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The University of Kansas Law Review

THE LEGAL PROFESSION, LEGAL EDUCATION, AND CHANGE

*Robert H. Jerry, II**

Just because we cannot see clearly the end of the road, that is no reason for not setting out on the essential journey. On the contrary, great change dominates the world, and unless we move with change we will become its victims.

Robert F. Kennedy¹

The accounts of how the legal profession has changed in recent years are as abundant as the changes themselves.² The common message is clear: the magnitude of change is immense, and the pace is unprecedented.

The legal profession is currently larger and more diverse than ever before. In 1970, there were just over 350,000 lawyers practicing in the United States; by the year 2000, there may be more than one million.³ In 1960, only about 2.6% of all practicing lawyers

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1. Arthur J. Olsen, *Kennedy Exhorts the Poles to Further U.S. - Soviet Friendships*, N.Y. TIMES, July 2, 1964, at 6 (farewell statement in Warsaw, Poland).

2. See, e.g., John W. Bickel II & William A. Brewer III, *The Demise of the Billable Hour*, TEX. LAW., Sept. 14, 1992, at 26; Jon Jefferson, *But What Role for the Soul*, A.B.A. J., Dec. 1991, at 60; Kenneth L. Lowe, *Managing the Partnership Track*, RECORDER, July 17, 1992, at 7; Don Valeri, *Law Firms in the 1990s Embracing Change As Never Before*, L. PRAC. MGMT., July-Aug. 1992, at 36.

3. ABA Task Force on Law Schools and the Profession: Narrowing the Gap, *Legal Education and Professional Development — An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 15 [hereinafter *Report*].

were women.⁴ Today, more than 22% of the practicing bar are women, and with women comprising more than 40% of current law school enrollments, their percentage of the practicing bar will grow in the future.⁵ Although minority groups remain substantially under-represented in the legal profession, significant changes have occurred in the number of minority lawyers practicing in this country. In 1960, there were barely 2,000 African-American lawyers, just 0.7% of the practicing bar.⁶ By 1990, the number of African-American lawyers had grown to 25,704, or 3.3% of the nation's lawyers.⁷ Less data exists for other racial minorities, but, from 1972 to 1992, total minority enrollment in the nation's law schools grew from about 5,500 students to about 19,400 students,⁸ slightly more than 14% of the country's total law school enrollment.

The practice settings for lawyers are more diverse than ever before. Lawyers in all sectors are becoming increasingly specialized in the subject matters about which they advise clients. The last three decades have witnessed significant growth in organizations that provide legal services to the poor and the middle class. Private corporations have increased the number of in-house counsel. During the past two decades, the so-called large law firms grew exponentially, and, as a result, a support-services industry geared to large firms emerged during this period. Many aspects of the law practice became global in their character.

While the profession changed, legal education changed just as dramatically.⁹ In 1953, 125 ABA-approved, juris-doctorate-granting law schools enrolled fewer than 35,000 students. In 1992, the 176 ABA-approved law schools enrolled nearly 130,000 students. The typical law school in 1953 had a modest library collection of about 30,000 volumes; today, it is not uncommon for a law school library to be ten times that size. In the 1950s, law schools gave little attention to student recruitment or placement; today, most law schools have significant operations in both areas. As law schools grew, the number of faculty likewise grew to more than 5,500 full-time instructors,¹⁰ approximately quadrupling in four decades.

4. *Id.* at 20.

5. *Id.*

6. *Id.* at 25.

7. *Id.*

8. *Id.* at 24.

9. *Long-Range Planning for Legal Education in the United States*, 1987 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 5 [hereinafter *Long-Range Planning*].

10. *A Review of Legal Education in the United States*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 67.

The educational programs in the nation's law schools changed dramatically as well.¹¹ Training in professional skills became a major part of most schools' curricula. Clinical education, for example, where faculty work directly with students in live-client representation, attained importance in virtually every school's program. In response to a number of lawyers' involvement in the ethical lapses of Watergate, the ABA established a requirement that every law student be instructed in professional responsibility. As law school faculties grew, the diversity of course offerings increased; most schools offered students the opportunity to obtain significant specialty training in one or more areas. Problem solving exercises, legal writing experiences, and skills simulation courses (as opposed to live-client clinics) became more common in curricula, and the typical student spent less time in substantive law courses taught by the Socratic methodology.

But no change in either the profession or the academy has attracted more attention than the increase in the number of lawyers. In 1948, the nation had 169,489 lawyers, but during the next three years, as labor markets absorbed returning World War II veterans whose educations were aided by the GI Bill, this number increased to 221,605, an increase of 31% in only three years.¹² From 1951 to 1971, the profession's size grew at a rate of approximately 3% annually; at the end of this period, the nation's lawyers numbered 355,242. Increases of this magnitude over a two-decade period may appear unremarkable, but the growth rate did exceed the rate of growth in the overall population during this period. In 1948, the ratio of population to lawyers was 790:1; this declined to 695:1 in 1951, and to 572:1 in 1971.

Since 1972, the growth in the number of lawyers has been considerably greater. By 1981, the nation's lawyers numbered 542,205, a 52% increase in ten years, and by 1991, the number rose to 777,119, a 118% increase from 1971. The ratio of population to lawyers fell to 418:1 in 1981 and 320:1 in 1991. As the profession more than doubled its size in this twenty-year period, the median age of the profession declined, and the experience of individual lawyers, on average, fell.¹³ Today, more than half of all lawyers entered the profession after 1975.

11. See generally *Long-Range Planning*, *supra* note 9, at 10-12 (giving an overview of changes in legal education since the late 1960s).

12. The data in this discussion are derived from the *Report*, *supra* note 3, at 15, which in turn draws from the American Bar Foundation, *1985 Supplement to the Lawyer Statistical Report*; R.L. ABEL, *AMERICAN LAWYERS* tbl. 22, at 280 (1989); and the ABA Membership Department.

13. *Report*, *supra* note 3, at 17.

The reasons for this growth are complex and widely debated. The ABA Task Force on Law Schools and the Profession states that "[t]he explosive growth . . . began in the law schools."¹⁴ But law schools did not cause the high degree of interest in the opportunities provided by the legal profession, which led to an abundance of applicants, and law schools had little to do with the economic factors that resulted in a period of sustained economic growth which increased the demand for lawyers' services. The large jumps in the 1960s and 1970s in the financial rewards of law practice undoubtedly attracted many to the profession who would otherwise have entered different fields. Also, the perception that law could be the vehicle for positive social change undoubtedly encouraged many to consider law as a career. At the University of Kansas, we have yet to match the size of the record applicant pools of the early 1970s, when many young men sought to continue their education during the Viet Nam War. As a graduate program in which no particular prerequisites are needed, law has always been an attractive pursuit for those who are making last-minute decisions to pursue post-baccalaureate education.¹⁵ Moreover, throughout the 1970s and 1980s, women and minorities sought entry to the profession in much larger numbers, and this helped sustain the growth of the profession during this period.

It is noteworthy, however, that the increase in lawyers over this period has accompanied significant growth in our nation's economic activity and a concomitant increase in our standard of living.¹⁶ This has created an environment that demanded more legal services to meet the transactional needs of the more complex and affluent marketplace; a marketplace in which more people had the resources to afford legal services. The increase in regulatory

14. *Id.* at 13.

15. The most recent manifestation of this phenomenon has occurred during the recent and on-going economic recession. Although demand in the traditional employment tracks for law school graduates is down, and this appears to be widely known, law school applications are stable, and in some regions are actually increasing. This somewhat perplexing situation is fueled, in my opinion, at least in part by college graduates who cannot find a job and who, at the last hour, consider graduate education and choose to enter law school.

16. From 1971 to 1991, when the number of lawyers in the nation more than doubled, the nation's gross national product in current dollars more than quadrupled. U.S. Bureau of the Census, *Survey of Current Business* (Apr. 1992), in *STATISTICAL ABSTRACT OF THE UNITED STATES 1992* tbl. 678, at 431. It would be interesting to compare the percentage of the world's lawyers currently practicing in the U.S. to the country's share of the world's gross national product, but "[c]ounting lawyers comparatively is a daunting undertaking, plagued by poor data and a bushel of apples and oranges problems." Mark Galanter, *The Debated Debate on Civil Justice*, *Wis. LAW.*, July 1992, at 5.

activity in the post-World War II era also increased the demand for lawyers, as did court decisions, both federal and state, which expanded the rights of those accused of criminal conduct. In addition, a law degree has been increasingly viewed as a useful credential for business, industry, and government positions that do not involve the traditional practice of law.

The legal profession has always been subject to pointed criticism,¹⁷ but attacks on lawyers during the last few years have had particularly strong resonance. Bar leaders have acknowledged that Vice President Quayle's speech at the 1991 ABA annual meeting in Atlanta "tapped a rich vein of public resentment of the legal profession."¹⁸ The 1992 Bush/Quayle campaign made a deliberate decision to attack trial lawyers and blame them for a variety of ills, and the critique made little effort to assist the general public's understanding of the diversity of the bar. The Clinton/Gore strategy, which began in a decidedly defensive posture when the Bush/Quayle campaign made much over the Arkansas Trial Lawyers Association's endorsement of Governor Clinton, deflected the Bush/Quayle parry by emphasizing that Clinton/Gore also stood for law reform, not by publicly highlighting the contributions of lawyers.¹⁹

Today's assault on the legal profession takes on particular urgency due to the seeming willingness of many Americans to identify too many of the nation's ills, each of which is a product of many interrelated and highly complex factors, with the increases in recent decades in the number of lawyers. The health care crisis, which has its roots in the costs of new technology, expanded

17. Examples of such criticism are well known to most lawyers. *E.g.*, Samuel T. Coleridge, *The Devil's Thoughts*, in *THE COMPLETE POETICAL WORKS OF SAMUEL TAYLOR COLERIDGE* 320 (1912) ("He saw a Lawyer killing a Viper . . . And the Devil smiled, for it put him in mind Of Cain and his brother, Abel."); Carl Sandburg, *The Lawyers Know Too Much*, in *THE COMPLETE POEMS OF CARL SANDBURG* 189 (1950) ("Why does a hearse horse snicker Hauling a lawyer away?"). In recent years, the critique has assumed an air of maliciousness, and lawyer jokes often carry a sting. *See, e.g.*, BILL BERGER & RICARDO MARTINEZ, *WHAT TO DO WITH A DEAD LAWYER* (1988); SKID MARKS: *COMMON JOKES ABOUT LAWYERS* (Michael Rafferty ed., 1988). Interesting, the difficulties lawyers encounter in the Bible seem to have received less attention. In the Scripture lesson read at my wedding, the lawyer who tried to trick Jesus with a question about the most important law was soundly cut down. *See Matthew* 22:35-40. Lawyers also take a beating elsewhere in the New Testament. *See, e.g., Luke* 7:30 (criticizing lawyers for rejecting God's counsel); *Luke* 11:46-52 (criticizing lawyers for not helping people in need and adding a curse for good measure).

18. Speech by Talbot D'Alemberte, President of the American Bar Association, at the Annual Meeting of the Kansas Bar Association in Topeka, Kansas (June 1992).

19. *See* Paul Richter, *Record Shows Trial Lawyers "Own Bill Clinton," Quayle Says*, *L.A. TIMES*, Aug. 28, 1992, at A20; Sandra Torry & Mark Stencel, *Bush, Quayle Put Lawyers in Election-Year Docket*, *WASH. POST*, Aug. 28, 1992, at A16.

coverages without cost containment, and lack of access owing to inefficient insurance markets, is often linked to the expense of defensive medicine caused by frivolous malpractice suits, which is at best only a small part of the equation. The decline in public recreational services, which has more to do with the stress imposed on local budgets by withdrawal of federal support for state and local governments, is sometimes blamed on expensive tort suits brought by lawyers.

Incredibly, the alleged excess of lawyers has been blamed, most notably by President Bush and Vice President Quayle, for the current sluggishness in the national economy.²⁰ This attack identified lawyers as causing unnecessary and excessive legal expenses and deterring large and small businesses from pursuing economically productive innovation because of the threat of litigation. Whatever force this argument has as an explanation for the recession, it pales in significance to the force of other factors, such as the cost of retooling an outdated manufacturing base, consumers' attraction to what are perceived to be higher-quality foreign-produced products, a labor force in need of retraining, the dislocations caused by cuts in defense spending, and decisions by business managers who have emphasized short-run costs and benefits to the detriment of long-run interests.

Yet, it is easy to attribute an eroding economic base to the costs associated with tort litigation and, ergo, greedy lawyers, when the data fall well short of establishing this assertion.²¹ The common refrain that the nation now has one lawyer for every 320 people (which is correct),²² that the U.S. has 70% of the world's lawyers (which is incorrect),²³ and that we are awash with frivolous lawsuits (which is incorrect)²⁴ points to an easy-to-understand, easy-to-hate

20. See, e.g., Harriet Chiang, *Bush Attacks "Crazy Lawsuits,"* S.F. CHRON., Sept. 24, 1992, at A1.

21. See Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645 (1992); Marc Galanter, *The Life and Times of the Big Six; Or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 936-46; Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PENN. L. REV. 1147 (1992).

22. See *Report*, *supra* note 3, at 15-16 (in turn relying on 1990 U.S. Census figures and the ABA Membership Department).

23. Chiang, *supra* note 20, at A1 (per Professor Marc Galanter, the U.S. accounts for approximately 30% of the world's lawyers).

24. Vice President Quayle's famous speech at the 1991 ABA meeting referred to a litigation explosion and mentioned 17.3 million lawsuits filed in state courts in 1989. Chiang, *supra* note 20, at A1. Ninety-seven percent of those suits were small claims, wills and estates, and divorces. Mark Green, *Bush and Quayle's "Legal Reform": A Hoax*, NEWSDAY, Sept. 24, 1992, at A1. Tort cases made up less than 0.5 percent of all state court cases. Chiang, *supra* note 20, at A1.

target for what are very real and dangerous problems facing our nation.

It is increasingly clear that our nation will not tolerate expensive and inequitably provided health care, inadequate public services, a declining manufacturing base, and an eroding standard of living. We are demanding change. To the extent the legal profession is identified as contributing to, rather than helping solve, these problems, we are a profession at risk.

The legal profession has unprecedented diversity by every measure; thus, suggesting anything that even resembles a rallying call for a unified profession is vacuous. But some realizations need to guide our discussions about the future.

First, our criminal justice system needs reform. The costs of incarcerating those convicted of crimes are increasing dramatically, and the expenses of new prison construction, prison maintenance, and running existing prisons are impairing the ability of state budgets to devote resources to the social and economic problems that lead to crime. The drug crisis is placing particular stress on the criminal justice system. Lawyers do not cause these problems, but lawyers who work in the criminal justice system do understand these problems and can do much to help our nation find solutions.

Second, our civil justice system needs reform. As a profession, we have collectively paid too little attention to the reasons for the public's interest in alternative dispute resolution (ADR). That ADR and the bundle of related alternative processes — including mediation, rent-a-judge, and mini-trials — are attractive as ways to reduce the time and expense of litigation points to a widely held frustration with the current litigation system. Without the benefit of data, I would also assert that the public widely perceives the civil litigation system as being excessively adversarial and hostile. The abuses of the system that do occur receive widespread publicity, much to the glee of the profession's critics. The experiences of those who suffer grievous wrongs and find relief in that system receive scant attention. Although, we would like to think that those who experience the legal system firsthand have higher levels of satisfaction than those with no such experience, the facts may be otherwise.²⁵ If as a profession we fail to address these concerns,

25. See Thomas W. Church, *The Mansion vs. the Gatehouse: Viewing the Courts from a Consumer's Perspective*, 75 JUDICATURE 255, 256 (citing YANKELOVICH, SKELLY AND WHITE, INC., *THE PUBLIC IMAGE OF COURTS; HIGHLIGHTS OF A NATIONAL SURVEY OF THE GENERAL PUBLIC, JUDGES, LAWYERS AND COMMUNITY LEADERS* (1978), for the proposition that public confidence in American courts is low, and that the more experience people have with courts as witnesses, litigants, or jurors, the less confidence they express in the judicial system).

someone outside the profession will do it for us, and expediency may take precedence over fairness if reform occurs without the close involvement of the legal profession.

Third, the interests of those who suffer accidental loss need to be elevated in the public discussion of law reform. Although tort law is only one small part of the total legal system, tort litigation has become a lightning rod for some of the most vociferous critics of the legal profession. This, then, is an area where perspective is needed, even if the significance of the issue is relatively small in the context of any objective assessment of how to prioritize needed law reforms.

During the last two decades, the needs of the victims of accidental loss have been addressed, but much remains to be done. To take the carnage on the nation's highways as one example, the evidence shows that the traditional tort-liability insurance system has been an inefficient way to get relief into the hands of accident victims, and that well-designed no-fault systems implemented during the past two decades have put more resources into the hands of accident victims at a lower cost. These changes have been resisted under the reasoning that no-fault mechanisms take away the right to trial by jury, but this debate usually fails to focus on whether the public — and accident victims in particular — would be willing to trade the right to jury trial for a guarantee of prompt, adequate reimbursement of economic loss suffered in accidents. My own view is that they would. But even if I am wrong, at least the public ought to be asked.

In many instances where injuries are suffered off the highway, our nation has completely failed to come to grips with the needs of accident victims. For example, it is a given that a small percentage of babies are born with defects that will require a lifetime of highly expensive treatment and care. In many situations, the injury is the fault of no one; it just happens. Yet parents of such a child, now looking at a baby who desperately needs care and realizing they lack the economic means to provide it, will look to third parties, meaning anyone with any relationship to the child who might have insurance or other resources that could be accessed for help. Who can blame them? What parent would not do the same in those circumstances when left with no other alternative? This problem is not caused by lawyers, but it results from our society's failure to provide adequate economic assistance to victims of accidental loss. Lawyers who work in the civil justice system understand these problems and can do much to help our nation find solutions.

Of course, legal educators can do much to help in these efforts. The expertise on our law schools' faculties must be tapped in the

search for solutions. Also, law schools must help students understand the challenges facing both our profession and our nation, and must assist in the inculcation of a sense of responsibility for helping find answers.

The partnership between law schools and the practicing bar that needs to be nurtured and expanded is discussed in great detail in the recent report of the ABA Task Force on Law Schools and the Profession: Narrowing the Gap. This Task Force, which was created in 1989 by the ABA's Section of Legal Education and Admissions to the Bar, published the results of its work in August 1992. Its report, *Legal Education and Professional Development—An Educational Continuum*,²⁶ is exhaustive.²⁷ It reflects the most comprehensive effort to date to explore our changing legal profession, the public's and our own expectations of what our profession is and what it ought to be, and how those in the profession acquire the skills and values necessary to function as professionally responsible lawyers. The final recommendation of the Task Force calls for establishing an American Institute for the Practice of Law with the objective of assisting the legal profession "more adequately to meet the public's appropriate expectations with respect to lawyer competence and professional responsibility."²⁸

One of the most important contributions of the Task Force is its recognition that "the task of educating students to assume the full responsibilities of a lawyer is a continuing process that neither begins nor ends with three years of law school study."²⁹ Instead, legal education is actually a continuum that begins before law school and lasts throughout one's career. Thus, law schools, by themselves, cannot be expected to resolve every issue to which lawyers' skills and values are relevant, but law schools cannot abdicate their responsibilities on these issues either.

Neither the legal profession's nor legal education's next generation can expect to conduct business as usual. Changes, of necessity, will occur. Our neglect of the problems that do exist in our legal system will give those who articulate contrived problems the

26. *Report, supra* note 3.

27. The Report exceeds 300 pages in length and has nearly 100 additional pages of appendices. The core of the Report is a detailed "Statement of Skills and Values" which inventories the skills and professional values that the Task Force thought essential for lawyers to have. *Id.* at 135-221. In its concluding passage, the Report lists twelve pages of detailed recommendations for "improving and integrating the process by which lawyers acquire their skills and values and for enhancing lawyers' professional development at all stages of their careers." *Id.* at 327.

28. *Id.* at 337.

29. *Id.* at 8.

upper hand in the effort to forge solutions. If that occurs, neither a better nor fairer system of justice will emerge. Lawyers, judges, and educators must assume leadership in explaining to the public what changes the legal system requires and how these changes are to be accomplished. Much is at stake.