

Here Come the Mediocre Lawyers

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"There are a lot of mediocre judges and people and lawyers." So said Sen. Roman Hruska of Nebraska in defending G. Harold Carswell's 1970 nomination to the Supreme Court.

There was little support for a "mediocre" judge on the high court, but what about "mediocre" lawyers in private practice? What if their numbers started to climb rapidly? That seems to be the way we are heading. While a cause for serious concern, this prospect may lead to a genuine legal reform.

In the past 20 years the law—and lawyers—have assumed an expanded role in our society. Lawyers have commanded higher and higher fees: The salaries that top firms pay new lawyers doubled from \$7,500 a year in 1965 (\$22,500 in 1983 dollars) to \$44,000 in 1983. The "practice of law" is now a \$25 billion industry.

High prestige and high incomes attracted many of our brightest young people. Law school enrollments increased 100% between 1963 and 1973, and grew another 25% by 1980. The total number of lawyers doubled, to more than 630,000. In short, the market worked.

But the bloom is fading. The number of students applying to law schools declined 1.6% in 1983. This small decline was followed by a 10.4% drop in 1984. So far this year the number of applicants has fallen an additional 14%. Almost 90% of all law schools were affected, even the most prestigious. In two years applications at Columbia fell more than 18%.

The declines are steepest among the brightest students. Between 1982 and 1984 the number of top scores (46+) on the Law School Admissions Test fell 50%.

What happened? It's not simple demographics. Although the Baby Boom generation has largely passed through school, the number of college graduates is at an all-time high.

Declining Incentives

First, law schools are caught in the general declining interest in graduate and professional education. Applications to dental schools are down 50% since 1975. Even business schools—home of the highly valued MBA—have seen a slight downturn.

There is also the perception of a "lawyer glut." New lawyers seem to be having a much harder time finding a job; and average starting salaries have reached a plateau, while the cost of attending law school is often more than \$15,000 a year.

Nonfinancial incentives have also diminished. Law no longer enjoys the respect it formerly did. And reforming society, once the primary interest of many law students, is no longer as popular.

In short, the market is again at work. Looking at the costs and likely rewards of law, many are choosing other careers.

All this may seem like good news. Most Americans think that we are an overlitigious society, and that we'd all be better off with fewer lawyers. That's not what will happen. At least in the short run, we will continue to produce more lawyers at the rate of about 35,000 a year. They just won't be as smart.

There are still more applicants to law schools than there are slots (1.6 to 1 in 1984). In response to the drop in applicants, schools have simply lowered admissions standards. As a result, the academic quality of law students has begun what appears to be a long-term decline.

In 1983, law schools enrolled 56% of applicants to maintain a nationwide total of 40,000 entering students. In 1984, the figure was 62% and, if present trends continue, in 1986 it will be 71%. Bruce Zimmer, executive director of the Law School Admissions Council, predicts that by 1987 one-third of America's law schools will be practicing open admissions.

Some law schools will establish minimum standards for admission. But any standard reasonably close to recent levels will require all but the most popular to reduce their size. (Some schools have adopted plans to shrink 10% to 30%.)

Many (perhaps most) law schools will take the path of least resistance and reduce their academic standards in order to maintain enrollments. The incentives are clear. In the past decade more than 100 schools built new facilities or substantially renovated existing ones. Hundreds of new and high-salaried law professors were hired. Steady enrollments are needed to justify these expenses.

Law schools might try to keep academic standards high by admitting more marginally qualified students and then failing those who do not perform. But few schools will revert to this practice, common in the 1950s. They will be competing for one another's students. Legal education has become much more expensive. Law

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students are now older; many are married, and many graduate with large debts. These students will avoid schools with high washout rates. Some schools already operate under a de facto "no fail" policy. Their mandated "curve" limits Fs to the bottom 2% or 3% of the class.

Thus, in the coming years we are likely to see an increasing number of mediocre lawyers released on an unsuspecting citizenry. An oversupply of lawyers will result in more "ambulance chaser" lawsuits and more frivolous suits by attorneys who do not have enough other work to pay the bills. Hardly a soothing thought, but probably offset by the positive effects of having more lawyers in the economy.

Solicitor General Rex Lee argues that we should let the market continue to do its work. A growing oversupply of new lawyers—with declining academic credentials—should drive down the average cost of legal services further (just as past expansions of medical school enrollments led to price competition among doctors).

The most serious weakness of our legal system is not that there are too many lawyers but that they are too expensive—and that they do the wrong things. President Carter exaggerated only slightly when he complained that "90% of our lawyers serve 10% of our people."

Legal services are beyond the reach of most Americans. Only the rich (who can hire a lawyer), or the poor (who might obtain free legal services), or the victims of a major injury (who can engage a lawyer for a contingent fee), have any real chance of obtaining legal assistance. We sorely need more lawyers—to help middle-class citizens cope with the legalisms of wills, consumer complaints, contracts, landlord/tenant battles and other problems.

And that is why the coming glut of mediocre lawyers could be a real boon to society. These new lawyers could make legal services more widely available to the average American. Many would group together, as is already happening, to create legal-service "clinics" that provide practical legal help at very modest prices.

But lawyers are not like widgets. Unlike a poorly manufactured product, incompetent lawyers are not easily driven from the market. They can spend years plying their

craft, and doing untold harm to clients. Thus, the legal profession can't be a completely free market.

To protect consumers, law graduates must prove their competency by passing a state bar examination. In 1983, the average state failure rate was about 25%. If bar examiners do not alter their standards, the declining academic quality of law students will lead to higher failure rates. In 1984, the California failure rate was 58%, up from 51% the year before. These California results are still atypical, but they could be a harbinger of things to come.

Historically, the organized bar has pressured state examiners to set high standards. It will try to maintain current standards to protect consumers. That thus restricting access to the profession will also help prop up falling incomes will not be lost on the lawyers.

Certainly, no one wants to see "incompetent" lawyers set loose on society. The bar's commitment to high professional standards should be applauded. But lawyers realize (and many legal researchers have documented) the bar examination's subjective unreliability. For example, in a well-known California study, Stephen Klein found that bar examiners agreed with one another about whether papers passed or failed only 67% of the time. More telling, when Mr. Klein gave the same papers to the examiners once more, 25% of the time they passed papers they previously had failed or failed papers they had passed.

This does not mean that standards should be radically lowered. A multistage testing procedure should be considered. New doctors are required to take a basic test before entering practice, but many elect further training and take board-certified specialty examinations. Why not lawyers? We can fine-tune standards so they weed out only the obviously incompetent.

Competent Legal Technicians

We purposely have characterized the coming crop of lawyers as "mediocre" to dramatize their fall in quality. The word has a precise meaning: "of moderate quality." Mediocre lawyers don't belong on the Supreme Court, but they can handle the average legal issue just fine. Barring a collapse of the applicant pool, most future lawyers will still enjoy far better qualifications than their 1950s counterparts.

Law schools should also adjust. The great improvement in the quality of law students in the past 20 years encouraged most schools to upgrade the scholarly content of course work; they now train students to handle the most intricate legal problems. If every American child dreams of being president, every law student dreams of taking a case to the Supreme Court. We don't need to exclude energetic young people from the law merely because they cannot reach this pinnacle of professional performance.

With some modifications in legal education, the changing pool of law students can become competent legal technicians. This role was played by the "second-tier" law schools until the late 1960s.

Thus, the same market pressures that led to fewer law school applicants may also encourage a more widespread—and equitable—distribution of legal services. That is, if we can maintain the flow of new lawyers while assuring minimum standards of professional competence.

Yes, we face a difficult trade-off: more lawyers of declining quality vs. more access to legal services at affordable prices. Deciding where the balance should be is too important to be left to the lawyers.

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