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Resurgent Professionalism? Partnership and Professionalism in Global Law Firms

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The Nature of the Problem

In this chapter I examine the tension between professionalism and business in law. Professionalism is undergoing a crisis of confidence as the state is intervening more in the regulation of the legal profession. The practice of law has traditionally been organized around the concept of partnership. Partnership, opposed to corporate structures, is now being stretched to its limit as a coherent form of governance. We see this clearly with law firms growing beyond 3000 lawyers as Baker & McKenzie and Clifford Chance have done. We may instead legitimately ask if we are seeing the emergence of the "industrialization" of legal practice (Bierman & Gely 2003: 970).

In order to make sense of these issues it is worth attempting to specify some variables that might help analyse the problem. The key variables necessary to consider are: *size*: large / small; *reach*: global / local; *structure*: corporate (hierarchical) / collegial. They are redolent of the distinctions Galanter (1983) drew between mega-law and ordinary lawyering. But while his aim was to distinguish two clearly demarcated types of legal practice, that for the corporation and that for the individual, my approach is different in that the distinction I draw is within the corporate category, not between hemispheres (Heinz & Laumann 1982). The focus is on mega-law both as an organising principle and as a type of practice. Since I have posed these variables in stark binary terms, let me sketch the raison d'être for this approach. I take as my starting point a paper by Becker *et al.* of McKinsey on law firms in the "winner takes all economy" (2001). The paper hypothesised that in order to be a winner in the globalised era, law firms were faced with two choices: (i) either to be full-service "integrators" with a global footprint, (ii) or to be small with a strong local presence and a network of "best friends" or to be specialist and focus on a particular niche area. These choices left a large number of law firms in limbo, neither truly large (global) nor truly small (niche). They lacked direction, a sense of mission, they were drifting and so in potential danger to unpredictable forces. It is not possible to verify this hypothesis empirically—for that we would need a laboratory—but we are capable of understanding some of its consequences by investigating the variables mentioned above. This examination will entail an analysis of the histories of law firms as well as the theoretical elements of professionalism and partnership.

The economic condition of law firms is only part of the problem, and the only one on which McKinsey focussed. For professionals self-regulation has always been crucial constituent of their identity. Once the core knowledge is transmitted to the novitiates, they are left to their own devices in order to produce their work product. There is monitoring and assessment, but it has a subsidiary role. The missing component from McKinsey's analysis is the role of values in defining work and identity. In order to capture these it is necessary to go beyond the analysis of organisation and into that of work and knowledge. The two interact and help shape the professional world.

Although I will be concentrating on the large corporate law firm as my unit of analysis, the fruits of this paper could spill over to other types of law firm. The UK government is proposing a series of deregulatory changes to the

organization of law practice that will permit, for example, the offering of legal services through supermarket outlets, and the formation of multidisciplinary practices (DCA 2005). Even without these changes the UK has one of the least restrictive regulatory frameworks on legal activities, especially when compared to highly restrictive jurisdictions, in terms of unauthorised practice, such as the United States.

Various commentators have written on the changes occurring in the structure and governance of law firms (Nelson 1988; Galanter & Palay 1991; Flood 1999). The changes usually envisaged are moves from professional partnerships towards more bureaucratic forms of control, which ultimately divest partners of control. The most sophisticated expression of this model of change is articulated by the Alberta school in Cooper *et al.* (1996) and Hinings *et al.* (1999). They posit two archetypes, the P^2 and the MPB. The adoption of types is useful for heuristic purposes even though in their pristine forms they may not accord entirely with reality. Indeed, reality probably presents a set of hybrids that meld characteristics of each (Friedson 1986).

The P^2 is the traditional form of organisation for professional service firms and law firms in particular. It has both objective and normative elements. Partnership is based on collegiality not hierarchy, collective decision making not authoritarianism, and decentralised patterns of professional work. On the normative side there are values that inhere within professionalism such as particular ethical stances, respect for partners' equality, and often unlimited personal liability. A firm organised along P^2 lines is more like a linked set of individuals rather than a corporate structure.

The MPB form, according to Hinings *et al.* (1999: 140), is an emergent response to the dynamic changes of the 20th century—increased competition and globalisation chief among them. The managed professional business capture features from modern business. Hierarchies are more defined with concomitant status differences. Financial planning through cost controls and target setting is an established mode of working. Specialization becomes a mainstay of the business and with it enters more bureaucratic forms of management, which entails professionals abdicating control to an executive. Normative controls give way to rational management orthodoxies. Firms which employ the MPB form are more highly segmented than P^2 firms. Perhaps what is more telling is that the influence of the MPB form then spills over into the profession as a whole increasing segmentation. Segmentation here is to be distinguished from deprofessionalization, which focuses more on deskilling as the operative function whereby status and identity are redefined downwards.

One difference between P^2 and MPB that needs reinforcing is that of the employee (Spangler 1986; May 2001). MPBs are more oriented towards the hiring of salaried employees than P^2s which focus on partnership. Of course P^2s hire employees: associates are the profit creation device of law firms. It is that within MPBs progress to partnership is diluted both in form and practice. MPBs are more active in creating two-tier partnerships and senior associate

positions (non-tenure track) than are P^2s. Within the sphere of the MPB the role of the employee is the norm.

The role of knowledge within professional organisations is of paramount importance. In law, especially, there has been an explosion of law making and regulation, which has intensified the work experience of lawyers incalculably. Gilson (1984) has noted that lawyers can be perceived to create value by providing safe harbour for their clients against the regulatory maelstroms that arise in transactions. The role of knowledge produces a tension in itself between the role of the generalist and the specialist. While in medicine the role of the general practitioner, as gatekeeper, is perceived to be inferior to that of the specialist (although the status of the physician was otherwise in 18th century England [Johnson 1972: 73]), in law there is no such equivalent to the GP, in part because of the hemispherical division between the corporate and personal plight sectors. In corporate law, therefore, it appears the entire population is composed of specialists. Yet some generalists do play significant roles. In this field generalists are typically senior members of firms—oligarchs—with considerable experience who operate as counsellors giving advice on a wide range of topics. They are assumed to have gravitas and wisdom that exceeds their identifiable specialty (Flood 1991). Stanley Berwin, a banking lawyer, for example, started two law firms in his career and acted as adviser to many banks.

Corporate law is here presented as a field of activity but it is one that is highly differentiated. This can be seen in the McKinsey analysis where the polar extremes are represented by Baker & McKenzie and Clifford Chance, law firms which cover the entire range of corporate work and the world, to Wachtell Lipton and Boies Schiller which concentrate on specific areas like mergers and acquisitions and corporate litigation.

The paper is structured thus: I will revisit the ideals of professionalism and consider how they fit within the modern legal profession that now exists in a globalised world. Secondly, I will examine the examples of a number of law firms and their fit with the archetypes outlined above, using American and English examples. The data for this section are largely derived from law firm histories and accounts, and from my own research. Finally, I attempt to discover if professionalism's is dying or not.

Professionalism

The study of professionalism and professions has an extensive history from the descriptive accounts of Carr-Saunders and Wilson (1933), to the quasi-scientific trait models of Greenwood (1957), to the professional projects formulated by Larson (1977). A different approach was taken by Becker (1970) who viewed professionalism as an expression of identity, a folk term, which has found resonances in Bourdieu (1992: 242).

The models proposed by Greenwood and the devotees of professionalisation attempted to place an analytic framework around a set of variable historical moments. The problem with trait and professionalisation models, however, was that they tended to reproduce the discourse of the professions

themselves, or those that claimed the professional title, without critique. They failed to distinguish among the legitimate and illegitimate claims made by different occupational groups for professional status.

Larson's exposition of the professional project has found its key exponent for the legal profession in Abel's analysis of both the British and American legal professions (1988; 2004). According to Abel the professional project has two components: the control of the production of producers; and the control of production by producers. This places professions in situation where self-interest supersedes the community bargain as outlined by Parsons. Essentially, professions are seen as rent-seeking groups attempting to enforce systems of closure against rival groups within society. Various scholars, Burrage (1996) and Paterson (1996), have argued that within the British context Abel overstates the case and the correct way of depicting professions is in a neo-contractual relationship with the state where the configuration of professionalism is continually being renegotiated.

One component of the theories about professionalism that needs to be emphasised because it is often over-shadowed by the role of power is knowledge. Eliot Freidson has promoted the cause of knowledge, which he links to power when he says: "I assume that knowledge cannot be connected to power without becoming embodied in concrete human beings who in turn must be sustained by organized institutions" (1986: xi). Knowledge then, and its incubator the academy, are crucial to the underpinning of professions. In Freidson's (1986: 4) analysis of formal knowledge and democracy formal knowledge is associated with the rise of modern science which is rooted in the universities. It is not by definition part of everyday knowledge, but rather elite knowledge. This is further emphasised by Daniel Bell (1976: 374): "the heart of the post-industrial society is a class that is primarily a professional class…A profession is a learned activity, and thus involves formal training, but with a broad intellectual context". Formal knowledge contains a tension therefore between the role of the intellectual and the technician, or, in other words, the difference between pure and applied knowledge. Stehr (2001: 497) argues that we must formulate a sociological concept of knowledge which he portrays as: "Knowing represents a relation to things and facts, but also to law and rules…In order to know it is not necessary to get into intimate contact with the things themselves, but only with their symbolic representations. This is precisely the social significance of language, of writing, printing and data storage." Knowledge becomes a basis for power, a capacity for action, a form of cultural capital that operates with a symbolic economy (Keynes 1936; Bourdieu 1986). In this way power derives from the selective ways knowledge is employed by professionals, whether in professional service firms or state bureaucracies. For Freidson the "pervasiveness" of this power can be seen in the roles of those who establish standards within the economy (1986: 227).

Professionalism is not a simple entity to be pinned down like a specimen butterfly. It is complex, changing depending on the perspective of the viewer. It is clear that there are two core elements, however, power and knowledge, whose expression alters according to the configurations various actors can adopt. The involvement of the state between the relationship of producer and

client can fundamentally change the character of their relationship from a more directly mediated one (Johnson 1972: 77). We see examples in the revision of the doctor-patient relationship in the second half of the 20th century through the introduction of the National Health Service in Great Britain; and more recently the British government's approach to the re-regulation of the legal profession via the Clementi Review (2004). Moreover, as professions challenge each other's hegemony over fields of work, their configuration mutates according to whether they succeed or suffer defeat (Abbott 1988).

Organising Lawyers: Partnership or Herding Cats

Within the legal profession modes of organisation vary, but for analytical purposes I focus on lawyers in private practice. This means ignoring lawyers who work in corporate law departments (in house counsel) (Rosen 1984) and those who work for government (eg, Lewis nd). These groups are generally located within hierarchically organised structures with express chains of authority, super- and subordination. However, concentrating on lawyers in practice also raises questions. "Practice" is one of those terms often taken for granted, but within the context of profession it should carry some meaning. MacIntyre's idea of practice is a set of complex activities carried on by humans in a collaborative context that generate internal goods of satisfaction and excellence (1984: 175). External goods such as prestige and money may also derive from it, but are not the constitutive elements. Indeed, MacIntyre sees external goods as intrinsic to institutions and therefore have a "corrupting power" (1984: 81). In this sense he identifies a tension between institution and practice, yet it is not really possible to conceive of legal practice without considering the institutions within which it takes place.

For law, the paradigm institution is the partnership, what has been referred to as the P^2 model. P^2 is exemplified in Emmnuel Lazega's analysis (2001) of a north-eastern American "old line" law firm, "Spencer Ropes & Gray" (SG&R). There were no formal departments within the firm. Partners considered the firm democratic with few formal rules. Management was in the hands of an executive committee consisting of a managing partner with two deputies. Consistent with the firm's informality, it operated a lockstep system of remuneration where compensation was based on seniority: partners reached the full partner share after 14 years of partnership. The lawyers believed lockstep avoided back-stabbing and enabled sharing more than would be feasible in an "eat what you kill" environment. The downside to lockstep was the free-rider problem—how did one cope with lawyers who didn't pull their weight?

Organisations, such as law firms, are, according to Lazega, composed of microstructures or niches. These are not defined groups but coalitions that share interests and allow for the exchange of resources to achieve particular ends. They have a strategic rationality. And since financial rewards are not a distinguishing feature among partners because of lockstep, other status criteria come into play. The classic tripartite division of the law firm is "finders, minders and grinders". The finders or rainmakers generate the business for the firm while the minders take on managerial roles in handling and distributing the work. The grinders sit at the bottom doing the work generating

the profit for the partners. Niches are multifunctional and depend on three types of resources, which are commitment to work, advice, and friendship. Their interplay helps explain the mechanics of cooperation and competition among peers. The first resource is important because the lawyers of SG&R had to cooperate in order to serve their clients. Cooperation varied according to need: the need of the file—what lawyers are needed to carry out the transaction, and the need of the client—would the client benefit from being cross-sold other firm services? Moreover, variation came about with intensity of work, so that alliances would shift according to how busy lawyers were. Managing uncertainty which is a considerable part of an attorney's effort creates demand for advice from others on how to cope with situations (Flood 1991). To whom does one go for advice? In part it depends on whether the advice sought is in another area of law or not. The effect is not too different, however. Advice is generally sought from superiors or equals, hardly ever one's inferiors. The third resource, friendship, was an amalgam of elements which were not always connected to work, but could be relied on at such moments when status games were providing negative results. Lazega gives the example of expulsion from the firm where abstention by two partners could deadlock the vote.

Niches ensure that organisations tend towards integration despite the power of centrifugal forces to push towards break ups. If niches become established as groups, there is the problem of defection. What stops a group leaving and joining another firm if it wishes to seek greater economic rewards or status? According to Lazega it is achieved by balancing the distribution of power through controlling access to resources. If members have complete access to all the resources outlined above, their capacity to defect is high. If, however, access is restricted to a single resource, their capacity is attenuated. Balancing power in these ways and creating interdependencies is referred to as a "Montesquieu structure": instead of distributing power equally throughout the organisation, inequalities, which create oligarchies, are allowed to develop thereby counterbalancing patronage and solidarity.

In knowledge-intensive firms work is often a collaborative exercise. Partners generate profit by bringing in cheaper associates to undertake the bulk of the work. No law firm wants to have a surplus of associates because of the wasted expense, so a slight shortage of associates creates a competitive market for them. Associates are, in effect, bid for by partners who can offer rewards in terms of interesting work that may lead to increased responsibility and the possibility of partnership through sponsorship. Access to associates indicates status among partners and among associates. Associates, though, may find some of the features of the firm daunting. While they must depend on patronage for election to partner, an overdependence on a single partner may be counterproductive if that partner is not of sufficient status to argue the associate's case. Changing patrons can be difficult. And even the use of associates' assignment committees might not be able to overcome these obstacles. In fact, any associate relying on assignments through the committee would be perceived to have problems.

Lazega emphasises the negotiation of precarious values. How do partners cope with pressures for change? What is acceptable change? The sorts of issues that arise in these negotiations are compensation rewards and peer review. The idea of rewarding "rain making" was anathema to many partners who saw it as divisive and creating disharmony. Avoiding competition in the compensation stakes also meant that peer review was not warmly welcomed. It could lead to similar outcomes.

Only the senior oligarchs, it seems, those with multiple attributes that engaged others' respect and admiration for their wisdom and productivity, could lead the firm into new directions as long as they were not too radical. They were the guardians against defection and were the protectors of the common good.

There is something enchantingly timeless and almost old-fashioned about the depiction of Spencer Ropes & Gray. It seems to embody all the values that create the quintessential professional. Yet in the 21st century it is probably more of an anomaly that the norm. There is a total absence of the impact of globalisation on the firm; indeed, it seems to exist in a time prior to that: and there is none of the frenzy that accompanies the marketing of new clients. So, while SG&R serves to demonstrate the extent of the P^2 archetype, it does not fit with the activities of the elite law firms of today.

In order to understand fully the tensions inherent in modern professionalism, I explore two types of law firm that exemplify the approaches outlined at the start of the chapter. They are global integrators and local niches. Although they are presented as opposites, there are some shared characteristics, so there is a little overlap.

Global Professionals

The archetypal global professionals/integrators are Baker & McKenzie, Skadden Arps, and Clifford Chance. In this section I focus on the first two.

Baker & McKenzie: The law firm was started with the explicit aim of being an international law firm. Russell Baker, the founder, had been inspired by his professors at the University of Chicago to think of the world in internationalist terms (Bauman 1999:11). During the 1940s Baker realised that he could exploit certain American tax provisions designed to assist trade with Latin America. By arranging sales through various subsidiaries US companies could save tax on their profits. Baker marketed the provisions to his immediate clients then promoted them through speeches and articles (id: 32). One result was that Baker & McKenzie began its global spread in Latin America rather than Europe. Baker's approach was different from other firms' ways of opening overseas offices. Instead of opening an office in a foreign city and staffing it with expatriate American lawyers, Baker decided to use local lawyers. As one Baker partner said: "You can't clone US lawyers all around the world" (id: 44). Nevertheless, there was significant movement of partners as new offices were established in order to inculcate the firm's philosophy to new lawyers. For example, the China and Hong Kong offices received a number of lawyers from the US, the UK and Australia (id: 193-216). The principle was that all lawyers would be part of a single partnership—although

Baker seemed to be *primus inter* pares—and that democracy would be the guide. While democracy allowed partners to deliberate in equality, the determinants of partner compensation had to allow for differences in styles and types of working practices among lawyers. The firm adopted “The Formula” (id: 47-50). It had four elements of which the first was the most important: this was Work Credit calculated by adding up the amount of fees collected for each partner. The second element was Client Credit which meant that partners who bring in new clients would receive 12% of the fees generated by those clients, except that 15% of those receipts would be placed in a fourth element called Fund A. The third element was Associate Profit which was the profits left over after associates’ expenses were deducted. The fourth element, Fund A, was derived from a series of points allocated to partners according to how long they had been with the firm. Although the firm was organised to emphasise the centripetal aspects of partnership—co-equals, joint decision making, lack of hierarchy—the adoption of the Formula produced centrifugal results because it emphasised the partner as profit centre, which could result in the hoarding of work. One partner commented, “without the structured freedom of the Formula, I don’t think you could have set up a multi-office, multi-jurisdictional partnership with people trained in different fields of law without the Formula. It got rid of all subjectivity. Everybody could see why everybody else was making the money they were making. The Formula sucks the venom out of what otherwise is a poisonous battle for control of the distribution of money to the partners” (id: 50). Nevertheless, the promoting of partners stressed the integrity of the partnership and complaints multiplied. In part to quash complaints a new class of partner, the Income Partner, was created. Income partners were treated the same under the Formula, but were unable to vote for several years until steeped in firm culture (id: 125).

For the first two or three decades Baker & McKenzie, even though it had opened over 20 offices throughout the world, was sufficiently small that its partners could meet and take decisions fairly easily. As the growth intensified the pressures on the partnership were felt more keenly. Firm growth remained important but deciding how and when to open new offices caused friction. Some offices, such as the Australian ones in the 1980s and 1990s, needed to be subsidised to remain active. The strictures of the firm’s Formula potentially disallowed this kind of cross-subsidy. If subsidies mean a diminution in partners’ compensation, then partners sought alternative means of expressing their displeasure. In the Australian example where adverse economic activity had forced up costs, the Sydney and Melbourne offices needed close to $1 million. The subsidy was granted but the management of those offices shifted to younger partners (id: 99). In the case of Hong Kong the firm had to partially abandon the enshrined Formula and create a Hong Kong version. Partners who rotated through Hong Kong found that, because of the Formula’s ruthlessness as an “eat what you kill” paradigm, their incomes could drop by as much as 30% or more. Obviously some partners became reluctant to move there. For Hong Kong a more communal approach was taken whereby all the elements were pooled and the partners decided on a fixed amount to be paid each year. There were slight variations for seniority which pushed the Hong Kong Formula towards a lockstep mode (id: 215-16).

The rate at which Baker & McKenzie was growing produced enormous strains on the management of the firm. That was still carried out in a relatively ad hoc, amateurish manner. Again, the Formula made it impossible for any lawyer to devote most or all of their time to management. The firm had no provision for remunerating lawyers for lost legal work. Moreover, there was resistance to moves in this direction as it appeared to signal the end of democracy with either individuals or groups possessing the power to issue orders (id: 123). As much as the firm believed in democratic governance, Russell Baker, the founder, was able to exert considerable pressure on other partners as long as he was alive. (He died in 1979.) There were occasional rebellions but by and large they were not revolutions that overthrew the traditional forms of authority.

As the firm graduated towards a more bureaucratic form of executive committees and chairmen, there was a chipping away at the structure of the partnership. One essential component of the democratic style was a rule called the “all save four” rule. No partner could be ejected from the firm if he and four others objected. It effectively guaranteed lifetime tenure for the partners. At the start of the 1980s the rule was attenuated gradually making it easier for the firm to lay off partners (id: 229). The final step towards complete management was the firm’s decision to appoint a full-time chairman instead of a series of part-timers. For example, the first non-American chairman, Wulf Döser of Frankfurt, recorded that in 1980, “he attended seven Executive Committee meetings in Tokyo, Zurich, Chicago, Milan, and Toronto. He also went to three regional partners meetings, two Policy Committee meetings, and five Financial Committee meetings” (id: 229-30). And as part-time chairman, his income suffered because the Formula so dictated. When the first full-time chairman was elected, he was inoculated from the effects of the Formula by being given a salary equivalent to the average of the top 50 earning partners in the firm. With the institution of a full-time chairman Baker & McKenzie tilted towards complete management, which included a move away from organically grown partners to more lateral hiring of partners.

Baker & McKenzie is a behemoth among law firms, but not all professional service firms. It started with a goal to be a global firm but one that would have collegiality at its heart. Collegiality embraces trust which is a prime constituent of a collective based on shared principles. As long as the partners could know each other, take account of others’ cultural values, and be part of a known entity, partnership could be articulated as a value laden concept. With the extraordinary growth of the firm, it had no choice but to become attached to principles of management while trying to remain enamoured of partnership. Ultimately, a firm like Baker & McKenzie becomes a set of interlocking networks, virtual arms-length relationships tied together by strategic goals, but not based on trust, especially since de-equitization is made easier and easier. In sum, Baker & McKenzie started with two divergent aims: to be a global law firm and to be a collegial partnership—never to be conjoined.

Skadden Arps: Skadden, Arps, Slate, Meagher & Flom started as a home for rejects from other law firms. Lawyers passed over for partnership at elite law

firms or young lawyers out of Harvard Law School ignored by the mainstream firms found Skadden Arps a congenial home in the 1950s and 1960s when the New York bar was extremely conservative (Caplan 1993). Moreover, the firm decided not to invest in organic growth by training up its own associates into partners: it needed to hire partners laterally (id: 46), which it was said, "kept the firm nimble and fresh" (id: 156). As Caplan notes: "From the firm's point of view, its hallmarks were pragmatism and openness. Skadden had a mix of Democrats and Republicans, and of Catholics, Jews, and Protestants (1993: 47). The firm's early work, which got it noticed, was handling proxy fights in takeovers. The work did not have the glamour of high-status corporate legal work and most mainstream New York law firms ignored it. In the 1970s its expertise in contested takeovers gained it work from investment banks such as Morgan Stanley and Lazard Freres (id: 57). Skadden had one other feature that distinguished it from other firms, namely, its commitment to seeing the work done quickly. The hours worked at the firm were notoriously longer than at others, in some cases more than 2,500 billable hours a year: Skadden earned a reputation as a sweatshop. It also leveraged its partners more than other firms with partner/associate ratios of 1:4 or more. By the 1970s, Joe Flom, the senior partner was envisaging the firm as a megafirm.

Most law firms like to build a stable of regular clients paying retainers. During the 1970s corporations began to realise that paying external counsel to do routine legal work was very expensive, and began instead to expand their in-house legal departments. One of the effects of the rapid increase in hostile takeover work was that it "unbundled" lawyer-client relationships. Since the mainstream firms rejected this work, it had to be outsourced to others, such as Skadden Arps. This meant that corporations were no longer exclusively dependent on their regular counsel; they could go to other firms for specific tasks—expertise shopping. It created a more open market for legal services, one based on transactions rather than relationships. Lawyers sought out clients and took over clients who had been referred to them.

Skadden Arps employed two tactics. One was to treat professionalism and commercialism as the same thing not polar opposites. The other was to use the media as a means of expanding its empire (id: 76-77). "White shoe" law firms were traditionally shy of the media. It was ungentlemanly to market oneself and unethical to advertise. Yet the 1970s was a time when the legal media market grew with paper like *The American Lawyer* and *The National Law Journal* (Flood 1996: 171). On the first tactic, because of the nature of hostile takeover work, many clients were concerned to "sterilize" Joe Flom and have him conflicted out of cases (Caplan 1993: 83). Since there were only two main law firms in the takeover business, Skadden and Wachtell Lipton, conflicts could radically reduce the level of business if successful. Flom therefore inserted a waiver clause in his retainer that said: "Should your corporation or any person affiliated with it seek to acquire or invest in any company which is a client of our office we will be free to represent that client and the same shall not result in a reduction of the retainer" (id: 83). A number of legal ethics' experts countered that the waiver was unprofessional, greedy, and unethical. The retainers, however, funded Skadden's moves to diversify into new areas of practice that depended less on mergers and acquisitions.

Another example of its commercialism was the use of premiums or performance fees in legal work. If a deal was successfully consummated the resultant fee could be four times as much if the deal had failed. Skadden thought of itself as being a functional equivalent of the investment bank and should be rewarded accordingly (id: 104).

The way Skadden treated its lawyers was at first unusual. The firm realised that doing work quickly was to be one of its hallmarks, so that no client would have cause to complain about tardiness. Arrangements for simplifying lawyers' lives in order that they could concentrate solely on work included in house gyms, food and snack supply services throughout the day, constant support services for photocopying, messages and word processing. It even offered the use of free psychiatric services and handled partners' investments. It was in Caplan's terms, "the American idea of the Japanization of the law firm" (id: 112).

Skadden has had moments of introspection about what kind of firm it is and hopes to be. In the 1980s it tried to determine its culture. Skadden's answer was summed up in the word, merit. It had two interpretations: one was in the quality of work, and the other was in the "excellence in individual performance on the job" (id: 157). It was not a culture derived from long relationships with clients. Some even argued there was no culture at Skadden: "The way you can tell that there is no culture here is that people try to get away with things that people at firms with established cultures wouldn't. I think there's more dishonesty about hours—with people inflating them. People here will try to take credit for things they shouldn't" (id: 171).

Like Baker & McKenzie Skadden used an "eat what you kill" system of remuneration. Up until the mid-1980s, the distribution was decided informally by Joe Flom with a few others. It led to some dissension because the money seemed to flow predominantly to the M&A lawyers in the New York office. At one stage when Skadden had made more money than it anticipated, it was decided that the money should be distributed in bonuses rather than partner units. The fund was known as the "Pig Pool" (id: 184). The bulk of the fund went to the M&A lawyers, causing many lawyers to feel the firm was on the road to destruction, with the result that the compensation system was overhauled and given to a committee to operate a more rational system.[2] Nevertheless, compared to Baker & McKenzie's "Formula", Skadden's compensation system is more subjective with a significant amount of its value based on perceptions and impressions as well as hard figures.

For most of its life Skadden had not been run democratically with partners having equal votes. The senior partners ran the firm as an oligarchy with Joe Flom as its titular head. Younger partners demanded a say in the election of the executive partner. Older lawyers saw this as a recipe for chaos and corruption. Compromises were found that allowed the firm to muddle through the situation without giving everyone what was wanted. But then Skadden was set up in opposition to mainstream law firm values. Joe Flom has referred to those who talk of the decline of professionalism as those "creeps who keep talking about their gentlemanly practice" (id: 153).

Local But Networked

The archetypes representative of this section are Cravath Swaine & Moore, Wachtell Lipton and Slaughter & May. Here I treat the latter two.

Wachtell Lipton: Wachtell, Lipton, Rosen & Katz is unusual compared to most corporate law firms. It has but a single office with 190 lawyers, a one-to-one partner-associate ratio, and average per partner profit of $2.35 million (vault.com). Both Baker & McKenzie and Skadden Arps significantly leverage their partners. According to Gilson & Mnookin (1985: 585) the higher the leverage, the higher the firm's per partner profit. In this fundamental respect Wachtell is different and deviates from the norm.

Wachtell was started by a small group of lawyers in 1965 with the express aim of doing transactional work in a partnership without hierarchy (Starbuck 1993: 898). These lawyers also refused to enter retainer relationships with clients (contra Skadden), thereby hoping to reduce the potential for conflicts of interests. Wachtell believed in not undertaking routine legal work, which meant turning down work, eg, due diligence which requires extensive use of labour. The firm wished to keep itself small.

One decision by the firm was to have far-reaching consequences, that of defending targets in mergers and acquisitions. A former Wachtell partner characterized the decision this way:

> Opposing [Michael] Milken positioned Wachtell Lipton as primarily a defense firm. The choice was not a necessary one. Skadden Arps flourished representing both sides. But limiting representation to target companies was a choice that Goldman Sachs had made years earlier, and it had proved very profitable for them...The early decision of Lipton to say that the firm would not join with Skadden Arps in raids [also] proved very successful. [...] When the poison pill defense was developed by Lipton and validated by the courts at the end of 1985, Wachtell Lipton's place as the premier defense firm was assured (Lederman 1992: 211).

Wachtell's Marty Lipton was, along with Joe Flom of Skadden Arps, one of the few to realise that hostile takeovers was a growing area of legal business. Thus he and Joe became the terrible twins of M&A. But legal work has a curious residue. Once a piece of work has been done, it can't be protected in the same ways as other intellectual property. It has a relatively short half life. For example, in an interview with Harvey Miller, then the doyen of New York bankruptcy lawyers, he surmised that his original legal work gave him a two-week advantage over other lawyers before they could imitate him (Flood & Skordaki 1997). So, even though Flom and Lipton had some advantage in M&A, they had to capitalize on it. Lipton achieved his fame by inventing the "poison pill". In order to make companies less attractive as targets, Lipton devised a means of multiplying shareholdings among current stockholders when the takeover occurred, thus diluting the acquirer's shareholding (Powell 1993). Even though the poison pill has been copied and developed over the years, it is still indelibly associated with Marty Lipton.

Like Skadden Arps Wachtell was an organisation of outsiders. It was attractive to Jewish law students at New York University Law School. As one partner said, “For years, two-thirds to three-fourths of the Wachtell lawyers were NYU graduates” (Starbuck 1993: 902). Wachtell’s approach to hiring was unusual. The typical way is for a firm to run a large summer intern programme from which it makes a number of offers of employment for the following year. Law firms hire more associates than they expect to make partner to account for attrition, but also to provide for a tournament between associates at the time of partner selection. Moreover, during the probationary period firms adopt the Cravath method of training, which essentially takes complex transactions, breaks them down into manageable parts each of which is taken by an associate under supervision (Swaine 1946). As associates accumulate more experience, they are able to take on bigger tasks and begin supervising others. So they learn the art of being a corporate lawyer.

Whereas Skadden Arps may take in over 100 summer interns, Wachtell chooses no more than 20 to 25. Offers are made to around 15 of them with six or seven accepting. According to Starbuck, “Associate lawyers receive appraisals after three, four, and five year. The senior partners make these appraisals quite frank so that the final partnership decision surprises no one. The partnership decision occurs earlier than at other leading firms. Of those who start at Wachtell, over 40 per cent become partners” (1993: 902). For associates the Cravath method is not the norm, which Kelly interprets as bureaucratisation by stealth (Kelly 1994: 204). Wachtell associates are expected to become self-sustaining autonomous units early in their careers in order to become part of teams comprised of different specialities.

The collegiality of the firm is mirrored in its compensation system which is based on lockstep. One partner presented it thus, “The three founders get 125% of the average. Other seniors get 100%. Younger partners progress toward 100%. A new partner would get around 33%. These percentages are determined entirely by seniority. No one is compensated for client clout” (id: 906). An “eat what you kill” system would intensify differences and foster a high degree of individualism manifested in the harbouring of work, as the recipients of Baker & McKenzie’s Formula found. Other partners at Wachtell emphasised,

> This compensation system can only work where everyone is sharing the workload. No one is seriously considering changing the system. It requires trust among partners, sharing, beneficence by the seniors. No one came to this firm for dollars; no one stays for dollars. We can move associates around because no partner is responsible for a specific client. Also, there is no reticence to bring someone else into a client relationship. Lockstep is very important (Starbuck 1993: 906).

Unlike Skadden, Wachtell’s culture discourages internal competition in order to foster the group. As Marty Lipton summarised it: “The Firm is not a business; it is an old fashioned professional partnership; there is no partnership agreement—only a handshake among friends” (id: 908). The

administration of the firm appears to follow the same informal route with partners assuming administrative roles according to desire. Another aspect of the firm's reluctance to promote the individual is seen in its attitude towards billing. It shies away from billing by the hour preferring instead to charge a price for the transaction that reflects the value the firm contributed to the deal. This often includes a substantial premium for successful transactions. Although clients could, and occasionally did, query the premium, in which case it would be discounted, they would not be able to employ the firm again. The firm had sufficient work to be selective about its client roster and so chose to base its relations on a system of trust in the value of its work.

Slaughter and May: Slaughter and May is the quintessential British "Magic Circle" law firm with around 750 lawyers. Although it has offices in Paris, Brussels, and Hong Kong, these are small compared to the main London one. Over 650 of the firm's lawyers are based in London (Legal500.com). Compared to the other firms mentioned above, Slaughter's has the longest history, being founded in 1889 (Dennett 1989).

Slaughter and May was an offshoot of another City law firm, Ashurst Morris Crisp. Both the founders had trained at Ashurst, which in the 1880s was considered a large law firm with three partners. Partnership was generally difficult to obtain at this period since sons were favoured over others and the 1862 Companies Act capped the number of partners at 20 (id: 227). This meant fission rather than fusion was the usual course. Hence both Slaughter and May, through necessity had to leave Ashurst to form their own firm, but they were assisted by John Morris of Ashurst who passed work and clients their way (id: 34).

It was not only partner numbers that were low; the numbers of lawyers generally in English law firms were small. There was much greater use of unqualified managing clerks to do legal work. St George (1995: 82) points out that "the ratio of partners to juniors and clerks could be as high as 1:20. In the 1840s the ratio at Baxter, Rose & Norton had indeed been as high as 1:100 during the height of the railway boom. By the 1860s, the number of clerks returned to its more usual seventy".

There is a significant difference between the way law firms practised in the 19th and 20th centuries. In Wachtell the emphasis was always on being a good lawyer, not on being an entrepreneur. A partner said, "Getting new business is irrelevant to people's performance. The criterion is always excellent legal work" (Starbuck 1993: 910). In 19th century imperial Britain being entrepreneurial was the name of the game with London as the financial capital of the world. Dennett records that John Morris was the director of "13 successful public enterprises…who had frequently been employed…to start at a few hours' notice, on a voyage across the Atlantic to assist in unravelling some vast complication in the American railway system" (Dennett 1989: 23). Slaughter and May continued this tradition as they forged links with merchant bankers, such as Emile Erlanger, Schroders and Seligmans. Their clients were involved in mining in the Far East and South Africa; in developing railways in several continents including South America; and in many of these

William Slaughter was highly active in promoting the companies, especially at their flotations, as well as being on their boards. For example, Dennett describes Slaughter's activities with one special client:

> Slaughter's largest single commitment outside his legal practice was still Home and Colonial Stores. Although a managing director, Charles Blake, was appointed to the board of the Stores in 1899, Slaughter remained the company's front-line negotiator with suppliers. His close correspondence with Julius Drew, still the biggest shareholder in Home and Colonial, offers insights into a number of aspects of Slaughter's life, not least his continuing position as chairman, his health and integrity (id: 120)

This is not to say that it was typical of American law firms not to have longstanding and complex relationships with clients. Throughout the 1930s John Foster Dulles, senior partner of Sullivan & Cromwell, helped US finance rebuild war-torn Germany assist the rise of the Nazis and actively supported Hitler (Lisagor & Lipsius 1988: 119-142).

Slaughter and May grew almost haphazardly. In the UK there was nothing comparable to the Cravath system of associate training. Quite a number of partners joined after having practised elsewhere: for example, Donald Tewson was admitted as a solicitor in 1908, and then practised alone for 22 years as a tax lawyer before he joined Slaughter and May (Dennett 1989: 176). In English law firms there is an extra layer of lawyer not found in American firms, namely, the articled clerk or trainee. These were used the same as associates, even though not fully qualified. One partner, when an articled clerk in the 1930s, told how he was introduced to Albert Pam of Schroders merchant bank with the expectation that he would work for the bank as one of their lawyers, "however humble" (id: 194, n 7). Managing clerks were still used, especially in work that City lawyers considered *infra dignatatum* like litigation. Slaughter and May's litigation department was run in that fashion for a long time (id: 223). It was only in 1978 that partners took over the running of the litigation department (id: 244).

The firm until after the Second World War had no formal division into departments, each partner considering himself a generalist who could turn one's hand to anything (id: 224). Moreover, the governance of the firm was a simple matter. The senior partner essentially made all decisions after informal discussion with other partners. In the 1950s the firm started using a management committee of senior partners to manage the firm. It still had an ad hoc tone to its meetings and deliberations. In the 1960s the firm commissioned consultants to examine its governance. It was suggested that the senior partner would become a full-time manager. Slaughter and May rejected this recommendation as the senior partner, who still carried a full workload, was too valuable a conduit to clients to lose. Instead they appointed an "administration partner" to relieve the senior partner (id: 230).

For British law firms at this time the most serious obstacle to growth was the limit on the size of the partnership to twenty lawyers. Slaughter and May

reached its limit in 1957 and from that time until 1967, when the cap was lifted, had to lose potential partners to other firms, in house legal departments and banks. Dennett tells of how the situation was compounded by the merchant banks' move into "the stage management of large public issues", which was normally done by the law firms (1989: 228). The banks started raiding law firms for their expertise. Slaughter and May lost partners to Hill Samuel, Guiness Mahon, Morgan Grenfell, and Schroders. Following the changes to the partnership rules in the late 1960s, law firms in the City of London started to grow rapidly. While a number of firms sought expansion through mergers, Slaughter and May continued to develop through organic growth and began to formalise its management (id: 264).

Slaughter and May followed a different path from its compatriots in the "Magic Circle". It shunned the mergers with and takeovers of foreign law firms in order to establish offices in different jurisdictions, as with say Clifford Chance. The firm instead adopted a "best friends" approach to globalisation. It would work in tandem, but not exclusively, with elite firms, such as Hengeler Mueller in Germany and Bredin Prat in Paris (slaughterandmay.com).

The Reprise of Professionalism?

The late 20th and early 21st centuries are profoundly different to the 19th and early 20th. There was considerably less regulation of law firms and lawyers in the earlier period. Lawyers were more entrepreneurial and willing to join in their clients' activities. In London solicitors were men of business as many attorneys were in New York. The early 1900s, however, see the Cravath law firm break new ground with the modern corporate law firm. Both in London and New York business interests are intertwined with their law firms. Lawyers become prominent in international politics. Men like John Foster Dulles and his brother became secretary of state and the director of the CIA, respectively (Lisagor & Lipsius (1988). The Depression gave birth to the New Deal in the US which intensified the regulation of business and increased the speed of the revolving door for lawyers in and out of government and practice. The UK developed the welfare state which gave rise to increased legal activity at the level of rights. It wasn't until the 1980s that business regulation was given a new turn by the Thatcher government with the "Big Bang" and a raft of state utility privatisations. By the last quarter of the 20th century the large law firm was well entrenched in the common law world. It was helping to shape globalisation by producing a system of private ordering transmitted through complex documents in the nature of, for example, franchise agreements, joint ventures, and increasingly sophisticated capital markets' instruments. These activities have multiplied as field of transnational organisations—eg, WTO, World Bank, NAFTA, EU—has grown ever denser.

While the accounting firms began to transform themselves into professional service firms full of multi-tasking collectivities, law firms largely hewed to their traditions. Despite a mild flirtation with multidisciplinary practices, law firms have remained single-minded entities. Finance and commerce are unable to develop without law whereas the services of a consultant have a more optional complexion. For lawyers there has been no comparative advantage to merging with other occupational groups.

The reverse is not the case, however. The directions indicated by the Clementi Review (2004) and the UK government's white paper on legal services (DCA 2005) suggest that the field may become open for non-legal institutions to offer legal services, for example, banks and supermarkets. These have been mainly driven by competition issues, which raise interesting concerns for the legal profession. For a long time the legal profession thought itself immune from competition issues by virtue of its professional status. Law was different. There was the fiduciary aspect combined with the tenets of lawyer-client privilege. Although the legal profession was able to justify a range of restrictive practices, including bars on unauthorised practice, it was not inoculated against challenge. As lawyers' preserves have been chipped away, pressure for greater regulatory control has emerged. In both the US and the UK a series of corporate scandals—eg, Savings and Loans, Enron, Maxwell, BCCI—have created much doubt around concepts of self-regulation.

All of this has taken place against a background of the legal profession announcing it would raise ethical standards, improve legal education (including continuing professional development), and promote better quality services (cf. Boon et al. 2005). The results of these promises are still awaited. Yet one of the key shibboleths of the legal profession, its independence from the state and clients has become less and less true. This was exemplified when in 2004 the client of a bank was unable to find a City of London law firm willing to sue the bank in case it damaged relationships (The Lawyer 2004). Gordon has further argued that

> [Lawyers'] moral standing has always been somewhat dubious because one of their jobs is to put the best face on even unattractive clients and causes, and because they are suspected over overselling their competence to profit from the misery of others. Valid or not, the critiques had a corrosive effect on attempts to defend professional values, good ones as well as bad ones, in terms of civic virtue or social trusteeship (2006: 6).

It suggests lawyers are legal heliotropes. These developments have placed the professionalism of the legal profession in jeopardy. It can no longer rely on its old stock of nostrums to mount defences. One consequence of law firms' activities has been the growth in external regulation. In the US the Securities and Exchange Commission and other federal agencies now have regulatory oversight of lawyers, in addition to state bars. Within the UK new regulatory structures are being formulated that will embody considerable external input. Self-regulation, one of the cardinal features of professionalism, is at risk.

The image of the classic P^2 type of professional organisation as presented by Lazega (2001) probably no longer obtains. But we do find traces trailing through contemporary law firm organisations. Law firms still claim to be partnerships, even if it is the MPB type, not corporations, so their identification with the clients appears not to be total. Even the most bureaucratic firms are subject to some of the same tensions as "Spencer Ropes & Gray". Partners, and departments, have to negotiate over resources, whether they are

associates, clients or funds. While certain departments can influence decisions more than others, eg, M&A in Skadden, they cannot exercise naked power as the M&A partners discovered when they attempted to promote more partners than they had agreed (Caplan 1993: 254). In this they are Montesquieu structures of interlocking niches competing for resources.

Of course this is brought further into relief when law firms adopt merit-based systems of remuneration over lockstep. Individualism then becomes the defining characteristic virtually opposed to collective endeavour. Both Baker & McKenzie and Skadden Arps typified this kind of behaviour among its partners. Remuneration was often a divisive force in the firms pitting lawyer against lawyer and departments against each other.

There are situations where large law firms have stayed with lockstep but found it difficult to operate in a global context. When Clifford Chance merged with Rogers & Wells of New York, it had to integrate an “eat what you kill” culture with a lockstep one. It attempted to do this by creating “super-points” for the exceptional New York lawyers as a transition to the normal lockstep. However, many of the key New York rainmakers left for other firms which had merit structures.

It may appear that “eat what you kill” is simply divisive and corrosive of evolving a true firm culture, but many law firms use it. It enables lawyers to claim their autonomy and identity at the expense of the firm. Realists might say that it reflects the nature of contemporary law firms. Partnership is now a transitory phenomenon not a lifetime match. If the converse, lockstep, achieves a longer term relationship in partnerships then it would be the obvious winner. But the very Magic Circle firms that have operated lockstep, apart from Slaughter and May, are now “de-equitising” partners, creating two-tier partnerships, and suffering high churn rates among their associates (The Lawyer 2006). The bargain implicit in the tournament has been broken.

There is one feature of professionalism that has been implicitly referred to but not made explicit yet. It is trust, one of the internal goods of satisfaction and excellence that MacIntyre (1984) believes characterises practice. One of the reasons for the success, I have argued elsewhere (Flood 2006), is that large law firms have been able to engender trust in a globalising world because of the role they play in sanctifying transactions. Their system of private ordering enables economic actors, strangers to each other, to engage in business in the belief that most contingencies have been covered in their documents. They have a template of proper behaviour, so to speak. The features of the institutions that create trust include the fact that they themselves embody the values of trust by virtue of being professional partnerships, or at least presenting themselves as such. The question can be legitimately asked: are global law firms capable of sustaining the framework of trust given their size and structure?

Certainly, other institutions that have abandoned partnership for corporate life are finding difficulties in balancing self-interest and clients’ interests. One example illustrates the dilemma. Goldman Sachs, the investment bank that

was once a partnership now a corporate entity, is a pre-eminent adviser to business of many years' standing. It also invests its own funds. With the rise in private equity investment, Goldman has participated in a number of hostile takeover bids in the UK and elsewhere (Financial Times 2006). It has now found that a number of its clients are doubtful of the bank's good faith. They wonder if they too will become targets. The result is that clients are switching away from Goldman. The trust that made Goldman a valued broker and counsellor has been diminished, such that the bank's chairman has had to command his managers to abstain from participating in hostile bids. There was a moment when a law firm nearly committed a similar error. Clifford Chance proposed categorising its clients into three prioritised strata: international, regional, and national. The regional and national clients were not happy at being ranked second and third in the firm's value structure. The firm dropped the classification.

All four law firms presented in this chapter started with the goals and values of professional partnerships. Law would be a means of earning a living but it would be a creative and enjoyable enterprise carried on among equals, as defined by MacIntyre (1984). Not all of them were able to sustain that vision, although I would have to question how far Skadden Arps subscribed to such a vision. Baker & McKenzie it seems was doomed by its very goal to fail. Russell Baker wanted the firm to be situated throughout the world. While the American lawyers dominated the firm through numbers, it succeeded in maintaining a semblance of unity. That has stretched beyond reason. Even though the partners meet occasionally relationships are thin at best, non-existent at worst. What then is the meaning of the firm in this case? In a study of global insolvency an accountant remarked that "I know most other insolvency practitioners around the world better than I do my own partners" (Flood & Skordaki 1997: 126).

Two of the firms in this study started or adopted the aim early on to abandon traditional lawyer-client relationships. Both Skadden and Wachtell wanted to be transactional law firms, focussing on the task rather than the client. This does introduce a new dynamic to what professionalism is. In one way it is appearing to behave like English barristers do, almost being at one remove from the client (Flood 2002). The result is that one becomes reliant on brokers to supply or act as conduits for work, which can be a high risk strategy. It therefore can only be an available option for a few. It pushes these firms towards Johnson's mediative category where a third party intervenes between the professional-client relationship (1972).

Because of their size and reach Skadden and Baker & McKenzie have been forced to adopt sophisticated and bureaucratic systems of management. These have reduced the impact that partners are able to have within their firms unless they participate in the appropriate committees. Bureaucracy is also imbued with the idea of standards and standardisation that eventually supersede the values inherent in professional ethics. Alternatively, Slaughter and May and Wachtell have introduced gradations of management on a scale of some to none. It means that partners must be involved in the running of their firms, which places them in a participatory democracy mode.

Where does this leave the professionalism of the legal profession in the 21st century? There is a more industrialised work force in law. Extended probationary periods for associates, full-time associate tracks, two-tier partnerships are the norm in corporate law firms. Traditional ideas of partnership are in retreat as firms defend their elites at the expense of the new legal underclass. The increased use of standards and audit to control through "self-verification" displaces the inculcation of ethical values, which legal education has largely given up. If professionalism is a combination of values, knowledge, and self-regulation, then it is a shrinking territory. Slaughter and May and Wachtell nevertheless, and ironically, raise the possibility of enduring professional values in a globalised world. Are they such outliers that they can never be considered normal? Or do they represent the new face of professionalism in the 21st century?

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[2] Although Skadden took a brutalist approach to compensation with its “Pig Pool”, the problem of the New York office is equivalent to the elephant in the drawing room. It is too big. Big law firms usually find their New York offices are the most profitable and the most highly remunerated compared to others. And law firm chairmen also find that the New York office is the most demanding in terms of their time and energy. If they don’t give the office the time it demands, in the words of one law firm chairman I interviewed, “The lawyers walk.”