

History of the United Nations War Crimes Commission includes an appendix which is as compelling today as it was in 1948. After observing that "the idea of sovereignty paralyses the moral sense of humanity," the author points out that periods of growth in international law coincide with world upheavals. "The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules of law deliberately and overtly recognized by the consensus of civilized mankind." The humanitarian crises of the post-Cold War world point to the compelling necessity of translating international consensus into prompt and effective collective action.

— Barbara Harff

Barbara Harff is associate professor of political science at the U.S. Naval Academy and the author of *Genocide and Human Rights: International Legal and Political Issues* (Monograph Series in World Affairs, University of Denver, Vol. 20, Book 3, 1984) and a series of theoretical, empirical, and case studies of genocides and politicides since 1945. The examples of present and potential communal conflicts were contributed by Ted Robert Gurr of the University of Maryland, based on his study of *Minorities at Risk: A Global View of Ethnopolitical Conflict* (forthcoming in 1993 from the United States Institute of Peace Press). Rodney Tomlinson of the U.S. Naval Academy provided useful comments. Other sources: Hersch Lauterpacht, *International Law: Collected Papers*, Vol. II, edited by E. Lauterpacht (Cambridge: Cambridge University Press, 1975); Lord Wright, "War Crimes under International Law," Appendix VI to the *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: His Majesty's Stationery Office, 1948).

Tasseled Loafers

Why did the medical researcher switch from laboratory rats to lawyers?

Because it's too easy to get emotionally attached to rats.

Because lawyers breed faster.

Because there are some things that rats won't do.

You find lawyer-bashing in Scripture: "Woe unto you, lawyers!" You find it in Shakespeare: "The first thing we do, let's kill all the lawyers." You find it in a medieval anthem to the patron saint of lawyers:

Saint Ive was a Breton,

A lawyer but not a thief.

A miraculous thing to the people!

It is in Carl Sandburg's 1920 poem "The Lawyers Know Too Much": "Why is there always a secret singing/When a lawyer cashes in?/Why does a hearse horse snicker/Hauling a lawyer away?"

During the recent election campaign, lawyer-bashing emerged as an improbable yet potent campaign issue. Picking up on themes that the Vice President has sounded repeatedly over the past two years, George Bush, in his acceptance speech at the Republican national convention, asserted scornfully that his

Democratic opponent had received the backing of "practically every trial lawyer who ever wore a tasseled loafer."

Sharp lawyers are running wild. Doctors are afraid to practice medicine, and some moms and pops won't even coach Little League any more. We must sue each other less and care for each other more. I am fighting to reform our legal system to put an end to crazy lawsuits, and if that means climbing into the ring with the trial lawyers, well, let me just say, round one starts tonight.

The *Washington Post* subsequently reported that the attack on lawyers had struck a more responsive chord with voters than any other line in the President's speech. As we all know, America has too many lawsuits and too many lawyers.

But do we know this, really? As a long-time critic of lawyers' adversarial excesses, I now find myself in an unaccustomed role: explaining why America needs its lawyers. To see why, we must look closely at the arguments for the "too many lawyers" thesis.

The Free Market for Lawyers

Coming as it does from such vigorous advocates of the free market as President Bush and Vice President Dan Quayle, the thesis seems almost nonsensical. Like any other business, law practice is governed by supply and demand. If there is a thriving market for legal services, that must be because consumers want them and need them. And if the day ever came when there actually were too many lawyers, the market would solve the problem. Lawyers would find themselves out of work; law school applications would dwindle.

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During the current recession, lawyers have in fact been hit hard. Law firms are downsizing. Recent law graduates have trouble finding jobs — just as engineers, schoolteachers, and auto workers do. Yet we do not find politicians scoring points by insisting that America has too many schoolteachers. And even in the recession, the demand for lawyers is still rather substantial. Americans obviously have a considerable appetite for legal services: a fact that is hardly likely to have escaped the critics. That's one reason why their lawyer-bashing looks suspiciously like client-bashing — and, ultimately, consumer-bashing.

If the complaint about "too many lawyers" doesn't hold up under market analysis, is there another way of understanding it? Of course there is. When newspaper columnists complain that there is too much violence on TV, they do not mean that Americans dislike violent TV shows. Just the opposite — audiences have an insatiable appetite for violence; the ratings don't lie. Rather, the columnists mean that violent TV shows are objectionable regardless of what the audiences want. The problem is not one of subjective demand but of what, objectively, is bad for us.

Evidently, then, critics such as Vice President Quayle believe that we have too many lawyers for our own good, regardless of what we want. There is something objectively wrong with what lawyers do. What might that be?

Carving Up the Pie

One celebrated answer has been proposed by Derek Bok, the respected former president of Harvard University and former dean of Harvard Law School.

"In Japan," Professor Bok wrote in a widely-publicized 1983 report, "a country only half our size, 30 percent more engineers graduate each year than in all the United States. But Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 *every year*. . . . As the Japanese put it, 'Engineers make the pie grow larger; lawyers only decide how to carve it up.'"

This argument has disturbing implications, because "carving up the pie" is what distributive justice is all about. It may be that Professor Bok is dismissing the whole idea of distributive justice, on the grounds that it encourages acts of appropriation on the part of the undeserving. Then again, he may simply want to claim that distributive justice is something America cannot afford — that justice can only be obtained at the cost of national destitution. Economists often speak of a trade-off between efficiency and equality, implying that a fairer and more equitable distribution of economic goods is bad for the economy. Perhaps this is what Professor Bok has in mind. If he's right, then we find ourselves at a genuine moral crossroads.

We should, however, greet this argument with considerable skepticism. After all, the current recession, and the record numbers of Americans now living below the poverty line, correlate with growing *inequality* in the distribution of income and wealth. The plain fact is that no one knows at what point, if ever, greater economic justice turns an economy sour. And given our recent economic history, it seems just as likely that a bit more thought as to how the pie is carved up could actually help it grow.



"We're slapping you with a stress suit, pal!"

Drawing by Shanahan; ©1991
The New Yorker Magazine, Inc.

Too Few Lawyers?

Finally, we might take Professor Bok to mean that lawyers are no friends of distributive justice. On this reading, the problem is with the way lawyers carve up the pie, not with the fact that they carve it up.

This may well be true. Legal services are distributed by the market, and the best legal resources go to the wealthiest clients, whether those clients have justice on their side or not. The high-priced talent at the command of large law firms virtually guarantees that those who can get such firms to represent them will get the largest slices of the pie, no matter what. Their poor or middle-class counterparts, unable to afford equal representation, will simply take their lumps.

Clients have legal rights, but without lawyers these rights would never be enforced. "Equal justice under law" is nothing more than a slogan without lawyers.

But of course this suggests that there are too few lawyers, not too many. For poor and middle-class people, the primary problem with the legal profession is that its services come at a price they cannot afford, and so they have no access to the legal system. The critics say that such people should not be consulting lawyers anyway: "We must sue each other less and care for each other more." But for some reason, these same critics have never, to my knowledge, proposed that government bureaucracies and large corporations be forbidden to hire lawyers of their own. On the contrary, Mr. Bush's remarks about "crazy lawsuits" clearly refer to lawsuits brought by ordinary citizens. "Too many lawyers" plainly means that while General Motors should have its corporate counsel, consumers wishing to sue General Motors probably should not have any counsel at all.

An example will illustrate the problem. For the past three years, students at the University of Maryland Law School have represented poor Baltimore residents in housing court. The clients are usually African-American single mothers, and the profile of the cases is always the same. The clients live in housing that contains egregious code violations: peeling and flaking lead paint, no heat, inoperative plumbing, leaks, crumbling walls and ceilings, rats and roaches. The landlord goes to housing court to evict the clients for non-payment of rent. City and state laws provide for rent abatements and rent escrow when the landlord does not keep the housing up to code. But without legal representation, the clients

don't know this. Often, they don't even show up at their eviction hearings, and as a result housing court has acquired a reputation as a summary eviction agency. The process works to turn a poor family into a homeless family.

With legal representation, however, the prospect changes. In three years, the students have never lost a case. In part, no doubt, that is because they bring a lot of effort and passion to their work. But ultimately, they always win because the law is on their side. Their clients have legal rights, but without lawyers these rights would never be enforced. "Equal justice under law" is nothing more than a slogan without lawyers.

Pie in the Sky

In addition to being philosophically misguided, Professor Bok's argument is practically naive. He seems to assume that if engineers make the pie grow larger, more engineers will make it grow larger still — in other words, that the economy can absorb and benefit from ever-increasing numbers of engineers (or, one assumes, practitioners of any learned profession other than law). In fact, of course, the United States presently has a glut of engineers and computer scientists; there are likewise too many MBAs, and demographers say that within a few years there will be too many doctors. The obvious point is that you can't determine what kind of job is good for the country simply by looking at that job in isolation from the rest of the economic system.

We can take this point further. The engineer—dependent as she is on the technician, the designer, the marketing manager, the supplier of parts and the retailer of finished products—can expand the pie only within a tangled network of transactions: contracts, collective bargaining agreements, sales of securities. And that's where lawyers come in. Stanford professor Ronald Gilson argued several years ago that the lawyers who sew up these transactions are specialists in reducing costs for the parties involved.

Business transactions depend upon accurate pricing of the assets that are traded or bought. Yet a moment's reflection tells us that the value of an asset is always contingent upon the laws and regulations governing its use. A piece of coastal real estate is worth less if environmental regulations restrict development; a creative financing scheme is worthless if it violates securities law. Only the lawyer can determine these facts, or structure transactions in order to reduce the losses that follow from acting upon imperfect information. In other words, rather than being parasitical middlemen or greedy ten-percenters, transactional lawyers actually add value to the deals they facilitate; that is to say, they make the pie bigger.

The Argumentum ad Nippon

What of Professor Bok's contrast between litigious America and lawyerless-but-productive Japan? The Japan argument is a commonplace among critics of the American legal profession. It is usually coupled with the implication that America's economic slippage, coinciding with Japan's ascent, has resulted from too many lawsuits against big business.

In fact, however, the Japan argument—the *argumentum ad Nippon*, in the words of Mark Sargent—is highly misleading. The number of law graduates from Japanese universities is *higher* per capita than in the United States, and so is the number of those who sit for the Japanese equivalent of the bar examination. But the Japanese government passes fewer than 2 percent of those who take the exam. And the 98 percent who fail it simply go on to corporations to do law-related work that doesn't require being a member of the bar — exactly the same kind of work that in-house corporate lawyers do in the United States.

As for the low litigation rates in Japan, these may be explained not by a Japanese aversion to lawsuits, but by the fact that Japanese lawyers charge an upfront, non-refundable retainer of 10 percent of the amount *claimed* in a lawsuit. To sue someone for a million dollars, the Japanese litigant must first pony up a \$100,000 retainer, which the lawyer keeps regardless of the outcome of the case. Japan is hardly the benign, lawyerless utopia portrayed by critics of greedy American lawyers. After all, the American contingency fee means that unless there is a successful outcome, the client pays nothing.

If there is a malpractice crisis, it is a crisis of too few claims.

Medical Malpractice

Much of today's antagonism toward lawyers focuses on medical malpractice. As Mr. Bush put it, "Sharp lawyers are running wild. Doctors are afraid to practice medicine" — afraid, that is, of spurious malpractice suits.

Here, as in the deification of Japan, the facts diverge widely from the myth. Three years ago, a Harvard team reviewing the records of hospitals in New York confirmed the findings of an earlier study in California: numerous patients are injured by physician negligence, *but fewer than 1 out of 10 of these patients file legal claims*. The other nine-tenths "lump

it." To paraphrase legal scholar Richard Abel: If there is a malpractice crisis, it is a crisis of too *few* claims. An old adage has it that when the finger points at the moon, the fool looks at the finger. When the malpractice lawyer's finger points at the physician, Mr. Bush suggests that we look at the lawyer.

There is, moreover, no truth to the conventional picture of juries eager to sock it to the doctors.

Critics argue as if the current body of litigation consisted mainly of personal injury and product liability cases.

Patients who file medical malpractice suits win less often than plaintiffs in any other type of personal injury claim, and juries award punitive damages in medical malpractice suits less often than they do in any other kind of case.

The myths surrounding medical malpractice are only one part of a larger myth about American litigiousness. Americans, it is said, cannot settle their quarrels peaceably. Instead of resorting to informal means, we are eager to appear in court, and have developed a propensity to take wild legal shots at those who can well afford (or so we imagine) to pay us off. Moreover, critics argue as if the current body of litigation consisted mainly of personal injury and product liability cases. In the words of the Chairman of the Board of the National Association of Manufacturers:

Like a plague of locusts, U. S. lawyers with their clients have descended on America and are suing the country out of business. *Literally*. . . . Product liability suits have brought a blood bath for U.S. business and are distorting our traditional values.

And yet, in the federal courts, the number of product liability suits filed in 1989 was 37 percent *lower* than in 1985. And there are strong indications that the federal court litigation explosion is caused not by tort-hungry ordinary citizens suing businesses, but by American companies that have made a conscious decision to settle their disputes in court rather than informally. Whether you look at the total number of federal court filings or the amount of judicial time occupied by the different categories of federal litigation, the results are the same: it is corporate contract cases, and not product liability cases filed by individuals, that are steadily growing in number.

Does this mean that American business has become vindictive or angry? Hardly. The increasing turn to the courts simply reflects a changed world economy

— that is to say, a more competitive one, with high-stakes single transactions that make it irrational for a company to swallow a short-term loss in order to preserve long-term amicable business relations. The legal trend has everything to do with American competitiveness, but nothing at all to do with the greed of trial lawyers.

Finally, what about the crazy lawsuits — the 34-year-old Michigan man who lost an eye when a sky-rocket he set off on the Fourth of July exploded, and who subsequently sued his parents for letting him set off fireworks while he was drunk? Surely we must lay these at the door of the lawyers.

Must we? We often hear these stories of crazy lawsuits being filed, but less often hear what the results are. For a crazy lawsuit to win, the plaintiff must first convince a skeptical judge, eager to flush cases out of an already overcrowded docket, that the issue raised has a sound enough basis in law to face a jury; then the plaintiff must convince the jury. Moreover, since 1983, when tough rules were introduced to prevent frivolous lawsuits, courts have fined and sanctioned lawyers who file them.

If the plaintiff in a crazy lawsuit was not thrown out of court, then evidently the judge and jury didn't think it was so crazy. The critics' alarm over this matter suggests that they distrust judges (most of whom are elected officials) and juries composed of ordinary citizens.

An End Run Around the Law

The suspicious attitude to democracy expressed by the President has appeared in Vice President

Quayle's speeches to an even greater degree. The argument at the heart of Mr. Quayle's attack on the bar is that lawyers are ruining American business by winning large awards for negligence, defective manufacture, or regulatory violations. His attack is only one part of his larger attempt to denounce the effects of health and safety regulations on American business competitiveness.

Yet Americans overwhelmingly support health and safety regulations and stringent manufacturing standards. And in the United States, which traditionally distrusts big government and massive bureaucracies, we have placed the major burden of enforcing these standards on injured private parties and their lawyers. The trial lawyer in tasseled loafers is, in essence, a bounty hunter. This makes him a despised figure, no doubt, and yet his hunt for personal profit plays a crucial role in law enforcement. The American system of relying on lawyers and clients to investigate and blow the whistle on negligent manufacturers is an example of the privatization that many conservatives ordinarily support. The trial lawyers are a thousand points of law.

What are the alternatives? Either a mammoth, intrusive legion of inspectors and bureaucrats, or laws and regulations that sound fine in the books but mean nothing in practice because they are never enforced. It is not hard to figure out which of these alternatives Mr. Quayle favors.

In promoting this agenda, however, the Vice President fails to acknowledge that when a system allows popular laws and regulations to be gutted by taking the enforcer out of the picture, it has made an end run around democracy. Overall, the "too many lawyers" argument is merely a sanitized and politically acceptable way to express distrust of clients and consumers, of judges and juries — and, ultimately, of laws and democracy.

— David Luban

We regretfully note the death of Ferdinand D. Schoeman, professor of philosophy at the University of South Carolina, on June 12 of this year. Professor Schoeman's association with the Institute for Philosophy and Public Policy began during his time as a Rockefeller Resident Fellow in 1984-85. He was the editor of the anthology *Philosophical Perspectives on Privacy* (Cambridge University Press), and his book *Privacy and Social Freedom* has now appeared as a volume in the Institute's series of Cambridge Studies in Philosophy and Public Policy. A lectureship in Professor Schoeman's name, devoted to issues of law and social philosophy, has been established under the joint auspices of the Philosophy Department and the School of Law at the University of South Carolina.

Sources: Derek C. Bok, "A Flawed System of Law Practice and Training," *Journal of Legal Education*, vol. 33, no. 4 (1983); Marc Galanter, "The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days," *Wisconsin Law Review*, no. 6 (1988); Marc Galanter and Joel Rogers, "The Transformation of American Business Disputing? Some Preliminary Observations" (unpublished); Ronald J. Gilson, "Value Creation by Business Lawyers: Legal Skills and Asset Pricing," *Yale Law Journal*, vol. 94, issue 2 (1984); David Mellinkoff, *The Conscience of a Lawyer* (West, 1973); Robert C. Post, "On the Popular Image of the Lawyer: Reflections in a Dark Glass," *California Law Review*, vol. 75, no. 1 (1987); J. Mark Ramseyer, "The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan," *Yale Law Journal*, vol. 94, issue 3 (1985); Carl Sandburg, "The Lawyers Know Too Much," in *Smoke and Steel* (1920).