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"Overcrowding": An American Perspective

*by Jerold S. Auerbach**

I. Introduction

THE QUESTION OF "overcrowding" is complex: how it is answered may ultimately depend upon whether the perspective is a professional interest in high status and low competition, or a public interest in expanded legal services. The Canadian answers may be quite different from those in the United States, but the American experience provides sufficient warrant for caution to offer it as a guide, and a warning. Examples drawn from the American experience may provide useful insights, at least for understanding that vital issues of social policy are deeply imbedded in assumptions about an overcrowded bar.

II. Historical Perspective

At different times, for quite different reasons, starry-eyed utopians and rigorous professionals have answered the question of whether there are too many lawyers affirmatively. Utopian visionaries have always tried to expel lawyers from their Gardens of Eden. To them, one lawyer was a crowd. There were rules in early Greece, republican Rome, and dynastic China against paid legal advice. Modern revolutionary movements, ironically often led by lawyers (Robespierre, Lenin, Castro), have sought to destroy the legal profession as a bastion of conservatism. Mistrust of legal professionals crossed the Atlantic with the earliest settlers in the American colonies. The *Fundamental Constitutions* of Carolina declared it "a base and vile thing" to practice law for a fee. In Massachusetts the *Body of Liberties* permitted the retention of counsel "Provided he give him noe fee or reward for his paines." Benjamin Franklin's *Poor Richard* echoed the popular complaint: " 'Tis the Fee directs the Sense to make out either side's Pretense." Colonists referred to a lawyer-bird, with its long bill, and a lawyer-fish, which was always slippery. Yet suspicion was no deterrent to the expansion of the colonial bar. Not long after independence, the Frenchman Crèvecoeur described American lawyers as weeds "that will grow in any soil that is cultivated by the hands of others; and when once they have taken root, they will extinguish every other vegetable that grows around them."

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III. The American Legal System

The United States became a lawyers' paradise. Our public issues, and many of our private ones, have always been framed in legal terms. There is an intimate connection between law and public life. Our institutional thought and language is highly legalistic: the question is always whether something is legal, or Constitutional; not whether it is fair, or just. Litigation is the characteristic remedy provided by our society to its aggrieved members. Few Americans, it seems, can tolerate more than five minutes of frustration without succombing to the temptation to initiate a lawsuit. Why is this so? In a fragmented, individualistic, competitive society that places a premium upon success, law provides a necessary degree of social cohesion. In a society where individual rights are paramount, there must be an abundance of lawyers to process and protect them. Legal careers are consequently immensely attractive; so, too, are currents of social criticism that refer to a legal "explosion," legal "pollution," the malady of "hyperlexis," and a swarming "plague of lawyers."

IV. Overcrowding: The Professional Perspective

The professional perspective emanates from quite different sources. In American history, the most vigorous debate over an overcrowded bar and controls on entry to the profession occurred during the 1920s. The striking demographic fact that preceded this debate was the spurt in the number of new lawyers who were either immigrants. In this context, bar admissions policies, indeed the entire debate over professional overcrowding, had momentous social implications. It raised, in stark fashion, the question of professional elitism and whether a restricted bar was consistent with, or in conflict with, the public interest in social mobility and the availability of legal services. Where the legal profession provided direct access to careers in public life, a movement to limit access to the bar because of its changing demographic base might easily become a device to deny political power to specific ethnic or religious groups. That, in fact, was the American experience: "overcrowding" vividly expressed the cultural claustrophobia of the professional elite that wished to close its ranks against undesirables.

Such issues may or may not consistitute any part of the Canadian debate about overcrowding. Insofar as Canada is, or is becoming, a legalistic society that resembles its southern neighbor, then here, too, professional access questions conceal important issues of public policy. At the narrowest professional level, the question is whether a legal career shall be open to all. On a broader level of public concern, the question becomes: at what point does an "undercrowded" bar impede access to justice? In some demographic respects the Canadian bar resembles the American bar: a concentration of firms and lawyers in a few large cities; more impoverished, rural areas experiencing an apparent shortage of law-

yers; small-town lawyers being apprehensive lest they lose business to newcomers.

V. The Nature of the Problem

These hints of a parallel immediately raise the question: What is happening in Canada, at the moment, that makes "overcrowding" an important, and evidently highly charged, issue for the legal profession? There is not any easy way to reconcile the professional interest in a limited, controlled bar with the public interest in expanded legal services. It is important, while this debate is in process, to recognize that these may be competing, not complementary, interests. Some of the concerns expressed at this Conference suggest that there are some important, and disturbing, parallels with the American experience. Although much rhetoric is expended on the ostensible need to save lower-income lawyers (who tend to be new to the profession) from suffering, the complaints about overcrowding seem to come primarily from bar association presidents, not from the Law Society or the law schools. The fear of overcrowding, in other words, seems to be tinged with the fear of professional competition. The statistics concerning the growth of the Canadian legal profession seem to suggest that the adequate provision of legal services may loom as a more serious problem than an overcrowded bar. "Overcrowding," in Canada as in the United States, is evidently an emotional, divisive issue within the bar. It is striking, however, that consumers of legal services have not been heard on this subject. Nor have representatives of those racial or ethnic groups who have sent a disproportionately low percentage of their own people to the bar had an opportunity to adequately air their views. At a time when women have just begun to enter the Canadian bar in significant numbers, any attempt to set limits to admission is bound to adversely affect aspiring women lawyers.

Throughout this century social theorists have taught us that a formal legal system, with a trained professional class, offers distinct advantages over alternative forms of social organization. To the extent that they are correct, and legalization represents progress, then an overcrowded bar may be part of the price that must be paid for this social benefit. At the very least, it is imperative to consider whose interests will be served if the bar expands, or if it is artificially contracted by the imposition of controls on the admission of new lawyers. The American experience provides unsavory answers to anyone who believes in equality of opportunity and broad access to justice. If the Canadian bar takes notice of this disturbing chapter in the history of the American bar it may spare itself, and the public it serves, an episode of invidious professional discrimination that will not serve its own interest, or the public interest.