# Reflections on the Practice of Law

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IN A CLASS with so many good and successful lawyers, I am honored to be asked to reflect on how law practice has changed since our graduation 50 years ago. Since I cannot write about that without expressing very personal views, I should first tell you about my career.

At Princeton, I had no idea what I would do later. My Navy ROTC commitment had me expecting four years in the Marine Corps, which were cut short when I was wounded in Vietnam in 1966, and retired for disability from the Marines in 1967. I then did what many of us did on graduation–entered Yale Law School, the last refuge of a generalist who didn't want to go to work right away. Dean Jack Tate, a son of the South who controlled admissions at Yale Law School, loved Princeton as "the northernmost of the Southern schools" and let most of us in who wanted to attend.

After law school, I clerked briefly for Earl Warren, who was then the retired Chief Justice, and worked even more briefly at the fledgling *pro bono* environmental firm Natural Resources Defense Council, which was just opening in New York and Washington. In 1971, my dream job, federal public defender in San Francisco, opened up and Tina and I moved to San Francisco with two-year-old Adam and with Nathan on the way. As a public defender, I tried many cases, some hilarious (one unsuccessful defense was that the teller in a bank robbery wasn't scared, therefore "no force or intimidation"; another was that a bank officer who embezzled to get money for drapes for his new house was clearly "insane"). After two glorious years trying cases, I left the public defender, joining two contemporaries to form our own litigation firm. My law school classmate Bill Brockett joined us soon after, and then he and I broke off from the others to start the current firm in 1978. By 1981, we were on the cover of *The American Lawyer* as a "Great Small Firm." Back then, big firms looked down on criminal defense, had no expertise in it, and were completely unprepared for the explosion of white collar defense practice that occurred in the 1970s. We went from representing bank robbers to bank presidents, and with the addition of some terrific younger partners, moved into other kinds of high-stakes litigation, especially intellectual property, securities, and antitrust.

I was fortunate to live in a time when the economy, especially in Silicon Valley, exploded, imploded, and exploded again. Litigation thrives in all business cycles. It was like being a Honda dealer in the 1980s. Our two-man firm grew to 85 lawyers, under one roof, trying cases all over the country.

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From my perch, having had a blessed, lucky, and happy career as a lawyer, what has changed since the 1960s? I won't delve into substantive law, the shift from the Warren Court to the Roberts Court, from expansion to contraction of legal rights—too political. Instead, I will address the economic change, from law as a profession to law as a business. The best place to start is with the effect of *The American Lawyer,* first published in 1979, which did much to accelerate that transition. Before Facebook, it told lawyers how much better others were doing than they were–promoting salary competition, professional jealousy, and rampant opportunism. Lawyers insinuated themselves into every business dealing, every aspect of economic life, even political and national security decisions. As one of my cynical friends put it, the legal profession played the role in the United States that eunuchs did in the Ottoman Empire—becoming ubiquitous and all-controlling.

Another consequence of this transition from profession to business was increased specialization. It seems as though lawyers today can only do one thing. Gone are the days when an attorney could hang out a shingle that said "Honest Lawyer" or "Somebody & Son – Lawyers." Beginning in the 1970s, attorneys, especially those at the biggest and best corporate law firms, concentrated on a single area–banking, or SEC, or antitrust, or wills and estates, or tax. There had always been legal specialists, but now becoming a specialist happened sooner in a career, and the specialty was narrower. Not just tax, but taxation of overseas entities; not just trial work, but litigation of SEC enforcement cases. The result has been stifling: less job satisfaction, less challenge to the individual lawyer. But the tradeoff was greater marketability. For the first time ever, lawyers in demand jumped from firm to firm. Dollar signs replaced loyalty. Law firms became corporations with thousands of lawyers under their umbrella. True partnership became a rarity.

Did this development undermine the attractiveness of the profession to young people? On the contrary, they just kept coming. In 1970, the United States had 300,000 lawyers; last year it had 1.2 million. In 1983, Derek Bok, then president of Harvard, bemoaned that the nation's young talent was headed to law school. (He was wrong: the nation's young talent drifted from law to investment banking, then to film, now to technology). Since the financial collapse in 2008, students are wising up. Law school admissions are down 30 percent; students recognize that there aren't jobs at the end of very expensive schooling.

But for people who are good at it, law practice is still great work. It offers independence, if you are brave enough to seek it. To paraphrase Rousseau, most lawyers, born free, are everywhere in chains, but they don't have to be. Law is about power, conflict, control, all subjects that continue to fascinate mankind. Law is problem solving, with the understanding that sometimes that means creating problems for other people. Although law is bound by tradition and resistant to innovation, creative lawyers make their own rules. As Garcia Marquez said about the game of Checkers, "[what] is the sense of a contest in which the two adversaries have agreed on the rules."

MUCH of the change has been positive. In a profession that was once almost all white males (as was our class at Princeton, with only one African American), women and minorities have been, if not welcomed, at least accepted at all levels, from judges to law firm partners to in-house counsel (although the number of senior minority partners at law firms is still distressingly low). *Pro bono* practice has been institutionalized, both at law firms, where recruits demand and ask about it, and in privately funded legal organizations– like NRDC, Environmental Defense Fund, NAACP Legal Defense Fund, Mexican American Legal Defense Fund, and legal aid organizations. That process was just starting in 1970, when the Ford Foundation funded NRDC and the Center for the Public Interest, and when law schools were starting clinics devoted to prisoners' rights, immigration, and legal aid services.

Another change for the good is increased awareness of the need for work-life balance, for family-friendly policies for lawyers. Long gone are the days of the Moore of Cravath Swaine & Moore, who, according to legend, was working after midnight, surrounded by associates, when the phone rang. He answered, listened, and barked, "What do you want me to do about it? Call the Fire Department." Hanging

up, he explained "That was my wife. Our house is on fire." Law jobs still require long hours, but most firms recognize the need for flexibility, vacations, lengthy maternity and paternity leaves, time for childrearing, and time for fun outside the job.

A CHANGE that has made law practice both better and worse is the relentless march of technology. Nothing ever goes away, and everything gets faster and faster. When I started, we made copies with carbon paper, mailed letters typed by secretaries, went to face-to-face meetings, and drank on plane trips. Now the i-drive stores everything, we are staring at iPhones every two minutes, letters go instantaneously by email, legal secretary is a dying profession, and most people work on their computers during plane trips (although I still drink). What are we getting from all the archival material that technology makes possible? Too much detail, and too much personal information. Anyone who has had to look through an engineer's email account in order to produce relevant documents will learn that most of it is pornography of one sort or another.

Social media makes an already overwhelming amount of unscreened, unvetted information even more suffocating. Any trial lawyer who doesn't check the Twitter, Facebook, and Linked In accounts of the jurors, or Google them, isn't doing the job. Having done it, what do you really know about that juror? It was certainly easier when all you had to go on was a few answers to *voir dire* questions and physical attributes like appearance, facial expression, and body language.

The area of law I care about the most—trial practice—has changed so much in the last 50 years that I worry about its survival. Jury trials in civil cases are almost extinct. In federal court, only 1.2 percent of civil cases filed are resolved by jury trial. In federal criminal cases, only 2.6 percent are tried before a jury. The rest are settled, plea bargained, mediated, arbitrated, or dismissed on motion. In 1963, a federal trial judge had an average of 39 trial events per year. In 2010, the number was six, less than a sixth as many. While there is much to be said on both sides of the question, the lack of trials–with their ability to educate, vindicate, and amuse—is a tragedy for maladjusted souls like me who love the chance to channel aggression into a socially acceptable pursuit. I agree with Borges, who in *The Art of Verbal Abuse* said, "A conscientious study of other literary genres has led me to believe in the greater value of insult and mockery." The world will be a far less interesting place when all disputes are settled by polite mediation.

But with or without jury trials, the challenge for the future remains the same as it has always been for every legal system: first, how to make law serve moral and ethical requirements as well as practical ones; and second, how to make it accessible to most people. During our 50 years since graduation, lawyers have become rich compared with other professionals, and have served the 1 percent admirably. We have also expanded our *pro bono* work, helping the poor and oppressed for little or no fee. What lawyers haven't done is figure out how to serve the legal needs of the vast majority of people, who are increasingly estranged from lawyers as they deal with their legal issues: foreclosure, consumer debt, criminal cases, family law issues, immigration, employment, and low-stakes business disputes. For them, the cost of legal services, the delay in getting finality, and the unnecessary complexity of most bureaucracy brings to mind the admonition of the Chinese emperor K'ang-hsi (1662-1723), who, wanting to keep his subjects away from courts, said: "I desire . . . that those who have recourse to tribunals should be treated without pity, and in such a manner that they shall be disgusted with law, and tremble to appear before a magistrate."

All I can say is that the nice thing about being our age is that we can (or have to) leave these problems to the next generation to solve.