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Litigation Abuse and the Law Schools

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EDITOR'S CORNER

At the Ninth Circuit Judicial Conference in July, 1983, one session was devoted to a discussion of "Excessive Discovery: A Symptom of Litigation Abuse." (Without knowing, I would guess that a similar title appeared on just about every judicial conference program this year—and last year, and the one before that.) Frank Rothman, President of MGM/United Artists, addressed the subject from the point of view of a corporate client, and his remarks are printed in this issue, beginning at page 342. Judges and trial lawyers expressed their views. And I was asked to comment on the extent to which the law schools may have contributed to the problem and may help with the solution. I responded as follows:

LITIGATION ABUSE AND THE LAW SCHOOLS

We are speaking of excessive discovery as one type—but only one type—of litigation abuse; as one symptom—but only one symptom—of a legal system widely criticized as inefficient and even unfair, a litigation system run amok. I have been asked to comment on the law schools' role in this, and to comment on whether law schools are effectively educating lawyers to minimize litigation abuse.

Most recently Derek Bok, President of Harvard University and formerly Dean of its Law School, leveled a broad range of charges at the legal profession and called for fundamental changes in how lawyers practice and how they are trained. Originally delivered as his report to Harvard's Board of Overseers, his comments have been widely publicized.

Mr. Bok is not alone in his dissatisfaction with law and lawyers, of course. Neither is he the first. Indeed, some of his criticisms are merely a recasting of Roscoe Pound's provocative statement, 75 years earlier, of "the popular causes of dissatisfaction with the administration of justice." Much in the Bok statement is not new, but what *is* new is his implication that the law schools are heavily to blame for the system's malaise, or at least for not leading a movement toward more efficiency, more evenly distributed justice, and—most of all—less adversariness. In his words, we train students "more for conflict than for the gentler arts of reconciliation and accommodation."

The part of Mr. Bok's commentary on the legal system that has attracted the most attention from the media is his comparison of America with Japan. He argues, explicitly or implicitly, that:

First, Japan is outperforming America because, in part, it uses its ablest people in productive pursuits rather than in such unproductive activities as lawyering;

Second, America would be better off if Americans were less

litigious, like the Japanese; and Americans would be less litigious if there were fewer lawyers and if those lawyers were trained to behave less contentiously; and,

Third, the law schools should lead the way to a less contentious bar and a less adversarial system by programs of research and teaching markedly different from those of which you and I are the products.

I

First, as to too many lawyers:

We have one lawyer for every 400 Americans, which is about 20 times as many per capita as in Japan. (I might note that there is no comparable disparity in the number of law students. Indeed, the number of Japanese who take the bar examination is higher per capita than the number of Americans. But the strictly enforced examination system limits the new lawyers to about 500 a year. In the United States, 75% of the applicants pass. In Japan, only about 2% are permitted to pass. That may, or may not, be related to Japan's preoccupation with quality.)

By contrast, Japan, with half our population, graduates a third more engineers each year. And Mr. Bok quotes the Japanese as saying, "Engineers make the pie grow larger; lawyers only decide how to carve it up." His theory is that we are misallocating our human resources, that too many of our most talented students are going to law school and then into pursuits that, he says, "often add little to the growth of the economy or to the pursuit of culture or the enhancement of the human spirit." Implicit in that statement is an image of the lawyer as parasite, as nonproductive of the things that make life abundant—an image which ignores a history of public and private service, professional and avocational, civic, religious, and cultural, which surely is not less than that of any other group in our society, by a profession and a system that has provided the most widespread access to individual justice in history.

If there are too many lawyers, and if law attracts a disproportionate share of the highly intelligent young people, what is to be done about it? Particularly, what's to be done by the schools? Mr. Bok offers no solution, or even suggestion. Surely he does not propose that the law schools take their students only from the bottom of the LSAT so that the high scorers and "Phi Bates" may be saved for computer manufacturing. We might then get students like the one who was asked on an exam what was Magna Carta:

Magna Carta happened centuries ago, in the English city of Coventry, where, to protest high taxes, Lady Godiva rode naked through the streets on a horse. She rode side-saddle, which is the origin of the phrase, "Hurray for our side!" Sir Walter Raleigh offered her his cloak, and said: "*Honi soit qui mal y pense*," which, being translated, means, "Thy need is greater than mine." Lady Godiva answered, "*Mon Dieu et mon droit*," which, translated, means "My God, you're right." That was the origin of Magna Carta.

Presumably Mr. Bok would not employ a system in which an agency of government determines how many could study law, how many electrical engineering, how many theology, how many hair dressing, and so on. We have a tradition of personal choice that we surely are unready to give up. Market forces and social values have governed career choice and will continue to do so. If there are too many lawyers, the market will soon tell us so. Especially are we unlikely to foreclose career choices in areas like law, where the cost of training—by contrast with medicine, for example—is relatively low. No one—least of all Mr. Bok's Harvard—is going to deny law school admission to the very gifted students, telling them to go into business or engineering instead.

Whether we ought to adjust the ratio between engineers and lawyers is less clear than Mr. Bok assumes. In any event, I am willing to let the market take care of that, even if in some short term situations it is inefficient. In the long term, it is more trustworthy than social planners, whether educational or governmental.

II

Second, as to contentiousness and litigiousness:

Are the law schools producing lawyers who simply pander to a flaw in our national character?

Mr. Bok, and others of course, charge that we are an excessively litigious society, especially as compared with Japan. (The comparison is always with Japan these days because Japan has outperformed us in a number of technological areas—not necessarily the ideal basis for choosing an exemplar. Earlier, the comparison was with Russia when we were embarrassed by the success of Sputnik. Should we, therefore, seek to emulate the Russian justice system?) The suggestion is that we are a less prosperous, less happy, less excellent society because we are contentious. The message is that we would be better off if only we were as non-litigious as, for example, the Japanese.

Before discussing the merits of the view that we are too litigious, what are the facts about Japanese non-litigiousness? That the Japanese have somewhat less litigation than we do is true; but that they are a less litigious people is not at all clear. There is not time here to explore the Japanese character, but scholars—most notably the University of Washington's John Haley, but also others—have said bluntly that Japanese non-litigiousness is a myth and that lower rates of litigation there are due rather to institutional barriers and incapacity. The Japanese courts are even more strained to capacity than American courts. I do not have current figures, but in the mid-'seventies, the case load there was 1700 cases per judge; and lately there are even more of the

cutting-edge, consumer-oriented, docket-crowding matters like pollution and thalidomide cases.

And the crowding is aggravated by the elongated form of trials in Japan, that involve recurring hearings spaced at intervals of weeks or months, as in the Continental courts. Moreover, a limited range of remedies and the lack of contempt power to enforce decrees make resort to courts less attractive. And, finally, there is a lack of lawyers to represent would-be litigants. This last seems to represent a national policy to inhibit litigation—but that is not a demonstrable good unless we know that individuals are not being denied what we deem “unalienable rights.”

Despite all these institutional obstacles to the use of courts, Japan is still quite litigious relative to some societies (twice as much as Sweden, for example; seven times as much as South Korea), but not very litigious compared with others (only a third as much as Great Britain and a fourth as much as Denmark).

In short, in absolute terms Japan is not a paragon of non-litigiousness; and even its lesser litigation rate compared with some countries is partly a consequence of systemic barriers to the use of the courts. As a consequence, Japan is not an instructive model.

But back to the charge that we are too litigious: The complaint is that we use the litigation system to vindicate interests traditionally dealt with in other settings, most of them private. As listed in a recent New York Times article, high school football coaches are sued by injured players, psychiatrists are sued by victims of their patients' crimes, universities are sued by students, bishops are sued by nuns, parents are sued by children, and young people are sued by sex partners over herpes infections. In that last connection, perhaps you have heard of the two Jewish women reading the paper, and one said to the other, “What’s this ‘herps’ that I’m reading about?” “I don’t know, but I’ll go look it up in the dictionary,” said the other. She returned in a few moments and reported: “First of all, we’re pronouncing it wrong: it’s pronounced ‘herpes.’ But not to worry—it’s a disease of the gentiles.”

Law and courts even venture to decide such profound questions as when life begins. Even theologians can’t agree on that. Three of them were arguing, and the Jesuit said, “Life begins when the egg is fertilized.” The rabbinical scholar said, “No, it begins when the fetus would be viable outside the womb.” “You’re both wrong,” said the Unitarian, “It begins when the last child goes away to school and the dog dies.”

As a people we are using law more and more as a device to affect human behavior. That may be because of our pluralism—greater than that of the nations with whose justice systems ours is often compared. It may be because we are an inherently contentious people; but if that is so, it’s not new. One of our early flags carried the motto, “Don’t tread on me.” Increased reliance on

law and litigation may have been triggered by our selfishness—what Tom Wolfe has characterized as the “new narcissism.” When offended we tend not to forgive and forget but to sue.

Each of these—all of these—may be causes. But I suggest that the proliferation of law and litigation is more fundamentally a consequence of our nation's commitment to equality and justice for all. It is a consequence of the fact that we are more democratic, with a more open society. With all our flaws, we are more responsive to the needs of individuals. That responsiveness to individuals is largely because of lawyers. The littlest person can kick back at the system—at government, at bureaucracy, at labor, at business. If anyone hurts him, he can find a lawyer. He has access to our courts. As Harvard's Abram Chayes points out, in a bureaucracy one can never be sure that his problem is being dealt with, but if one files an action in court he gets a response. It's a tempering condition in our society.

We should look on the so-called litigation explosion not as the sign of an ailing society, as so many do, but as evidence of our belief in the dignity and worth of every individual.

Obviously we have problems. That's why we're here—to discuss some of those problems. And the inaptness of some of the comparisons with other systems and the lack of secure factual basis for some of the charges should not blind us to the need to correct what is wrong, improve what is faulty, and invent what is needed to enable our children and children's children to enjoy the structured liberty and individualized justice we have known. There must be improvement in dispute resolution and, as Ronald Olson puts it, lawyers should lead the parade.¹ Perhaps you saw the cartoon by Guindon with five rather morose-looking people sitting around a table in a quiche-and-hanging-ferns restaurant, and one asks: “Is the process of evolution still going on, or is this pretty much it?” Well, the question is rhetorical for lawyers: change will continue—accelerate, even. But it must be principled, with clear notions of where we are trying to go. We should not, for example, adopt so-called reforms that have as their goal the exchange of the present system for some kind of bureaucratized—or even judicialized—arrangement by which the right of the individual to pursue a remedy for a perceived wrong is transformed into mere access to a vending machine dispensing homogenized palliative measures. Nothing is more unequal than treating unequals equally, than treating the dissimilar similarly.

Obviously, we must consider and experiment with alternative modes of dispute resolution. But all the alternatives—mini-trial, mediation, arbitration, and the like—work only because litigation is generally *their* alternative.

1. Olson, *Alternative Means of Dispute Resolution*, 17 INTERNATIONAL SOCIETY OF BARRISTERS QUARTERLY 373, 377 (1982).

Without a reasonably available litigation system, other modes become unpredictable, mushy, and ultimately unfair. Mr. Olson quotes Professor Mnookin's phrase: "bargaining in the shadow of the law."² The health of the conciliation system depends on the effectiveness of the justice system. Sharpen up the trial system and, as day follows night, it will sharpen up the conciliation/mediation system.

III

Where do the law schools fit into this?

It is undeniable that law schools have played only a minor role in studying the justice system as system. Moreover, their traditional preoccupation with case law *has* emphasized solution by litigation, as Mr. Bok charges.

But the charge is too sweeping and also a little dated. Though they came to it late, most good schools—including Bok's Harvard, my own University of Michigan, and numerous others—have excellent courses in judicial administration, in negotiation techniques, in client counseling, in the structure and ethics of the profession, and the like, all responsive to the kinds of concerns expressed by Mr. Bok. The curricula of most schools reflect the great plurality of ways that exist of controlling social behavior and resolving controversies—by statute, by administrative mechanisms, by all the things we have been talking about here. Though course names may have changed little, content and method these days relate much more to prophylaxis than pathology. Contracts, land use planning, enterprise organization, commercial law, family law, administrative law—these and a score more are dealt with in ways that seek to avoid conflict and litigation. For example, a good contract can withstand litigation attack, but a better contract anticipates the problem and avoids litigation.

In the litigation field, schools are upgrading their skills training, as the Chief Justice, Judge Devitt, and others have urged. Do we also discuss complex litigation, like that described by Frank Rothman, and consider how to reduce its ridiculous costs? Of course we do. Do we also help our students understand that the goal is not "winning" but serving the client's best interest? Do we also train students to recognize and use other means of resolution? Yes, but less well—partly because these other skills are harder to teach, harder to get a handle on.

We can do better. We must do better. But law schools are neither the problem nor the solution. Market forces are at work here, and lawyers are realists. If there is heavy reliance on litigation to resolve disputes, it is in substantial part because the people—the litigants, not the litigators—have

2. *Ibid.*

wanted it and found it useful. We should indeed study the legal system as system, the profession as profession, the place of law in society. And no respectable law school can afford to ignore instruction in alternatives to litigation. But it is unrealistic, foolish even, to ask schools to soften their students' zeal. Students must learn how to represent clients with enormous skill, dedication, and toughness. If they are so trained, then they will be better able to "bargain in the shadow of the law." Then they will be able to employ the "gentler arts of reconciliation and accommodation" without selling their clients down the river. We must teach the alternatives in the shadow of the law.

To make the point with some hyperbole, I propose that we not send out students who think that their role is to confer, to compromise, to resolve, no matter the question. I want to produce graduates who are able and prepared to represent their clients' positions skillfully and zealously, in court if necessary, but who, because they are so equipped are then in a position of strength to resolve disputes in any of a number of alternative ways.

I will then trust those persons, our graduates, to work toward improving the system, to invent new mechanisms, to meet the needs that may be fully understood only by one who is on the firing line. I do not discount the creative contributions made by my faculty colleagues from time to time, especially in substantive areas; but in the adjective area—the operations area—of our profession, the scholars can only suggest. We must look to the bench and bar to make the wise and workable adjustments in the long run.

When I was a student at Cornell Law School a generation ago (indeed, two generations ago: I have students who are sons and daughters of my students), I was told that a responsible lawyer would become active in the organized bar and work to improve the profession and its service to the public. I still believe *that* is the way to improve the system. And the greatest service the schools can perform is to be sure that their students not only receive rigorous training but also are made aware that law is not a closed system, not an end in itself, and are inspired to be lifelong critics and improvers of the profession and the system under which it operates.

Clearly there are flaws, all around—in the schools, in the bar, in the bench. To take issue with President Bok on some points is not to rebut the need for creative change. But the need will always be greater than we can meet. It's like the angry owner of the losing race horse who confronted his jockey and said, "When that hole opened up on the homestretch, why didn't you ride through?" "Because," said the jockey, "the hole was going faster than we were."

John W. Reed