

Speech

THE COUNTY COURTHOUSE NO LONGER LOOMS OVER THE COMMUNITY

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The title of this Article may be mysterious, but only because it is a metaphor. The subject of my Article is actually professionalism and professional ethics in the practice of law. My theme is that our contemporary concepts of professionalism and professional ethics are based upon an obsolete image of society, one that contrasts with the social context in which the practice of law is now conducted. This obsolete image is widely shared by senior members of the profession, who may have actually experienced the old style of practice, and by many younger ones. Enraptured by this image, we keep harking back to earlier times for solutions, or at least amelioration of, what we describe as the erosion of professionalism, particularly "civility." I do not dispute that there has been change of the relationships referred to by the term civility. However, the important question is the nature of that change. My purpose is to direct attention to the social condition in which "professionalism" must now be nurtured. The modern condition is an impersonal, highly competitive environment.

To this end, I tender another metaphor to describe the present situation, the metaphor of the high rise law office. I suggest that the high rise law office now dominates the community and that we should ponder the implications of that fact.

I. THE LOOMING COURTHOUSE

In the last two decades of the nineteenth century there was a building boom in courthouses. The boom was most evident in the Midwest and South but manifested itself all over the country. The typical style can be called neo-baroque and was not limited to courthouses. The capitol building in Albany, New York, City Hall in Philadelphia, and the Executive Office Building in Washington are other examples of the style. The

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exterior features include height and size relative to the other structures in the area and a formal design exhibited through columns and stairways, tall windows, and somber decorative detail. The interior features include a large atrium, high ceilings, long hallways, marble or terrazzo floors, and oaken interior walls. Inside the building, the courtrooms are deep and wide and centered on the bench, which is elevated to a dominating position over the courtroom well. People coming to the courthouse for the first time are in awe, as they are supposed to be. Even the court regulars—lawyers and staff—have the sense of being in church, indeed perhaps a regional cathedral. Buildings like this are still in use in many American cities.¹

Small counties could not always afford such splendor. However, they did the best they could. Equally important to the architecture of the court house was location. If there was a hill or even a slight rise in the terrain, the courthouse was situated at its apex. If the terrain was flat, the courthouse was surrounded by a public park and thereby distanced from nearby commercial buildings. In any event, it was the most prominent building in town.

Let me paint a picture also of the surrounding professional and commercial community. It consisted of a handful of lawyers and doctors, the clergy of several denominations, perhaps an accountant (the tax laws were not yet so devilish as to require every business to have an accountant), the presidents of two or three banks, and a few pharmacists. This small group of professionals typically constituted all of the locals who had gone to college except for the teachers in the local schools, who were mostly women, not allowed to vote until 1920, and hence usually outside the local political orbit. The commercial sector included businessmen in various retail and wholesale trades, depending on the regional economy. (There were very few businesswomen anywhere.) The handful of businessmen who dominated local manufacturing and commerce also dominated the local economy. The rest of the urban population were clerks or mechanics of one kind or another, whether at the local railroad terminal, the telegraph office, blacksmith and machinery shops, or in the offices of the county clerk and the county sheriff. The surrounding rural population were farmers and farm laborers and the women and children. In parts of the country having a black population, the blacks usually were town laborers or farm hands except for a few proprietors of enterprises catering to blacks—funeral director, insurance agent, perhaps a nurse practitioner.

An important element of the social structure was religious affiliation. Most people believed in God and had at least nominal affiliation with a specific congregation or parish. There were various denominations and many separate congregations. Membership in congregations generally reached across socio-economic status, somewhat strengthening the position of the churches as an integrating force in the community.

1. See PHYLLIS LAMBERT ET AL., *COURT HOUSE: A PHOTOGRAPHIC DOCUMENT* 8 (Richard Pare, ed. 1978).

The officials of government included the mayor, the city councilmen and county commissioners, the state legislative delegation, and the judge—or two or three judges in larger cities. The judges were the community's highest level full-time government officials. The federal government was far away and rarely in evidence, except through the post office. State government generally was almost as remote.

This typical community had a distinct socio-economic structure, to refer to it in academic terminology. Economic authority was concentrated in the local bank presidents and owners of the dominant businesses. Political authority was concentrated in the mayor and the county commissioners. Legal authority was concentrated in the judge and a handful of prominent lawyers. Others in the upper literate local community circulated around these concentration points. The rest of the community—the city clerks and the farm laborers—were politically more or less passive followers.

II. THE TRADITIONAL COMMUNITY'S GOVERNANCE SYSTEM

This classic American community was self-contained, hierarchical and regulated by inherited unwritten conventions of conduct.² Classic portrayals of this social system in American literature include Hawthorne's *The Scarlet Letter*, Dreiser's *An American Tragedy*, Lewis's *Babbitt*, and not least—given its focus on a lawyer—Lee's *To Kill a Mockingbird*.

The small town being self-contained, most interactions among the local population were with other members of the community. Transactions with people in outside communities were occasional and relatively formal—intercity bank transactions, purchase and sale of farm and industrial supplies and products, tax payments to the state government, mortgage transactions with East Coast financial centers, and so on. Virtually all transactions in a self-contained community necessarily involved “repeat players” or players having direct connections with repeat players. Accordingly, everyone had a reputation based on his or her local record and on local gossip. Reputations were a basis for estimating the capability and integrity of the players on both sides. The players were aware that their performance in every new transaction would be addressed in future gossip and thereby would add or detract from reputation.

The town being hierarchical, significant decisions in the town's business, political and community affairs were taken through the community's power structure. Voting at elections was of course democratic. Although elections are considered crucial in democratic theory, elections in the traditional community usually reflected local consensus previously established. In any event, elections were only occasional and only determined incumbency in elective office. The incumbents following the elections

2. See generally ROBERT S. LYND & HELEN MERRELL LYND, *MIDDLETOWN: A STUDY IN CONTEMPORARY AMERICAN CULTURE* (1929) (MIDDLETOWN is the classic sociological study of a small American town.).

made decisions about public affairs in closed meetings—the proverbial “smoke filled room.” Most important decisions in other affairs were also made in closed meetings—marriage and inheritance in the family, business decisions, and most all decisions by non-elective officials in government. So also the decisions of professionals such as lawyers and decisions based on their advice. So, of course, were judicial decisions.

In closed meetings, decision ordinarily depends not on headcount but on effective influence—“clout” as they call it in Chicago. In business, as the saying goes, the boss is not always right but he (or she) is always the boss. In the family, parents dominated decisions and the family was, or was widely thought to be, based on a paternalistic principle. As for decisions in government, the point about clout was made best by Abraham Lincoln. It can be recalled that in a critical decision, upon counting that his ten cabinet members voted “nay” while he voted “aye,” Lincoln said, “The ayes have it.” In the traditional local community, decisions reflected power and authority derived from family relationships, property ownership, management control of business operations, church affiliation, and local leverage derived from connections with the outside world. Not least important was clout expressed in character, particularly the ability to deal with reality and the steadiness to carry through difficult courses of action.

I have gone on at some length in describing the “informal structure” of the traditional community. By informal structure I mean the complex web of relationships through which a community actually functions, as distinct from its formal legal structure. In this country, government formally proceeds through public debate and voting, business is separated from government, there is a “wall” between church and state, and everyone is equal. In the informal structure, the boundaries between sectors are permeable and people have distinct places in the society. Sociologists, legal realists, and serious politicians believe that the informal system ordinarily and substantially determined outcome in most transactions in the old days and that the informal system continues to determine most outcomes today. As was observed by Tip O’Neill, former Speaker of the House of Representatives, “All politics is local politics.”

III. PROFESSIONALISM AND PROFESSIONAL ETHICS IN THE TRADITIONAL COMMUNITY

The governance of the legal profession in the traditional community was part and parcel of this system.³ That is, governance of the legal pro-

3. See Joel F. Handler, *THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY* 3 (1967); see also *People v. Belge*, 376 N.Y.S.2d 771, 772 (N.Y. App. Div. 1975), *aff’d*, 41 N.Y.2d 60, 62 (1976). This is the famous, or infamous, “Buried Bodies Case,” where a lawyer representing a criminal defendant in a small upstate New York community withheld information given to him by his client identifying the location of the bodies of two young women that the defendant had killed. The lawyer disclosed the information only after a plea bargain in which the information was used as a bargaining chip. The lawyer’s conduct, in fulfilling what seems to me his clear duty, resulted in public outrage.

fession was also locally self-contained, hierarchical in structure and conducted according to unwritten conventions. Descriptions of this system were the basis for reforms in the system of professional discipline that were recommended in 1970 by the “Clark Committee” Report, formally known as the American Bar Association Special committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement. The following are excerpts for that Report:

The intimacy, the small size and the lack of organization and leadership in many of our small county bars constantly hobble effective [disciplinary] procedures. Also there is the back scratching phenomenon. For example, some of our bar associations have as few as a half dozen members. For them to discipline one of their own is virtually an impossible task. . . .⁴

We have found in many instances that a complaint might be against an attorney in the rural areas where the attorneys are close, and it could be a serious embezzlement of funds, and the member of the disciplinary agency might go to his friend and say, “Look, Joe, why don’t you take care of this before it goes any further. . . .”⁵

A local grievance committee is most reluctant to bring a disbarment proceeding because the defendant is usually known to the members of the local grievance committee on a first name basis.⁶

These accounts leave unstated how a professional community of lawyers that avoided formal disciplinary proceedings managed to cope with misfeasance and malfeasance occurring within its company. The answer is, of course, that the lawyers used the informal techniques of social control. These include professional gossip (leading to local bad reputation), extra wariness in transactions, refusal of referrals, restriction of “professional courtesies,” and, in varying degree, ostracism. One form of ostracism imposed on a lawyer would be the difficulty a tainted lawyer would have in carrying through transactions—settlement of a lawsuit, for example, or bargaining out terms of a business deal—because other lawyers distrusted him. Another form of ostracism would be the inability of an outcast to form a partnership with any other local lawyer.

The judge was party to most of the information going into a lawyer’s reputation and used his informal powers as sanctions. A judge could refuse to grant extensions and excuses, could apply the rules of procedure with rigor instead of liberality, and view with special skepticism papers authored by the suspect lawyer. Loss of “credit” with the judge could put a lawyer out of business.

These mechanisms in aggregate could be called social “friction”: small impediments and obstacles, some of them virtually invisible, resulting in loss of motion and energy and accomplishment of purpose. In more for-

4. ABA Special Comm. on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 9 (1970) (also known as the Clark Commission) (quoting the chairman of a state bar association disciplinary committee).

5. *Id.* at 10 (quoting a member of a state disciplinary commission).

6. *Id.* at 16.

mal terms, in the traditional community the system for enforcing norms of conduct is based on shared local knowledge, accurate or merely believed, and grant of informal benefits and imposition of informal retaliatory sanctions based on such knowledge. This mechanism, not legal rules, supplied the effective governance of the legal profession.

Systematic enforcement of formal written rules of ethics was not possible because, as it was said to the Clark Commission, "the defendant is usually known to the members of the local grievance committee on a first-name basis."⁷ Nor was systematic enforcement necessary, except perhaps in extreme cases, because the threat of informally imposed "friction" was a generally adequate deterrent. It is my interpretation that the extreme cases, those involving disbarment, essentially gave formal legal ratification to a verdict previously established by informal consensus. It is also my interpretation that the informal system was the effective fibre of professionalism in the bygone era.

Perhaps, needless to say, the system was not always fair and impartial, as noted in the Clark Committee Report. The president of a black bar association in a jurisdiction with a substantial black lawyer population testified: "We do not have any representation on the [grievance] committee."⁸

IV. THE HIGH RISE LEGAL PROFESSION

In the world of today and tomorrow the county courthouse no longer looms above. Instead, prominence and predominance reposes in the lawyers and not the judges. Within the bar, predominance reposes in the law firms dealing in high stakes transactions and high stakes litigation. No longer is "the" judge a central figure, nor do the small country bars have much significance. The modern American population is increasingly concentrated in cities and metropolitan areas, localities which now all have multiple judges, often dozens of judges, sometimes hundreds. The members of the bar in a typical urban community are no longer on a first name basis; indeed, they are no longer even on a last name basis. Ask the average lawyer the name of the president of the county bar association and you will likely draw a blank. Ask the name of the "powerhouse" law firms, however, and you can usually get an informed answer.

The powerhouse law firms have local connections and usually include lawyers whose practice is locally-oriented.⁹ However, these firms have prominence primarily through their out-of-town connections: connections to business corporations with headquarters elsewhere; to financial centers in New York and, increasingly, in London, Tokyo, and Germany; to centers of political power in the state capitals and in Washington; and

7. *Id.*

8. *Id.* at 44.

9. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 280 (1982) (stating that lawyers from large firms tend to have more connections to local "notables").

to professional circles across the nation and the world, now organized on the basis of legal specialties and not local residence. These law firms typically have their offices no longer across from the old courthouse but up in high rise office buildings. The high rise office building, not the courthouse, now looms over us.

There is nevertheless an informal system of governance working in this new socio-economic context, just as there was a different kind of informal system working in the context of yesteryear. The new system like the old depends on gossip, reputation, and the sanction of "friction," just as in the old days. Indeed, at the high speed at which the modern professional community functions, avoidance of friction becomes an even more important element in accomplishing transactions. As a matter of elementary physics, obstruction in turning the wheels of an oxcart is much less serious than obstruction in the wheels of modern commerce. The point can be made by recognizing that the opposite of "friction" in this context is "access." In today's world of law, business, and politics, "access" is usually critical. Everyone can get in the front door and talk to the receptionist. But will the key person inside the door see you, answer your telephone or fax messages, agree to meet?

In my estimate, neither the legal profession nor the general public nor the academic community has fully recognized and understood the disappearance, or at least the diminution of the significance, of the old courthouse and the old social community in which the courthouse was a central institution. The legal profession has of course sensed the gap in various ways. One response has been increasing elaboration of legal rules to govern the ethics of the profession.¹⁰ Some elaboration is required in my opinion, for example in the concept of ethical responsibility of the law firm as distinct from the responsibility of individual lawyers. Another response is the purposive nurturing of informal social mechanisms that function like the old courthouse community. Here I have in mind such movements as the American Inns of Court, the recognition of the importance of mentoring within law firms, and the increasing activities of specialized bar affiliations such as the Business Law and Litigation Sections of the American Bar Association. However, some of the bar's activity represents a quest for return to the good old days. In my opinion, that quest will be as futile as the hope that we could solve problems of urban congestion by requiring attendance at more cowboy movies.

The general public has not caught on, largely because it has had little assistance in understanding the new situation. The average citizen evidently thinks of lawyers, for good and evil but unfortunately mostly for evil, in terms of personal relations in an intimate community. However, average citizens recognize that most of them do not know the name of a reliable lawyer. Indeed, most of them recognize that they do not even

10. See generally *RESTATEMENT OF THE LAW GOVERNING LAWYERS* (Proposed Final Draft 1996) (formulating common law governing lawyers); *ABA Special Comm'n on Ethics 2000* (1983) (considering revisions in Rules of Professional Conduct adopted by ABA).

know someone who in turn would know the name of a reliable lawyer. In the community around the old courthouse, the average citizen usually would have had at least that second hand acquaintance with a lawyer. Now, the average citizen is relegated to lawyer advertising, thereby subject to the peril of being unable to differentiate between conscientious legal assistance and unctuous exploitation. Increasingly, to find a reliable lawyer the average citizen needs the help of what we used to call "lay intermediaries." That is, they turn for advice about a reliable lawyer to the modern equivalents of an old-fashioned neighborhood—an employer, a labor union, a trade association, a religious congregation.

However, the bar generally has been unhelpful in fostering these substitutes for the old neighborhood and indeed has generally been hostile to them. These organized connections between ordinary citizen and legal services are of little interest to the large law firms. Large law firms connect with business clients through different information networks than those that are available to the average citizen. At the same time, the small firm and solo practitioners either become specialists whose practice is based on referrals from other lawyers or general practitioners who retain hope that personal injury and other potentially lucrative cases will come over the transom. The interest of lawyers in equal fishing rights for clients, although largely a delusion in my opinion, has been the basis of opposition to new kinds of "lay intermediaries." That interest should yield to recognition of the interests of the average citizen.

Finally, in my estimate the academic community has not been of much help in clarifying the modern condition so far as legal services are concerned. In recent years, systematic study of the social process in legal services—the sociology of law—has not been a growth industry. There has been some very good work, but it has concentrated on the lawyer-client interaction rather than on how the client and lawyer initially entered the interaction. Moreover, systematic study has not been adequately addressed to the large firms serving business clients. This dormancy is somewhat difficult to understand, given the vibrancy of the sociology of law three decades ago. One reason may be the relative eclipse of sociology in favor of economics, a field in which the ready-made if often superficial answer is freedom of the marketplace. Another explanation no doubt is the great technical difficulty of studying the subject. Obstacles include the rule of confidentiality of lawyer-client affairs, the geographical dispersion of the relevant populations, trade secret interests of the bar, and the extraordinary labor and patience required for good work. Another explanation in my view is the orientation of many members of the academic community interested in legal sociology. At all events, really illuminating contemporary studies of connection and interaction between lawyers and clients at the level of the powerhouse law firms are virtually nonexistent.

Doing systematic studies of a professional community based on national and international networks instead of local community would be

very difficult. The people involved are by definition dispersed, their interactions intermittent, their communications confidential, the opportunity to be a silent observer very difficult to establish. Austin Sarat and William Felsteiner have demonstrated what can be done today in an old-fashioned local community, in their study of divorce lawyers.¹¹ Heinz, Laumann, Nelson, and Schnorr have done illuminating work in a large complex urban community, but here again have the advantage of working in a single locality.¹² And there are suggestive but unsystematic observations in books such as Lincoln Caplan's study of the law firm of Skadden, Arps, Slate, Meagher & Flom.¹³ Pulling these approaches together into a systematic study of larger firm practice would be a formidable undertaking. Until such a study is accomplished, assuming that it could be, we will have to proceed on the basis of anecdotal information and professional lore.

V. CONCLUSION

A major problem in governance of the contemporary legal profession, as in many other aspects of contemporary life, is that we have not adjusted our perceptions and frames of references to deal realistically with the world as it has become. We tend instead to assume that the old informal system is still in place and that it continues silently to reinforce the legal rules that we long thought were self-executing. That assumption has proved inadequate as a mechanism for governance of the bar. In default of better solutions, concerned members of the bar have frantically added layers of rules; specifications in sub-rules; additional procedures and preliminaries to legal procedures; and provisions for post-procedure review. In these efforts, we have perhaps not taken adequate account of the structure of the new informal systems, nor asked how they differ from the traditional forms that occupy our collective mind's eye, nor how the new mechanisms interact with the legal system.

Our assumption continues to be that the legal rules are self-executing. However, the new legal rules, like the old ones, are embedded in a social and political matrix. In the modern context the difference is not so much the rules but the modern social matrix—complex, high-speed, locally im-

11. See AUSTIN SARAT & WILLIAM L.F. FELSTEINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 4,8 (1995) (describing divorce lawyer interactions with clients). See generally CAROL J. GREENHOUSE ET AL., *LAW AND COMMUNITY IN THREE AMERICAN TOWNS* (1994) (describing the interaction of law and culture in three mainstream American towns).

12. See John P. Heinz et al., *The Constituencies of Elite Urban Lawyers*, 31 *LAW & SOC'Y REV.* 441, 446-60 (1997); see also Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 *LAW & SOC. INQUIRY* 679, 687 (1996) (discussing the role of lawyers in the Silicon Valley).

13. See generally LINCOLN CAPLAN, *SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE* (1993). See also MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* 25-167 (1994) (discussing the impact of five legal organizations on the lives of their lawyers).

personal, more dependent than ever on image, connection and reputation. We have not yet caught up with that change.