A Flawed System of Law Practice and Training

Derek C. Bok

All graduate schools risk becoming captives of their professions, absorbed in preparing skilled professionals and seeking new knowledge for practitioners to employ. This preoccupation is understandable, since the acquisition and transmission of specialized knowledge are the central tasks of a professional school. But they are not its only tasks. A vigorous school should address the larger problems of its calling, serving as a conscience to its profession and a stimulus for change. In fulfilling this function, a faculty must be knowledgeable enough to speak convincingly to practitioners, detached enough to see the blemishes of their profession, skilled enough in research and analysis to explore each defect thoroughly and offer thoughtful suggestions for reform. These responsibilities are always important, but particularly so today when the public is disenchanted with the professions and highly critical of their performance. . . .

Our legal system bears a strong resemblance to our health care system twenty years ago. At that time, the medical care offered to paying patients was rapidly becoming more effective, more sophisticated—and more expensive as well. But quality medicine was available only to the well-to-do or to those who happened to be covered by an adequate prepaid plan. Millions of people with modest incomes could not afford decent care; they visited doctors less often and their mortality rates were distinctly higher.

From my distant perch, our legal system seems to occupy a comparable position today. As in medicine, there is much in our law which represents a triumph of the human spirit: the steadfast defense of individual freedom and civil liberties, the constant elevation of reason over prejudice and passion, the protections afforded to minority and disadvantaged groups. But there are also similarities of a darker kind. The laws that govern affluent clients and large institutions are numerous, intricate, and applied by highly sophisticated practitioners. In this sector of society, rules proliferate, lawsuits abound, and the cost of legal services grows much faster than the cost of living. For the bulk of the population, however, the situation is very different. Access to the courts may be open in principle. In practice, however, most people find their legal rights severely compromised by the cost of legal services, the baffling complications of existing rules and procedures, and the

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long, frustrating delays involved in bringing proceedings to a conclusion. From afar, therefore, the legal system looks grossly inequitable and inefficient. There is far too much law for those who can afford it and far too little for those who cannot. No one can be satisfied with this state of affairs.

If medicine faced a similar predicament at least two decades ago, what can we learn from its experience? Alas, not much. To be sure, Congress was reasonably successful in giving access to the needy. By such enacting programs as Medicare and Medicaid, it did offer poor and elderly people the chance to have quality care. But legislators chose to reach their goal by simply asking taxpayers to reimburse physicians for any services they rendered to the old and the indigent. Thus, neither doctor nor patient had an incentive to keep costs down. Since quality care was expensive, the result was a massive rise in health costs. To curb these increases, lawmakers resorted to regulations to slow hospital construction and moderate the rise in room rates. But this strategy failed because the regulators never fully understood the problem and never succeeded in gaining the cooperation of doctors. Health care costs continued to rise more rapidly than the cost of living and now consume almost 10 percent of our gross national product—a larger share than in any other industrialized country of the world.

With this example before us, we should think hard about the problems of our legal system to avoid making similar mistakes. In this spirit, let us examine our problems and try to understand them clearly.

One-half of our difficulty lies in the burdens and costs of our tangle of laws and legal procedures. Contrary to popular belief, it is not clear that we are a madly litigious society. It is true that we have experienced a rapid growth in the number of complaints filed in our courts. But filings are often only a prelude to some kind of voluntary settlement. The number of disputes *actually litigated* in the United States does not appear to be rising much faster than the population as a whole. Our courts may *seem* crowded, since we have relatively few judges compared with many industrial nations. Nevertheless, our volume of litigated cases is not demonstrably larger in relation to our total population than that of other western nations.

At the same time, the complexity of litigation seems to be increasing. Even if a case is settled without trial, preliminary motions and discovery procedures may occupy much time of judges and attorneys. Moreover, the country has experienced a marked growth in statutes and administrative regulations; the number of federal agencies jumped from twenty to seventy in the last two decades while the pages of federal regulations tripled in the 1970s alone. Paralleling these trends, the supply of lawyers has doubled since 1960 so that the United States now boasts the largest number of attorneys per thousand population of any major industrialized nation—three times as many as in Germany, ten times the number in Sweden, and a whopping twenty times the figure in Japan. In sum, though there may not be more court cases, the country has more legal work to do and many more attorneys to do it. Just what society pays for this profusion of law is hard to guess. Lloyd Cutler has put the figure at $30 billion a year,[1] but the truth is that no

1. Lloyd Cutler, Conflicts of Interest, 30 Emory L.J. 1015 (1981).

one has bothered to find out. Be that as it may, legal costs are primarily people costs, and if we mark the growth in the total number of lawyers and the average compensation of attorneys, it is clear that legal expenditures have been climbing more rapidly than the gross national product for many years.

Is it wrong to spend so much on legal services? After all, people pay a lot for underarm deodorants, television soap operas, liquor, and drugs. If rules are passed by elected representatives and legal expenses are voluntarily incurred, is it clear that the nation is spending "too much" on law?

The catch in this argument, of course, is the quiet assumption that rules and regulations are all freely chosen through something akin to a market process. In fact, that is far from being the case. All lawsuits are heavily subsidized by the government and are usually desired by only one party to the dispute. Many rules are the work of judges or bureaucrats over whom the general public has little control. Although the public may support the general outlines of a statute, its details and complexities are rarely understood, let alone endorsed, by the average voter. Most of our laws and administrative regulations have been complicated by the efforts of pressure groups and lobbyists. Even legislation widely approved when enacted often proves unexpectedly cumbersome and ineffective, yet efforts at reform quickly die from inertia or from the opposition of vested interests.

No, we cannot comfort ourselves by supposing that laws and legal services are freely chosen by the public like breakfast cereals and automobiles. Nor do laws necessarily offer effective or efficient means of achieving the public good. For example, after a dozen years of teaching labor law and antitrust, I would argue that large areas of the law in each of these fields rest so heavily on sheer guesswork that no one can be confident that our rules actually serve the public interest.

In antitrust, I would not go so far as to endorse the view, now fashionable among economists, that our laws seriously harm the economy (except, perhaps, for a few particulars, such as the restrictions on cooperative research ventures). I do question whether most of the legal marathons and treble damage suits that clutter the field are truly worth the money and time they cost. To test this judgment, I recently approached an old acquaintance—one of the country's leading antitrust experts—and asked him whether he would dispute my claim that over half of all antitrust decisions have no demonstrable effect in furthering accepted economic goals. Instead of chiding me for speaking rashly, my colleague replied that he would push the figure up to at least 75 percent.

In labor law, more than half the work of the National Labor Relations Board is devoted to defining the proper employee unit in which to hold elections and enforcing an intricate body of rules governing the electioneering behavior of unions and employers. Unit determinations often consist of fine-spun applications of vague, even contradictory, principles with no convincing demonstration of how the public interest is served. One can argue that these decisions cause little harm, especially if the size of the election unit is unimportant. But they do cost inordinate amounts of money, time, and energy. At Harvard, for example, a year of effort and over one

hundred thousand dollars were consumed by the government and parties trying to decide whether to hold an election among the clerical workers in the entire University or only among those working in the Medical School. Even a rich country cannot afford to spend such sums on issues of this kind.

As for the electioneering rules, studies have shown that most of the board's attempts to regulate employer threats, seductive promises, misleading statements, and other campaign gambits have little or no effect on the voting behavior of employees or the outcome of the elections themselves.[2] Much the same is true of other aspects of our labor laws. For example, numerous studies have found no reduction in accident rates resulting from the mass of regulations on work-place safety.[3] And yet, the law grinds on in an unceasing effort to build a consistent body of rules from what are often unproven or unrealistic premises.

If these observations are even half true, our legal system leads to much waste of money that could be put to better purposes. But even greater costs result from the heavy use of human talent. Not only does the law absorb many more young people in America than in any other industrialized nation; it attracts an unusually large proportion of the exceptionally gifted. The average College Board scores of the top 2,000 or 3,000 law students easily exceed those of their counterparts entering other graduate schools and occupations, with the possible exception of medicine. The share of all Rhodes scholars who go on to law school has approximated 40 percent in recent years, dwarfing the figures for any other occupational group. Some readers may dismiss these statistics on the ground that lawyers often move to careers in business or public life. But the facts fail to support this rationalization, for roughly three-quarters of all law school graduates are currently practicing their profession. . . .

The net result of these trends is a massive diversion of exceptional talent into pursuits that often add little to the growth of the economy, the pursuit of culture, or the enhancement of the human spirit. I cannot press this point too strongly. As I travel around the country looking at different professions and institutions, I am constantly struck by how complicated many jobs have become, how difficult many institutions are to administer, how pressing are the demands for more creativity and intelligence. However aggressive our schools and colleges are in searching out able young people and giving them a good education, the supply of exceptional people is limited. Yet far too many of these rare individuals are becoming lawyers at a time when the country cries out for more talented business executives, more enlightened public servants, more inventive engineers, more able high school principals and teachers.

These points may seem carping or conjectural, but they are not without tangible effects. A nation's values and problems are mirrored in the ways in which it uses its ablest people. In Japan, a country only half our size, 30 percent more engineers graduate each year than in all the United States. But

2. Julius G. Getman, Stephen B. Goldberg & Jeanne B. Herman, Union Representation Elections: Law and Reality (New York: Russell Sage Foundation, 1976).

3. Stephen G. Breyer, Regulation and Its Reform (Cambridge, Mass.: Harvard Univ. Press, 1982).

Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 *every year.* It would be hard to claim that these differences have no practical consequences. As the Japanese put it, "Engineers make the pie grow larger; lawyers only decide how to carve it up."

The elaborateness of our laws and the complexity of our procedures absorb the energies of this giant bar, raise the cost of legal services, and help produce the other great problem of our legal system—the lack of access for the poor and middle class. The results are embarrassing to behold. Criminal defendants are herded through the courts at a speed that precludes individual attention, leaving countless accused to the mercy of inexperienced counsel who determine their fate in hasty plea bargaining with the prosecution. On the civil side, the cost of hiring a lawyer and the mysteries of the legal process discourage most people of modest means from trying to enforce their rights. Every study of common forms of litigation, such as medical malpractice, tenant evictions, or debt collections, reveals that for each successful suit there are several others that could be won if the victims had the money and the will to secure a lawyer.

Congress has tried to address this problem by creating the Legal Services Corporation. But even in its palmiest days, the corporation was only empowered to help the poor and had money enough to address but a small fraction of the claims of this limited constituency. Since then, its budget has been cut severely. Middle-income plaintiffs often find that legal expenses eat up most of the amounts that they recover. In personal injury claims, contingent fees may help surmount the cost barrier, but legal expenses consume a third or more of the average settlement in most proceedings and can often rise to 50 percent in cases going to trial. As many observers have testified, the costs and delays of our system force countless victims to accept inadequate settlements or to give up any attempt to vindicate their legal rights.

This state of affairs has become so familiar that it evokes little concern from most of those who spend their lives in the profession. As I visit in different cities, however, and talk to laymen in other walks of life, these problems loom so large as virtually to blot out every other feature of the legal system. The blunt, inexcusable fact is that this nation, which prides itself on efficiency and justice, has developed a legal system that is the most expensive in the world, yet cannot manage to protect the rights of most of its citizens.

The Roots of Our Predicament

How did this situation come about? The typical response is to lay most of the blame on legislators and public officials for enacting far too many rules while refusing to appropriate enough money for legal aid. There is much to be said for this view. But it is far from the whole truth. Even a brief glance at the record will show plenty of examples in which the cost of litigation and the volume of legal activity continue to rise although the legislature is inactive. In my own field of labor law, for example, the case load of the National Labor Relations Board has quadrupled over the last thirty years even though there have been no major new statutes and no growth at all in the size of the union movement. In largely common law fields, such as

personal injury litigation, legal costs have risen steadily, often without new legislation, so that they now eat up more than a third of the typical insurance premium.

All things considered, our difficulties would not end even if legislators stopped producing new rules and appropriated enough money to allow all poor and middle-class people to hire competent lawyers. In fact, the problems would probably grow much worse. Judges and other adjudicators would continue to create new precedents and rules. Moreover, beneath the visible mass of litigation lies a vast accumulation of festering quarrels and potential suits that never come to court because of fear, ignorance, and the inhibiting cost of legal services. If Congress provided enough funds for legal aid, or if it agreed to offer the same support to legal defenders as it gives the prosecution,[4] it could easily touch off a burst of litigation that would cost huge sums of money and add heavily to the burdens and delays of the legal system.

The roots of our predicament, then, are more complex than popular impressions would allow. Many factors contribute to the volume of disputes and the intricacies of legal rules. Industrialization and technology produce new forms of conflict and injury; new knowledge extends our understanding of causation, giving rise to novel theories of liability; fresh government initiatives create new interests and limit private activity in ways that lead to legal controversy. Amid these many causes, however, one thread runs particularly vividly. At bottom, ours is a society built on individualism, competition, and success. These values bring great personal freedom and mobilize powerful energies. At the same time, they arouse great temptations to shoulder aside one's competitors, to cut corners, to ignore the interests of others in the struggle to succeed. In such a world, much responsibility rests on those who umpire the contest. As society demands higher standards of fairness and decency, the rules of the game tend to multiply and the umpire's burden grows constantly heavier.

Faced with these pressures, judges and legislators have responded in a manner that reflects our distinctive legal traditions. One hallmark of that tradition is a steadfast faith in intricate procedures where evidence and arguments are presented through an adversary process to a neutral judge who renders a decision on the merits. Compared with procedures used in other advanced countries, ours are elaborate and hence relatively expensive. They also force the parties, rather than the state, to bear most of the cost of finding the facts, thus adding further to the burden of going to court.

Another characteristic of adjudication is the tendency to concentrate on the immediate case at hand while paying less heed to the effects on a wider public. Patrick Atiyah has eloquently shown how far this trend has proceeded in Anglo-American law over the past century.[5] The practice is understandable, but the results are troublesome from several points of view. Legal proceedings and judicial opinions often have their greatest effects on

4. Bernard Botein & Murray A. Gordon, The Trial of the Future (New York: Simon and Schuster, 1963).

5. Patrick S. Atiyah, From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law, 65 Iowa L. Rev. 1201 (1980).

people who are neither parties to the litigation nor even aware that it is going on. Decisions that emphasize the peculiarities of each case can give too little guidance to this wider public and thus can spread confusion. Worse yet, as lawsuits get more enmeshed in details, they cause greater expenses and delays that inhibit the poor and middle class from ever going to court, especially under an adversary system that places so many of the costs of fact finding and litigation on the parties.

By complicating the rules and insisting on an adversary process conducted by the parties, judges can undermine justice in many types of cases. Consider the problem of collecting debts. As matters now stand, only well-to-do creditors, such as department stores and loan companies, can normally afford to press their claims on an economical basis. Few debtors have the money and the confidence to defend themselves in court. As a result, up to 90 percent of the defendants in large cities never come and contest liability, even though many of them have a strong case.[6] To overcome this problem, the government may provide legal counsel free of charge, but that device merely reverses the tables, since it is uneconomical even for institutional lenders to prepare sufficiently to resist a skillful defendant unless the unpaid debt is very large. In both situations, the elements of fair process may be observed. In neither case will justice necessarily be done.

By concentrating so heavily on the immediate parties in dispute, judges are also more likely to reach results that affect other people in unexpected and undesirable ways. For example, suppose that judges in divorce cases begin to move away from the traditional presumption in favor of awarding custody to the mother. Such rulings will not have their primary effect on relatively few parents who argue over custody before a judge. The principal impact will fall upon the vastly larger number of divorcing couples who agree on separation terms and only go to court to have their settlement approved. For these couples, the effect of the decisions may be far from what the judges actually intended. Instead of simply leading to more agreements giving custody to deserving fathers, the new rules may strengthen the hand of calculating husbands and enable them to push their anxious wives into accepting less support to be sure of keeping the children.[7]

Another illustration of this problem occurs when courts impose new safeguards to forestall the abuse of power. In intervening, judges are acutely aware of the wrongs they seek to correct but much less conscious of the subtler inhibitions that their remedies may place upon the initiative and authority of other well-meaning officials. To illustrate the point, consider this snapshot of a large urban high school caught in the backwash of repeated legal interventions.

> In this school, as in many, order in the halls and to some extent in classrooms is supervised by hall guards or quasi-police or actual police officials. The presence of raw power indicates that authority has been lost. All behavior is regarded as tolerable unless it is specifically declared illegal. There are narrow definitions of jurisdiction. A student who

6. See David Caplovitz, Consumers in Trouble: A Study of Debtors in Default (New York: Free Press, 1974).

7. See Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979).

> complains to the school principal of being attacked is asked on which side of the street the beating took place. If it happened across the street, it would be out of the school jurisdiction and hence of no concern to the principal. A female teacher was still shaking as she told us about a group of students who had verbally assaulted her and made sexually degrading comments about her in the hall. When we asked why she did not report them, she responded, "Well, it wouldn't have done any good." "Why not?" we pressed. "I didn't have any witnesses," she replied. Adult authority is increasingly defined by what will stand up in court. There are fewer and fewer adults who have the confidence to act on Justice Frankfurter's dictum that "much that is legally permitted is repugnant to the civilized mind."[8]

The legal rules that helped produce this result were doubtless prompted by serious abuses committed by other authorities in other schools. I would not deny this fact nor even insist that court decisions need force a resourceful school official to quite the sterile, legalistic response so vividly described in the preceding passage. My point is simply that the judges involved were undoubtedly more aware of the injustices before them then they were of the eventual impact their rules would have on the environment of the local schools. In this way, courts frequently hamper abler officials and better institutions in an effort to regulate the inept and the irresponsible. In many cases, the harm done exceeds any benefits achieved.

Such examples can be multiplied endlessly. One can sympathize with judges, of course, since they have neither the staff nor the resources to anticipate the full impact of their decisions. Even the law journals do not give much help, since legal scholars are rarely trained in the methods of empirical investigation and hence do not devote themselves to exploring the actual effects of legal rules on human behavior. Regardless of who is responsible, however, the results of this neglect are unfortunate. Not only are judges more likely to reach decisions that are quixotic or perverse. By failing to perceive the full impact of their handiwork, lawmakers and regulators tend to have inflated and unrealistic notions of their capacity to use legal rules to influence behavior and achieve constructive change.

The problems just described might be contained if our legal system authorized someone to keep watch and make sure that the process as a whole is meeting the needs of those whom it purportedly serves. Unfortunately, such oversight and coordination do not exist. In principle, the legislature could exercise this authority, but it does so only occasionally and in a political environment that severely limits what can be done. Thus, power is divided among countless jurisdictions and tribunals, each intent upon the isolated fragments of human conflict that come before it. No one feels responsible for the operation of the entire system or worries whether the different parts fit together in a coordinated whole.

This environment produces a special kind of justice. It leads officials to exaggerate the law's capacity to produce social change while underestimating the cost of establishing rules that can be enforced effectively throughout the society. Since laws seem deceptively potent and cheap, they multiply quickly. Though most of them may be plausible in isolation, they are often confusing and burdensome in the aggregate, at least to those who have to

8. Gerald Grant, The Character of Education and the Education of Character, Daedalus 141 (Summer 1981).

take them seriously. Contrary to the views of left-wing scholars, the results are not simply a form of exploitation to oppress poor, defenseless people; the wealthy and the powerful also chafe under the burden. For established institutions, in particular, the typical result is a stifling burden of regulations, delays, and legal uncertainties that inhibit progress and allow unscrupulous parties to misuse the law to harass and manipulate their victims. For those of modest means, however, the results are even more dispiriting. Laws and procedural safeguards may proliferate, but they are of scant use to those who cannot afford a lawyer. All too often the ultimate effect is to aggravate costs and delays that deny legal protection to large majorities of the population.

In fairness, I should acknowledge that much new thought is now being devoted to these problems. Rarely has this country seen a time of such experimentation to reduce costs, simplify laws, and improve access for the poor and middle class. Whole bodies of rules and litigation have washed away through deregulation and no-fault legislation. Lawmakers have talked of sunset provisions and impact statements to attract greater attention to the costs and burdens of legal rules. All manner of efforts are under way to establish alternate forums to reduce the cost of resolving disputes. At the same time, prepaid plans are growing to bring legal services within the reach of the middle class, not to mention the support Congress has given to the Legal Services Corporation to provide attorneys for the poor.

Despite this burst of creativity and initiative, we have a long way to go even to make a start toward solving our problems. Experiments may abound, but there is often no rigorous, comprehensive process for evaluating such ventures to decide which work well and under what circumstances. Lacking such data, one cannot know what remedies fit the various kinds of disputes that need to be resolved. Worse yet, only rarely do scholars look at substantial bodies of law to measure their effects against appropriate goals or to study their true impact on those whom they were designed to serve. As a result, in few fields of law can one find a thoughtful debate, let alone a consensus, on such questions as how clear the applicable rules should be, how elaborate and costly the procedures should become, or how quickly disputes need to proceed to a hearing and final resolution. So long as this confusion persists, we will have difficulty evaluating and reforming the legal system. No complex human enterprise can succeed without some way of establishing objectives, coordinating the work of all constituent parts, and assessing the progress made toward accepted goals.

As for the poor and middle class, we again have no idea of the kind of access the legal system should provide. On occasion, the Legal Services Corporation has suggested some specific goal, such as so-and-so many lawyers per 10,000 people. But targets of this kind are meaningless without a description of just what legal services and protections such representation would achieve. One sometimes read that the poor have received legal help in 15 percent of the cases in which they sought assistance. But no one seems inclined to consider how much legal assistance the poor actually need, let alone what services society can afford to provide. Should the indigent enjoy free legal service for any complaint they have? Presumably not. But then,

what kinds of cases or legal rights are serious enough to make legal aid a legitimate national responsibility? The truth is that the issue is not discussed, and since it is not discussed, we have no way of evaluating the status quo or deciding what it would take to reach a reasonable goal.

In this state of confusion, market pressures slowly work to transform the legal profession. Once again, the parallels with medicine are striking. In both fields, large institutions are steadily crowding out the solo practitioner and the small partnership. More and more physicians work for health maintenance organizations and other forms of group practice. The doctor's autonomy is increasingly cramped by the growth of huge medical complexes—corporate employers fighting to restrain rising health premiums, chains of proprietary and nonprofit hospitals, mammoth health insurance carriers, not to mention public regulatory agencies.

In law, the actors have different names but the plot is much the same. Legal staffs of large corporations have become the most rapidly growing segment of the bar. At the same time, private law firms continue to expand by opening branches in more and more cities. For clients at the lower end of the economic spectrum, larger forms of organization are likewise developing: prepaid group plans, companies offering cut-rate legal services in supermarkets and shopping malls, poverty law offices funded by the federal government.

These new organizations will have effects on what we pay for legal work in this country. To a degree, they may help to lower attorneys' fees by engendering greater competition and economies of scale. Nevertheless, the total bill for legal services in America does not depend nearly so much on the size of attorneys' fees as it does on the volume of litigation and legal services throughout the society. As time goes on, the growth of prepaid plans, legal service corporations, and poverty law offices is likely to focus more organized pressure on the government to find ways of subsidizing legal services for the poor and middle class. The mounting oversupply of lawyers promises to push in the same direction. If these pressures are simply allowed to increase access to a very complex and expensive legal system, the total cost of law in our society will continue, as in medicine, to follow a steep, upward trajectory.

Devising adequate remedies for this predicament will be extremely difficult. But certain points seem clear. To begin with, there is no single solution for our problems. Individual measures will not merely be ineffective; they may actually make the situation worse. For example, Chief Justice Burger periodically calls for massive improvements in the training of trial lawyers. At first glance, who could object to such a proposal? But it is probable that such a reform, *standing by itself,* would increase litigation, lengthen trials, and add significantly to the very burdens that the Chief Justice wishes to lighten.

An effective program will require not only multiple efforts but a mixture that involves attempts to simplify rules and procedures as well as measures that give greater access to the poor and middle class. Access without simplification will be wasteful and expensive; simplification without access will be unjust.

A program embodying these principles will include initiatives along a number of lines already described. Lawmakers will need to adopt no-fault car insurance everywhere and extend the no-fault concept to new fields of liability. Legislatures will have to take a hard look at provisions for treble damages and other artifical incentives that stimulate litigation. Agency officials will want to mount a broad review of existing laws to simplify rules and eliminate regulations that do not serve a demonstrable public purpose. These efforts at simplification must be accompanied by larger appropriations to make legal counsel available to the poor. But money alone will not suffice. In cases involving debtors and creditors, landlords and tenants, and other disputes that touch the lives of ordinary folk, judges will have to develop less costly ways of resolving disputes, since expensive adversary trials ultimately deny access, and therefore justice, to countless deserving people. Likewise, lawyers will need to devise new institutions to supply legal services more cheaply. Such changes, in turn, will undoubtedly force the organized bar to reexamine traditional attitudes toward fee-for-service and the unauthorized practice of law.

These steps will be difficult enough, but I suspect that even they will prove to be only palliatives. To make real progress, two added initiatives will be needed.

To begin with, an effective legal system will probably require greater efforts to plan and coordinate the work of our many separate courts and jurisdictions. In a system filled with different tribunals, each preoccupied with the random disputes that happen to pass before it, every judge can conscientiously perform his appointed task and still unwittingly subject many individuals to injustices and incongruous results. In some way, we need to develop mechanisms for reviewing whole bodies of law and their effects on the people they purport to serve. Only then can the appropriate officials set objectives and develop coordinated strategies to allow fields of law such as personal liability or environmental protection or employment discrimination to do a better job of meeting the needs of those whose lives they affect.

In addition, judges, lawmakers, scholars will all have to recognize that our conception of the role of law has fallen into disrepair. In its place, they will need to search for a new understanding that is no less sensitive to injustice but more realistic in accounting for the limits and costs of legal rules in ordering human affairs. Such an effort should result in fewer rules, but rules that are more fundamental, better understood, and more widely enforced throughout the society. Lacking such a vision, judges and regulators will continue to drift toward a general willingness to intervene whenever they feel that one person has suffered at the hands of another. That is the logical end of a process that concentrates so heavily on the plight of individual litigants and gives so little heed to the effects on the system as a whole. What emerges from this process is a spurious form of justice. In such a world, the law may seem enlightened and humane, but its constant stream of rules will leave a wake strewn with the disappointed hopes of those who find the legal system too complicated to understand, too quixotic to command respect, and too expensive to be of much practical use.

The Role of Law Schools

The prospects for achieving such reforms are daunting, I realize. A comprehensive effort to improve our legal system will call for help from every quarter: lawyers, judges, legislators, regulatory officials. I shall not try to describe the contributions that each of these parties can make. My immediate concerns lie with education, and it is there that I would concentrate my attention.

One way by which educational institutions can contribute to reform is to mobilize their capacities for generating new knowledge. The public complains about the cost of legal services, but no one has discovered how much money we spend each year on our legal system. Communities experiment with alternative forums for resolving disputes, but do not evaluate these experiments systematically to learn which ones work and how well. Though doctors are learning to assess the costs and benefits of medical procedures and new technologies, lawyers are not making a comparable effort to evaluate provisions for appeal, for legal representation, for adversary hearings, or for other legal safeguards to see whether they are worth in justice what they cost in money and delay. Scholars have shown little interest in the theories of cognition that might help decide whether rules of evidence permit judges to make more accurate decisions or merely accumulate useless data that add to legal expenses and delays. Nor has anyone done much to explore the forces that encourage or inhibit litigation so that we can better predict the rise and fall of legal activity.

Our limited knowledge seriously inhibits efforts to increase efficiency and access in the legal system. It is idle to talk of sunset provisions if lawmakers lack the methods to assess the costs and benefits of legislation. It is useless to create arbitration panels and mediation services if no one troubles to test their performance against predetermined criteria. It is reckless to offer proposals to ease congestion in the courts if even the proponents cannot tell whether such measures will achieve their goal or simply evoke more litigation (much as wider highways often succeed in merely calling forth more cars). Worst of all, it will be impossible ever to develop more sensible theories of the appropriate role of law if we do not make greater efforts to examine the effects of the laws we already have.

Although these points seem obvious enough, law schools have done surprisingly little to seek the knowledge that the legal system requires. Even the most rudimentary facts about the legal system are unknown or misunderstood. We still do not know how much money is spent each year on legal disputes and services in the United States. We still hear law professors and eminent jurists refer to "the litigation explosion" and "our litigious society," even though the factual basis for such assertions is shaky at best. In part, perhaps, this ignorance results from the lawyer's skepticism about the usefulness of academic research. Over a century ago, Christopher Columbus Langdell was fond of asserting that law is a science and "that all the available materials of that science are contained in printed books." More recently, a witty law professor is said to have remarked: "All research corrupts, but empirical research corrupts absolutely."

It is easy to find examples to justify this skepticism. One's eyes glaze over at the recollection of parking meter studies, scalograms to predict judicial behavior, game theories that purport to illumine litigation tactics. Yet we ignore the social sciences at our peril, for their techniques grow steadily more refined. Business school professors begin to have more intricate theories of competitive markets that might help legal analysts predict the effect of changes in our antitrust laws. Scholars in schools of public policy and education develop more sophisticated methods of program evaluation that could help implement sunset laws or detect the secondary and tertiary effects of legal rules on human behavior. Doctors work with statisticians to measure the costs and benefits of protracted hospitalization, of coronary bypass surgery, of mastectomy, of CAT scanning; one cannot help but wonder whether similar techniques might not help to assess the usefulness of legal procedures as well.

As yet, this work is largely overlooked by our great schools of law. One can argue that such studies are not the proper province of the legal scholar and that it is better to wait for social scientists in other parts of the university to do the necessary research. But experience shows how empty this observation is. Law professors cannot stand idly by and expect others to investigate their problems. Social scientists have not done much of this work in the past nor will they in the future. If the necessary research is to go forward, legal scholars must help organize it and participate in it, albeit with the aid of interested colleagues from other disciplines.

If law schools are to do their share in attacking the basic problems of our legal system, they will need to adapt their teaching as well as their research. The hallmark of the curriculum continues to be its emphasis on training students to define the issues carefully and to marshal all of the arguments and counterarguments on either side. Law schools celebrate this effort by constantly telling students that they are being taught "to think like a lawyer." But one can admire the virtues of careful analysis and still believe that the times cry out for more than these traditional skills. As I have tried to point out, the capacity to think like a lawyer has produced many triumphs, but it has also helped to produce a legal system that is among the most expensive and least efficient in the world.

One example of this problem is the familiar tilt in the law curriculum toward preparing students for legal combat. Look at a typical catalogue. The bias is evident in the required first-year course in civil procedure, which is typically devoted entirely to the rules of federal courts with no suggestion of other methods for resolving disputes. Looking further, one can discover many courses in the intricacies of trial practice, appellate advocacy, litigation strategy, and the like—but few devoted to methods of mediation and negotiation. Throughout the curriculum, professors spend vast amounts of time examining the decisions of appellate courts, but make little effort to explore new voluntary mechanisms that might enable parties to resolve various types of disputes without going to court in the first place.

Many people have debated whether lawyers exacerbate controversy or help to prevent it from arising. Doubtless, they do some of each. But everyone must agree that law schools train their students more for conflict than for the

gentler arts of reconciliation and accommodation. This emphasis is likely to serve the profession poorly. In fact, lawyers devote more time to negotiating conflicts than they spend in the library or the courtroom, and studies show that their bargaining efforts accomplish more for their clients. Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time.

Another glaring deficiency is the lack of attention given to the very problems of the legal system that I have been discussing. This neglect is particularly striking when one hears the repeated claims of established law schools that they are not training lawyers but preparing "leaders of the bar." If this assertion is to be taken seriously, one would suppose that students in these schools would be studying ways of creating simpler rules, less costly legal proceedings, and greater legal protection for the poor and middle class. Yet even a cursory glance at the law school catalogue will serve to destroy this illusion. I can scarcely recall a single class, let alone an entire course, devoted to these issues during my three years of law study. Although the situation has improved since then, courses on the problems of the legal system are almost always relegated to elective slots where only a handful of students typically attend.

Leadership also calls for more than merely preparing leaders of the bar. Law schools will need to take the initiative in educating for a broader range of legal needs in our society. An efficient system of extending access to legal services throughout the society will demand the imaginative use of paralegal personnel. An effective system for extending legal protection to the poor must involve greater efforts to educate the disadvantaged about their rights, so that they can defend their interests without being exploited or having to go to court. A serious attempt to provide cheaper methods of resolving disputes will require skilled mediators and judges, who are trained to play a much more active part in guiding proceedings toward a fair solution. In short, a just and effective legal system will not merely call for a revised curriculum; it will entail the education of new categories of people. It is time that our law schools began to take the lead in helping devise such training.

Beyond education and research, law schools can also help to create new institutions more efficient than traditional law firms in delivering legal services to the poor and middle class. As in medicine, these organizations will benefit if they are linked to a university so that they can offer teaching opportunities and intellectual stimulation to their attorneys while drawing upon the services of second- and third-year law students. Medical schools have long pioneered in similar efforts, first by helping create teaching hospitals, and then by developing outreach clinics in poorer neighborhoods and prepaid health plans for the middle class. By comparison, the record of our law schools is modest, despite the recent growth of clinical programs that give advanced students a chance to work on the cases of indigent clients.

The points I have made need not be cast in the form of criticism; they also

represent opportunities to strike at the most persistent problems that have troubled our law schools. For example, other faculties often look askance at law professors for devoting themselves to pedestrian forms of research, endlessly pecking at legal puzzles within a narrow framework of principles and precedent. Efforts to confront the larger defects of the legal system offer the chance to address a greater variety of issues using a wider range of research techniques.

Law students have also complained for years about the sameness of instruction with its constant discussion of borderline cases and problems. In contrast to medical school, where the experience becomes more absorbing as students leave the lecture hall and enter the ward and clinic, legal education often seems tedious after the first year. Happily, the great issues confronting the profession provide opportunities to address this problem by introducing new forms of teaching and learning for second- and third-year students—classes to study the methods of mediation and negotiation, supervised work in new institutions for delivering legal services, courses on the organization and deficiencies of the legal system and its institutions, seminars on new ways of resolving disputes and avoiding litigation.

A further problem for law schools is the striking lack of professional commitment displayed by many of their students. Unlike medicine, few young people decide to be lawyers early in life. Instead, law schools have traditionally been the refuge of able, ambitious college seniors who cannot think of anything else they want to do. With such lukewarm beginnings, it is not surprising that many students tire of their studies and grow unwilling after their first year to prepare their coursework or participate in class discussions. If law faculties wish to counter these attitudes, they should welcome the chance to motivate their students by giving them a larger vision of their calling, a sense of what a life of leadership in the bar might entail, an awareness of the urgent problems of the profession that they could help to resolve.

The law school that seizes these opportunities could become a more interesting place, experimenting with new methods of teaching, new forms of research, even new institutional settings for combining instruction with legal services. Fortunately, a handful of schools seem intent upon exploring these opportunities. I am pleased that Harvard Law School can be numbered among these pioneers.

Conclusion

The problems I have dwelt on here are but examples of the many difficulties that have produced wide discontent with all our major professions. Doctors are assailed for failing to control health costs and for pursuing specialization and advanced technology at the expense of a humane consideration for the welfare of their patients. Business is attacked for the salaries of its executives, for its failure to prepare adequately for competition from abroad, for its inability to cooperate effectively with the government in addressing major social problems. Public servants are pilloried for their bureaucratic ways, their inefficiencies, their lack of sensitivity to the problems of those they seek to regulate.

In short, the public seems critical of all institutions and increasingly concerned that the country is no longer working well. International comparisons—in industrial productivity, infant mortality, the extent of pollution, crime, poverty, and many other social ills—seem to give ample reason for this concern. Universities cannot hope to solve such problems by themselves. Progress calls for cooperation from many institutions beyond the reach of the campus. But faculties can supply knowledge that is often vital to the development of sound solutions. Universities can also prepare able people with a broad view of their profession and with skills to help address its problems. Unfortunately, most professional schools have done little to meet this challenge. They have concentrated on training practitioners for successful careers while failing to acquaint them with the larger problems that have aroused such concern within the society. It is time to break out of this narrow mold, enlisting faculty and students in a common concern for the failings of a costly and often inaccessible legal system.