the profession, one wonders whether it would be a healthy development for the entire profession. It is striking that in the United Kingdom, as it prepares for 1992, firms of solicitors are now approaching 1000 lawyers, and there is candid talk of further mergers to create a dominant group of no more than ten firms.

The growth of mergers, lateral transfers, and resulting dissolutions even of successful firms is a troublesome signal that law firm loyalty, once the glue of the profession, no longer holds any special significance. This is a new and unwelcome kind of lawyer independence. Lawyer search firms may, and do, prosper in a period when law firms scout for new talent in the constant move for expansion, and lawyers are as eager for the next upscale move as they are for client service. But it is difficult

to believe that the integrity of the practice of law will benefit; certainly what little camaraderie that now remains is destined for early retirement.

The law-as-a-business phenomenon can no longer be discounted. Size necessarily begets bureaucracy, which in turn demands business-like methods. Introduction of efficient office management is of course desirable, but concomitant demands on the bottom line require more concentration on the search for clients, on billable hours, and consequently reduced *pro bono* and other public interest service. Along with the attention to the bottom line inevitably comes the need for more capital, sometimes prompting a desire to sell shares in the law firm. Another manifestation of the same concern is the relatively new, but growing practice of bringing an unrelated business, consulting firm, engineering firm, or, in one case, a bank into association with the firm. It is apparent that the practice of law is changing, and many would say not for the better.

As the practice of law becomes more and more identified with business, the ethics of the marketplace increasingly weaken or even supplant the professional responsibility concerns of the lawyer. The glory of the legal profession, and its justification for self-governance, has been the client-centered nature of the profession. The one-on-one relationship that has traditionally been the strength of the legal profession is increasingly relinquished to the impersonality of deal-making, indistinguishable from and frequently allied with investment banking. As an object lesson, look what happened to the investment-banking business. It could happen here.

WHAT OF THE FUTURE?

You may think my scenario is too gloomy, and perhaps it is. But no one—I repeat no one—can deny at least the possibility of disaster. If the large-firm syndrome in its present incarnation is ultimately proved to be nonviable in the business sense, there are two possibilities: (1) The collapse of a substantial number of law firms, with the concomitant disruption in client representation and the displacement of thousands of lawyers who must then compete in the market for lesser compensation; or (2) the consolidation of many large firms into a few super firms. In either case I see nothing but disadvantage for law schools that have become increasingly dependent on the continuing growth of the large law firm. And surely such developments would bode ill for enhancement of ethical concerns or enlargement of commitment to the public interest.

If the practice of law moves further away from a perceived commitment to law as a public service, I assure you that the highly praised privilege of self-regulation will be taken away. The public, already doubtful as to whether the profession serves the cause of justice, needs little persuasion to move in for the regulatory kill.

That scenario need not happen. This last decade of the century will be decisive in determining the future direction—even the fate—of the component parts of the justice system. There is blame enough to go around, from legal education's attempts to cash in on newly found placement success, through the practicing bar's disinterest in public service, to the organized bar's excessive concern with lawyer self-interest. Fortunately, opportunities abound for each segment of the profession to help turn the process around. Let me sketch out those opportunities, or, as I would prefer to say, those obligations.

First, legal education must make good on its pious declarations of concern for government service and public interest practice by its graduates. I recognize that it is not easy in the present climate, but some things can be done, although not without cost: loan forgiveness; encouragement of law firm supplements to public interest compensation, for example, the Skadden Arps program; insistence that recruiting law firms demonstrate a policy that encourages *pro bono* practice by associates *and* members; and by constant reminders to students that the legal profession is a public service profession. An encouraging sign of awakening concern is the development by law students in individual schools, and in combinations from several schools, of public interest efforts while in law school, including cash contributions to support public interest endeavors.

Law schools must find more persuasive methods for the teaching of professional responsibility. The law schools must also find ways to recapture the second- and third-year law students who have been lured into remunerative part-time work or other activities considered more diverting than the pursuit of legal knowledge in the classroom.

Second, the private practice of law is in no sense a coherent whole that speaks or acts with a single voice. The hundreds of thousands of sole practitioners, the hundreds of thousands of small-firm practitioners, the nearly two hundred thousand lawyers whom I call large-firm practitioners, and the approximately seventy-five thousand corporate lawyers have always acted in individual self-interest, which is their acknowledged right under the umbrella of a self-governing profession. Nevertheless, individually and collectively, these disparate elements of the practice must

somehow coalesce around the proposition that the public profession of the law is a privilege granted by the community on the condition that all practitioners accept the obligation of public service. This means that individual lawyers and aggregations of lawyers, whether in law firms or other legal service organizations, must structure their codes of professional responsibility and provide meaningful enforcement thereof so as to ensure the integrity of the process and to minimize cost and delay in the delivery of legal services.

Recognition of the collective obligation of the legal profession brings me to my final, and in some ways most important, prescription for the health of the legal profession. I refer to the organized bar, encompassing the thousands of bar associations—national, state, local, ethnic, gender-based, or professionally specialized. Fragmented as they may be along lines of geography or specialized interests, there is, or at least should be, a common denominator of purpose that links them all. The fragmentation of the legal profession, at least along state boundary lines, was once more understandable. In our federal system, lawyers in each state could consider themselves somewhat apart from lawyers in all other states because of differences in the rules of law locally controlled legal education, in the standards for admission to practice, and in the ethical rules. Within recent decades, however, particularly since 1970, the profession has been substantially nationalized. The ABA establishes standards for legal education at the 175 ABA-approved law schools. Most states accepted the Multi-State Bar Examination. The Code of Professional Responsibility in 1970 and the Model Rules of Conduct in 1983, while not assuring complete uniformity among the states, have at least provided a common core.¹⁴ The Supreme Court has redefined the Constitution to permit lawyer advertising, to encourage the practice of advocacy by public interest organizations, to forbid minimum fee structures, and to remove many state-erected barriers to interstate practice. The legal profession is no longer a matter of exclusively local concern. In a number of respects the profession has been nationalized. The next stage, already visible on the horizon, is the new interest in the international scene. Many law firms have one or more foreign offices and one, Baker and McKenzie, has more than thirty outposts in other countries.

The unifying principle within the legal profession is the common obli-

14. The Clark Committee Report on lawyer discipline in 1970 introduced the concept of common principles for lawyer discipline that led to the ABA Model Rules for Lawyer Discipline in the 1980s and a new commission to report in 1991 with recommendations for further changes.

gation to improve the quality of legal services delivered to individual clients and service to society at large. Lawyers have a special talent for problem-solving, which is increasingly important in our complex world of government regulation and tangled private and public interconnections. No other profession has similar capacity or is charged with similar responsibility—not the health professionals, not the engineers, not the accountants, not even public officials who solve some problems while creating others. This unique capacity of lawyers to reduce complexity to manageable terms and to provide answers to perplexing problems defines the role of the legal profession and justifies our claim to the special status of self-regulation. That special capacity and the resulting special role also define the special obligation of the profession, from which there is no escape. We are not the keepers of society; we are its servants, its interpreters, and its instruments for problem-solving, from the lowliest individual dispute to the very conditions of world peace. Much of this obligation is satisfied through the courts, whose independence must be maintained and whose integrity must be protected—again by the legal profession. Yet, important as the courts are in dispute resolution, infinitely more controversies are resolved by negotiation, mediation, arbitration, and the whole array of alternative dispute resolution mechanisms that have gained so much popularity in recent years.

The traditional role for bar associations has been to serve the professional interests of their members, protecting against governmental incursion and defining rules of practice that are beneficial to lawyers and their clients. Accordingly, the principal conflict in bar association meetings often has been among lawyers who mainly serve the interest of plaintiffs, those who serve defendants, and those who serve business interests. Those sometimes conflicting interests are of course appropriate for lawyer organizations. But they are not enough. Lawyers are also the designated guardians of the law, whether constitutional, statutory, regulatory, or traditional. Improvements of the law—reform if you will—is the highest obligation of the legal profession. Because it is not feasible for individual lawyers to fulfill this obligation, it becomes the task of the organized bar. Increasingly, bar associations accept that responsibility, and many perform it honorably. As the most prominent example, consider the change in the role of the American Bar Association, which has moved from an all-white, male organization to one that emphasizes at every level the need for increased participation by women and minorities. While the ABA continues its concern for the welfare of lawyers—some-

times in ways that seem more self-protective than public-minded—the overarching agenda is clearly something larger.

Consider the agenda of the ABA in its midwinter meeting in Los Angeles in February 1990. The ABA approved resolutions dealing with restoration of the anti-discrimination laws which were dismantled by the Supreme Court of the United States in its last Term; redefining drug offenses; establishing a new commission to recommend improvements in the criminal justice system; assistance to developing countries in the establishment of independent justice systems; and a strong pro-choice position on abortion.¹⁵ Meanwhile, hearings were held at the same meeting on ways to improve the lawyer discipline system and on ways to enlarge cooperation between legal education and the practicing bar in training for lawyer competence. Showcase programs dealt with the drug problem and with improved means for lawyer outreach to the public. Justice Thurgood Marshall was awarded special recognition by the Fellows of the ABA, an organization he could not join during most of his years in practice.

State and local bars are in many cases replicating these concerns and bringing forward the issues on which lawyers can make a contribution on the national level. It is still not enough, but increasingly the obligation has been accepted and more and more frequently it is being discharged honorably and effectively.

CONCLUSION

My final charge is to legal educators, private practitioners, government lawyers, public interest lawyers, judges and bar associations to acknowledge and accept this high responsibility. In the words of the widely repeated advertisement of a few years back: “Try it; you’ll like it.”

Or, more significantly, in the words of Martin Luther King: “There is always time to do right.”

15. In August 1990, the ABA rescinded its stance on abortion rights.

