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# The Lawyer Bubble: A Profession in Crisis, by Stephen J. Harper (book review)

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allow the British to search American ships suspected of engaging in the illegal transatlantic slave trade." He discusses how, after Congress abolished slavery in the District of Columbia in 1862, thousands of Maryland slaves fled to the District. He discusses how slaveholders moved their slaves to plantations farther inland in order to distance them from Union lines to which they could flee, and how the Union established "contraband camps" to accommodate the large number of slaves who did flee. He discusses how Union officers dealt with slave mothers who fled to Union lines with their children but could not be put to work as the men were.

In April 1864, Lincoln wrote, "When the war began, three years ago, neither party, nor any man ... anticipate[d] that domestic slavery would be much affected by the war." In his second inaugural address, Lincoln said that, despite the fact that slavery "was, somehow, the cause of the war," neither side "anticipated that the *cause* of the conflict might cease with, or even before, the conflict itself should cease." James Oakes responds: "This was nonsense. When Lincoln was inaugurated [on March 4, 1861], it was hard to find anyone who did *not* anticipate that slavery would be very much 'affected' by the war. Lincoln's own actions belie his memory. Within weeks of the South's capture of Fort Sumter, his cabinet approved [General Butler's] policy of refusing to return fugitive slaves in the seceded states. ..." In 1864, despite the wishes of even some war-weary Republicans, Lincoln refused to negotiate a peace that would allow slavery to survive. Nevertheless, because the Constitution protected slavery in the states where it existed, Lincoln always insisted that the abolition of slavery was not the purpose of the war. It was only a means to restore the Union. *Freedom National* shows that this distinction made little difference. ⊙

*Henry Cohen is the book review editor of* The Federal Lawyer.

## *THE LAWYER BUBBLE: A PROFESSION IN CRISIS*

BY STEPHEN J. HARPER

*Basic Books, New York, NY, 2013. 251 pages, $26.99.*

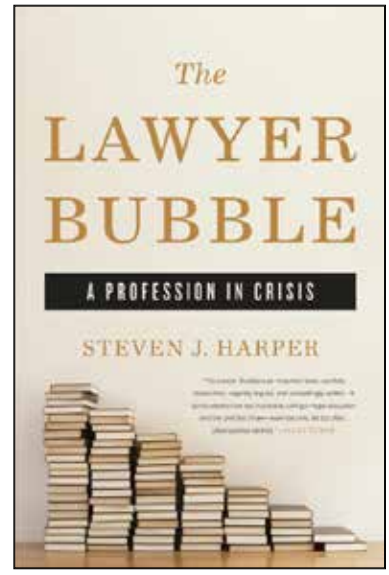
**Reviewed by Michael Ariens**

Stephen J. Harper's, *The Lawyer Bubble: A Profession in Crisis,* is the latest iteration of the "institutional failure" or "business disaster" story. A number of such books were published about 1990, including the classic *Barbarians at the Gate: The Fall of RJR Nabisco*, which told a tale of corporate excess. The equivalent in the law field at the time was *Shark Tank*, the subtitle of which, in case anyone browsing in a bookstore was unclear about the title, is *Greed, Politics, and the Collapse of Finley Kumble, One of America's Largest Law Firms*. Business disaster books have been quite popular since then, for businesses (such as Enron and Tyco and Lehman Brothers) keep failing in such spectacular fashion.

The Great Recession that began in December 2007 led to another round of business disaster books, including *Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System—And Themselves*; *A Colossal Failure of Common Sense: The Inside Story of the Collapse of Lehman Brothers*; and *House of Cards: A Tale of Hubris and Wretched Excess on Wall Street*. Like their forebears, these books make a hard sell for the claim that the disaster was of a titanic nature. And, where the business disaster book is found, the legal disaster book is sure to follow.

*The Lawyer Bubble* has an important point to make: The legal profession suffers from major problems and is in a crisis. Unfortunately for its author, these problems do not include a bubble of lawyers, making the catchy title inapt. American law schools will continue to enroll fewer students than the 50,000-plus enrolled shortly after the Great Recession struck, and some law schools are likely to fail, creating significant economic uncertainty for universities and academics who have benefitted from a formerly impervious market for legal education. Nevertheless, the claim that, for the foreseeable future, the number of law graduates will far outweigh the number of law graduates, is unconvincing, though it is likely true in some parts of the United States. I am convinced, however, that the debt that law students have taken on is too large for the incomes new lawyers will earn. Further, I am convinced that large law firms will continue to hire fewer new law graduates than they have in the recent past. But even if these two beliefs are true, it does not mean that a bubble exists and is about to pop.

Harper writes well, and his passion for the profession of law and those who hope to enter it comes through clearly. His research is thorough, and he has thought deeply about the modern American legal profession, and,




in particular, the modern large law firm. But the structure of *The Lawyer Bubble*, and its quite modest proposals for reform, leave me wondering for whom Harper believes he is writing. *The Lawyer Bubble* requires too much background knowledge to be of much use to undergraduates thinking about entering law school, offers little new for academics worried about their students, and proposes few things that most big law firm managing partners will readily accept. And, of other lawyers, from those employed by the government to in-house counsel to those in private practice in mid-sized and small law firms, Harper speaks not.

Thus, the approach taken in *The Lawyer Bubble*, as well as its title, results in hiding rather than highlighting serious structural problems within the legal profession. *The Lawyer Bubble* is divided into three parts: "Law Schools," "Big Law Firms," and "Deflating the Bubble." The problem with Part I is not Harper's diagnosis: Too many law school administrators believed that students could take on an extraordinary amount of debt because high-paying jobs would always await new graduates, and so law schools raised tuition with little or no regard for the possibility that the merry-go-round might stop. Further, the annual *U.S. News & World Report* ranking of law schools is based in part upon how much money they spend per student, regardless of whether the expenditures benefit the students. As Harper notes, the more a school "charges for tuition, the more it can spend—and the more students have to borrow." But this critique of legal education has already been done, and done better, by law professor Brian Tamanaha in *Failing Law Schools*.

Part II criticizes big law firms, and here Harper shines. As a retired former partner at the large law firm of Kirkland & Ellis, he knows where the bodies are buried. Lawyers at big law firms are dissatisfied, he writes, because of "the transformation of most such institutions into businesses focusing on the bottom line." That large law firms exist solely to maximize profits for partners is a theme that Harper discusses in illuminating detail and with fury and passion. "The central features of the prevailing big-firm model—leverage, hourly rates, and billable hours—create conditions that decrease opportunities for advancement and are hostile to any attorney's search for a balanced life. ... Meanwhile, partner profits and attorney dissatisfaction have risen in tandem as big firms' lawyers make more money and enjoy it less."

Harper traces the history of profit maximization by big law firms. He explains how partners became independent contractors looking to take "their" clients to the highest bidder, and how the "eat what you kill" ethos (see Milton C. Regan Jr., *Eat What You Kill: The Fall of a Wall Street Lawyer*) stratified "partners," created enormous income disparities, and made it easy for big law firms to layoff associates and "unproductive" partners by the hundreds (more than 5,000 total) when the Great Recession occurred. After discussing the bankruptcies of the firms of Heller Ehrman, Thelen Reid & Priest, and Howrey, Harper discusses, in his finest chapter, the 2012 bankruptcy of Dewey & LeBoeuf. For those interested in the frailties of the ethos and economics of the very large law firm, this case study is exceptional.

Part III of the book, on deflating the bubble, proposes reforms of law schools and of big law firms, and concludes with a chapter titled "Prospective Lawyers." Harper's proposed reforms for law schools make sense, but none is original or particularly insightful. Law schools have been talking for years about what to do with the third year, including efforts to provide practical learning for students, and many academics accept that law schools should be more accountable for the debts that their students incur.

Harper's discussion of reforming the big law firm mixes the trite with the profound. Revising the billable hour system was an *ABA Journal* cover story; Harper offers little new about the pernicious consequences for lawyers and clients of equating time and money. His belief that big law firms will eliminate non-equity partnership status or reduce the income disparity among equity partners appears fantastical. On the other hand, his assessment of the harmful consequences to law firm culture through extreme leveraging of the associate-partner ratio, and his concern that big law firms fail to evaluate and provide meaningful work to associates, are ideas that some big law firms might embrace to differentiate themselves in the marketplace. He extols the efforts of Munger, Tolles & Olson to create "a strong identity, loyal clients, and happy lawyers," and offers it as a model to others.

The chapter titled "Prospective Lawyers" recounts the tragic suicides of several lawyers and the death, due to unclear causes, of a 32-year-old associate. Although bracing, this chapter can hardly be said to be relevant to deflating the bubble or to be about prospective lawyers.

In his epilogue, Harper discusses a former Kirkland & Ellis colleague, Fred H. Bartlit Jr. When Harper was a young attorney, Bartlit gave Harper's phone number to a client, who, Harper writes, "contacted me directly with a request to handle all of its cases in Chicago and Washington, D.C." Harper lauds Bartlit as one of several mentors from whom he learned how to practice law honorably and successfully. Harper then notes that, 20 years ago, Bartlit left Kirkland & Ellis to form his own litigation boutique firm, one that billed based on results rather than by time.

Harper's encomium to Bartlit is well deserved. But I wonder why Harper's answer to the transformation of the big law firm is reform rather than abandonment. Bartlit was the manager of the Kirkland & Ellis litigation department when he left the firm. If a lawyer as happy and successful as Bartlit decided, 20 years ago, that, on balance, abandonment was better than reform, then why would Harper believe otherwise? Harper has cogently and clearly shown that the intervening years have exacerbated the trend of transforming big law firms into businesses focused solely on maximizing profits. Can they really be reformed? Or is another transformation needed—one that doesn't see the big law firm as elite, but as obsolete. ⊙

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## *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN*

BY STUART BANNER

*Harvard University Press, Cambridge, MA, 2011. 355 pages, $29.95.*

**Reviewed by Harold L. Burstyn**

We lawyers mostly suffered through first-year property law, with its endless recitations of types of conveyances, one after another. We hoped never again to think about the vicissitudes of ownership, even if we practiced the law of real estate or of estates and trusts. Stuart Banner's almost 300 pages of clear and graceful prose should change our minds.

In a series of exceptionally readable chapters, supported by extensive endnotes, Banner's *American Property* takes us through the changes in our views of property from colonial times to the present. He begins by discussing the abandonment of what the English called incorporeal hereditaments, each a right that went with an estate in land or an office. Some of these rights never came to the United States: *advowson:* "the right to appoint a minister to a church"; *tithes*: "one-tenth of annual produce of the land within the parish"; *corodies*: "the right to receive food or money from a religious institution"; *dignities*: "a property right in a noble title." Other rights disappeared not long after our independence from Britain: rights of common, the right to hold a government office, primogeniture, entail. The English tradition of presuming a tenancy to be joint became a presumption of tenancy in common. The doctrine of *ancient lights*, which limited development in favor of not allowing new construction to restrict the light that fell on a property, soon disappeared.

Successive chapters in *American Property* follow other changes over time. First is the rise of intellectual property, a term that in the 18th century "meant something closer to the sum of knowledge possessed by a person or a society." Patents and copyrights originated in monopolies granted by the ruler. No longer discretionary by early in the 19th century, they became "property rights in information." Trademarks and goodwill became property by the last third of the 19th century. In the second half of the 19th century, property began to be understood as a bundle of rights, rather than as a thing, "in order to argue for *greater*