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Glenn Harlan Reynolds

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SMALL IS THE NEW BIGLAW: SOME THOUGHTS ON TECHNOLOGY, ECONOMICS, AND THE PRACTICE OF LAW

*Glenn Harlan Reynolds**

These are not happy times for either the practice or the teaching of law. On the practice side, law firms are folding and laying off lawyers in unprecedented numbers, while on the teaching side, many of us wonder whether the current model of legal education is adequate to the twenty-first century. And there is reason for concern on both fronts.

In this Idea, I will look at some general changes in technology and economics over the past few years—changes that have to a significant degree undermined the position of large, integrated concerns dealing in information and information-related services. I will then discuss how these changes relate to the legal profession, and in particular the large-firm sector, and what that means for legal education and for those pursuing a career in the law.

I. THE CHANGE

Set the wayback machine for 10,000 B.C. What does the world look like?¹

Except for cave bears and saber-tooth tigers—both pretty much extinct by this point anyway—the scale is pretty small. The biggest human organizations are band and tribe-level: at most, a few hundred people, but usually only a few dozen. The line between work and play is

* Beauchamp Brogan Distinguished Professor of Law, University of Tennessee. J.D., Yale Law School, 1985; B.A., University of Tennessee, 1982. This Idea grows out of a lecture delivered at Hofstra University School of Law in March 2009. Thanks to Jessica Molinaro for her excellent research assistance.

1. Part I of this Idea has been previously published in GLENN REYNOLDS, AN ARMY OF DAVIDS: HOW MARKETS AND TECHNOLOGY EMPOWER ORDINARY PEOPLE TO BEAT BIG MEDIA, BIG GOVERNMENT, AND OTHER GOLIATHS 1-10 (2006), and Glenn Harlan Reynolds, *How We're Heading Back to the Future*, TCS DAILY, June 15, 2005, <http://www.tcsdaily.com/article.aspx?id=061505B>.

pretty blurry. Some things are clearly work and some things are clearly play, but many are in-between, and people go from one to another as circumstances dictate, not according to a schedule. Agriculture hasn't been invented yet, though people brew beer from wild grains and are starting to notice that if you plant the seeds, they'll come up in the same place next year, making it easier to brew beer. (What, you think people invented agriculture for *bread*?)

The few material possessions that exist are homemade, except for a very small amount of stuff purchased from itinerant traders carrying rare luxuries like amber, obsidian, or dyestuffs. Children aren't sent off to school, but hang around the adults as they go about the business of the day. The most dangerous activities, like big-game hunting, are off-limits to the kids, but in general they grow up quickly and are a part of all the day's activities.

Even in these caveman days, there's plenty of technology around. Humans are tropical animals, and without technologies like fire and clothing, most of the world would be off limits. Finely wrought flint tools are capable of impressive feats (how do you think those saber-tooths and cave bears became extinct?), but there aren't any machines as we'd understand them. Probably the most sophisticated device in general use is the spear thrower. The biggest organized human events are mass hunts and the occasional clan gathering. They're limited in size and duration because you can't feed that many people by hunting and gathering in one place for long, and it's hard to store much food: it goes bad, or it's eaten by vermin.

Fast-forward a few thousand years and not all that much has changed. Advances in agriculture and organization make some difference: more people can live closer together, thanks to the higher efficiency of farming over hunting and gathering (though because farming is hard work, those people are usually worse-nourished and harder working than the hunters and gatherers). There's still not much in the way of sophisticated machinery. There are tools a caveman wouldn't recognize, but nothing he couldn't figure out in a few minutes.

Things stay pretty much this way, in fact, until the Industrial Revolution. Agriculture, written language, and metals allow big empires to organize large numbers of people, but not very efficiently. Doing things on a large scale is usually less efficient than cottage industry because coordinating all those people is so much trouble. You can build big things, like the Pyramids or the Great Wall of China, but at enormous cost, and only by making people choose between hauling bricks or being killed. This was the norm.

But the Industrial Revolution changed things. Improvements in organization, communications, and machinery meant that it was often much more efficient to do things on a large scale than on a small one. Adam Smith noted this in his famous description of a pin factory in *The Wealth of Nations*:

[A] workman not educated to this business . . . could scarce, perhaps, with his utmost industry, make one pin in a day, and certainly could not make twenty. But in the way in which this business is now carried on, not only the whole work is a peculiar trade, but it is divided into a number of branches, of which the greater part are likewise peculiar trades. One man draws out the wire, another straightens it, a third cuts it, a fourth points it, a fifth grinds it at the top for receiving the head; to make the head requires two or three distinct operations; to put it on, is a peculiar business, to whiten the pins is another; it is even a trade by itself to put them into the paper Those ten persons, therefore, could make among them upwards of forty-eight thousand pins in a day. . . . But if they had all wrought separately and independently, and without any of them having been educated to this peculiar business, they certainly could not each of them have made twenty, perhaps not one pin in a day; that is, certainly, not the two hundred and fortieth, perhaps not the four thousand eight hundredth part of what they are at present capable of performing, in consequence of a proper division and combination of their different operations.²

Division of labor allowed large groups to be organized in ways that were actually *more* efficient than smaller groups or collections of individuals acting independently. Big machinery allowed big jobs to be done, but because the machinery itself was big it could *only* do big jobs efficiently. When the smallest efficient steam engine is big enough to power a whole factory, it doesn't make sense to use it for anything less: the cost is the same, but the return is smaller. Thus the "minimum efficient scale" as of the Industrial Revolution turns out to be pretty big. And you need a lot of capital for these big operations, which has its own implications, financial and otherwise.

Most of the developments of the nineteenth and twentieth centuries followed this pattern. You can't run a railroad as a family business. The same is true for steel mills (the Chinese Communists tried backyard steelmaking, disastrously, with their "little steel" program, but learned better) and, after the very earliest days of the automobile industry, auto

2. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 4-5 (Edwin Cannan ed., 1937).

factories—outside of a few shops serving NASCAR or very rich car collectors, people don't build cars one at a time any more.

Big organizations doing big things: it's the story of the nineteenth and twentieth centuries. In fact, it was so much the theme of those centuries that it's easy to forget what a departure this was from the rest of human history. But it was a huge departure, brought about by the confluence of some unusual technological and social developments.

And it was a mixed bag. On the one hand, it made people in industrialized countries a lot richer, healthier, and longer-lived. Really, *a lot*. In his book, *The Escape from Hunger and Premature Death: 1700-2100*, historian Robert Fogel notes that the improvement in living conditions for the working classes in industrial countries during the Industrial Revolution is without any parallel in human history.³ Life expectancies got much longer (from thirty-two in 1725 to seventy-six in 1990 in the United Kingdom),⁴ people got taller, were sick less often, and ate much better diets. The poor of today do much, much better than the aristocrats of the pre-industrial era.⁵

The large-scale operations hit their zenith at mid-twentieth century, with American business revolving around huge entities like General Motors and IBM. Economists like John Kenneth Galbraith began arguing that big corporations were protected from failure by their size, and that the kind of massive organization and information-processing available to these huge enterprises meant that smaller businesses couldn't possibly compete.⁶ Bigger was better, and the managerial class "technostructure" that ran these big corporations would be the real source of power, without having to worry about crude things like profits.⁷

This turned out not to be the case. Even as Galbraith's book was appearing, the seeds of change were taking root. *The New Industrial State* came out in 1967. The year before, in the thirty-fifth anniversary issue of *Electronics* magazine, Gordon Moore had first proposed "Moore's Law"—essentially, that computing power was doubling every two years and would continue to do so for the foreseeable future.⁸

3. ROBERT WILLIAM FOGEL, *THE ESCAPE FROM HUNGER AND PREMATURE DEATH: 1700-2100: EUROPE, AMERICA, AND THE THIRD WORLD* 1, 8, 19 (2004).

4. *Id.* at 1, 2 tbl.1.1.

5. *See id.* at 9 tbl.2.2, 11 tbl.1.3, 13 tbl.1.4, 21.

6. *See* JOHN KENNETH GALBRAITH, *THE NEW INDUSTRIAL STATE* 74-77 (1967).

7. *See id.* at 77-81.

8. Gordon E. Moore, *Cramming More Components onto Integrated Circuits*, *ELECTRONICS*, Apr. 19, 1965, at 114-17.

It was a while before the impact of this trend on Galbraith's formulation became obvious, but the growth of cheap computing power has already undercut the importance of big organizations in many, many areas. That cheap computing power is now being coupled with cheap manufacturing—including, increasingly, what Neil Gershenfeld calls “personal fabrication” in his book, *Fab: The Coming Revolution on Your Desktop—From Personal Computers to Personal Fabrication*.⁹ But even without the kinds of progress that Gershenfeld describes, manufacturing, including custom manufacturing, has gotten cheap and versatile enough to neutralize many of the advantages that large organizations once held.

For activities that, ultimately, are about processing information, the computer revolution itself has drastically reduced the minimum efficient scale. A laptop, a cheap video camera, and the free iMovie or Windows Movie Maker software (plus an Internet connection) will let one person do things that the Big Three television networks could only dream of in Galbraith's day, and at a tiny fraction of the cost.¹⁰ The same laptop with a soundcard, a couple of microphones, and software like Acid, ProTools, or Audition can replace an expensive recording studio. Change the software to Lotus or Excel and it can replace an office full of Galbraith-era accountants with calculators, pencils and paper, or even with access to big 1960s mainframe computers.

This observation is commonplace now, of course, but its implications for Galbraith-era economics have gotten somewhat less attention. It's not just that fewer people can do the same work; it's that *they don't need a big company* to provide the infrastructure to do the work, and, perhaps even more importantly, they may be far more efficient *without* the big company and all the inefficiencies and stumbling blocks that its bureaucracy and “technostructure” tend to produce.

Those inefficiencies were present in Galbraith's day, too, of course. People have been making jokes about office politics and bureaucratic idiocies since long before *Dilbert*. But in the old days, you had to put up with those problems because you needed the big organization to do the job. Now, increasingly, you don't. Goliath's clumsiness used to be made up for by the fact that he was strong. But now the Davids are muscling up without bulking up. So why be a Goliath?

9. NEIL GERSHENFELD, *FAB: THE COMING REVOLUTION ON YOUR DESKTOP—FROM PERSONAL COMPUTERS TO PERSONAL FABRICATION* 3-4 (2005).

10. See Glenn Harlan Reynolds, *Watch Out Hollywood: The Entertainment Industry's Real Threat Isn't Piracy, It's Backyard Spielbergs Armed with Digital Moviemaking Gear*, *POPULAR MECHANICS*, Oct. 2005, at 52, 52.

That is the question that many people are asking themselves, and as technology moves toward smaller, faster, and cheaper approaches to many jobs, we're starting to see an army of Davids taking the place of those slow, shuffling Goliaths. This won't be the end of big enterprises or big bureaucracies (especially, alas, the latter), but it will represent a dramatic reversal of recent history toward more cottage industry, more small enterprises and ventures, and more empowerment for individuals willing to take advantage of the tools that become available.

II. THE LEGAL PROFESSION

While these changes have gone on in the larger world, of course the legal profession followed along. In the middle of the nineteenth century, large law firms were rare—and “large” wasn't really very large at all. As clients grew—railroads, banks, then other large corporations like steelmakers, automakers, IBM, etc.—law firms grew with them.¹¹

Like the clients, law firms were taking advantage of economies of scale and scope. A large firm could spread the costs of big investments—at first, a law library, later things like secretarial pools, duplication equipment, and expensive computerized research services—across a large number of attorneys. And, because of its size, it could maintain in-house expertise on a large number of subjects, allowing it to meet clients' needs for advice on subjects ranging from bankruptcy to intellectual property to labor and employment, without the client having to search out these experts on its own. Big clients and big law firms went together because both were taking advantage of the efficiencies brought about through bigness—efficiencies that outweighed the undeniable costs that bigness also brought.

But in looking at big law firms today, it's worth asking whether technology has eroded the advantages that once accrued to size. What, exactly, do big law firms bring to the table?

In essence, it seems to me, they bring two things: reputation and resources.

Reputation is shorthand for a brand: when you hire, say, Sullivan and Cromwell, you are buying a brand. This has numerous advantages: instead of hunting around yourself for top-notch attorneys, you can just

11. For a discussion of this growth, see Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1015-22 (1994). See also QUINTIN JOHNSTONE & DAN HOPSON, JR., *LAWYERS AND THEIR WORK: AN ANALYSIS OF THE LEGAL PROFESSION IN THE UNITED STATES AND ENGLAND 199* (1967) (“One of the most significant modern developments by the American legal profession is the growth of corporate law departments.”).

hire a big firm and let them do the hunting for you. The lawyers they hire, you can assume, will be first class, and if you're like most clients, you can figure that the folks at Sullivan and Cromwell or other top law firms know more about picking top lawyers than you do. It's more efficient to let them do it. And because they're big, these firms have lawyers who are experts in a wide variety of fields—who are available if you should need them. (Reputation also lets you protect yourself if you're the person in charge of choosing a firm: if you pick a top-brand law firm, you're in the situation of computer purchasing agents who for years said that nobody got fired for buying IBM.)

Likewise, in hiring a large top-shelf law firm, you're acquiring all sorts of related resources, from document-handling to paralegals to messengers, who are presumably of first-rate quality themselves. These could be acquired separately on an unbundled basis, but there are real efficiencies to letting a bunch of top-notch lawyers pick a support team that they'll be relying on over the course of addressing a lot of different problems, not just yours.

On the other hand, there are downsides. Despite the big name, expensive law firms don't always produce the best legal work. Once, when I was a law clerk on the federal Court of Appeals, I read a brief by a big, famous law firm whose key goal was to convince the court that the rule of a particular case was contained in Chief Justice Warren Burger's concurring opinion. Alas, however, Burger's name was misspelled as "Berger" throughout. And, in my experience, any group of lawyers can tell similar stories about mistakes from even the most elite of law firms.

Second, large law firms are often very expensive for what they deliver. Junior associates are billed out at rather expensive rates even though they do not yet possess advanced skills, the pressure on firms to generate revenues to support all the resources mentioned earlier can lead to bill-padding and other outrageous charges, and changes in culture in the law-firm world mean that the "brand" is less reliable, as turnover among associates and partners makes it less likely that firms will covet their reputations as much as they once did when associates were likely to make partner and partners tended to stay with the same firm for life.

Likewise, from the standpoint of individual lawyers, the law firm offers less than it used to. Secretarial support and big libraries are far less important in an age of e-mail, Lexis and Westlaw, and the popularity of working from home or from Starbucks.¹² Job security, once

12. Actually, not that new of a phenomenon. See Val D. Hornstein, *Commuting to the Law Office on the Information Superhighway: Virtually There*, STAN. L. & POL'Y REV., 1994, at 99, 100

offered by big firms, is now largely nonexistent even for those who make partner. And collegiality and cooperation are less significant in mega-firms where partners barely know each other and depart at the drop of a hat if their billings don't keep up or if another firm offers more money.

III. A KILLER APP?

So is there a disintermediating application that could do to big law firms what iTunes did to record stores and what Craigslist has done to newspaper classified advertisements? I'm not sure, but here are some thoughts on what that might look like.

If reputation is important, what could replace the law-firm brand as a source of reliable information? There are several possibilities I can think of.

First, of course, Martindale-Hubbell has long functioned as a source of information, including some reputational information, on lawyers.¹³ Presumably, this could be expanded. (Perhaps client reviews could even be included—something like the reader-review section on Amazon.com, with attorneys awarded various numbers of stars for performance. Or perhaps not.)

Bar associations might be another source of reputational information, though in this case there might be concerns of a “Lake Woebegon effect,” in which an attorney-rating system administered by the attorneys it rates would tend toward grade inflation and a rating of all lawyers as above average. Certainly the record of attorney discipline by attorneys does not suggest extreme rigor.

A third source of reputation-rating, however, is a bit more promising: law schools. There are several things in favor of enlisting law schools in rating attorneys, among which is the inescapable fact that they're already doing it. When large law firms hire attorneys, they tend to pay a lot of attention to where prospects went to law school and how they ranked in their classes at those law schools. Indeed, when you deal with a junior attorney at a big law firm, you're dealing with someone whom the law firm evaluated at a half-hour interview on campus, a one-day interview at the firm's offices, and perhaps a “summer associate”

(describing early popularity of telecommuting and “virtual” law firms); see also Glenn Harlan Reynolds, *Community by the Book*, WALL ST. J., Dec. 29, 2001, <http://www.opinionjournal.com/extra/?id=95001660> (describing the popularity of working from “third places”).

13. See Martindale.com, About Martindale-Hubbell, http://www.martindale.com/xp/legal/About_Martindale/about_martindale.xml (last visited Mar. 24, 2010).

term where attending baseball games and cocktail parties played a much larger role in the experience than, alas, it tends to play in the actual practice of law.

Given the large role that law school admissions and grades play in lawyers' future employment already, might it make sense for law schools to eliminate the middle-man and start their own reputational ranking system? After all, a graduate's law school record is already based on far more data than a law-firm hire: class rank and grades are based on three years of experience, by a number of different professors, whose collective judgment forms the basis for the degree, the average, and the class rank. Furthermore, law schools already keep track of their graduates after graduation—though admittedly, mostly for the purpose of asking them for money—such that it would be no huge leap to pay closer attention to their careers.

So it becomes possible to imagine a law school putting all of this together to form a virtual law firm made up of its alumni and making their expertise, and its imprimatur, readily available to interested clients. In some ways, this would provide more useful information than law firms do and without some of the downside.

IV. CONCLUSION

I don't actually think that law school directories are the killer application that will end big law firms: I offer the above more as a thought experiment than as a serious proposal. But it does seem plausible enough to suggest that *some* sort of disaggregator might succeed. If I had a clearer idea of what that would look like, I'd probably be pursuing it for myself instead of writing for a law review, but one is well-advised not to look to law professors for hands-on entrepreneurial know-how.

I would suggest, though, that now may prove an especially good time for experimentation. Large law firms, under heavy economic pressure to cut costs, are laying off attorneys in vast numbers, meaning that there are many lawyers with excellent résumés out there who might potentially support some sort of alternative scheme for delivering topflight legal services.¹⁴ Meanwhile, clients—facing an economic downturn of their own—are even more eager than usual to cut legal

14. The "Layoff List" from the *American Lawyer* shows over 3000 layoffs among the AmLaw 200 top law firms as of March 24, 2010. AmericanLawyer.com, The Layoff List: By the Numbers, http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202430161161&The_Layoff_List_By_the_Numbers_ (last visited Mar. 24, 2010).

bills. And computing technology, including resources for communication, social-networking, and “crowdsourcing,” has advanced considerably in recent years.

The ingredients would seem to be in place for an alternative approach. Will we see it come about in the near future? I’m inclined to think so.

Meanwhile, these changes in the legal market suggest that those of us in legal education might want to consider some changes of our own. Regardless of whether law schools or someone else change the legal market, the fact is that legal education (and law-school placement efforts) has for many years been focused on training our best students for work in large law firms. With more and more of those students now facing layoffs and with large traditional law firms likely to enjoy a less dominant role in coming decades than they have enjoyed over the past several, we may want to focus more on skills courses, clinical experiences, and other kinds of legal training that will leave students ready to practice on their own or as part of ad-hoc groups that vary from one project to another, rather than expecting much of their law-practice training to be provided by a large firm.

On the one hand, law professors may be ill-suited for such an effort, since most of us are alumni of traditional large firms. On the other hand, the nature of free-agent law practice, with limited support resources, ad-hoc collaboration, and irregular hours probably bears a closer relationship to how most of us live our lives than to the life of a big-firm partner or associate.

And there is a bright side to these changes. As I mentioned, the transition to an “industrial” style of work produced a workplace/home separation that was a sharp departure from prior human history. Nowadays, people who work from home often find that it brings them closer to their families.¹⁵ On the downside, you can look at it as having to work from home, but on the upside, you can look at it as getting to work from home. One of the partners at my old law firm—famous for his long hours—was upset when his five-year-old drew a family picture for kindergarten and left him out. Perhaps under the new model he’d be shown pecking on a Blackberry, but at least he’d be in the picture.

And there’s more to it than that. One of my former students is a family lawyer. She abandoned a firm for solo practice and then abandoned her office entirely, drastically cutting overhead. With a

15. See Glenn Harlan Reynolds, *Cottage Industry*, TCS DAILY, Sept. 3, 2003, <http://www.tcsdaily.com/article.aspx?id=090303A>.

laptop and a cellphone, her office is wherever she is, and her clients are happy because she makes house calls. Larger firms are making similar moves.

We won't see corporate mergers being handled by solo practitioners—but, already, a lot of the legal work on deals like that is being done from laptops and cellphones that aren't in the big firm's posh office space,¹⁶ and that, too, is likely to increase.

Ultimately, what lawyers offer is expertise and advice. Those are offerings that require neither fancy offices nor large staffs, however helpful those things may sometimes be. In a world in which small-scale operations can now often compete on an even—or even superior—basis with large ones, we should expect the practice of law to change accordingly. Those of us in the business of training new attorneys should take note.

16. See V. Dion Haynes, *Recession Sends Lawyers Home: Firms Trade Brick-and-Mortar Prestige for a Better Business Model*, WASH. POST, Mar. 9, 2009, at D1.

Willard left his job as partner at DLA Piper, a huge global blue-chip law firm, because, he said, he was fed up with the traditional business model that required it to annually increase rates and billable hours to finance ballooning profits and overhead.

Last fall, he joined a start-up “virtual” law firm that he said is much better suited to the current economic conditions: It does business mainly over the phone and Internet and through video conferencing. Because the firm lacks two of the biggest cost drivers—a prestigious brick-and-mortar office and associates—he said he is offering his clients substantial savings compared with what they paid before.

“Everyone realizes the big law firm model is broken,” said Willard, a partner in Silicon Valley-based Virtual Law Partners, who works out of his office—adjacent to his kitchen and family room—at his Reston home.

Although thousands of lawyers and staff members across the country have been let go during the past six months, Willard and Virtual Law's founder say that since June they have been adding three partners per month. “When you tell people, ‘I'm going to drop my rates 25 percent,’ it's a pretty easy decision” for them to hire you, Willard said.

Id. That makes sense.
