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LETTING GO OF OLD IDEAS

William D. Henderson*

THE LAWYER BUBBLE: A PROFESSION IN CRISIS. By *Steven J. Harper*. New York: Basic Books. 2013. Pp. xvi, 208. \$26.99.

TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE. By *Richard Susskind*. Oxford: Oxford University Press. 2013. Pp. ix, 165. \$18.95.

INTRODUCTION

Two recently published books make the claim that the legal profession has changed (Steven Harper's *The Lawyer Bubble: A Profession in Crisis*¹) or is changing (Richard Susskind's *Tomorrow's Lawyers: An Introduction to Your Future*²). The books are interesting because they discuss the types of changes that are broad, sweeping, and dramatic. In suitable lawyer fashion, both books are unfailingly analytical. They both also argue that the old order is collapsing. *The Lawyer Bubble* is backward looking and laments the legacy we have squandered, while *Tomorrow's Lawyers* is future oriented and offers fairly specific prescriptive advice, particularly to those lawyers entering the legal field at a time when the number of traditional (what I call "artisan") legal jobs is shrinking.

Many of us working in the legal industry are interested in this topic because we are facing business conditions with no familiar historical analogue. From my own vantage point as a law school professor, things look pretty bleak. As a result of the precipitous, multiyear decline in applicant rates and historical trends in admission and matriculation rates, the number of law students who enrolled as 1Ls in the fall of 2013 fell below 40,000³—a low-water mark not seen since the mid-1970s.⁴

* Professor of Law and Val Nolan Faculty Fellow, Indiana University Maurer School of Law. I would like to thank Steven Harper and Richard Susskind for the rigor and energy they bring to their work. Their contributions are worthy of lengthy reflection.

1. Steven Harper is an Adjunct Professor, Northwestern University School of Law and Weinberg College of Arts and Sciences.

2. Richard Susskind is a Visiting Professor, Oxford Internet Institute, University of Oxford.

3. See *ABA Section of Legal Education Reports 2013 Law School Enrollment Data*, AM. BAR ASS'N (Dec. 17, 2013, 7:30 AM), http://www.americanbar.org/news/abanews/aba-news-archives/2013/12/aba_section_of_legal.html (reporting fall 2013 entering enrollment at 39,675 for the 202 law schools accredited by the American Bar Association).

4. See *Enrollment and Degrees Awarded: 1963–2012 Academic Years*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf [hereinafter *Enrollment and Degrees Awarded*] (last visited Nov. 28, 2013).

It is certainly possible to rebound from a thirty-five-year low in entering enrollment, but the statistics are not promising: In 1977, there were 163 law schools accredited by the American Bar Association (“ABA”).⁵ In 2013, there were 201,⁶ with even more in the accreditation pipeline.⁷ This represents a 23 percent increase in the bricks and mortar. Paying this increased overhead might have been sustainable when incoming 1L enrollment peaked at 52,000 in the fall of 2010.⁸ But since 39,675 students enrolled in fall 2013, law schools have experienced a 24 percent drop in incoming students over three short years. A decline this large and swift is an enormous financial blow to institutions that have high fixed costs (read: tenured faculty) and no experience coping with large-scale change. Further, the pain is likely to increase as the comparatively larger incoming classes from fall 2011 and 2012 graduate and their tuition revenues leave the building.⁹

Perhaps we should have seen this change coming. Over the last several decades, the nature of legal practice has indeed changed. In 1975, scholars from the American Bar Foundation conducted a major study of the Chicago bar (“Chicago Lawyers I”).¹⁰ One of the most salient findings of the Chicago Lawyers I study was that the legal profession had functionally divided into two “hemispheres,” one serving individuals and small businesses and the other working for large organizational clients such as corporations.¹¹ Which hemisphere a lawyer served turned out to be a remarkably accurate proxy for a lawyer’s ethnicity, religion, law school, bar association and social club memberships, home zip code, and annual income.¹² The Chicago Lawyers I study described these two groups as hemispheres not only because they were of roughly equal size but also because their professional interests and networks seldom overlapped.¹³

5. *Id.*

6. *Id.*

7. See Jennifer Smith, *Crop of New Law Schools Opens Amid a Lawyer Glut*, WALL ST. J., Feb. 1, 2013, at B1, available at <http://online.wsj.com/article/SB10001424127887323926104578276301888284108.html> (discussing the opening of Indiana Tech in Fort Wayne, Indiana, and the University of North Texas in Dallas).

8. See *Enrollment and Degrees Awarded*, *supra* note 4.

9. Some law schools are turning to LLM programs to fill the resulting financial gap, but that strategy is far from a panacea. See, e.g., Bryce Stucki, *LLM: Lawyers Losing Money*, AM. PROSPECT (May 8, 2013), <http://prospect.org/article/llm-lawyers-losing-money> (discussing the “unregulated wasteland” of LLM degrees, which are being used to prop up law school finances, in large measure because the ABA does not require any meaningful consumer information to help assess the value of LLM degrees (quoting Professor Caron) (internal quotation marks omitted)).

10. JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (rev. ed. 1994).

11. *Id.* at 37, 127–28.

12. *Id.* at 136, 174.

13. *Id.* at 23–25, 174.

In 1995, the same core group of researchers replicated this study (“Chicago Lawyers II”).¹⁴ Over the intervening two decades, the organizational sphere had expanded dramatically due to the proliferating legal needs of corporate clients growing in size and geographic scope. The amount of time that lawyers devoted to organizational clients had increased to double that spent on personal and small-business clients.¹⁵ Thus, “hemisphere” was no longer an accurate description.

One laudable effect of this growth surge was that racial and class divisions between the two hemispheres began to crumble, as the corporate bar needed to recruit beyond a handful of elite law schools.¹⁶ But the rapid growth of the corporate sphere also exacerbated income inequality within the profession. Chicago Lawyers II reported that between 1975 and 1995, the mean income of lawyers in Chicago’s large law firms (with 100 or more lawyers in 1975 and 300 or more lawyers in 1995) grew from \$144,985 to \$271,706 in inflation-adjusted 1995 dollars.¹⁷ In contrast, the mean income of a solo practitioner dropped from \$115,694 to \$80,075 (also in 1995 dollars).¹⁸ Not surprisingly, only 2 percent of solo practitioners were working a second job in 1975, compared with 32 percent in 1995.¹⁹

The Chicago Lawyers I and II studies are works of rigorous social science. Thus, they provide a useful backdrop for evaluating the big-picture change accounts offered by Harper and Susskind. Two interconnected insights from Chicago Lawyers I and II help make sense of these two dramatically different books.

The first insight is that the ability to make a living as a “people’s” lawyer has been on the decline for several decades. Arguably, this has occurred because there have been no giant leaps forward in how lawyers solve legal problems. Today, similar to a half century ago, lawyers meet with clients, talk to them over the phone, write letters, contracts, memoranda, and court documents, and make various in-person appearances on their clients’ behalf. In contrast to the legal profession’s unchanging nature, manufacturing technology has advanced such that we currently enjoy better and cheaper cars that require fewer workers to produce. Likewise, with the dawning of the digital age, we have more information and no longer pay a daily toll for newsprint. If technology has generated productivity gains for lawyers, greater legal complexity has subsumed the resulting cost savings. As a result, few lower- or middle-class people can afford several hours of a lawyer’s time

14. JOHN P. HEINZ ET AL., *URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR* 6–7 (2005); see also William Henderson, *Second Look at the Second City*, *LEGAL AFF.*, Nov.–Dec. 2005, at 61, available at http://www.legalaffairs.org/issues/November-December-2005/review_henderson_novdec05.msp (reviewing HEINZ ET AL., *supra*).

15. HEINZ ET AL., *supra* note 14, at 42–43, 316.

16. See *id.* at 95.

17. *Id.* at 163.

18. *Id.*

19. *Id.* at 164.

to solve their legal problems.²⁰ Unfortunately, without substantial gains in productivity comparable to other industries, people's lawyers are unable to profitably tap into the latent demand for solutions to legal problems. If we—the collective legal profession—grasped the full dimensions of this problem, I suspect that we would find it more troubling, as it is at odds with our self-image of promoting access to justice.

The second insight is that the declining fortunes of people's lawyers have been, in economic terms, more than counterbalanced by a surge of growth in the corporate sphere. This aggregated prosperity has obscured from plain view the seismic structural shift slowly occurring within the profession. But a time of inevitable reckoning occurred following the credit crisis in the fall of 2008, when corporate legal departments were no longer able or willing to pay the high fees of large firm corporate lawyers.²¹ Since that time, the wealthy lawyers who manage the Am Law 100 (the 100 largest U.S. law firms based on annual revenue) have begun to experience unease as their revenues per lawyer began decreasing or, at best, remained flat. This development ended a pattern of year-over-year growth that had existed since the inception of the Am Law 100 in 1986.²²

With average Am Law 100 profits in excess of \$1 million per partner,²³ hitting a revenue plateau is unlikely to engender much sympathy. But, as it turns out, large and prestigious law firms are prone to collapse. Among the firms included in the first Am Law 100 list in 1987, thirteen failed over the next twenty-five years, a mortality rate of over 5 percent per decade.²⁴ All these failures share one common hallmark: partners with large books of business lost faith in the enterprise and left for greener pastures, creating a proverbial run on the bank.²⁵ The responsive strategy of law firm leaders has

20. A similar development has occurred in the United Kingdom. See *Legal Services Benchmarking*, LEGAL SERVICES BOARD 19 (June 2012), http://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/individual_consumers_use_of_legal_services_lsb_report_17_07_12_ii.pdf (reporting the significant number of legal problems that British citizens fail to redress because the cost of hiring a lawyer, from an individual consumer perspective, is perceived as too high).

21. See Mark Harris, *Seize the Day*, CORP. COUNS., Oct. 2011, at 55, 55 (observing that a relatively small number of general counsels now have the pricing power to force law firms to change); Ashley Post, *More In-House Lawyers Are Exercising Power over Law Firms*, INSIDE COUNS. (Mar. 29, 2012), <http://www.insidecounsel.com/2012/03/29/more-in-house-lawyers-are-exercising-power-over-la> (discussing an Association of Corporate Counsel survey revealing that “corporate law departments are increasingly calling the shots”).

22. William D. Henderson, *Rise and Fall*, AM. LAW., June 2012, at 56, 60 (examining financial patterns in the Am Law 100 during the first twenty-five years of the list).

23. *Id.* at 59.

24. See *id.* at 58–59 (noting that the number of failed firms would rise from eleven to thirteen if Dewey & LeBeouf failed, as that firm resulted from the merger of two firms on the original list—Dewey Ballantine and LeBoeuf, Lamb, Greene & MacRae); Peter Lattman, *Crippled Firm in Bankruptcy Proceedings*, N.Y. TIMES, May 29, 2012, at B1, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0DE3D6153EF93AA15756C0A9649D8B63> (reporting Dewey & LeBeouf's demise).

25. See Henderson, *supra* note 22, at 60–61.

been to attempt to pay market value to the firm's heavy hitters to keep them in the fold.²⁶ Yet, to spur growth (or the perception of growth) in a flat market for corporate legal services, a rival law firm may be willing to pay more for partners who have portable clients. The profitability and geographic spread of large law firms create the illusion that they are strong, monolithic institutions. Yet, on the inside, these firms feel very fragile, primarily because the pace of lateral movement among corporate law firms continues to increase.²⁷

To ward off failure, leaders of these firms increasingly manage them to benefit equity partners with big portable books of business—a demographic that is, on average, fifty-five to sixty years old, relatively rich, and in no mood to change.²⁸ Because clients are reluctant to pay for the time of junior associates, corporate law firms cut their summer associate ranks in half between 2002 and 2012.²⁹ The timing here is key—this change has been occurring since 2002, not 2008. This fact strongly suggests that the large-scale drop-off reflects a change that stretches well beyond any business cycle. Further, to maximize profits for the few, the equity tier is getting smaller, while a greater proportion of junior and middle-aged lawyers are permanently parked in counsel positions or the nonequity tier.³⁰ This is a new form of leverage that can increase short-term profits, as clients are still willing to pay for midlevel and senior expertise. This is a remarkably aggressive squeeze play, as nonequity partner compensation has stagnated to pump up the income of a smaller class of equity partners.³¹ The only way for an up-and-coming lawyer to share in this wealth is to build and control a large book of business. Knowing this, many equity partners have become very territorial about who works on their matters and who talks to their clients.

26. See William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. L. REV. 1691 (2006) (discussing the importance of paying partners the value of their marginal product and suggesting that the rise of the two-partner structure is designed to achieve this goal).

27. See William Henderson & Christopher Zorn, *Playing Not to Lose*, AM. LAW., Feb. 2013, at 56 (presenting various data concerning lateral partner trends and noting that the overall volume of lateral movement has increased approximately 50 percent since 2000).

28. This observation is borne out by much of my informal fieldwork with law firms and law firm leaders, as well as statistical work that I have done related to origination and billing credits within large law firms. In a recent project, my colleagues and I observed that on average, a partner's origination and billing receipts peak at age fifty-eight and then slowly trail off.

29. See William D. Henderson, *Sea Change in the Legal Market*, NALP BULL., Aug. 2013, at 10, 10 (reviewing aggregate data culled from the National Association for Law Placement ("NALP") Directory of Legal Employers in 2002 and 2012 and finding a drop-off in summer associates from 11,300 to 5,600 over that decade).

30. See *id.* at 11 & fig.2 (showing proportionate increase in counsel—senior attorney and partnership ranks from 2002 to 2012 at the expense of associates and noting that most of the growth in partnership ranks is within nonequity tiers).

31. See Jeffrey A. Lowe, *Partner Compensation Survey*, MAJOR, LINDSEY & AFRICA 7 (2012), <http://www.mlaglobal.com/partner-compensation-survey/2012/FullReport.pdf> (finding, based on a survey of over 2,000 partners at major firms, that average nonequity compensation dropped from \$336,000 in 2010 to \$335,000 in 2012, while average equity compensation increased from \$811,000 to \$896,000).

This turmoil at the top ranks of the legal profession is one of the key fault lines across which both Harper and Susskind walk. With this Introduction in place, the balance of this Review will introduce readers to the change accounts provided by these two seminal authors. Part I summarizes the key elements of Harper's *The Lawyer Bubble*, which is primarily a historical narrative. Part II describes the emerging legal landscape of *Tomorrow's Lawyers*, with special emphasis on drivers of change that Susskind identifies. The reason for this emphasis is simple. Those who understand the drivers are much more likely to prosper in the years to come. The Conclusion offers final observations and a straightforward thesis: It is time to let go of old ideas, and to some extent, old institutions. Further, if we return to our first principles of professionalism, it is possible to both do good and do well.

I. HARPER'S *THE LAWYER BUBBLE*

There is one overriding fact you need to know about Steven Harper to understand the structure and content of this important new book. He is a highly accomplished trial lawyer who practiced law for over thirty years at Kirkland & Ellis (Harper, pp. ix–x), a preeminent law firm known for tough, bare-knuckles litigation. *The Lawyer Bubble* essentially puts two codefendants on trial: the deans of the nation's 200-plus law schools (Chapters One to Three) and the managers of the nation's large law firms (Chapters Four to Eight). According to Harper, both sets of actors have sold out to the “culture of short-termism” (Harper, p. xiii). The prize they are after is a higher position in the industry's primary league tables: the *U.S. News & World Report* law school rankings and the Am Law 200 rankings of firms by revenues and profits (Harper, pp. xi–xii).³² Alas, they have forgotten that prestige is not a worthy end in itself; rather, it is a by-product of the choices we make and the lives we lead. A great trial lawyer will reduce her case to an easy-to-follow narrative that establishes, factual-brick-by-factual-brick, how and why the defendants committed the offense. Harper does this with formidable skill.

Let us start with the law schools—an environment that I ought to have some comparative advantage in understanding. Here is a sample of Harper's opening argument:

The lawyer bubble began to form when vital institutions—law schools and the American Bar Association (ABA)—abdicated their responsibilities in favor of misguided metrics and insularity. Law school deans are supposed to be the profession's gatekeepers, but far too many have ceded independent judgment in an effort to satisfy the mindless criteria underlying law school rankings, especially *U.S. News & World Report's* annual list. (Harper, p. xi)

As an insider, I can quibble with Harper's characterization but not in any way that helps law school deans. These days, most professors assume

32. In 1999, *The American Lawyer* expanded the Am Law 100 by an additional 100 law firms. This list, in turn, became the Am Law 200. No doubt this change was good for circulation.

that the dean's job is to raise money for the law school. In that role, deans invariably learn that alumni care deeply about the rankings of their law schools. Further, law students care, too. In 1999, while I was a 1L student at University of Chicago Law School, our school dropped from fourth to sixth in the rankings. Shortly afterward, the dean placed an explanatory letter in our student mailboxes. The letter acknowledged the seriousness of the matter and assured us that the drop was temporary.³³ The dean of admissions—who had admitted all of us—was then promptly reassigned. I recall one impeccably credentialed classmate telling me, “Had I known we were going to drop from four to six, I would have gone to NYU.”

Sure, law school deans ought to exercise independent judgment for the good of the profession. But if we want actual independent judgment, akin to that of an Article III federal judge, we need a different institutional structure. At present, law school deans are university middle managers, beholden to a diverse array of stakeholders amid a highly competitive market for law students and institutional prestige. Although it is true that most law school deans have tenure, all of them are human. Harper places a lot of faith in moral fortitude and resolve.³⁴ Unfortunately, there is not an identifiable, let alone clear, leadership path that a law school dean can follow to focus steadfastly on the educational mission and be confident that her institution will emerge on the other side intact. Perhaps the various stakeholders are misguided, but many sincerely believe that their own law schools would be better off in both the short and long terms if their institutions more effectively played the *U.S. News* rankings game.³⁵ A dean is closer to a politician than a priest—she cannot just ignore the views of the congregation and expect the center to hold.

Rather than cowardice or lack of resolve by law school deans, an alternative explanation for this downward trend is that law schools are suffering from a tragedy of the commons.³⁶ In brief, there are some classes of problems that only a regulator empowered to punish selfish short-term behavior can resolve. For example, conscience may be an inadequate tool to curtail overfishing in the oceans. Most commentators would agree that the

33. Fourteen years later, the University of Chicago Law School did, in fact, climb back into the number four spot. See *Best Law Schools*, U.S. NEWS, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited Nov. 28, 2013) (listing the University of Chicago Law School as tied for fourth in the 2013 rankings).

34. See, e.g., Harper, p. xvi (“Those who attribute the current state of the legal profession to market forces beyond anyone’s control are wrong. Human decisions created this mess; better human decisions can clean it up.”).

35. See, e.g., Nancy B. Rapoport, Editorial, *Managing* U.S. News & World Report—*The Enron Way*, 48 GONZ. L. REV. 423, 424 (2012–2013) (former law school dean acknowledging the enormous ranking pressures on administrators from students, alumni, and faculty).

36. This concept ought to be familiar to anyone who has studied the field of law and economics. Its origin traces back to a 1968 article by the ecologist Garrett Hardin. See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

gaming around of part-time students,³⁷ transfers,³⁸ contingent scholarships,³⁹ and student employment outcomes,⁴⁰ which are some of the weapons used in the *U.S. News* arms race, has brought shame and disrepute to the legal academy. Further, because the rankings reward schools for high spending on students,⁴¹ the cost of law school and average student debt loads have skyrocketed.⁴² And yes, the number of students admitted to law school today bears no relationship to the number of high-quality legal jobs readily available on the back end. But how do law schools fix these problems without either violating federal antitrust laws or destroying themselves by making the proverbial first move?

If I sound skeptical of some of Harper's criticisms, these disagreements are fairly limited in scope. Drawing on his trial lawyer roots, Harper has such a thorough command of law school minutiae that it would be difficult for any law professor to step into the ring with him and expect to walk out with a victory or a draw. Harper may heap criticism on the legal academy, but he acknowledges the complexities at work, such as the naïveté of prospective law students—a naïveté he recalls in himself when he enrolled at Harvard Law School in the mid-1970s (Harper, pp. 3, 205). He also explains the crazy incentives created by the federal government's financing of legal education—virtually providing a blank check for law schools yet forcing students and taxpayers to bear all the risk (Harper, pp. 10–12, Chapter Three).

On law schools, Harper's closing statement has a simple thesis: “[N]otwithstanding the praiseworthy efforts on the part of a few, including deans who recently have announced plans to reduce entering class size, a key difficulty remains: a failure of vision” (Harper, p. 54). Here, I have to agree. The problems facing legal education are indeed serious and exact real

37. See William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 *IND. L.J.* 163 (2006) (reporting that law schools are increasingly diverting low-LSAT-scoring students into part-time programs to evade *U.S. News* reporting requirements while retaining revenue from these students).

38. See Jeffrey L. Rensberger, *Tragedy of the Student Commons: Law School Transfers and Legal Education*, 60 *J. LEGAL EDUC.* 616, 637–40 (2011) (discussing the incentive structures around LSAT and undergraduate GPA statistics that lead high-prestige law schools to raid the IL classes of their lower-prestige law school counterparts).

39. See Jerome Organ, *How Scholarship Programs Impact Students and the Culture of Law School*, 61 *J. LEGAL EDUC.* 173 (2011) (discussing the advent of contingent scholarships, which are designed to boost a school's LSAT and undergraduate GPA median statistics while minimizing the outlay of scholarship dollars).

40. See Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83 *IND. L.J.* 791, 803–05 (2008) (discussing evidence of puffery in employment statistics submitted to *U.S. News*).

41. See Bill Henderson, *Can Stanford Be #1 in the US News Rankings? The Data*, *EMPIRICAL LEGAL STUDIES* (July 31, 2010, 12:36 PM), http://www.elsblog.org/the_empirical_legal_studi/2010/07/can-stanford-be-1-in-the-us-news-rankings-the-data.html.

42. See BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 107–11 (2012).

human damage. Fixing these issues is going to be uncomfortable and inconvenient for many. Yet, to enable us to rise to the occasion and confront difficult problems such as these, most of us working in the legal academy have been given tenure. We may not be natural leaders, but the buck has to stop with us. Vision does not just fall from the sky. It evolves over time through focused energy relentlessly applied to a very difficult problem with no guarantee of success. I have tried to make my own substantial contributions,⁴³ although Harper makes me question if I am doing enough. Many others are working hard to forge a better way.⁴⁴ Eventually, someone's better vision is bound to stick.

The balance of Harper's analysis is directed at large law firms,⁴⁵ a subject he knows well. Harper's thesis here is plain and relentless: the nation's large law firms have squandered their inheritances and lost their way. Although lawyers at large firms comprise only 15 percent of practicing attorneys today, Harper notes that "their influence is far greater than their numbers" (Harper, p. xi), a sentiment widely shared by others.⁴⁶ On numerous levels, Harper demonstrates an astonishing mastery of the factual record. To build his case, he collected nearly every shred of evidence available in the public domain. I am a full-time academic who studies the legal profession. Based on my experience, it appears that Harper turned over every possible rock and then arrayed the record in a way that was most damaging to the defense.

As Harper points out, the available data suggest that large law firms are comparatively unhappy places (Harper, pp. 58–63). Drawing on even more industry data, Harper makes the case that dissatisfaction is attributable to long hours, internal competition for pay and status, and dwindling chances to make partner (Harper, pp. 64–70). I can quibble here a bit. On balance, lawyers at large law firms do consistently express lower levels of satisfaction than lawyers working for smaller firms, in-house legal departments, or the government. But they are well compensated for the hardship, and the money

43. See, e.g., William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461 (2013).

44. Professor Tamanaha deserves special mention here for being brave enough to write a book declaring that the law school emperor had no clothes, see TAMANAHA, *supra* note 42, but there are many others who think similarly. Fortunately, many law school consortia are now off the ground and working to improve legal education.

45. What constitutes a "large" law firm has changed over time. Harper focuses primarily on firms competing for positions in the Am Law 200 legal tables. Harper, pp. xii–xiii.

46. See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* 182 (1989) (reporting that as of 1980, only 9.2% of lawyers worked in law firms with more than twenty lawyers, yet "such firms have become the most conspicuous feature in the American legal landscape"); Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1869 (2008) (observing that the large firm sector is "the fastest-growing, most prosperous, and most dynamic sector of the profession"); Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 IND. L.J. 433, 433 (1989) ("Large law firms are the most successful institutional component of the American legal profession according to the criteria of economic prosperity, proximity to the corridors of economic and political power, and the influence exerted on the legal profession generally.").

and status can advance their other goals in life.⁴⁷ Harper's broader point, however, is that it did not used to be this way. According to Harper, his first decade or two at Kirkland & Ellis were imbued with a sense of civility and professionalism that was ideal for mentoring young lawyers (Harper, pp. 68–69). Money was secondary but more than adequate. Since the subsequent advent of *The American Lawyer* league tables, Harper argues, large law firms seemed to have lost their souls (Harper, pp. 70–72).

Harper suggests that if leaders of large law firms had not improvidently placed firm size and profits above community and shared purpose, the health of the firms, and by extension the profession, would be restored.⁴⁸ Like any great trial lawyer, Harper builds his case through stories. He starts with the rise and fall of Finley Kumble (Harper, pp. 104–09), the first major law firm to be built entirely on star lateral partners.⁴⁹ Finley Kumble debuted at number two in the inaugural Am Law 100 in 1987, but within a few short months, it was gone.⁵⁰ Harper deftly makes the case that, one by one, virtually every major law firm collapse since then (Heller, Howrey, Thelen, etc.) follows a similar Finley Kumble-type pattern: rapid expansion and heavy reliance on laterals, shifting compensation to the big producers, overreliance on bank credit to fund basic operations, a steady outflow of the middle-rank partners unhappy with the changes, and a flourish of bravado before the fall (Harper, pp. 128–32). Indeed, by virtue of its extreme parallels with the trajectory of Finley Kumble, Dewey & LeBoeuf's rise and fall serves as the sole focus of Chapter Eight.

According to Harper, the firms that have avoided collapse are often held together by little more than money. Harper quotes an internal email from the chair of K&L Gates, a global law firm of forty-eight offices that were knitted together over the last decade or so through mergers and lateral hiring (Harper, pp. 117–18). The chair sent the email to the firm's partnership at the end of December, right before the firm closed its books for the year (Harper, p. 118). The chair wrote,

47. See, e.g., Kenneth G. Dau-Schmidt & Kaushik Mukhopadhyaya, *The Fruits of Our Labors: An Empirical Study of the Distribution of Income and Job Satisfaction Across the Legal Profession*, 49 J. LEGAL EDUC. 342, 365 (1999) (reporting an income-satisfaction trade-off among Michigan Law alumni); Kenneth G. Dau-Schmidt et al., "The Pride of Indiana": An Empirical Study of the Law School Experience and Careers of Indiana University School of Law-Bloomington Alumni, 81 IND. L.J. 1427, 1457–62 (2006) (reporting that lawyers at large firms experience a tension between satisfaction with their work and income and dissatisfaction with their work-family balance).

48. Harper's Epilogue could not make this clearer:

The baby boomer generation now in charge of almost everything has done some things right, but it has made a mess of the legal profession. Time and again, the focus on short-sighted metrics has sacrificed long-term vision. Nothing made that approach inevitable; choices made it happen. Better choices can fix it.

Harper, p. 208.

49. See Henderson, *supra* note 22, at 59.

50. See *id.*; see also Harper, pp. 104–09.

Many of you came from different cultures. I don't care about your prior acculturation. . . . We are a US-based global law firm. US law firms operate on a cash basis of accounting. Our fees must be collected by midnight within the fiscal year in which they are due. . . . I couldn't care less whether it appeals to you. It is who we are and therefore it is who you are.⁵¹

Harper then queries, "Is there room for other, nonmonetary values that traditionally have attracted some young lawyers to the profession, and if so, how do firms encourage their survival?" (Harper, p. 119). Harper is troubled that firm culture may be little more than the email's final line, "Get us paid by tomorrow."⁵²

Admittedly, all of this looks very bad. And therein lies the value of Harper's book. The legal profession has problems because appearances matter.⁵³ We ought not to litigate this case, so to speak, by arguing that Harper does not understand the nuances and complexities of being a law school dean or a "BigLaw" managing partner in the twenty-first century (although, for the record, these nuances and complexities are real). Why? Because when we point to the root cause of our helplessness (*U.S. News* or the need to forestall a "run on the bank" of partners leaving for other firms, for example) we become obligated, as self-regulated professionals, to search in earnest for a solution to these root causes. Harper claims that our problems flow from a lack of moral resolve. Others point to misguided regulatory structures that doom law firms and law schools.⁵⁴ A third criticism may be that those who prospered under the old order are hindered in their ability to adapt, thus causing their institutions to crumble.⁵⁵ Perhaps it is a confluence of all three explanations. But we ought to know one thing for sure: defensive words will neither make us look good nor solve our problems.

Harper devotes Part III of this book to prescriptive solutions. None of them is particularly controversial, and all of them would elevate the profession. For law schools, Harper suggests the following: confront the brutal realities facing our graduates; modify or curtail federal loan programs so

51. Harper, p. 118 (citing Elie Mystal, *The Two Faces of K&L Gates*, ABOVE THE LAW (Jan. 14, 2011, 1:04 PM), <http://abovethelaw.com/2011/01/the-two-faces-of-kl-gates/> (reproducing the text of an email reportedly sent by K&L Gates's chair)).

52. Harper, p. 119 (internal quotation marks omitted).

53. Cf. JAMES C. FREUND, *LAWYERING: A REALISTIC GUIDE TO LEGAL PRACTICE* 6 (1979) ("If there's one thing you learn in lawyering—as with the rest of life—it's that appearances rank only a shade behind reality in significance. . . . So when I talk about matters of optics, it's not to suggest hypocritical role-playing for which we're all ill-suited; rather, it's for the purpose of bringing appearances into line with realities.").

54. See, e.g., Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707 (1998) (citing ethical constraints on noncompetition agreements and nonlawyer ownership as reasons for the inability of the legal profession to adapt to the changing needs of clients); see also Gillian K. Hadfield, *Legal Barriers to Innovation*, REG., Fall 2008, at 14 (same).

55. See William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 374 (2011) (noting that the transitions occurring in the legal profession fit the old adage, "nothing fails like success" (internal quotation marks omitted)).

that law schools bear the risk of bad employment outcomes; restructure the 3L year; create a postgraduation training program; shrink law school enrollments; continue the ongoing trend toward more transparency; and provide reality therapy for prospective students (Harper, Chapter Nine). For law firms, Harper provides the following solutions: awaken the federal judiciary to its power to end the billable hour through the methods used to award attorneys' fees; rethink size; reduce profit-driven leverage; find high-potential recruits and give them meaningful work and honest evaluations; and reopen the equity class to create a true partnership ethos among all firm lawyers (Harper, Chapter Ten).

If put to a vote, a majority of the legal profession would likely sign on to Harper's proposals. There is no shortage of good will among lawyers. Unfortunately, these worthy aspirations are mediated by market forces with all their attendant uncertainties. The natural human impulse is to fix old and familiar institutions. But from a social perspective, it may be better to let them fail and create something new.

II. SUSSKIND'S *TOMORROW'S LAWYERS*

Like Harper's *The Lawyer Bubble*, Richard Susskind's *Tomorrow's Lawyers* offers a diagnosis for what ails the legal profession and a prescription for the future. Yet, despite the overlap in subject matter and the quality of the underlying analyses, it is hard to overstate the differences between these two books. Simply put, Harper looks backward at the problems that plague the legal establishment, while Susskind looks forward and describes the formidable changes ahead. In Harper's case, the problems are so serious that one is left wondering whether he has written about the last days of the old guard. Susskind, in contrast, describes an emerging legal landscape that many practicing lawyers and law students will find both foreign and frightening.

Tomorrow's Lawyers begins with a short inscription, quoting Alexander Graham Bell, that partially captures the differences in emphasis and perspective between Susskind and Harper: "When one door closes, another door opens; but we often look so long and so regretfully upon the closed door that we do not see the ones which open for us" (Susskind, p. x).

A second inscription, this one from the contemporary writer Clay Shirky, is particularly helpful to younger lawyers and law students trying to make sense of their elders: "Institutions will try to preserve the problem to which they are the solution" (Susskind, p. x). In the past, academic credentials and institutional prestige were viewed as reliable proxies for identifying the most skilled, capable lawyers. This was the structure of the legal marketplace in 1978, when the prestigious Chicago firm of Kirkland & Ellis hired Harvard Law graduate Steven Harper. In more recent years, cost and predictability have become increasingly important to corporate legal departments, and on these key pain points, traditional elite institutions offer little or no guidance. This breakdown in alignment between buyer and supplier

opens the door for new entrants ready to deploy an ever-increasing array of technological breakthroughs to solve a host of knotty legal problems.

During this period of transition, young lawyers are destined to be confused. Should they pursue and accept positions in the “prestigious” old order or cast their lot with the new legal entrepreneurs? Neither option provides the sure career path that many law students seek.

If the reader is unfamiliar with Susskind, here are a few essential facts you need to know. Susskind is Scottish and holds an LLB from the University of Glasgow.⁵⁶ After qualifying to practice law, Susskind enrolled in a PhD program at Oxford, where he focused on the unexplored terrain of law and computers.⁵⁷ His graduate work became the basis for his first book, *Expert Systems in Law*.⁵⁸ Although Susskind has enjoyed numerous academic appointments over the years, in his primary vocation, he serves as a strategy and technology consultant for many of the world’s most successful professional service organizations.⁵⁹ Susskind could more than cut it as a full-time academic, but he can certainly garner more income and influence from his independent perch. For the most part, the accounting profession has embraced Susskind as an indispensable trusted advisor.⁶⁰ In contrast, lawyers view him with skepticism, although most are uncomfortable dismissing him publicly.⁶¹

Why the discomfort? My favorite story on this front is Susskind’s 1996 prediction that email would someday replace the telephone as the dominant method for lawyers and clients to communicate.⁶² At the time, the internet was still a novelty limited to universities and computer aficionados. Prudent and ethical lawyers would never succumb to such an insecure method of client communications, or so said Susskind’s critics.⁶³ Yet, nearly twenty years later, lawyers have become chained to their computer devices and smartphones, lest a client’s email does not receive a prompt reply. In the introduction to *Tomorrow’s Lawyers*, Susskind asks the question, “Why [l]isten to [m]e?” (Susskind, p. xvi). He answers it himself: “Even my fiercest

56. In the United Kingdom, law is an undergraduate degree.

57. See Richard Susskind, <http://www.susskind.com> (last visited Nov. 28, 2013).

58. See RICHARD E. SUSSKIND, *EXPERT SYSTEMS IN LAW: A JURISPRUDENTIAL INQUIRY*, at vii (1987).

59. See Richard Susskind, *supra* note 57.

60. In public presentations, Susskind often acknowledges that his biggest and longest-standing client engagement is with a “Big Four” accounting firm. Because accounting firms have reinvented themselves as business consultants, Susskind’s ideas are presumably more readily accepted.

61. This assertion is based on my own observation. I have attended several Susskind lectures where the audience is comprised primarily of prosperous corporate lawyers.

62. See RICHARD SUSSKIND, *THE FUTURE OF LAW* 137 (1996).

63. See RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES*, at xxx (rev. ed. 2010) (“[I]n 1996, senior officials in [the Law Society of England and Wales] said I should not be allowed to speak in public. I had been predicting then that most lawyers and clients would soon communicate by e-mail, and the feeling was that I failed to understand confidentiality and was bringing the profession into disrepute.”).

critics will concede that . . . over the last 25 years I have been right more often than wrong in my predictions” (Susskind, p. xvi). Yes, that is pretty much spot on.

This book is by far Susskind’s most accessible and arguably his best. I suspect that the convention that got him the most traction was his desire to communicate directly with younger lawyers and prospective law students. The opening passage makes it nearly impossible not to keep reading:

This book is a short introduction to the future for young and aspiring lawyers.

Tomorrow’s legal world, as predicted and described here, bears little resemblance to that of the past. Legal institutions and lawyers are at a crossroads, I claim, and are poised to change more radically over the next two decades than they have over the last two centuries. If you are a young lawyer, this revolution will happen on your watch. (Susskind, p. xiii)

The book is a slender 165 pages that one might devour in a single sitting. Young lawyers ought to read this book. But the people most likely to do so are young partners at large law firms because many of them are beginning to piece together the reality that their organizations are on an unsustainable path—a realization that is fine for the fifty-five- and sixty-year-olds but a potentially disheartening discovery for everyone else.

Tomorrow’s Lawyers is divided into three sections. Part I discusses the radical changes beginning to unfold in the current legal marketplace. Part II describes what the resulting legal landscape is likely to look like. And Part III focuses on the prospects for young lawyers. Susskind acknowledges that much of the revolutionary momentum is driven by clients of large corporations (the organizational clients described in the Chicago Lawyers I and II studies⁶⁴) who can no longer afford the rising costs and lack of innovation offered by traditional large law firms.⁶⁵ Yet, the good news is that the rising tide of technology is likely to have a great democratizing effect on law, making it more affordable and accessible to the masses (the personal services hemisphere may make a comeback!). In the years to come, idealistic legal entrepreneurs will have the opportunity to do good and do well.⁶⁶ In the process, however, we will likely lose the insular academic and professional guilds of the artisan lawyer.

According to Susskind, the three drivers of this change are “the ‘more-for-less’ challenge, liberalization [better known in the United States as market deregulation], and information technology” (Susskind, p. 3). The more-for-less challenge constitutes a phenomenon pertaining primarily to organizational clients. Some highly esteemed scholars have argued that law is a

64. See *supra* notes 10–19 and accompanying text.

65. See Susskind, pp. 3–5.

66. See, e.g., Susskind, p. 83 (“For those aspiring lawyers who hoped for a career akin to that enjoyed by lawyers of their parents’ generation, they will be disappointed. For those who seek new opportunities and wish to participate in bringing about the advances that I predict in this book, I believe there has never been a more exciting time.”).

mature industry.⁶⁷ Yet, in a rapidly globalizing and regulated world, law becomes even more important to maintain stability and civility. What has become mature, however, are particular ways of provisioning law to stakeholders. We do not really notice when the poor and the dispossessed, or even the middle class, cannot afford access to the legal system. But when corporate clientele complain about bills, the rules of the road are likely to change for their benefit. And those clientele need and want better, faster, and cheaper methods of solving and preventing their legal problems.

In terms of liberalization, Susskind refers primarily to the market reforms in the United Kingdom and Wales, which have opened the doors for nonlawyers to capitalize, own, and manage businesses that provide legal services (Susskind, pp. 5–9). These reforms are akin to U.S. state bars repealing Rule 5.4.⁶⁸ In the United Kingdom, the primary rationale for the liberalization is that the previously closed market underserved ordinary citizens.⁶⁹ Susskind predicts that within ten years or so, “most major jurisdictions in the West” will move toward similar reforms.⁷⁰

Susskind’s third driver of change is information technology (“IT”), although the engineers and scientists are unlikely to arrive on the scene by themselves. Instead, venture capitalists and private equity—types who are hoping to profit from the transition will invite them. Citing the achievement of Watson, IBM’s artificial intelligence system that won a 2011 *Jeopardy!* championship on live broadcast television, Susskind notes that “there is no finishing line for IT and the Internet” (Susskind, pp. 12–13). Sure, IT will speed up modern law practice through various forms of automation. But Susskind suggests that new technologies will open the door to entirely new ways of practicing law (Susskind, p. 13).

Susskind divides the coming innovations into two groups: sustaining technologies and disruptive technologies. Sustaining technologies “are those that support and enhance the way that a business or a market currently operates” (Susskind, p. 39). Telephones, desktop computers, fax machines, email, smartphones and tablets, and electronic filings surely fall into this camp. Disruptive technologies, in contrast, “fundamentally challenge and change the functioning of a firm or a sector” (Susskind, p. 39). Outside the

67. E.g., Stephen Bainbridge, *Is Law a “Mature” Industry?*, PROFESSORBAINBRIDGE.COM (July 9, 2009, 12:42 PM), <http://www.professorbainbridge.com/professorbainbridge.com/2009/07/is-law-a-mature-industry.html>.

68. See MODEL RULES OF PROF’L CONDUCT R. 5.4 (2013) (prohibiting business combinations between lawyers and nonlawyers when any portion of the business involves the practice of law).

69. See Susskind, pp. 84–85 (noting that “research in England and Wales conducted a few years ago concluded that around one million civil justice problems go unresolved each year”).

70. Susskind, p. 9. As I have noted elsewhere, an enormous amount of the changes that Susskind envisions can occur without market liberalization, as one can view everything up until the courtroom door or “client counseling moment” as a legal input or process that can be purchased from a nonlawyer supplier. See William Henderson, *Losing the Law Business*, CAYMAN FIN. REV., First Quarter 2013, at 78, 78.

legal field, the paradigmatic example of a disruptive technology is digital camera technology, which led to the demise of Kodak, a once-dominant brand in the chemical film industry (Susskind, p. 39).

For lawyers and law students, the word “disruption” is bound to have an unnerving connotation. But, as Susskind points out, “For the buyer of legal services, this disruption is often very good news indeed” (Susskind, p. 40). Susskind sees at least thirteen disruptive technologies in law (Susskind, p. 40), which he discusses one by one in Chapter Five and throughout the rest of the book. These technologies generally follow some variation of better, faster, or cheaper, although the cost curves are relentlessly headed downward. Thus, to my mind, the disruptive technologies fall into two main buckets: faster—cheaper and better—cheaper.

The faster—cheaper bucket includes the following: (1) automated document assembly, which cuts out fees for drafting and customization; (2) relentless connectivity, which sets up a responsiveness expectation that undermines the work and social lives of lawyers; (3) e-learning, which supplants the lecture element of academic learning and potentially much more; (4) online legal guidance, which organizes legal information to facilitate client self-help; (5) legal open-sourcing, which puts standard documents, checklists, and flowcharts into the public domain; (6) closed legal communities, where law firm work products that corporate clients paid for can be pooled together and shared as a common resource; (7) workflow and project management, which wring out the inefficiency of the billable hour; and (8) online dispute resolution, which has proved its muster on eBay and properly raises the question whether court is a “service” or a “place.”⁷¹

The better—cheaper bucket is perhaps even more corrosive to existing institutions. These disruptive technologies include the following: (9) electronic legal marketplaces, where firms and lawyers are credibly rated by current and former clients on the basis of quality, cost, and value; (10) embedded legal knowledge, which essentially builds trip wires to keep employees or citizens from breaching contracts or transgressing safety regulations; (11) intelligent legal search engines, which supplant not only junior lawyers and paralegals but also legal process outsourcers, as humans are simply outmatched; (12) big data, which will reveal insights for predicting legal outcomes and identifying and mitigating legal risk; and (13) artificial intelligence—based problem solving, which essentially unleashes computers akin to IBM’s Watson on the types of legal problems currently handled by living, breathing lawyers prone to various forms of cognitive bias and bounded rationality.⁷²

If the reader scoffs at such fanciful visions of the future or protests that they are overstated, I have only one reply: time will tell if Susskind is right. I have ample experience observing how lawyers and law professors respond to Susskind’s ideas, as I have heard him speak live on half a dozen occasions. The reaction, I can assure you, is never one of wonderment. Rather, the

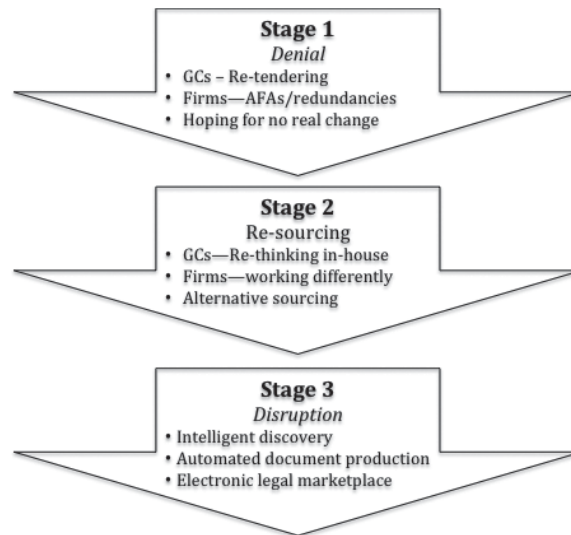
71. See Susskind, pp. 41–47, 99–102.

72. See Susskind, pp. 42–43, 46–49.

general tenor tends to be skepticism mixed with fear, as individual audience members process the extent to which their cheese will be imperiled if Susskind is even partially right.⁷³

Chapter Eight is entirely dedicated to the timing of these changes, which Susskind predicts will unfold in three stages. Stage 1 is denial, which, according to Susskind, describes the present state in which legal departments dicker with law firms over cost-containment strategies (Susskind, pp. 77–79), such as volume discounts. These efforts, in turn, fail to produce significant innovations in how legal work is organized and performed. Stage 2 is re-sourcing. This stage is characterized by legal departments becoming more open to nontraditional legal vendors and law firms embracing technology and process improvement to survive (some will, many will not, according to Susskind) (Susskind, pp. 3, 79–80). Stage 3 will be full-blown disruption, when entirely new businesses and institutions will overtake the old order (Susskind, pp. 81–83). Susskind illustrates the transition through these stages in the following diagram (Susskind, p. 77 fig.8.1):

FIGURE 1
THE THREE STAGES OF CHANGE



To my mind, the true paradigm-shifting innovations identified by Susskind tend to have one killer theme in common: whenever practicable, one-to-one artisan lawyering is giving way to one-to-many modes of legal problem solving. As Susskind notes in the final section of the book, this trend is extremely problematic for today's law students, as law schools are teaching a craft that is relevant to a tranche of legal work destined to shrink in the years

73. One of the best-selling business books of all time is a fable on how to deal with unwelcomed change in our life circumstances. See SPENCER JOHNSON, WHO MOVED MY CHEESE? (1998).

to come (Susskind, pp. 135–39). Indeed, it is only now beginning to dawn on law school faculty that the legal industry of the future will be profoundly interdisciplinary.⁷⁴ And I am not talking about law and economics or law and psychology, although these disciplines will certainly remain relevant. Rather, one will find the greatest frontiers (and fortunes) at the intersection of law and systems engineering, computational linguistics, and process management.

CONCLUSION

In the final chapter of *Tomorrow's Lawyers*, Susskind retells a story—well known in corporate circles but less so among lawyers—of the world's leading manufacturer of power tools assembling its new executives for an entry-level training course. The training facilitators present the new recruits with a slide showing a gleaming power drill and ask whether this product is what the company sells (Susskind, pp. 157–58). One by one, the new recruits slowly muster the courage to say, “Yes, this is indeed what the company sells.” The trainers then move to the next slide, which shows a hole neatly drilled into a piece of wood. “This,” they say, “is actually what our customers want, and it is your job as new executives to find ever more creative, imaginative, and competitive ways of giving our customers what they want” (Susskind, p. 158).

As a legal educator, I am hesitant to embrace metaphors that do little more than extol the commercial marketplace. I generally advocate that lawyers need more critical detachment and less ideology (close to zero is the right amount). That said, as a practical matter, if the goal is indeed to delight the customer, then a thoroughgoing knowledge of the customer's preferences is absolutely indispensable. In the case of law, there is ample evidence to suggest that both corporate legal departments and ordinary citizens would like to have fewer legal problems. And for those problems that remain, they would like them dispensed with in a timelier and less expensive manner.⁷⁵

My point here is a very simple one: there is tremendous pent-up demand for better, faster, and cheaper legal products and services. This fact alone raises certain issues of professional responsibility, at least for U.S. lawyers. Each spring, I guide students in my Legal Professions class through the

74. See, e.g., Rachel M. Zahorsky & William D. Henderson, *Who's Eating Law Firms' Lunch?*, A.B.A. J., Oct. 2013, at 32, 38, available at http://www.abajournal.com/magazine/article/whos_eating_law_firms_lunch (“A technology-driven revolution is overturning how America practices law, runs its government and dispenses justice. The revolution has so far gone almost completely unnoticed by the people who teach aspiring lawyers. This has to change.” (quoting Professor Goodenough) (internal quotation marks omitted)).

75. Consensus, however, may depend on whether we are all behind Rawls's veil of ignorance. See JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999) (arguing that principles of social fairness are more readily discernible when individuals are deprived of any guarantees on their starting position).

Preamble to the Model Rules of Professional Conduct, drawing their attention to paragraph [9], which reads, “Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living.”⁷⁶ If this passage is true, it likely follows that the transition from one-to-one artisan lawyering to one-to-many IT-enabled legal systems lays the foundation for the mother of all ethical dilemmas, at least for lawyers who lack the tools and expertise to profit from this brave new world.

Although practicing lawyers and law professors have financial incentives to resist the marginalization, if not the obsolescence, of artisan lawyering, a bigger obstacle is arguably the presence of mental frames that make it nearly impossible to envision alternative paths. The famous physicist Max Planck once wrote, “A new scientific truth does not triumph by convincing its opponents and making them see the light, but rather because its opponents eventually die, and a new generation grows up that is familiar with it.”⁷⁷ If the physicists can fall prey to mental frames, lawyers are unlikely to fare any better. Perhaps this explains why some of the leading innovators in today’s large corporate legal departments, such as Mark Chandler (of Cisco Systems, Inc.) and Paul Beach (of United Technologies), never worked in traditional corporate law firms—arguably, it would have ruined them. As water runs downhill, the best innovations will eventually be studied, copied, and adopted by others. But because of old mental frames, these changes will occur more slowly than reason and self-interest might dictate.

I was recently jarred out of my own mental frame when I reviewed data on the composition of the nation’s largest law firms over the last thirty-five years. The long-standing conventional wisdom is that large law firms have been steadily increasing leverage in pursuit of ever-higher profits per partner.⁷⁸ I was a subscriber to this persistent narrative. Yet, as shown in the time series plot below, the data tell a different story⁷⁹:

76. MODEL RULES OF PROF’L CONDUCT pmbL, para. 9 (2013).

77. MAX PLANCK, SCIENTIFIC AUTOBIOGRAPHY AND OTHER PAPERS 33–34 (Frank Gaynor trans., 1949).

78. See, e.g., Harper, p. 77 (“Firms create leverage by hiring far more entry-level associates than they ever intend to promote into the equity partnership. . . . [T]he equity partners make a lot of money on those associates during the years preceding the up-or-out equity partnership decision.”); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 760 (suggesting that the incentive structure of modern law firms is to “increase associate leverage and billable hours” to meet the compensation expectations of rainmaker partners).

79. William Henderson & Evan Parker-Stephen, *The Diamond Law Firm: A New Model or the Pyramid Unraveling?*, LAWYER METRICS (Dec. 3, 2013), <http://lawyermetrics.com/2013/12/03/the-diamond-law-firm-a-new-model-or-the-pyramid-unraveling/>.

FIGURE 2
AVERAGE PERCENTAGE OF PARTNERS AND ASSOCIATES: NLJ 250,
1977–2012



Among the nation's 250 largest law firms, the high-water mark for traditional partner–associate leverage occurred nearly a quarter century ago. It took a precipitous drop in the early 1990s and expanded again during the heyday of the “dot.com era” but has trailed off ever since. In the meantime, firms have created and expanded new categories of lawyers, such as staff attorneys and counsel.⁸⁰ Further, essentially all the growth in the partnership ranks has occurred within the nonequity tier.⁸¹ The trend lines in the diagram above do not reflect a business model that exploits young lawyers; rather, they reveal a business model that is steadily forsaking them. This does not bode well for BigLaw's future, especially as new legal vendors offer alternative paths that appear far more sustainable.

After reading *The Lawyer Bubble* and *Tomorrow's Lawyers*, I was reminded of yet another book written by a lawyer, Daniel Pink's *A Whole New Mind*.⁸² Pink's thesis is that we are moving into an economic and political era in which traditional left-brain analytical thinking will be insufficient to secure lucrative, lifelong employment, primarily because “abundance, Asia, and automation” are steadily increasing competitive pressures on knowledge workers.⁸³ Pink's insightful book suggests that the solution to this competitive dynamic is to cultivate the emotive, empathic, aesthetic, and storytelling components of our right brain, creating a whole new mind that is more

80. See Henderson, *supra* note 29, at 11.

81. *Id.*

82. DANIEL H. PINK, *A WHOLE NEW MIND* (2005). Pink is a graduate of Yale Law School who worked for then–Vice President Gore before taking up writing full time.

83. See *id.* ch. 5 (explaining the impact of abundance, Asia, and automation on knowledge workers, particularly in the United States).

adept at problem solving and hence in higher demand by clients and employers. No doubt, this is good advice for today's college graduates. But as a matter of national policy, it is wholly inadequate.

In the years to come, the unfettered forces of abundance, Asia, and automation are likely to be enormously disruptive politically, socially, and economically. *Tomorrow's Lawyers* arguably presents a mere (and mild) microcosm of a problem with much higher stakes that affects virtually everyone here and abroad. Perhaps in a highly globalized yet atomized society, controlling the fallout from the pressures of abundance, Asia, and automation is too big a task for anyone to take on. Yet, how to control this fallout is the type of dilemma that lawyers have historically sought to resolve, sometimes at the expense of our own parochial interests. I certainly hope we try.

