Nowhere To Go But Up

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Lawyers and judges and law teachers talk too much to each other. (Nonlawyers would end the sentence short of the last three words; and they may be right. But I want to make a different point.) Law-trained individuals tend to seek out the company of those with similar training and professional interests. That is perfectly natural and even in many respects desirable. But by so restricting their contacts, members of the legal profession are missing important insights into the public view of the profession. Perhaps lawyers suspect what information is thus denied them, and they are not sorry. Indeed, it is no secret that most nonlawyers neither like nor trust lawyers. At most they are likely to have a grudging respect for lawyers as word-merchants whose services are necessary for the attainment of client objectives that may not always be the purest. People in trouble turn to lawyers as do those who wish to get other people in trouble. If a lawyer aids in the successful resolution of a contested matter, the triumph is credited to the justice of the claim rather than to the skill of the lawyer. But woe unto the unsuccessful lawyer whose lack of skill, diligence, or appropriate influence causes a “miscarriage” of justice.

To remind lawyers and law students of the low regard in which they are held by the public is scarcely new; but lawyers, like others, shield themselves from the unpleasant truth by limiting their contacts to the extent possible to members of the same self-admiring fraternity.

When the Watergate valve was turned on, the opprobrium unleashed against lawyers was nothing newly sprung from that ruptured floodgate; but it quickly became an occasion for the public venting of passions long held in reasonable restraint. Consider, for example, this 1961 memorandum written (for internal consumption) to explain the policy of a major American corporation with respect to the antitrust laws:

We often hear it said that the really valuable lawyer is the one who can tell business what it can do and how it can do it, notwithstanding the law; . . . .

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The sentence concludes with the pragmatic warning:

but much experience demonstrated that this is a short-sighted view of the matter.

More encouraging is the overall conclusion of the policy memorandum (which I hope continues without change today):

[O]ur point of view should be one of actual good faith compliance with the substance of these laws, with a clear purpose not to look for mere loopholes which may be temporarily taken advantage of. The history of business under these laws is that when such loopholes are for the time being availed of, a price has to be paid therefor before the story ends. Nor should this Company, as a policy, ever seek to get just as close to the line of what is legal and what is illegal as human ingenuity can devise.

Other examples of the way in which the public views the legal profession are not hard to find but scarcely necessary to any reasonably introspective member of the bar. Even the Supreme Court of the United States rejected the argument of the Virginia State Bar that the sale of professional services, as an aspect of a “learned profession,” should be exempt from the terms “trade or commerce” in section 1 of the Sherman Act. In striking down the minimum fee schedule published by the Fairfax County Bar Association and enforced by the Virginia State Bar, the Court coolly concluded that

In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce.

The profession has not been unmindful of these and other criticisms. After the Goldfarb decision was announced on June 16, 1975, American Bar Association President James D. Fellers not only found the decision “not unexpected,” but observed constructively that the decision certainly will not make it more difficult for the legal profession to carry out its duty . . . . [The decision restates] what the American Bar Association and lawyers everywhere have always known. In general, the Court has said that the legal profession has an overriding responsibility to serve the public.

2. Id. at 2014.
The obligation to "serve the public" is the recurring theme of the nine Canons in the Code of Professional Responsibility. For example:

Canon 1: A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.
Canon 2: A Lawyer Should Assist the Legal Profession in Fulfiling Its Duty to Make Legal Counsel Available.
Canon 8: A Lawyer Should Assist in Improving the Legal System.
Canon 9: A Lawyer Should Avoid Even the Appearance of Professional Impropriety.

More important than the mere existence of these horatory declarations of virtue is the fact that the organized bar, particularly the American Bar Association, many of the state bar associations, and some of the local bar associations, are increasingly concerned with meeting in fact, as well as in appearance, the professional responsibilities that must be satisfied if the bar is to be recognized as a "learned profession" with meaningful obligations to provide public service. (I shall comment separately on the extent to which the law schools are meeting their professional responsibility obligations.) Let me suggest three broad areas in which there should be—and I believe there is—movement toward better accomplishment of the properly lofty aims of the profession. (1) Re-examination of the legal process to determine whether there are better ways of dispute resolution. (2) Improvement of the systems for the delivery of legal services. (3) Assuring the integrity and competence of those permitted to render legal services, whether as judges or as practising lawyers.

1. Dispute Resolution. It is generally acknowledged that the criminal justice system in the United States is a failure. Overcrowded dockets, excessive reliance on plea bargaining, and unjustifiably disparate sentences rob the criminal process of the dignity and fairness it must have as a respected dispenser of justice.

Less commonly recognized is the fact that the civil justice system is not much better. The complaint is common—and probably correct—that too many conflicts are brought to the courts for resolution that could better be handled elsewhere. Yet there remains a strong sense of public trust in the judicial system. Whenever an issue is not satisfactorily resolved by the legislative or executive branches of government, there is an immediate suggestion that the matter be taken to the courts—to "the highest Court in the land,
if necessary.” Perhaps this somewhat uniquely American practice is less a tribute to the people’s confidence in the courts than it is to their lack of confidence in the other branches of government. Whatever the reason, the result is that the courts of the United States are increasingly called upon to deal with the great social issues of our time, whether resolution of those conflicts is likely to be within their competence or not. American courts, particularly in the federal system, have been called upon to deal not only with the broad constitutional issues of racial discrimination, but as well with the specific formulation and daily administration of plans for desegregation of schools, of which Boston, Denver, Detroit, and Louisville are only the most recent and most dramatic examples. Now, as a result of the decision in Goss v. Lopez, it appears likely that the courts will be required to develop codes of procedure for the discipline of children in public elementary and secondary schools and perhaps even to supervise their operation for procedural fairness.

Nowhere is the problem more dramatically illustrated than in the prisons of America. Once the courts abandoned their traditional “hands off” attitude that had allowed prison administrators virtually unchecked authority over their institutions, the courts were invited to take a closer look; and they were horrified at what they found. The initial result was a rash of decisions condemning the practices uncovered. When that was found too episodic and without enduring impact, the reluctant but not unnatural reaction was to continue the supervision of the institutions found constitutionally deficient. In one of the federal circuits it is said that each federal district judge has his own prison to operate (or sometimes to close down).

Other examples are readily available in terms of Title VI cases of racial or sex discrimination, unequal delivery of municipal services, denial of voting rights, challenges to the siting of atomic or other power plants, and the whole range of energy versus environment type of issues now so commonly brought to the courts for resolution.

The point here is not to suggest that any one of these classes of cases, or even any individual case, should not have been brought to the courts for resolution. After all, the courts are trained to give an answer to a question that may have been skillfully avoided by other branches of government. But if the courts are to become the vehicles

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4. 95 S. Ct. 729 (1975).
for settling so many of the great issues of our time, at least three things must be done differently: (a) Some of the low-level dispute-resolution matters that now clog the courts must be taken elsewhere. (b) The judges who decide and the lawyers who present these new issues must be better trained to comprehend the physical and social sciences that are relevant to the problems. (c) Better procedures must be devised to assure that the evidence relevant for an informed decision is available to the deciding court, whether provided by the parties, by others interested in the dispute, or at the call of the court.

These hard questions raise the collateral but closely related question of whether the adversary system as we know it in the United States is appropriate to the cause of justice. The 1975 American Assembly on Law and a Changing Society II raised the issue in these words:

Our system of adjudication is the adversary system. In that system, the truth, in the sense of relevant facts accurately determined, is vitally important for the rational administration of justice. Too often our adversary techniques conceal or distort the truth rather than promote its discovery. The legal profession should consider and explore appropriate modifications of adversary procedures for the purpose of better determining the truth, and should formulate ethical prescriptions embracing a higher professional duty to seek the truth.

2. Delivery of Legal Services. If the primary obligation of the profession is to “make legal counsel available,” as stated in Canon 2, and to “assist in improving the legal system,” as mandated in Canon 8, the obligation to improve the delivery of legal services is clear. No one asserts that adequate legal services are now available to all who need them. Perhaps the rich are well provided for, and in some places the indigent are well served, at least as to criminal matters. But in other places the legal assistance available to the poor scarcely meets the constitutional standards of Gideon and Argersinger, and the level of assistance on civil matters for the poor is everywhere insufficient, often nonexistent, despite the efforts of the Legal Services Program of the Office of Economic Opportunity and its successor, the Legal Services Corporation. Unfortunately, both have been inadequately funded. In some ways the great middle class, the majority of all Americans, is most disadvantaged of all. Too poor (and too uninformed) to take proper advantage of preventive law, but too “rich” to receive public assistance, most middle
class individuals use lawyers only when there is no alternative. Too often they fall into the hands of those least prepared to solve their problems at reasonable cost.

The matter need not be as cheerless as the above statement of present fact suggests. The profession is at last alert to the problems and its obligations. The law schools are now producing in record numbers the best trained lawyers ever graduated in the United States—or probably anywhere else. The idealism of this new crop of lawyers is also the strongest the nation has ever seen. Accordingly, ways must be found to harness this newly available talent into improved methods for the delivery of legal services. The time is ripe. The professional responsibility obstacles have been removed from prepaid legal insurance programs, whether relying on open or closed panels; minimum fee schedules have been set aside; some form of advertising by lawyers seems assured of approval; and various methods of certifying for specialization and competence are being tried with near assurance that some will prove workable and useful. Most important of all, though, is the fact that the conscience of the profession has been stirred. Nothing was possible until that happened; now nothing is impossible.

3. Development and enforcement of standards of discipline for judges and lawyers. It is one thing to require, as does Canon 9, that "A lawyer should avoid even the appearance of professional impropriety." It is quite another matter to determine exactly how the line should be drawn between representing a client "competently" (Canon 6) and "zealously within the bounds of the law" (Canon 7) on the one hand and the kind of representation that may be unfair to other individuals or injurious to the public interest.

For the present purpose of noting the difficulty of deciding between two "rights," it may be sufficient to note the apparent clash between the traditional scope of the lawyer-client privilege and the SEC-sponsored demand for disclosure of actual or potential client wrongdoing. The dilemma is real and not easily resolved. In the securities field, as elsewhere, the lawyer has special privileges almost of a monopolistic character. No corporation, large or small, can file pleadings without a lawyer to prepare and sign them; and ultimately the lawyer must appear to represent the corporation in any judicial or quasi-judicial proceeding. In short, business cannot operate without lawyers; and lawyers believe that they cannot represent their business clients effectively without the kind of confidential arrangement contemplated by the lawyer-client privilege. But
the SEC is now engaged in a campaign to force new ethical standards upon lawyers, requiring disclosure of client confidences in a far wider range of circumstances than was ever previously thought necessary under the Code of Professional Responsibility. The new question is this: Are there circumstances in which a lawyer must disclose wrongdoing, actual or suspected, of a client who sought his confidential advice?

Equally troublesome problems arise in other aspects of the profession. The encouraging thing is that the bar is increasingly aware of the subtleties of professional responsibility and is working diligently and realistically to find solutions that protect the interests of clients, lawyers, and the public.

Efforts to discipline lawyers and judges for wrongdoing or incompetence have perhaps been less successful. But the search continues for better ways, from increased attention to merit selection of judges to the development of less cumbersome, but still fair, methods of removing judges from the bench or lawyers from practice where damage to the public interest would otherwise be the result.

And What of the Law Schools?

Let me set forth as directly as possible my compliment and my complaint. First the compliment. In my judgment legal education in the United States has never been stronger than at the present time. American law schools provide superb instruction in legal reasoning, research techniques, and substantive knowledge. They even do reasonably well at those hard tasks of teaching competence in the written and spoken skills of advocacy; and they are rapidly learning how to provide significant laboratory experience in the practical aspects of litigation through imaginative clinical training programs.

And now my complaint. American law schools in my judgment have failed in two important respects. (1) They have not taken seriously enough the obligation to inculcate their students with high ethical standards. (2) Law teachers have not taken seriously enough their obligation to "assist in improving the legal profession" (Canon 8).

1. Training for Professional Responsibility. It is unquestionably difficult to teach effectively the moral standards of the profession, involving, as appears on the surface, too-obvious homilies on

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the one hand and quirkily detailed rules on the other. But to view the professional responsibilities in that light is tunnel vision of the most restricted nature. Contemporary problems of professional responsibility are as interesting, as intricate, and as many-faceted as those of criminal justice, consumer law, or conflict of laws. It is in fact somewhat puzzling that law teachers have in general not recognized the possibilities in this area for problem-method instruction or other methods that have been devised by imaginative law teachers to enliven other subjects considered important but possibly difficult to make interesting for their students. One suspects that at least some law teachers are less interested in the moral and public interest aspects of the law than in the craftsmanlike manipulation of result made possible through deep mastery of procedure and substance. The predictable result is that generations of law student graduates emulate their admired instructors in believing that knowledge of law is designed to provide an advantage to the superb technician, regardless of the merits of a particular case or the wider public interest.

Whatever the reason, the fact is that professional responsibility as a law school subject has often been regarded as one of the rejects of legal education, to be assigned to the ineffectual teacher, the newly arrived instructor, or the anecdotal adjunct. Even when the American Bar Association changed its rules to require instruction in professional responsibility for all graduates of ABA-approved schools, the law schools were quick to get legislative history that allowed continuance of the long-tried, but still unproved "pervasive" approach, leaving to each instructor the obligation to identify and instruct on the professional responsibility issues in his or her course.

That is not good enough.

2. Law Teachers as Advocates of Reform of the Legal Profession. Law teachers have never been reluctant to speak out on the large public issues of the day, whether as individuals or in collectively signed statements of principle; and this I think very useful. But they have in general been less willing to take collective stands that might be influential in reform of the profession or in assuring

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6. I have more fully developed my views on this point before the ABA Section on Legal Education and Admissions to the Bar on August 12, 1975, in remarks entitled "Is Justice Relevant to Legal Education?"
better delivery of legal services. It is perhaps unfair to charge both
the Association of American Law Schools and the ABA Section on
Legal Education and Admissions to the Bar with navel-
contemplation. But it is not easy to recall important contributions
either has made to increasing the integrity or responsibility of the
profession as a whole. True, they are not charged with that obliga-
tion; but ways have been found to air widely shared views on other
issues perhaps thought more interesting, but even less obviously
relevant to legal education.

It is not hard to find relevance to legal education in the issues
of the profession into which the law school graduates will soon be
immersed. Problems of open versus closed panels for prepaid legal
services, certification for competence in general or as specialists, fee
shifting, lawyer advertising, and alternative means of providing
legal services to the poor are all issues that vitally affect the profes-
sion and the soon-to-be-graduated law students. Why should law
teachers not be concerned (which unquestionably they are individu-
ally)? More important, why should they not express that concern in
the places where the decisions about the profession will be made?