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THE RHETORIC OF PROFESSIONAL REFORM*

DEBORAH L. RHODE**

The study and practice of the law are doubtless an honourable employment; and when a man acts becoming the dignity of the profession, he ought to be esteemed by every member in the community. But when any number of men under sanction of this character are endeavouring to perplex and embarrass every judicial proceeding; who are rendering intricate even the most simple principles of law; who are involving individuals, applying for advice, in the most distressing difficulties; who are practising the greatest art in order to delay every process; When such men pretend to cloak themselves under the sacredness of law, it is full time the people should inquire, "by what authority they do these things."¹

Assaults on the American legal profession reveal a depressing continuity in theme and an even more discomfiting continuity in response. Polemics issued over the last decade by President Jimmy Carter, Chief Justice Warren Burger, and Harvard President Derek Bok are almost indistinguishable from those of political leaders and publicists two centuries earlier.² According to conventional critiques, America has had too much law and too little justice, while lawyers have contributed as much to the problem as the solution. Even

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1. *Honestus*, Observations on the Pernicious Practice of the Law No. 1 (Mar. 9, 1786), reprinted in 13 AM. J. LEGAL HIST. 244, 249-50 (1969) [hereinafter cited as *Honestus*]. See generally Surrency, *The Pernicious Practice of Law—A Comment*, 13 AM. J. LEGAL HIST. 241, 242 (works signed by *Honestus* have been attributed to antifederalist politician Benjamin Austin).

2. Compare, e.g., J. Carter, Remarks at the 100th Anniversary Luncheon of the Los Angeles County Bar Association, May 4, 1978, printed in 64 A.B.A. J. 840, 842 (1978) (criticizing legal profession for excessive litigation and self-interest, and inadequate service to poor and middle class); W. Burger, YEAR END REPORT ON THE JUDICIARY 17-19 (1983), and Annual Message on the Administration of Justice, A.B.A. Midyear Meeting (Feb. 12, 1984), at 13; and Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983) (criticizing unequal distribution of legal services and tendencies toward litigiousness) with Letter from John Adams to Charles Cushing (Apr. 1, 1756), reprinted in 46 MASS. HIST. SOC'Y PROC. 410-12 (1913) (the lawyer "often foments more quarrells than he composes, and enriches himself, at the expense of impoverishing

the metaphors have remained unchanged; attorneys appear and reappear as "cursed caterpillars" and a "plague of locusts" preying on the "[b]owels of our common-wealth."³

The bar's response to these assaults has hovered between confession and avoidance, but generally has settled on the latter option. Sustained tirades have provoked ad hoc commissions, refurbished codes, and scholarly lamentations, but never the sweeping renovations that critics vaguely espouse. Although this dialectic is by no means unique to the legal profession, its persistence raises an obvious question: Why has there been such little change in either the rhetoric or dimensions of reform?

Part of the difficulty lies in the abstract mode of most reformist discourse. Implicitly or explicitly, the critic tends to embrace paradigms that call for x without y. Among the customary objectives are:

- better quality legal services without additional cost;
- greater public accountability without greater governmental control;
- enhanced access to the legal system without increased litigiousness;
- less adversarial and professionally-dominated means of dispute resolution without impairment of individual rights or creation of second class systems of justice;
- more incremental reform without deflecting attention from the more fundamental problems that remain.

The difficulty, of course, is how to accommodate those competing ends. On that point, reformist rhetoric is rarely illuminating. If, as a practical matter, it is generally impossible to achieve much of x without some risk of y, such paradigms do not advance analysis. Rather, they invite an enervating skepticism. All too often, apologists from the right assume that no fundamental change is worth the risk, while critics from the left conclude that none is plausible absent major social transformation.

To move beyond this standoff will require a different theoretical framework. Underlying the sweeping slogans of "too much law, too

others more honest and deserving than himself"); *Honestus*, *supra* note 1, No. IV, at 262-66 (lawyers delay recovery and increase the cost of dispute resolution). See generally Bloomfield, *Lawyers and Public Criticism: Challenge and Response in Nineteenth-Century America*, 15 AM. J. LEGAL HIST. 269 (1971) (discussing nineteenth century efforts to impose greater social responsibility upon the legal community).

3. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 83 (1973); Auerbach, *A Plague of Lawyers*, *HARPERS*, Oct. 1976, at 37.

little justice" are normative and empirical presuppositions that warrant closer scrutiny. In particular, we need more probing analysis of the relationship between professional structures, public needs, and social change. We also need a better understanding of reformist texts. How do they reflect and reformulate our professional ideals and political agendas? What implications can we draw from the competing subtexts of discourse on reform?

To call for more rhetoric about rhetoric does, of course, invite its own set of difficulties. Abstract critiques about abstract critiques appear in some sense vulnerable to the very objections they raise. But that acknowledgment ought not to invite acquiescence in the existing terms of reformist dialogue. What is unsatisfying about the current framework is not abstraction per se but a form of abstraction that misdescribes dilemmas and misleads as to solutions. The difficulty is not simply that problems in the legal order are complex and adequate responses elusive, but that the way these problems are defined tends to obscure their complexities. To understand the possibilities as well as limitations of reform strategies will require greater sensitivity to the rhetorical structures in which they proceed.

I.

Much reformist rhetoric has a curiously schizophrenic tone. It is often simultaneously assumed that Americans are "over-lawyered and underrepresented."⁴ Critics have variously depicted a populace besieged by "hyperlexis," "legal pollution," and "judicial overload."⁵ Yet of equal concern is the cost, complexity, and concomitant inaccessibility of law for the majority of Americans. These competing diagnoses of "the problem" lead to obvious difficulties in prescription. Much reformist rhetoric envisions some halcyon era in which law plays a far less promiscuous role, as well as a legal system to which all citizens can readily resort in pursuit of individual rights.

Not only are such critiques normatively inconsistent, they are often empirically inexact. Much of the argument proceeds by anecdotes, analogies, or statistics that are demonstrably inadequate to

4. J. Carter, *supra* note 2, at 842.

5. Manning, *Hyperlexis: Our National Disease*, 71 *Nw. U.L. Rev.* 767 (1977); Marcus, *Judicial Overload: The Reasons and the Remedies*, 28 *BUFFALO L. REV.* 111 (1979); Ehrlich, *Legal Pollution*, *N.Y. Times*, Feb. 8, 1976, § 6 (Magazine), at 17. See also Gellhorn, *Too Much Law, Too Many Lawyers, Not Enough Justice*, *Wall St. J.*, June 7, 1984, at 28, col. 3 (Dean Gellhorn's response to current criticism of the legal profession); cf. H. ST. JOHN CREVECOEUR, *LETTERS OF AN AMERICAN FARMER* (1787), quoted in C. WARREN, *A HISTORY OF THE AMERICAN BAR* 217 (H. Fertig ed. 1966).

the occasion. The anecdotal approach is to depict a legal landscape awash in petty grievances. The decline in religious and secular institutions has allegedly left a void too often filled by contentious claimants and an imperial judiciary.⁶ Suitors sue dates,⁷ football fans sue referees,⁸ children sue parents,⁹ and beauty contestants sue each other.¹⁰

Of course, what counts as undue litigiousness depends largely on the eye of the beholder. Claims against sex-segregated Little Leagues have been viewed as frivolous in some but scarcely all circles, and the criteria guiding critics' characterizations are almost never disclosed.¹¹ How, for example, do conventional critiques help to evaluate suits like Pillsbury's \$1.5 million trademark infringement litigation against *Screw* magazine, which had run a sexually compromising picture of the company's animated baking dolls, Poppin' Fresh and Poppie Fresh, together with the corporate slogan, "Nothing Says Lovin' Like Something from the Oven and Pillsbury Says It Best"? When *Screw's* offer to cease publication of the photograph and acknowledge its transgressions proved unavailing, the dispute escalated into a three-year exchange of invective and innuendo.¹² Is that an example of undue litigiousness or a legitimate vindication of principle and property interests?

Such questions, like those of the "How's your spouse?" variety,

6. For a discussion of the void left by family, church, and community, see Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982); see also R. GAMBETTA, M. MAY & J. FOSTER, *GOVERNING THROUGH COURTS* 15-16 (1981) (arguing that the decline of "kinship institutions" has "contributed to greater utilization of the courts").

7. *Jilted California Accountant Sues His Date for \$38 in Expenses*, N.Y. Times, Jul. 26, 1978, at 10, col. 1.

8. Auerbach, *supra* note 3, at 42 (Washington football fans contest call on touch-down pass).

9. *Turnabout is Fair Play*, Nat'l L.J., June 11, 1979, at 39, col. 2 (after psychiatrist advised son to sue parents for parental malpractice, parents retaliated by suing psychiatrist for their resulting legal expenses).

10. *My, Oh Yes*, N.Y. Times, Aug. 3, 1980, § 4, at 7, col. 3 (suit by Miss Dallas against Texas Beauty Pageant winner Miss Lubbock who allegedly extended her talent performance approximately two minutes beyond the allotted time limit).

11. According to former Stanford Law School Dean and Legal Services Corporation President Thomas Ehrlich, sex discrimination in Little League baseball is wrong "as a matter of policy" but "[a]s a matter of sound allocation of judicial resources . . . courts should stay out of such matters." Ehrlich, *supra* note 5, at 17. Apparently, Ehrlich does not believe that courts could or should refrain from intervening in all "policy" questions. He does not elaborate on why gender discrimination in athletics is appropriate for abstention. For a critical review of literature about access, see Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319 (1985).

12. *Pillsbury Co. v. Milky Way Productions, Inc.*, 215 U.S.P.Q. (BNA) 124 (N.D. Ga. 1981), discussed in M. MARKS, *THE SUING OF AMERICA* 181-84 (1981).

invite the same proverbial response: "Compared to what?" Litigation has long served expressive functions, and it is by no means clear that the current level of ventilation is imposing unique or undue judicial burdens. The cases on which anecdotal indictments proceed consume only a tiny fraction of judicial workloads, and comparable grievances can be compiled from any number of societies not renowned for their litigiousness or their lack of religious and secular institutions. For example, in nineteenth century Russia, a peasant sued for return of sunflower seeds taken to feed a pet crow, and in 1965, one district court in Belgrade entertained 9,000 suits for slander and insult.¹³

To claim a distinctive problem of rising dimensions, reformist rhetoric requires a different tack, and the course often chosen involves some statistical sleight of hand. Among the most popular evidence of a legal epidemic is the growth in federal caseloads, which increased by fifty percent between 1969 and 1972.¹⁴ What this account leaves out is that the rate of increase has leveled off, and that the progression looks rather less alarming in the state courts, which account for ninety-seven percent of all civil litigation. Although precise statistical information is impossible to obtain, the best available evidence demonstrates only a modest rise in the total number of claims filed per capita over the last century, and a declining percentage of cases proceeding to trial.¹⁵ Moreover, the number of filings gives only a partial perspective on court congestion. A large percentage of the recent increase involves pro se prisoner petitions and uncontested divorces, which do not entail time-consuming adjudication. As Wayne McIntosh's and Lawrence Friedman's research indicates, there have clearly been historical periods and jurisdictional pockets in which the statistical level of American litigiousness

13. Friedman, *Access to Justice: Social and Historical Context*, in 2 ACCESS TO JUSTICE 23 (M. Cappalletti & J. Weisner ed. 1979); Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 56 (1983) (quoting *Spite Feuds Fill Yugoslavia's Courts*, N.Y. Times, Oct. 16, 1966). For a discussion of the low percentage of cases involving "headline-making" litigation, see M. MARKS, *supra* note 12, at 17-25. See generally Grossman & Sarat, *Litigation in the Federal Courts: A Comparative Perspective*, 9 LAW & SOC'Y 321 (1975) (discussion of social, economic, and political conditions that affect litigation).

14. Tribe, *Too Much Law, Too Little Justice*, ATL., July 1979, at 25, 25 (computations adjusted for population increase); cf. Ehrlich, *supra* note 5, at 17 (from 1960 to 1974, the number of federal court cases rose by about 60%).

15. Galanter, *supra* note 13, at 43; McIntosh, *150 Years of Litigation and Dispute Settlement: A Court Tale*, 15 LAW & SOC'Y REV. 823, 826-28 (1980-81). See generally L. FRIEDMAN, *TOTAL JUSTICE* 15-23 (1984).

has been significantly greater than at present.¹⁶

Yet to many contemporary critics such evidence appears somewhat beside the point. Thus, President Bok's recent jeremiad, after making an appropriate historical disclaimer, nonetheless concluded that the United States was over-lawyered and over-regulated. Like others of its genre, Bok's assault rested heavily on analogy. America, he noted, has spawned the highest concentration of lawyers per capita in the world, and has litigation rates far in excess of other industrial nations. After observing that Japan has thirty percent more engineers than the United States and one-twentieth the number of lawyers, Bok closed with the oft-cited assertion that "[e]ngineers make the pie grow larger; lawyers only decide how to carve it up."¹⁷

Such critiques work more effectively on the rhetorical than the empirical level; as a description of American attorneys' roles in corporate planning, regulatory compliance, civil liberties litigation, or criminal defense, the pie metaphor seems somewhat lacking. Moreover, the statistical profile is highly selective. Given the proliferation of special tribunals, administrative forums, and nonlawyers performing legal functions in many countries, reliance on litigation rates or numbers of licensed attorneys provides a highly imperfect comparative picture. Japan produces twice as many law graduates per capita as America, and many of these individuals provide assistance comparable to that of American attorneys; the low number of licensed Japanese lawyers is a function of bar examination pass rates of under two percent.¹⁸ So too, America's level of litigation, while significantly higher than Japan's, is in the same range as that of other countries such as England, Australia, and Denmark, which are not typically viewed as verging on "legal hypochondria" or adjudicative "paralysis."¹⁹ Nor is it clear that American investment in litigation has reached intolerable levels. What little data is available

16. McIntosh, *supra* note 15, at 826-28; Galanter, *supra* note 13, at 38; Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267, 291-96 (1975); accord J. BALDWIN, *THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI* (1853).

17. Bok, *supra* note 2, at 573-74; see Cannon, *Contentious and Burdensome Litigation: A Need for Alternatives*, 63 NAT'L FORUM—THE PHI KAPPA PHI J. 10 (1983); see also Gellhorn, *supra* note 5 (two-thirds of the world's lawyers practice in the United States).

18. The pass rate is, in turn, partly attributable to the small number of places available at the Legal Research and Training Institute of the Supreme Court of Japan. Institute attendance is a prerequisite for admission to the bar. Tsuboto, *Myth and Truth in Non-Litigiousness in Japan*, 30 LAW SCHOOL RECORD—U. CHI. 8, 8-9 (Spring 1984); Easton, *Fewer Lawyers? Try Getting Your Day in Court*, Wall St. J., Nov. 27, 1984, at 28, col. 4.

19. Compare Galanter, *supra* note 13, at 51-61, with Manning, *supra* note 5.

suggests that a quite small fraction of individual grievances end up in court.²⁰ The 1983 federal budget for the judiciary was a modest \$796 million,²¹ about one-third the cost of a single Trident submarine.

That is not to deny the force of all statistical observations. The last quarter century has witnessed an unprecedented growth in the volume of law and lawyers.²² In certain respects we remain, as de Tocqueville noted, an exceptionally legalistic culture and our tolerance for lawyers' fees is not easily rivaled. America's annual investment in legal assistance reportedly totaled over thirty-eight billion dollars in 1983, and between 1972 and 1983 increased at a rate of about twelve percent annually.²³ Quite apart from any historical and cross cultural comparisons, it is fair to question a system generating that level of expenditure on professional intermediaries. Overall, legal fees consume between a quarter and a third of the recoveries in litigated cases, and do not necessarily bear close relationship to the professional time expended or risks assumed.²⁴ In the typical case, lawyers for plaintiff and defendant together recover as much or more than the prevailing party.²⁵ Between forty to

20. See, e.g., Miller & Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y. REV. 525, 544 (1980-81) (suggesting grievances ultimately taken to court amount to 5% of those filed); see also B. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC* 260-64 (1977) (suggesting use of lawyers varies with dispute involved).

21. ANNUAL REPORT, DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 63 (1983). Such aggregate estimates do not, of course, include subsidies provided through tax deductions for legal fees.

22. The number of federal trials consuming more than 20 days has almost quadrupled in the past two decades. Gellhorn, *supra* note 5. The number of attorneys has doubled since the 1960s, B. CURRAN, K. ROSICH, C. CARSON & M. PUCETTI, *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980's*, at 4 (1985), and "the pages of federal regulations tripled in the 1970's," Bok, *supra* note 2, at 571. "In 1977, legislative bodies at the federal, state and local levels enacted approximately 150,000 new laws, [each of which] required the issuance of ten new regulations." Tribe, *supra* note 14, at 25.

23. U.S. Dep't of Commerce, *U.S. INDUSTRIAL OUTLOOK 1984*, at 52-22.

24. See generally Clermont & Curriivan, *Improving on the Contingent Fee*, CORNELL L. REV. 529 (1978); Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970); Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) [hereinafter cited as Trubek]; Case, *Lawyers Often are Grossly Overpaid*, N.Y. Times, Dec. 2, 1984, § 3, at 2, col. 3; Miller & Astrue, *Court Costs and Delay: A Guide for Analysis* 10 (1984) (unpublished manuscript) (on file in the Maryland Law Review office).

25. Draft of Recommendations to ABA Action Commission to Reduce Court Costs and Delay, *The Program on the Legal Profession—Harvard Law School*, at III-3, F-5, F-6 (Jan. 20, 1983) [hereinafter cited as Action Commission Recommendations].

eighty percent of accident insurance premiums end up paying attorneys and court costs rather than compensating victims.²⁶

Of equal concern is the inaccessibility of legal services to middle and low income individuals. A vast number of legal claims are unperceived or unpursued because of the cost and complexity of legal processes. The most comprehensive surveys have estimated that Americans consult lawyers on less than a third of all matters that "reasonably could be called legal problems" and that about a third of the adult population has never had contact with an attorney.²⁷ By its own estimates, the federally funded Legal Services Corporation can handle only a small percentage of the legal problems annually encountered by persons below the poverty line.²⁸ The number of attorneys working for nonprofit public interest organizations is estimated at under 500.²⁹ The consequence, according to conventional critiques, is that America has "far too much law for those who can afford it and far too little for those who cannot."³⁰

As an abstract matter, greater access to justice is difficult to oppose.³¹ In a more practical sense, however, there is considerable fuzziness to the concept.³² The "legal need" studies are problematic on several levels. From an empirical perspective, it is unclear precisely what is being measured. Any society generates a vast array of conflicts that could give rise to legal action. Whether they do is a function of the organization of the legal system and its broader cultural setting. Legal needs are a social construct, not some "Archimedean starting point against which we can measure the adequacy of legal services."³³ From a normative perspective, most muttering

26. See J. KAKALIK, P. EBENER, W. FELSTINER, G. HAGGSTROM & M. SHANLEY, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 86-91 (Inst. for Civ. Just.—Rand Corp. 1984); Tribe, *supra* note 14, at 29; Wellington, *Toxic Torts: Managing the Asbestos Problem*, YALE LAW REPORT 20 (Spring 1985) (citing Rand report); *Medical Malpractice Cost Debated At Hearing*, N.Y. Times, Jul. 15, 1984, § 1, at 23, col. 1; accord sources cited *infra* note 54.

27. B. CURRAN, *supra* note 20, at 186, 261; Miller & Sarat, *supra* note 20, at 543; Trubek, *supra* note 24, at 87.

28. LEGAL SERVICES CORPORATION AND THE ACTIVITIES OF ITS GRANTEEES: A FACT BOOK (1979).

29. CENTER FOR PUBLIC INTEREST LAW, SURVEY OF PUBLIC INTEREST LAW CENTERS: NARRATIVE REPORT 5 (1980).

30. Bok, *supra* note 2, at 571.

31. Evans, *Universal Access: The Trojan Horse*, in THE PROFESSIONS AND PUBLIC POLICY 191 (P. Slayton & M. Trebilcock ed. 1978).

32. *Id.*

33. Galanter, *Delivering Legality: Some Proposals for the Direction of Research*, 11 LAW & SOC'Y REV. 225, 226 (1976). See also Evans, *supra* note 31, at 208 ("[A]ccess is as much a

about access finesses the fundamental questions. Almost by definition, the demand for greater participation proceeds on the assumption that the current legal system yields justice: Why else would one want entry? Generally absent from the analysis is any acknowledgment that the same social, economic, and political forces that have constrained access may also constrain the quality of justice available. Expanding participation without redistributing power may simply legitimate existing structures.³⁴

Moreover, crusades for access seem strangely oblivious to concerns about litigiousness. What forms of legal conflict are socially desirable? How much "naming, blaming, and claiming" do we want to encourage and what level of public resources are we prepared to invest in that enterprise?³⁵ On those points, egalitarian exhortations have been utterly unilluminating. There is broad agreement that the "right" distribution of legal talent is not simply a function of what individuals are willing and able to pay, but little indication of what alternative allocative criteria are appropriate. Typically the critic rests with some categorical condemnation of market measures, and a vague genuflection to equality. According to then President Jimmy Carter, access to justice "must not depend on economic status,"³⁶ and former federal judge and law professor Marvin Frankel has concurred. Justice ought not to be for sale; "substantially equal access to the services of lawyers" should become a national priority.³⁷

Except as symbolic subtext, such rhetoric has a vacuous ring. As Tawney once observed about equal opportunity, one wonders what would horrify proponents most, "the denial of the principle or the attempt to apply it."³⁸ Given the elasticity of legal needs and disparity of talent within the profession, any meaningful effort to equalize access would require not only massive public subsidies but the prohibition of private markets. More modest calls to enhance, if not fully equalize, access still leave all the sticky points unaddressed.

characteristic of the process of provision of professional services as of the demand for them by users."); Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 LAW & SOC'Y REV. 401 (1975).

34. See generally Cahn & Cahn, *Power to the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Frandszelk, *Justice and the Reduction of Litigation Costs: A Different Perspective*, 37 RUTGERS L. REV. 337 (1985); Nader, *Consumerism and Legal Services: The Merging of Movements*, 11 LAW & SOC'Y REV. 247 (1976);

35. Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81).

36. J. Carter, *supra* note 2, at 844.

37. M. FRANKEL, *JUSTICE: COMMODITY OR PUBLIC SERVICE* 8 (1978).

38. R. TAWNEY, *EQUALITY* 103 (1964 ed.).

What price are we prepared to pay for process? How do legal services compare with other claims on our collective resources? Do we share the concerns raised by the British Royal Commission on Legal Services: "A society in which all human and social problems were regarded as apt for legal remedy . . . would not be one in which we would find it agreeable to live"?³⁹ If that is our consensus, which sorts of problems call for nonlegal responses and how should that determination be made?

Reformist rhetoric generally skirts those issues by retreat into romanticism. The most common course is to hypothesize a package of alternative modes of dispute resolution that will simultaneously expand access, reduce contentiousness, empower individuals, and solidify communities. Although little of this commentary presents itself as utopian, its prescriptions seem often to assume that form. That approach has, in turn, provoked a counterassault of critiques intent on exposing the gap between the rhetoric and reality of reform.

The debate over alternative dispute resolution encompasses a broad range of strategies designed to reduce reliance on law, lawyers, and adjudicative procedures. Arbitration, deregulation, no-fault compensation systems, assistance for pro se litigants, media ombudsmen, neighborhood justice centers, expanded small claims courts, and rent-a-judge services are among the conventional proposals for more accessible and less adversarial means of dispute resolution. Few of these approaches are entirely recent innovations. A number of American colonies and early utopian settlements sought to dispense with licenced attorneys, while various ethnic, religious, and commercial communities functioned with alternative arbitration processes throughout the nineteenth and twentieth centuries. Norwegian courts of conciliation, established in the late eighteenth century to protect citizens from the "gluttony of lawyers," have had various American analogues, including a spate of small claims courts beginning in the early 1920s.⁴⁰ What is, however, distinctive about

39. THE ROYAL COMMISSION ON LEGAL SERVICES: FINAL REPORT 17 (1979).

40. See J. AUERBACH, *JUSTICE WITHOUT LAW* (1983); see also Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in 1 *THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE* 210 (R. Abel ed. 1982) [hereinafter cited as *POLITICS*]. See generally Leigh-Wai, *Dispute Settlement in Chinese-American Communities*, 21 *AM. J. COMP. L.* 627 (1973) (examining structure, procedure, and theory of dispute settlement among first generation Chinese immigrants in America); Comment, *Community Courts: An Alternative to Conventional Criminal Adjudication*, 24 *AM. U.L. REV.* 1253 (1975) (discussing community courts with jurisdiction over certain criminal matters).

the current climate is the intensity of support for alternative dispute resolution within powerful public, private, and professional constituencies. Foundation officers, government officials, legal academics, and bar association committees have all joined forces under an informal banner.⁴¹

Much of their enthusiasm has centered on community justice programs, which began generating a small cottage industry during the late 1970s. Since such programs have been the most intensively studied offshoots of the alternative dispute resolution campaign, they provide an interesting case study in the implementation of reformist rhetoric and the dangers of undifferentiated diagnoses, prescriptions, and denunciations.

As an abstract concept, neighborhood justice appeared to offer all things to all constituencies. Community-based conciliation programs promised to secure cheaper, speedier forums for resolving grievances; to reduce court congestion by diverting minor disputes; to enhance individual autonomy by expanding party control while encouraging consensual mediated settlements; to further equal justice by redressing and deterring exploitation of previously unrepresented individuals; and to empower disadvantaged communities while reducing social friction.

In practice, however, such objectives turned out to be overstated and to some extent incompatible. In order to divert a significant number of disputes from court calendars while achieving cost advantages over formal tribunals, conciliation programs could not afford time-consuming consensual processes and assistance by adequate trained personnel. Since powerful adversaries were often unwilling to submit to voluntary processes or to accept unsatisfactory outcomes, the centers could do little to assist have-nots against haves without abandoning consensual premises. Strategies for reconciling individual grievances did not appear well suited for encouraging collective responses to common problems.⁴² Measured

41. See FORD FOUNDATION, *NEW APPROACHES TO CONFLICT RESOLUTION* (1978), and *MEDIATING SOCIAL CONFLICT* (1978); Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973); Rice, *Mediation and Arbitration as a Civil Alternative to the Criminal Justice System—An Overview and Legal Analysis*, 29 AM. U.L. REV. 17 (1979); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976); R. COOK, J. ROEHLAND, & D. SHEPPARD, *NEIGHBORHOOD JUSTICE CENTERS FIELD TEST: FINAL EVALUATION REPORT* (Dep't of Justice 1980) [hereinafter cited as R. COOK].

42. See generally Abel, *The Contradictions of Informal Justice*, in *POLITICS*, *supra* note 40, at 281-82 (demand of behavior change transformed into a claim for money); Hofrichter, in *POLITICS*, *supra* note 40, at 240; Merry, *Defining "Success" in the Neighborhood Justice Movement*, in *NEIGHBORHOOD JUSTICE: AN ASSESSMENT OF AN EMERGING IDEA* 187 (R. Tomasic & M. Feeley eds. 1982) [hereinafter cited as *NEIGHBORHOOD JUSTICE*] (present

against their original objectives, neighborhood justice centers have inevitably fallen short. According to numerous empirical studies, such programs have not proved cheaper⁴³ or significantly quicker⁴⁴ than formal adjudication; they have not appreciably reduced court congestion;⁴⁵ and they have not materially altered the disadvantages of the disadvantaged.⁴⁶ As has generally been the case with small claims courts, neighborhood justice has remained too remote and cumbersome for the least well-off disputants, and on occasion has lent itself to capture by those already advantaged in formal adjudicatory processes.⁴⁷ All too often, mediation between unequal parties has simply ratified rather than redressed the inequalities that contributed to disputes.⁴⁸

Thus, many critics from the left have viewed informalism as a strategy for avoiding problems of court reform by simply avoiding courts. From their perspective, an individualized conciliatory approach deflects attention from strategies that might provide more enduring collective solutions. Yet if reformist rhetoric has been uncritical in its endorsement of informalism, much revisionist rhetoric has been equally indiscriminating in its condemnation. Many leftist critiques glide over differences in program objectives and experiences which suggest that some informalist strategies have produced significant gains for the poor.⁴⁹ Other analyses rest with exposing

procedures not ideal for increased communication and shared understanding); Tomasic, *Mediation as an Alternative to Adjudication: Rhetoric and Reality in the Neighborhood Justice Movement*, in NEIGHBORHOOD JUSTICE, *supra*, at 222-23 (neighborhood justice centers more adept at dealing with superficial matters); Tomasic & Feeley, *Introduction*, in NEIGHBORHOOD JUSTICE, *supra*, at xii-xiii; Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 89 (1974) (neighborhood justice centers more effective at resolving juvenile, family, and religious problems than neighborhood, employment, consumer, and citizen-government disputes); W. FELSTINER & L. WILLIAMS, COMMUNITY MEDIATION IN DORCHESTER, MASSACHUSETTS 46 (U.S. Dep't of Justice 1980).

43. Tomasic, *supra* note 42, at 238; R. COOK, *supra* note 41, at 107.

44. Merry, *supra* note 42, at 183 (when comparison includes cases settled before trial).

45. Tomasic, *supra* note 42, at 240; R. COOK, *supra* note 41, at 104.

46. Tomasic, *supra* note 42, at 186-87.

47. See, e.g., J. AUERBACH, *supra* note 40; Lazerson, *In the Halls of Justice, the Only Justice is in the Halls*, in POLITICS, *supra* note 40, at 159. For commentary on small claims, see generally Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 LAW & SOC'Y REV. 339 (1976); Yngvesson & Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219 (1975); THE SMALL CLAIMS STUDY GROUP, LITTLE INJUSTICES: SMALL CLAIMS COURTS AND THE AMERICAN CONSUMER (1972).

48. See Abel, *supra* note 42, at 295-301; Tomasic, *supra* note 42, at 246. See generally Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984) ("mediation is the least appropriate of available legal remedies for wife abuse").

49. Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384

contradictions while ignoring relevant comparisons. The spectre of second-class justice for the poor implies that first-class justice is the plausible alternative. Yet as critics of informalism have frequently acknowledged, a full panoply of process has typically functioned more to protect the haves than the have-nots.⁵⁰

Moreover, the facade of formalism masks a system already heavily reliant on informal resolutions. In the halls of justice, "justice" has been determined largely in the halls, through settlement negotiations heavily insulated from paper protections.⁵¹ While weaker parties can be "cooled out" or pressured into inadequate settlements in informal proceedings, the same pressures occur under more ostensibly adversary processes.⁵² We have no systematic evidence that alternative dispute mechanisms generally produce less defensible results; if anything, participants' perceptions are to the contrary. Those who have had experience with adjudication report less respect for courts than the public generally, and are less satisfied than participants in more informal modes of dispute resolution.⁵³ Whatever its other inadequacies, the process of neighborhood conciliation has appeared to litigants as more humane than its alternative, and that of itself should suggest problems with any monochromatic critiques.

It should also point up the need for less categorical rhetoric and more contextual analysis. The choice between informal and formal alternatives cannot be resolved in the abstract, nor should it be determined by crude economic indices such as the amount in controversy or parties' ability to buy their way into more adversarial settings. Informed decisions about the appropriate structure of dispute resolution must depend on greater attention to the social, political, and legal culture in which they function. Analysis should center not only on the comparative efficiencies of available

(1985), and studies cited therein. See also Rose & Scott, "Street Talk" Summonses in Detroit's Landlord-Tenant Court: A Small Step Forward for Urban Tenants, 52 J. URB. L. 967, 992-97 (1975) (discussing impact of on-site legal aid clinics for tenants contesting evictions).

50. See *supra* note 47 and *infra* note 52.

51. Lazerson, *supra* note 47, at 149-50.

52. D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 96-116 (1974). See generally Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15 (1967) (effects of negotiated settlements on the criminal justice system); Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

53. R. CONNER & R. SURETTE, THE CITIZEN DISPUTE SETTLEMENT PROGRAM: RESOLVING DISPUTES OUTSIDE THE COURTS—ORLANDO, FLORIDA 11 (A.B.A. 1977); R. COOK, *supra* note 41, at 105; Saraf, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 439 (1977); Simon, *supra* note 49, at 386.

processes, but also on the collective values to be served. Where these values are not readily reconciled, we need a clearer sense of priorities. Reducing cost and delay might be crucial in some categories of cases (e.g., collection of child support); deterring future abuses might be most critical in others (e.g., domestic violence). The choice of process should be more attentive to the particular rights, responsibilities, and relationships at issue.

Similar lessons can be drawn about the implementation of other strategies on the informalist agenda. Invariably, the rhetoric promises far more than the reform delivers. To take only the most obvious examples, the watered-down no-fault insurance schemes that have survived bar lobbying have failed to attain many of their promised objectives.⁵⁴ Attempts to simplify trial procedures and pretrial practices have in some cases produced greater efficiency for lawyers, but because of prevailing fee structures, have not resulted in lower costs for clients.⁵⁵ Small claims courts and form preparation services designed for pro se litigants have proved inaccessible to large percentages of their clientele since courts are not staffed to provide such assistance and private services have been legally barred from offering it.⁵⁶ Yet these strategies have also yielded some clear benefits in reducing costs or empowering pro se parties, and have promoted greater understanding about directions for further reform.

To make those reforms meaningful, however, we need a richer set of narratives about a richer range of alternatives. Among other things, we might undertake more serious examination and experimentation with various forms of subsidies, streamlined delivery systems, and fee-shifting arrangements. For example, a number of jurisdictions have some variant of a rule providing that parties who

54. J. LIEBERMAN, *THE LITIGIOUS SOCIETY* 52-53 (1981); cf. J. O'CONNELL, *ENDING INSULT TO INJURY* 10-11 (1975); O'Connell, *No Fault and Political Practicalities*, 1980 *INS. L.J.* 82, 87 (blaming ineffectiveness of no-fault on lobbies and special interests). *Contra* A. WIDISS, J. LITTLE, R. CLARK, & T. JONES, *NO FAULT INSURANCE IN ACTION: THE EXPERIENCES IN MASSACHUSETTS, FLORIDA, DELAWARE AND MICHIGAN* (1977). See generally *Alternative Compensation Schemes and Tort Theory*, 73 *CALIF. L. REV.* 548 (1985).

55. See Action Commission Recommendations, *supra* note 25, at C-22 (discussing California's Economic Litigation Project); cf. ABA ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY, *ATTACKING LITIGATION COSTS AND DELAY* 63-67 (1984) (clients charged contingent fees do not benefit but those billed on an hourly basis do).

56. See Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 80-85 (1981); see also *Florida Bar v. Furman*, 376 So. 2d 378 (Fla. 1979) (barring secretarial service from advising pro se litigants on how to fill out forms); *Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978) (allowing sales of sample legal forms, but forbidding lay person from giving advice).

refuse a formal settlement offer and receive a less favorable judgment at trial must pay the fees and expenses that their opponents incur after the offer, subject to certain exceptions and limitations.⁵⁷ Such a strategy might prove salutary in some contexts by promoting settlements, deterring nonmeritorious litigation, and providing redress for small or moderate claims that are now too expensive to pursue.⁵⁸ We could also borrow from the approach of other industrialized nations that have established simplified administrative and pretrial discovery procedures, progressive governmental subsidies, and citizen advice bureaus for various routine legal matters.⁵⁹ Although no single strategy is likely to prove transformative, the cumulative effect of a composite approach might yield significant progress. If, as critics maintain, we have "too much law and too little justice," surely part of the reason is that we have had too much vacuous rhetoric and too little interest in attempting significant reforms or in pursuing the empirical and normative analyses that would make such efforts fruitful.

II.

The other major issue that seems to preoccupy the profession and its critics involves questions of quality. Yet lawyer competence, like access to justice, is a subject on which the relationships between rhetoric, research, and reform have been particularly attenuated. The last decade has witnessed a seemingly endless round of recriminations concerning the inadequacy of legal representation. There has been no shortage of diagnoses, but almost no hard data. While the organized bar has been constantly called to action, it has proved singularly ill-disposed to act, at least with respect to licensed practitioners. Competence, like access to justice, is what everyone wants

57. See, e.g., NEV. R. CIV. P. 68; N.J. CIV. PRAC. R. 4:58.

58. Rowe, *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 147-52 (Winter 1984). See Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982); Zander, *Payment into Court*, 125 NEW L.J. 638 (1978) (statistics on English system); S. Pink, *Progress Report to the American Bar Association Action Commission to Reduce Court Costs and Delays in Cost-Shifting Mechanisms*, Program on the Legal Profession—Harvard Law School (Apr. 29, 1983); see also *Symposium—Attorney's Fees*, 1984 UTAH L. REV. 533-669. Such proposals merit close contextual analysis since under some circumstances they may unduly amplify pressures to settle.

59. See, e.g., Langbein, *The German Advantage in Civil Procedure*, 56 U. CHI. L. REV. 823 (1985). For a discussion of criteria concerning the choice of courts over other tribunals, see generally THE ROLE OF COURTS IN AMERICAN SOCIETY 94-101 (J. Lieberman ed. 1984); Bush, *Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice*, 1984 WIS. L. REV. 893.

more of, but no one has a very clear sense of what exactly "it" is, how best to promote it, or which efforts will be worth the cost.

Demands for increased competence have an extended historical lineage. Since their inception, state, local, and national bar associations have intermittently agitated for measures to upgrade professional performance and status. The recent chorus of concern began in the early 1970s when Chief Justice Burger asserted that between one-third and one-half of lawyers appearing in serious cases were "not really qualified to render fully adequate representation."⁶⁰ Although the empirical basis for that assertion remained undisclosed, other commentators from all points on the ideological spectrum offered similar assessments and various committees convened to consider appropriate responses.⁶¹ One of the most prominent of these bodies was the committee on federal court standards headed by United States District Judge Edward J. Devitt, which disclosed a problem of rather less alarming dimensions than the Chief Justice had posited. According to the judges responding to the Devitt Committee survey, only nine percent of federal practitioners were either "very poor," "poor," or "not quite adequate" while seventeen were "adequate but no better."⁶²

Of course, since only a small fraction of the American bar litigates in federal courts, and judges see only a small part of lawyers' total work, such survey data are scarcely conclusive. And more systematic evidence has yet to appear.⁶³ In part, the difficulty lies with definition. It is not that we are lacking in attempts. Rather, it is that conventional definitions tend to be cryptic and conclusory or specific and subjective: in either case, they remain highly indeterminate in application except at the margins. For example, the American Bar Association's Code of Professional Responsibility mandates

60. *Chief Justice Burger Proposes First Steps Toward Certification of Trial Advocacy Specialists*, 60 A.B.A. J. 171, 173-74 (1974). See Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227 (1973).

61. S. TISHER, L. BERNABEI, & M. GREEN, BRINGING THE BAR TO JUSTICE: A COMPARATIVE STUDY OF SIX BAR ASSOCIATIONS 71-85 (1977); Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973); Oelsner, *Decision on Schooling for Lawyers Raises Broad Questions on Competence of the Profession*, N.Y. Times, Apr. 8, 1975, at 18, col. 2.

62. Report and Tentative Recommendations of the Committee to Consider Standards for Admission to Practice in the Federal Courts to the Judicial Conference of the United States 6-7 (1978).

63. See Blair, *Trial Lawyer Incompetence: What the Studies Suggest About the Problem, the Causes and the Cures*, 11 CAP. U.L. REV. 419, 442 (1982); Cramton, *Lawyer Competency and the Law Schools*, 27 N.C. ST. B.Q. 7, 7-8 (Dec. 1980); Rosenthal, *Evaluating the Competence of Lawyers*, 11 LAW & SOC'Y REV. 257 (1976).

“preparation adequate in the circumstances,”⁶⁴ while the Model Rules of Professional Conduct require “the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”⁶⁵ By whose standards and at what cost are matters left discretely unaddressed? More comprehensive approaches, such as that of the recent American Bar Association Task Force on Professional Competence, provide more adjectives but not necessarily more illumination.⁶⁶

Indeed, for a highly heterogeneous bar, performing widely variegated tasks for clientele of widely varying means, it is unclear that any single abstract formulation will be useful. Nor is it apparent that, whatever the definition, we are likely to obtain reliable evidence about what amount of representation falls short. Any such assessment would require detailed monitoring of every facet of a broad sample of cases, a process that poses substantial problems of cost, confidentiality, and counterfactual speculation.

These difficulties in evaluating competence among practitioners lead to obvious problems in predicting it among applicants for bar membership. Again we suffer from an embarrassing absence of data. Although we have some evidence that performance in law school correlates with performance in bar examinations,⁶⁷ we have no idea that either correlates with competence in practice.⁶⁸ Rather,

64. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(2) (1981).

65. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).

66. According to the American Bar Association Task Force on Professional Competence,

Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically capable. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities.

A.B.A. TASK FORCE ON PROFESSIONAL COMPETENCE, FINAL REPORT AND RECOMMENDATIONS 4 (Jul. 1983).

This definition borrows language from the Committee on Continuing Professional Education of the American Law Institute—American Bar Association, in its publication, A MODEL PEER REVIEW SYSTEM 11 (Discussion Draft) (1980). For a critical analysis of such definitions and their insensitivity to resource constraints, see Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639.

67. A. CARLSON & C. WERTS, RELATIONSHIP AMONG LAW SCHOOL PREDICTORS, LAW SCHOOL PERFORMANCE, AND BAR EXAM RESULTS vii-ix (1976).

68. See, e.g., White, *The Definition of Legal Competence: Will the Circle Be Unbroken?*, 18 SANTA CLARA L. REV. 641, 645-46 (1978).

the fragmentary research available reveals that most qualities rated most relevant by practitioners and employing organizations are not learned in law school or tested on bar examinations: e.g., fact-gathering, instilling confidence, effective oral expression, maintaining client and collegial relations, document drafting, diligence, judgment, supervisory capability.⁶⁹

Moreover, this taxonomy of traits raises serious questions about the most popular proposals for enhancing practitioner performance, such as continuing legal education, specialty exams, practice requirements, or clinical experience. Most clearly identifiable incompetence is a function less of cognitive deficiencies than attitudinal problems and economic constraints.⁷⁰ To the extent that inadequate representation results from sins of sloth, indifference, or infidelity, or from inadequate stakes and client resources, the conventional proposals are somewhat beside the point.

Indeed, we have no systematic evidence of how those proposals might affect general levels of cost and quality. Although a significant number of states now mandate continuing legal education, none has attempted to assess its impact. And surely it is not self-evident that requiring passive attendance at a few intermittent lectures will have substantial effects.⁷¹ It is equally unclear that specialization is a more desirable route. Studies of litigated cases reveal no correlation between specialization and fees charged or results obtained.⁷² Research on state specialization programs provides no firmer grounds for optimism. The only comprehensive evaluation to date made no effort to assess cost and quality apart from seeking opinions from a sample of certified and noncertified specialists. Not

69. See L. BAIRD, A. CARLSON, R. REILLY, & R. POWELL, *DEFINING COMPETENCE IN LEGAL PRACTICE: THE EVALUATION OF LAWYERS IN LARGE FIRMS AND ORGANIZATIONS* 51-55 (1980); F. ZEMANS & V. ROSENBLUM, *THE MAKING OF A PUBLIC PROFESSION* 123-64 (1981).

70. MacAulay, *What's at Stake: An Educator's Perspective*, in *PROFESSIONAL COMPETENCE AND THE LAW* 48-55 (L. Trakman ed. 1981) (discussing economic constraints); Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 *CREIGHTON L. REV.* 613, 618 (1977) (discussing attitudinal problems). See also Maddi, *Improving Trial Advocacy: The Views of Trial Attorneys*, 1981 *AM. B. FOUND. RESEARCH J.* 1049 (discussing proposed remedies for incompetence and the substantial areas that these remedies fail to address).

71. Continuing legal education requirements are typically in the range of 15 hours per year. See, e.g., Oregon State Bar, *Ad Hoc Committee on Mandatory Continuing Legal Education*, Memo to the Board of Governors I (June 1, 1980). Furthermore, they do not require examinations. For a discussion of administrative tangling over how to measure an hour (e.g., whether credit should be given for luncheon lectures if cocktails are served), see Byron, *Mandatory Continuing Legal Education in Minnesota: The First Year*, 50 *ST. JOHN'S L. REV.* 512, 516-17 (1976).

72. Trubek, *supra* note 24, at 113-14.

surprisingly, the results were inconclusive. While most participants in the program believed that specialization had a significant effect in raising competence and a negligible or favorable effect in reducing costs, most nonparticipants reported that the program had no impact or slight impact on competence, but negligible or adverse effects concerning costs.⁷³

The absence of evidence has, however, had no discernible effect on professional discourse. Reformist rhetoric generally proceeds in blissful obliviousness to the possibility that increased legal competence might entail increased cost and hence decreased client access, or that enhanced professional accountability might require diminished professional autonomy.

Indeed, one of the most striking aspects of the bar's breast-beating about competence is its failure to connect that issue to broader questions of self-regulation. Rarely has the profession paid any serious attention to the numerous studies indicting disciplinary agencies' insensitivity to negligence and overcharging; many practitioners retain a "there but for the grace of God go I" attitude toward reporting or sanctioning collegial ineptitude.⁷⁴ Yet while ABA presidents announce competence as the "issue in the 1980s," ABA members pronounce satisfaction with regulatory structures that have failed to address it.⁷⁵

The inadequacies of bar disciplinary processes reveal a more fundamental anomaly in the bar's conventional rhetoric on regulation. A primary justification for the profession's current licensing requirements and monopoly protections is that a free market would prove untenable; individuals could not judge for themselves the adequacy of legal services provided. Current bar disciplinary structures, however, proceed on the opposite premise and rely almost exclusively on complaints from aggrieved clients (about ninety percent of which are dismissed without investigation).⁷⁶ Such ex post

73. SOCIAL SCIENCE RESEARCH INSTITUTE, UNIV. S. CALIF., ASSESSMENT OF THE CALIFORNIA PILOT LEGAL SPECIALIZATION PROGRAM 23 (1979) (available at the Maryland Law Review office).

74. A.L.I.-A.B.A. COMMITTEE ON CONTINUING PROFESSIONAL EDUCATION, ENHANCING THE COMPETENCE OF LAWYERS (Report on the Houston Conference, Feb. 3-5, 1981) 247 (comment of Michael Franck); Note, *The Lawyer's Duty to Report Professional Misconduct*, 20 ARIZ. L. REV. 509 (1978). For descriptions of the inadequacy of disciplinary sanctions, see also Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985), and sources cited therein.


75. *Enhancing Lawyer Competence: ALI-ABA Confab Faces the Issues*, 67 A.B.A. J. 265 (1981) (quoting A.B.A. President-elect David Brink); *Law Poll: Self-Regulation, Some Lay Participation Still Are Favored*, 69 A.B.A. J. 154 (1983).

76. See Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 547-48 &

policing is wholly inadequate for the vast range of circumstances in which parties lack information, or incentives to obtain it, regarding the relative quality and cost of representation.

Without a fundamental rethinking of the premises and practices of bar governance, the prospects for substantial reform remain limited. No licensed vocation is well situated to assess the points at which public and parochial interests diverge. If the history of other professions is any guide, the most significant efforts to upgrade quality and efficiency will come through external pressure, whether from government or private intermediaries such as management corporations or insurance companies. Although the prospect of similar intrusions has met with almost universal condemnation by the organized bar, that response warrants reexamination. Not all restraints on regulatory autonomy have resulted in state surveillance; competence-oriented reforms in accounting and medicine, for example, have relied heavily on peer review. To be sure, the bar's distinctive and often appropriately adversarial relationship with the government calls for special sensitivity to the potential for regulatory retaliation. But some issues of professional governance could usefully be explored by politically accountable representatives. It would surely be possible for courts to design ongoing oversight structures insulated from professional as well as state domination.

An independent institution, composed of a broad cross-section of affected constituencies, might begin serious assessment of various strategies for identifying and redressing inadequate representation. To concede the indeterminacy of definition is not to suggest the futility of all performance oversight. Rather, we need structures sensitive to variations in cost, context, and consumer preferences. Such a framework could accordingly call for greater experimentation with mandatory performance review procedures, arbitration processes for consumer grievances, adequate client security funds, and decently funded disciplinary systems. More fundamentally, regulators further removed from professional tutelage could undertake a reexamination of the entire structure of bar licensure in light of past performance, current trends, and future needs. Less reliance on a narrow range of interest groups pursuing a narrow range of interests is a prerequisite for significant professional reform.



III.

Part of the difficulty with reformist rhetoric lies in the inherently compromising nature of the enterprise. The categorical pronouncements and simple prescriptions that are effective in mobilizing reform tend also to frustrate its implementation. When diagnosis proves more complicated and solutions more elusive, audience attention flags, momentum dissipates, and often only the most incremental changes endure. A decent interval passes, the problem is rediscovered, and the rhetoric then recurs with slight variations in tone but little alteration in theme. Perhaps that is the best one can expect in a pluralistic process where public constituencies are uninformed, unaroused, diffused, or divided, and powerful professional interests are implicated. Yet at the risk of striving too hard for an uplifting note, it makes sense to inquire whether anything in the current climate signals opportunities for departures from the conventional dialectic.

An optimist's overview of the past two decades might stress several distinctive points. In particular, there have been considerable changes in both the study and structure of the profession. The controversies sparked by the activism of the Sixties, the post-Watergate fallout of the Seventies, and the accumulation of Law and Society and Critical Legal Studies scholarship in the Eighties have all had significant repercussions for research on legal services. The hortatory homilies that once dominated the literature are being increasingly supplanted by more rigorous normative and empirical analysis. So too, changes in public expectations, such as the rise in consumerism and in demands for self-help assistance and deregulation strategies, have raised questions about bar governance and monopoly privileges. Such questions assume added force in light of recent changes in professional structure. The last two decades have witnessed an increase in competition, commercialization, scale, and stratification that could have substantial effects on the quality and distribution of legal services.

The dramatic one hundred percent increase in the number of lawyers between 1960 and 1980, together with the reduction of formal barriers to competition in the same period, has led to some striking changes in the professional culture. Attorneys are experiencing heightened pressures to expand the market for individual legal services through advertising and prepaid insurance, as well as to compete more effectively for corporate business. Not only has the bar experienced greater competition from within the profession, there have been increasing assaults from without. Banks, real estate

brokers, accounting agencies, insurance companies, and pro se services have all made significant encroachments on professional terrain, and the trend shows no sign of abating.

That competitive pressure is, in turn, likely to encourage legal service providers to seek economies of scale through further increases in size and specialization. The result may be a greater proliferation of prepaid insurance plans and mass market chain offices that deliver routine assistance at lower cost. If such trends continue, it makes sense to inquire whether these new dinosaurs of the law industry will lay the foundations for their own demise. To the extent that such innovations rely on prepackaged computer programs and paraprofessional assistance, they raise questions about the need for elaborately trained attorneys to superintend essentially ministerial work. So too, the increase in commercialization necessary to secure large volumes of business and economies of scale could further erode the profession's claims to status and monopoly. The more law is sold like laxatives, the more difficulties the bar may face in maintaining cultural authority and autonomy.

As these challenges to professional privilege intensify, they cannot help but draw into question the merits of current licensing structures. The past century has witnessed steady increases in specialization within the American bar; there is now little commonality in the substantive knowledge, practice skills, primary clientele, or work settings of many segments of the profession. Given this rise in specialization, attorneys may face renewed pressure to recognize in form what is true in fact. With the myth of homogeneity in decline, the maintenance of homogeneous licensing criteria becomes more problematic.

From the consumer perspective, there is much to be said for more fluid education and certification requirements. If credentialing processes ranging from three months to three years were to supplant the existing monolithic mandates, clients would have access to a greater range of choice in price and quality of representation. To be sure, movement to a totally free market is unlikely in light of the information costs and difficulties that clients face in evaluating professional services. Yet the history of the American bar, as well as the experience of other professions and other countries, suggests that the contours of vocational monopolies are dependent on a broad range of contingencies, many unrelated to consumer concerns.⁷⁷

77. See M. LARSON, *THE RISE OF PROFESSIONALISM* 10-18 (1977) (e.g., compulsory education, restrictive membership, state protection); see also Rhode, *supra* note 56, at 97.

Individuals with less training than attorneys commonly perform a vast range of legal tasks here and abroad, and formal recognition of that fact could encourage more cost-effective representation. Greater competition among a greater range of providers is likely to intensify pressures for product differentiation that will require more systematic quality control. This market dynamic, together with certification structures designed to promote informed consumer choice and adequate responses to consumer grievances, might result in significant societal benefits.

Relaxation of the profession's monopoly could also have salutary effects by reducing its stake in existing modes of dispute resolution. For example, the rise in pro se divorce and will preparation services has to some extent reduced cost, enhanced access, and encouraged individual self-sufficiency. It has also encouraged development of simplified procedures and standardized forms that diminish the need for any professional intermediaries.⁷⁸ The greater the decline in attorney fees and hegemony in certain practice areas, the less the bar will have to lose from procedural reform.

There is, of course, a less panglossian side to such predictions. Increasing concentration and standardization of the market is likely to prove a mixed blessing. It is possible that the survivors in a more competitive and commercialized struggle will be those who develop the best marketing techniques and bedside manners, not those who provide the highest quality services. Greater specialization could result in more rigidly stratified subgroups, each intent on protecting its own turf from outside encroachment.

In order to make more informed assessments about the relationship between changes in professional structures and the delivery of legal services, we need more data and less desultory diagnoses, more refinement of premises and fewer reductive prescriptions. To that end, we should invest in ongoing systematic research that is self-critical in agenda and analysis. Greater institutional support for empirical as well as theoretical research is crucial, not because such research is value free but because it can illumine the value choices confronting us. We need to think more about the directions in

78. For example, the California bar has distributed simple statutory will forms, and Florida, following the publicized controversy over a legal secretary's pro se divorce service, implemented a somewhat simplified uncontested divorce procedure. See *The Florida Bar Re Amendment to Florida Rules of Civil Procedure (Dissolution of Marriage)*, 450 So.2d 817 (Fla. 1984); *Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978); FLA. R. CIV. PRO. 1.611. See also H.B. 2968, 63d Or. Leg. Assembly (1985) (certification and regulation of legal scriveners).

which we are drifting, whether we will like the destination, and what price we would be willing to pay to shift course. We need also to consider what more we need to know to contemplate answering those questions.

J. Austin once posited that all philosophical inquiry may be reduced to two central questions: What does it mean and how do you know? The same might be said of issues relating to the quality and distribution of legal services. To talk seriously about access to justice and competent representation we need closer scrutiny of our factual and normative assumptions. If we wish to make meaningful reforms, we must first develop more meaningful rhetoric, and a richer understanding of its internal tensions.

Nor can we simply rest with demands for better research on legal services. Such claims form their own rhetorical genre which, when emerging from research institutions, has an uncomfortably self-validating tone. The problem is not merely that we lack precision in prescription or facts about implementation. Clearing away conceptual confusions will not necessarily yield structural change: exposing contradictions could simply amplify conflict. We need also a better sense of how data can shape dialogue and how policy can be translated into politics. We need, in short, to locate issues of professional reform within a broader social context accessible to a broader range of constituencies. That will, in turn, require not only structural changes that expand opportunities for participation and reflection but a rhetoric that makes such changes imaginable.