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# Lawyers in the Mist: The Golden Age of Legal Nostalgia\*

Marc Galanter\*\*

Men ever praise the olden time, and find fault with the present, though often without reason. They are such partisans of the past that they extol not only the times which they know only by the accounts left of them by historians, but, having grown old, they also laud all they remember to have seen in their youth. Their opinion is generally erroneous in that respect . . . .

Niccolo Machiavelli (1532)<sup>1</sup>

Lawyers, of the generation that I know, are apt to think their lot cast in evil days. How often we hear that the profession is commercialized; that the lawyer of to day does not enjoy the position and influence that belonged to the lawyer of seventy-five or a hundred years ago; that, instead of being an all-around lawyer, one must now be a specialist; that the rules of law are less definite, and the decisions of the courts less certain than they used to be; and that the last thing a lawyer need know, in order to success [sic] under present-day conditions, is the law.

Lloyd W. Bowers (1904)<sup>2</sup>

No one watching the contemporary furor over the litigation explosion and lawsuits devouring America can fail to be impressed by the power of folklore to overwhelm workaday organized social

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\*\* Evjue-Bascom Professor of Law and Director, Institute for Legal Studies, University of Wisconsin Law School.

1. Niccolo Machiavelli, *Discourses on the First Ten Books of Titus Livius* (Christian E. Detmold, trans.), in MACHIAVELLI, *THE PRINCE AND THE DISCOURSES* 271 (1940).

2. Lloyd W. Bowers, *The Lawyer To-Day*, 38 AM. L. REV. 823, 823-24 (1904). Bowers (1859-1910) was general counsel of the Chicago & North Western Railway Co. and Solicitor-General of the United States from 1909 until his death.

knowledge.<sup>3</sup> Time and again, the protestations of bean-counters and skeptics are vanquished by stories about perverse institutions peopled by malingering plaintiffs, greedy lawyers, capricious jurors, and arrogant judges, proving yet again that it is not what is so that matters, but what people — at least for the moment — think is so. Tenacious belief may not make it so, but can have powerful effects.

In this essay I address another cluster of folklore about the legal system — one that belongs more to our professional discourse than to the wider public debate, although it has its echoes there. I propose to examine the prevalent notion that the legal profession has fallen from an earlier condition of grace into an abject and debased condition. Many believe that lawyers, courts, and the law once displayed an excellence no longer in evidence. Contemporary discourse about law practice is laced by a sense of lost virtue and lost amenity and infused with nostalgia for the good old days.

In the literature decrying the litigation explosion, for example, America's legal malaise is seen as part of a falling away from the true America. This view mourns the loss of a time when society was benignly self-regulating, law was clear, certain and reasonable, judges applied it dutifully and eschewed activism, lawyers were upright paragons of civic virtue, and litigation was rare.<sup>4</sup> Fables of

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3. On the complex of folkloric beliefs about America's "litigation explosion," see Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM chs. 1-2 (1995).

These larger assertions about the civil justice system are embodied in oft-related atrocity stories about outrageous claims and monstrous decisions. See Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform*, 52 LAW & CONTEMP. PROBS. 269, 292-97 (1989); Robert M. Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, 11 STUD. L. POL'Y & SOC'Y 95, 104-08 (1991); Steven Brill & James Lyons, *The Not-so-Simple Crisis*, AM. LAW., May 1, 1986, at 1; Fred Strasser, *Tort Tales: Old Stories Never Die*, NAT'L L.J., Feb. 16, 1987, at 39.

4. In Walter K. Olson's *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (1991), there is recurrent reference to "the old legal system" — a normal orderly world in which the law was clear, judges were restrained, lawyers were upright, and litigation was rare. *Id.* at 3; see also *id.* at 142, 145, 155-56, 168, 216-19, 340; PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988). Huber's book is premised on the notion that "we are living in an altogether new legal environment, created in little more than twenty years, and profoundly different from what existed in this country and in England for six centuries before." *Id.* at 10. Huber makes

decline range from the lament of a Supreme Court Justice about the imagined debasement of the caseload of the federal courts since his law school days<sup>5</sup> to popular distress about litigiousness in a rural county with little litigation.<sup>6</sup>

Of course, the lure of nostalgia is not peculiar to law. The sense of painful loss and disaffection with the new pervades much cultural criticism. Raymond Williams traced the centuries-long series of laments about the demise of traditional English country life that was “dying out now.”<sup>7</sup> Reviewing a set of new books about beaches, Jonathan Raban found the same pattern of the receding Golden Age that Williams found in remembrance of country life. An author under review, Raban observes:

Like so many other writers about the coast, . . . affects a tone of routine threnody and his book takes the form of a lament for yesteryear — for lost crafts and industries, lost places, lost people. It’s always the conceit of such writers that the golden age of the beach existed within living memory and that its fall from grace has happened as a result of very recent industrial, social, or bureaucratic upheavals.<sup>8</sup>

references to the more rational and benign conditions that prevailed under “the old law.” *E.g.*, *id.* at 21, 23, 71, 96, 97, 116-19, 186.

5. Antonin Scalia, Remarks Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 15, 1987). But see Marc Galanter, *The Life and Times of the Big Six; Or, the Federal Courts in the Good Old Days*, 1988 WIS. L. REV. 921, for the evidence of misperception associated with this view.

6. David Engel, *The Oven Bird’s Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC’Y REV. 551, 551-52 (1984). Engel studied a small Illinois county in which concern about litigiousness was high, although there was relatively little litigation. *Id.* at 551. Although contract actions were almost ten times as frequent as personal injury cases, it was the latter that provoked concern because they controverted core community values of self-sufficiency and stoic endurance. *Id.* at 574-75. Engel concluded that denunciation of tort litigation was “significant mainly as a symbolic effort by members of the traditional community to preserve a sense of meaning and coherence in the face of social changes they found threatening and confusing.” *Id.* at 580.

7. RAYMOND WILLIAMS, *THE COUNTRY AND THE CITY* 9, 11-12 (1973). As he pursued the trail back to the time of the Magna Carta and the Norman Conquest, Williams wondered whether

the timeless rhythm [lies] . . . in a free Saxon world before what was later seen as the Norman rape and yolk? In a Celtic world, before the Saxons came up the rivers? In an Iberian world, before the Celts came, with their gilded barbarism? Where indeed shall we go, before the escalator stops?

One answer, of course, is Eden . . . .

*Id.* at 11-12.

8. Jonathan Raban, *On the Waterfront*, N.Y. REV. BOOKS, July 14, 1994, at 39. In an observation that might apply to many chroniclers of Golden Ages, Raban notes that the author of the book in question “seems in this book to be a historian with little interest in

Commenting on the discourse of educational reform, Hanna Holborn Gray recently observed:

The language of educational criticism . . . is most often that of longing. The rhetoric of concern about higher education stands as a surrogate for talking about a confusing and always changing world, of sketching out the ideals of a better, more coherent, and once-stable universe. Yearning for the idyllic way things were when one went to college, the wish that the place would never change, the fear that it has done so; all this represents a common form of expressing distress and disillusion with a threatening, uncertain, and mystifying world that now challenges cherished beliefs and once-secure anchors, one that threatens to repudiate the clarities and simplicities of a better time. . . .

The "golden ages" constructed in the service of educational critique and reform float somewhere uneasily in a timeless stratosphere that is nonetheless asserted to have existed in a nameless historical space.<sup>9</sup>

The decline of law from a noble profession infused with civic virtue to commercialism has been a recurrent theme of professional discourse. Distress about lost virtue has been a constant accompaniment of elite law practice at least since the formation of the large firm a hundred years ago.<sup>10</sup> Indeed, when the large law firm was invented, just before the turn of the century, there was already a sense that the profession had fallen from its former high estate and, by too close an embrace of business, had become merely a branch of business:

[The bar] has allowed itself to lose, in large measure, the lofty independence, the genuine learning, the fine sense of professional dignity and honor . . . . [F]or the past thirty years it has become increasingly contaminated with the spirit of commerce which looks primarily to the financial value and recompense of every undertaking.<sup>11</sup>

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history, and his disregard for the past enables him to invent it at his convenience." *Id.*

9. Hanna Holborn Gray, *The Leaning Tower of Academe*, 49 BULL. AM. ACAD. ARTS & SCI. 34, 35-36 (1996).

10. MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 11, 36 (1991); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

11. *The Commercialization of the Profession*, AM. LAW., Mar. 1895, at 84.

That very contemporary critique was published a hundred years ago in the *American Lawyer*, not the intense monthly that since 1979 has chronicled and cheered on rapid change in the world of large law firms, but a long-extinct legal newspaper of the same name published in New York from 1893 to 1908.

A century later, the 1990s has seen a remarkable flowering of lament about decline and celebration of the profession's virtuous past. Within a few years we have seen the publication of Mary Ann Glendon's *A Nation Under Lawyers*,<sup>12</sup> Anthony Kronman's *The Lost Lawyer*,<sup>13</sup> and Sol Linowitz's *The Betrayed Profession*<sup>14</sup> — to mention just three prominent contributions to the genre.<sup>15</sup> We are surely living in the literary Golden Age of nostalgia for the Golden Age of lawyering.<sup>16</sup>

Professor Glendon and Dean Kronman concur that the last twenty-five years or so have witnessed a triple decline: in the judiciary, in the legal academy, and in the practicing bar — particularly the bar's elite large firm sector. It is the latter that I wish to address. Dean Kronman's story is simple and straightforward: "For a hundred years the large corporate firm has been the principal standard-bearer of the lawyer-statesman ideal in the

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12. MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994).

13. ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993).

14. SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION* (1994).

15. These represent the crest of a swiftly flowing tide. See, e.g., Chief Justice Warren E. Burger, *The Decline of Professionalism*, 63 *FORDHAM L. REV.* 949, 949 (1995) ("The decline of professionalism . . . in the law, has taken on epidemic proportions."); Arlin M. Adams, *The Legal Profession: A Critical Evaluation*, 93 *DICK. L. REV.* 643, 652 (1989) ("The . . . most pervasive manifestation of the change in the legal climate is the decline of professionalism and its replacement with commercialism."); Norman Bowie, *The Law: From a Profession to a Business*, 41 *VAND. L. REV.* 741 (1988); Lincoln Caplan, *The Lawyers' Race to the Bottom*, *N.Y. TIMES*, Aug. 6, 1993, at A-29. For a dyspeptic version of the declension theme, see PETER MEGARGEE BROWN, *RASCALS: THE SELLING OF THE LEGAL PROFESSION* (1989). For the bar's "official" account of the danger of commercialization, see AMERICAN BAR ASS'N COMM'N ON PROFESSIONALISM, *IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM* (1986) [the "Stanley Report"].

16. Dissent from the Golden Age view rarely appears in print. For two notable examples from practitioners, see Milton V. Freeman, *The Profession of Law is NOT on the Decline*, 96 *DICK. L. REV.* 149 (1992); John H. Pickering, *The Profession's Better Than Ever*, *EXPERIENCE*, Summer 1995, at 22; cf. Richard Posner, *Barflies*, *NEW REPUBLIC*, Oct. 31, 1994, at 40, 41 ("The profession was not as wonderful in 1960 as Glendon makes out. Many of the changes since then are improvements or inseparable from improvements."). For a sanguine and eloquent early twentieth-century response to lost glory laments, see [railway general counsel and Solicitor General of the U.S.] Bowers, *supra* note 2, at 2 (quoted in epigraph).

sphere of private practice” and the incubator of “a steady stream of lawyer-statesmen.”<sup>17</sup> Until the “revolution” of the practice environment of past twenty years<sup>18</sup> changed their institutional character, the large corporate firm was the “primary carrier” of this ideal.<sup>19</sup> But “today’s large firm offers an environment much less hospitable to the lawyer-statesman ideal.”<sup>20</sup> Now, few large firms are committed to public service “except in the most begrudging and mechanical way.”<sup>21</sup> So the lawyer who wishes to live a life centered on the values of the vanishing lawyer-statesman ideal is advised to avoid elite corporate practice in favor of “the general-practice law firm in a small town or city outside the country’s largest metropolitan centers.”<sup>22</sup>

Professor Glendon’s favored period overlaps with Dean Kronman’s, but she explicitly rejects the golden character of much of the period that Dean Kronman extols. The early decades of the large law firm fail to qualify as markedly superior to the present:

[I]f one’s benchmark for corporate firms is the palmy days at the turn of the century when lawyers were using every tactic in the book (and many that were not) to help clients bust unions, consolidate monopolies, drive competitors out of business, and obtain favorable treatment from judges and legislators, it would be hard to demonstrate a marked ethical decline.<sup>23</sup>

She locates the profession’s Golden Age in the forty-year period from 1920 to 1960:<sup>24</sup> when lawyers were “widely oriented . . . to a common set of ideals;”<sup>25</sup> bar leaders consistently affirmed concepts of professionalism; associates who did good work were ordinarily rewarded with partnerships; lawyers would subordinate

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17. KRONMAN, *supra* note 13, at 273.

18. *Id.* at 274.

19. *Id.* at 273.

20. *Id.* at 283.

21. *Id.* at 378.

22. KRONMAN, *supra* note 13, at 379.

23. GLENDON, *supra* note 12, at 57.

24. In fairness, she avoids the locution “Golden Age” although clearly identifying the period of superior virtue and amenity as roughly 1920 to the early 1960s. *Id.* at 34-37. As one who enjoys jousting with promoters of Golden Ages, I am deeply grateful for her specificity and her eschewing of the wiggle room to be had by positing a Golden Age that elastically expands and contracts.

25. GLENDON, *supra* note 12, at 35.

considerations of economic gain to “firm solidarity or to ideals of right conduct.”<sup>26</sup>

Surely these fine features graced the profession then — but also present were many of the nasty things that in her account have become dominant since the 1960s. There was probably — and I think she agrees with this — more corruption then.<sup>27</sup> And elite law practice was disfigured by systematic exclusionary practices — a blemish she feels has been overcome and does not cancel out the genuine professional felicity achieved in that period.<sup>28</sup>

Things have gone awry in the past generation. Since Professor Glendon is fully aware that all was not wonderful in those earlier times nor are they entirely nasty now,<sup>29</sup> this is a judgment about the central tendency of law practice — or at least elite law practice — in two periods of time.

Here we see the perils of the Golden Age style of argument. Sorting out the mixed bags of evidence about Period A and Period B, it is tempting to solve the tricky problem of detecting those central tendencies by proceeding on the basis that nobility is of the essence for Period A; the imperfections and abuses we find are regrettable dross, but do not alter the essential character of practice. For Period B, however, the imperfections and abuses reveal the essential character and occasional flashes of the noble and elevated are sports or vestiges of a better time.

Basically the Golden Age is an essentialist argument, well-suited to produce vivid contrasts and to suppress continuities. Typically, such an account emerges not from independent examination of the past but from the polemical thrust of a critique of the present. Its presentation may involve a number of specific techniques. One is the selective invocation of great exemplars, comparing the giants that strode the earth in those days with the at best ordinary creatures of today. Thus, Professor Glendon uses not only John W. Davis but Abraham Lincoln to characterize the

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26. *Id.* at 37.

27. *Cf. id.* at 72.

28. Glendon minimizes the thrust of exclusion, for the legal establishment of her Golden Age did not simply decline to accept Jews, women, and Blacks in their own firms, but fostered and supported extended campaigns to keep the wrong sorts of people out of the profession entirely. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* ch. 4 (1976).

29. Thus, she provides an interesting set of accounts of contemporary practitioners who have experienced immense gratification exerting themselves for clients in unusual ways. GLENDON, *supra* note 12, at 95-98.

virtues of lawyers in the Golden Age and Oliver Wendell Holmes to illustrate its intellectual honesty.<sup>30</sup>

As the invocation of Lincoln suggests, another common accompaniment of Golden Ageism is temporal displacement. For example, describing the origins of discovery Professor Glendon notes: "But attorneys representing economically powerful clients *now* regularly use these devices to outwait and outspend their opponents as well as to obtain pertinent information."<sup>31</sup>

She illustrates this with a well-known story about Cravath partner Bruce Bromley:

The Diaghilev of discovery . . . [who] once boasted to an audience of Stanford law students, "I was born, I think, to be a protractor. . . . I would take the simplest antitrust cases and protract for the defense almost to infinity. . . . [One case] lasted 14 years. . . . We won that case, and, as you know, my firm's meter was running all the time — every month for 14 years."<sup>32</sup>

Surely a sad commentary on the ethics of the corporate bar. But what does it tell us about decline from the Golden Age? Professor Glendon picks up the Bromley quote from a 1978 *Time Magazine* article.<sup>33</sup> But Bromley (1893-1980) gave the Stanford talk in 1958,<sup>34</sup> when he was 65. He is describing events over the course of a career that pretty much spanned Professor Glendon's Golden Age. Perhaps Bromley, who rose to be a leading light at the firm that as much as any exemplified the Golden Age, was a deviant case. But how can we tell what is typical and what is deviant?

At least some contemporaneous observers back in the Golden Age had a very different take on the virtue of the corporate bar. In 1934, Harlan Fiske Stone, hardly a romantic enemy of the established order, deplored the commercialization and deprofessionalization of the big-firm lawyer in terms that resonate with Professor Glendon's (and Dean Kronman's) assessment of contemporary practice:

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30. *Id.* at 86.

31. *Id.* at 56 (emphasis supplied).

32. *Id.*

33. *Id.* The source is cited on page 301. Coincidentally, in *The Litigation Explosion*, anti-litigation publicist Walter Olson also relies on the *Time Magazine* source to project Bromley's account of half-a-century ago as evidence of novel conditions in the recent past. OLSON, *supra* note 4, at 231, 366.

34. Bruce Bromley, *Judicial Control of Antitrust Cases*, 23 F.R.D. 417 (1958).

More and more the amount of his income is the measure of success. More and more he must look for his rewards to the material satisfactions derived from profits as from a successfully conducted business, rather than to the intangible and indubitably more durable satisfactions which are to be found in a professional service more consciously directed toward the advancement of the public interest . . . . [I]t has made the learned profession of an earlier day the obsequious servant of business and tainted it with the morals and manners of the marketplace in its most anti-social manifestations.<sup>35</sup>

Another observer of the profession in those days was Karl Llewellyn, Professor Glendon's (and my) teacher and the subject of her moving tribute to him as a champion of the common law and the tradition of lawyerly craftsmanship. In 1933, Llewellyn published a wide-ranging survey of the world of law practice in which appreciation of the skill and ingenuity of the corporate bar is combined with condemnation of its narrow business perspective and the "lopsided" development of the law resulting from the concentration of the most talented in the service of corporations.

Most of [the bar's] best brains . . . [are] in the service of large corporations. They are the ablest of legal technicians. I doubt if the world has ever known abler. But their main work is in essence the doing of business.

. . . .  
 . . . [T]he practice of corporation law not only works for business men toward business ends, but develops within itself a business point of view . . . .<sup>36</sup>

Corporation law practice becomes itself a business. . . . [A]bove all [the senior lawyer] is, and he is valued as, a *business-getter*. The measure of him is the business he can summon from the vasty corporation deep. . . . He cashes in, then, as an enterpriser, putting his own label on the work of others.<sup>37</sup>

Their work, their interest, and their outlook drive them into lack of social perspective. They rival both the technical

35. Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 6 (1934).

36. Karl Llewellyn, *The Bar Specializes — With What Results?*, 167 ANNALS AM. ACAD. 177, 177 (1933).

37. *Id.* at 177-78.

proficiency and the insight into the country's legal needs of the Great Brass Brain that calculates the tides. Where we need vision, there is vacuum.<sup>38</sup>

Of course, Stone and Llewellyn are using these descriptions to flog the lawyers of their day, as our contemporary critics are flogging those of the present day. But the accounts of these observers raise a series of difficult questions: Was the large corporate firm ever the prime carrier of the ideal of public service? Has there really been a decline in the profession's devotion to public service? How much has the mix of business and service motivations changed?<sup>39</sup> Has there been a change in the extent to which corporate litigators play hardball? It is fair to say that once we abandon the essentialist Golden Age/Fallen Age frame, we just don't know.

One reason such comparisons are difficult is that information about law practice in the Golden Age was much more restricted than in the present period. In the late 1970s, there was a sudden and dramatic expansion in the availability of information about law practice.<sup>40</sup> With the growth of a more intrusive and candid legal journalism, more ample directories, and more penetrating scholarly research, information about the earnings, fees, clients, internal politics, and business strategies of law firms became accessible beyond a narrow circle of insiders. Earlier there were occasional flashes that momentarily illumined the Stygian darkness — like Bruce Bromley's candid revelations — but on the whole lawyers were shrouded by norms of reticence and confidentiality. Today, the glare of publicity exposes lawyers' work and wiles. Whether lawyers' conduct has worsened remains unknown, but what surely has declined is the opportunity for lawyers to hide beneath the wraps of confidentiality, free of any external scrutiny. So it is difficult to distinguish how much has changed in what lawyers are doing and how much in what Steve Brill is making us unable to ignore.

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38. *Id.* at 179.

39. *See, e.g.*, GLENDON, *supra* note 12, at 67 (characterizing the elite bar of the Golden Age as suffused with a "trader" rather than a "raider" mentality (in Jane Jacobs's metaphorical usage)).

40. On the "new information order of the law," see GALANTER & PALAY, *supra* note 10, at 68-75.

Another confounding factor is the change in scale of the legal world.<sup>41</sup> If we accept large firms as an admittedly rough surrogate for elite “big time” lawyering, we see that during Professor Glendon’s Golden Age elite practice involved only a few thousand lawyers;<sup>42</sup> fifty years later over 100,000 lawyers were practicing in firms larger than fifty lawyers.<sup>43</sup> However one assesses the quality of their contributions, it would be surprising if there were not many more Warren Christophers and Lloyd Cutlers engaged in public service today than there were Elihu Roots and Henry Stimsons then. That a much higher proportion of lawyers (or elite lawyers) were engaged in disinterested public service in the good old days seems highly unlikely. A sense of professional obligation to provide legal services *pro bono publico* is far more evident today than it was during Professor Glendon’s Golden Age. As one 1940 graduate, looking back on changes in the profession, observed: “During my law school days I cannot remember ever hearing the words ‘pro bono’ or any reference to a professional obligation to give free public service.”<sup>44</sup>

Suppose for the moment that we were to concede that the style and satisfactions of law practice have deteriorated. Would it make any difference to anyone other than lawyers themselves? The subtitle of Professor Glendon’s book, “How the Crisis in the Legal Profession Is Transforming American Society” advances a strong claim that American society is much affected by “the crisis of the legal profession.” But here “legal profession” is used in the wider sense, encompassing judges and academics, as well as the practicing bar. The crisis in all three manifests itself as the

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41. On the growth of the various dimensions of the legal world, see Marc Galanter, *Law Abounding: Legalisation Around the North Atlantic*, 55 MOD. L. REV. 1 (1992).

42. Well on in Professor Glendon’s Golden Age, *Fortune* estimated that “about 100 U.S. law firms have a dozen or more partners each. For every partner there are usually three hired lawyers.” *The U.S. Bar*, FORTUNE, May 1949, at 90, 172 (The three-to-one associate to partner ratio is almost surely an overstatement.). In 1957, as her Golden Age drew to a close, there were some 38 firms in the United States with 50 or more lawyers. ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 43 (1969). In 1991, there were 749 firms with 51 or more lawyers. BARBARA A. CURRAN & CLARA N. CARSON, AMERICAN BAR FOUND., *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S* 16 (1994).

43. There were 105,236 lawyers in firms of 51 or more in 1991. CURRAN & CARSON, *supra* note 42, at 25.

44. Pickering, *supra* note 16, at 30. The emergence and growth of structured pro bono activity in law firms is described in the several contributions to Robert A. Katzmann’s *The Law Firm and the Public Good* (1995).

ascendancy — or at least the sustained eruption — of legal romanticism. “What is novel is the rise in visibility, power, and prestige of lawyers, judges, and scholars who are in open revolt against traditional conceptions of their roles.”<sup>45</sup> We have undergone an “extended orgy of legal hubris.”<sup>46</sup> “[I]nnovators and iconoclasts with shallow roots in legal traditions and poor grounding in normal legal science” have arrogantly flouted ideals of evenhandedness in judging, and have engaged in shoddy advocacy scholarship.<sup>47</sup> The invocation of settled traditions and normal legal science colors the past with a harmony and consensus that was only part of the contemporary experience. In the very midst of her Golden Age:

For elite corporate lawyers who saw the events of the times as a nightmare come true, law professors and teachers were the enemy . . . . Law teachers were portrayed by some of the bar’s leaders as “dangerous academic theorists” who “refused allegiance” to the American Constitution and form of government and who threatened “the safety and security of constitutional government.” . . . [E]lite law teachers were conceived of as subversive “liberals” who harbored ideas resembling those of Karl Marx and as “dangerous academic theorists” who pretended “to sit in judgment not only upon decisions of the Supreme Court but upon the relative merits of the judges.”<sup>48</sup>

Prominent among the “dangerous academic theorists” of that day was Karl Llewellyn, who now deservedly serves as Professor Glendon’s scholarly ideal and her model of “appetite and energy for creative problem solving.”<sup>49</sup>

As I read Professor Glendon, the sins of the contemporary practicing bar are relatively venial, only part of a larger “crumbling of civil society” that has released “tides of opportunism.”<sup>50</sup> Practicing lawyers, it seems, are less perpetrators of the crisis than victims of the arrogance of the disdainful knowledge classes.<sup>51</sup>

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45. GLENDON, *supra* note 12, at 283.

46. *Id.* at 288.

47. *Id.* at 288, 290.

48. RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* 133 (1995).

49. GLENDON, *supra* note 12, at 194.

50. *Id.* at 100.

51. *Cf. id.* at 283 (“self-appointed vanguard of an aspiring oligarchy”).

The real villains that Professor Glendon is exercised about are judges who are assertive, arrogant, and activist, rather than restrained and even-handed, and academics who abandon disinterested inquiry for advocacy scholarship.

But of course the Golden Age itself is as much advocacy as it is history. What does its enduring appeal tell us about our legal culture? What does its current flowering tell us about the changes our legal order is undergoing? Golden Age arguments conscript the emotional power of the personal sense of loss that is part of our life cycle. In the accounts of Dean Kronman and Professor Glendon, as in a long series of earlier accounts, the time when virtue prevailed is just over the receding horizon of personal experience. The sense of decline mirrors the common personal experience of a gap between aspirations and practice: in the flesh, working life is experienced as more mundane, routine, business-like, commercial, money-driven, client-dominated, and conflict-laden than it is supposed to be. It is easy to believe that the way it is supposed to be is the way that it used to be.

But if it were just a reflex of biography, we would expect legal nostalgia to be uniformly distributed. In the course of interviewing solicitors in large firms in London, where the world of law practice has gone through equally dramatic structural changes in the past twenty years, I have been struck by the entire absence there of the expressions of loss and regret that are so common among observers of the American legal scene.<sup>52</sup>

Why are Americans more susceptible to Golden Age angst? Perhaps it is because we have such exalted aspirations for law and lawyers. We are all familiar with the oft-repeated observation of Alexis de Tocqueville that “[i]t is at the bar or the bench that the American aristocracy is found.”<sup>53</sup> Chroniclers of the Golden Age lament the fall from aristocratic virtue. But admiration for the public ideals that lie at the center of the aristocratic vision should not blind us to the partial and flawed character of their earlier institutional incarnation. Nor should appreciation of the attainments of the profession eclipse our awareness of the new tasks

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52. I have no systematic evidence, but I have the impression that some sections of the American legal world — women and minority lawyers, plaintiffs’ lawyers, ADR practitioners, law and economics types, feminist legal theorists, to mention just a few — are less susceptible to the charms of the good old days.

53. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 288 (1959), *quoted in* GLENDON, *supra* note 12, at 280 (different translation).

facing lawyers in a world increasingly dominated by large formal organizations.<sup>54</sup>

Our growing social knowledge about law suggests a more nuanced and ironic response. It is long past time to abandon the essentialism that makes the past good and the present bad — or vice versa. And it is important to enlarge our concern to consider not only the satisfaction and fulfillment of lawyers but the way that different professional arrangements effect the law and its users and consumers. Once the latter come into the picture, we may have a very different view of earlier arrangements and recent changes. The flowering of the large law firm represented the development of a new level of proficiency in providing legal services. But it also marked the emergence of what John Heinz and Edward Laumann call “the two hemispheres of the profession,”<sup>55</sup> one consisting of lawyers in small practices serving individuals, and the other of lawyers in large firms providing more elaborate lawyering to large organizations (corporations, unions, governments).<sup>56</sup> The increasing proficiency of lawyers fostered by the organization of large firms has been accompanied by a spectacular increase in the disparity in the availability and quality of legal services between organizations and natural persons. In recent decades, the sections of the bar that service individuals have shared in the gains in proficiency. But as law has become more complex and technical, using it has become prohibitively expensive for almost all natural persons, especially when contending with organizations. The professional achievement of lawyers will depend far less on recapturing the imagined felicity of the good old days than on their response to the challenge of providing remedies and protections to individuals and publics in a world of large organizations.

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54. Cf. James S. Coleman, *The Rational Reconstruction of Society: 1992 Presidential Address*, 58 AM. SOC. REV. 1 (1992).

55. JOHN P. HEINZ & EDWARD O. LAUMANN, RUSSELL SAGE FOUND./AMERICAN BAR FOUND., *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 319 (1982).

56. Cf. Marc Galanter, *Mega-law and Mega-lawyering in the Contemporary United States*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS* 152-76 (R. Dingwall & P. Lewis eds., 1983).