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Professionalization and the Question of Numbers

by Rodney F. White*

I. INTRODUCTION

AS ONE EXAMINING the question of the number of lawyers from outside the legal profession, I would like to make some observations from the perspective of the sociology of the professions. Among our interests are the ways in which the character of different occupations changes as the society changes, and how one can assess the contributions which particular professions make to the society and the influences which they have on its development. I am interested in the roles played by the legal profession and the factors influencing its growth.

It is essential that the evaluation of the increase in numbers in the legal profession not be conducted simply from the standpoint of its effects on the fortunes of the profession itself but that particular attention be paid to the needs and attitudes of those whom the profession is meant to serve. The extent and quality of service that a profession provides to the society at large, and the degree of confidence which the recipients of its services have in its providers, are more important criteria than the degree to which these occupations guarantee a good living to their practitioners. While professionalism stresses service over remuneration, the actions of professional bodies and practitioners frequently demonstrate the reversal of these priorities.

It also seems that any profession can benefit in its deliberations on questions of the expansion of its numbers from examples provided by the experience of other professions concerning the key factors at issue. Most of the professions are presently experiencing some important pressures resulting from changes in societal organization and developments in technology, and they are being subjected to increased scrutiny by the public and greater controls by various levels of government. Following a period when one observer suggested that we might be witnessing the "professionalization of everyone", there now appears to be a move towards de-professionalization even on the part of established professions such as law.

For these reasons I wish to devote the bulk of my remarks on the numbers issue in this field to a consideration of the changing role of the legal profession in society, the ways that it is regarded by the public, and the extent to which it will be free to control its own destiny in the future. In doing this, I will also indicate what I believe the legal profession can

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learn from the experience of other professions.

II. THE NUMBERS ISSUE

The question of increasing numbers of practitioners is clearly one of concern for the members of any profession. It is also a policy issue for the society at large. The factors taken into consideration by each of these interested parties in reaching a conclusion are likely to differ considerably. Thus the degree of autonomy which the society will be prepared to grant to a profession in governing its own affairs will be affected by the extent to which it views the interests of the profession and that of society as coinciding, rather than being in conflict.

The members of any occupation will tend to evaluate the prospect of increasing numbers from the standpoint of how it relates to the existing and potential demand for their talents. Policy makers are likely to focus on an assessment of need within the society for the services which this particular type of manpower can provide. The legal profession is likely to be concerned by the supply of lawyers on the market and how it may affect their earning power relative to other professional groups, whereas policy makers will want to know whether there is an adequate distribution of legal services across all sectors of the society. One hopes that both would be concerned about the possible effect of numbers on the quality of services available.

The mandate which a profession acquires from the society, to be the exclusive performers of certain activities such as curing the sick, is granted on the basis of its contributions to societal welfare. Thus a policy decision to increase the numbers in any of the fields of highly qualified manpower will be based on the expected increases of health or social service provision, or in this case justice, relative to the costs involved in training that additional manpower. Of course it also should be recognized, as some legal authorities have pointed out, that concepts such as societal need and the public interest are as imprecise as the notion of profession itself.

With the increased 'commoditization' of the service fields such as health, education and legal advice, there is a trend toward taking decisions regarding manpower and facilities in these areas on the basis of expected demand for their 'products', rather than the assessed need for the services they provide. This can lead to a variety of 'consumer' responses including the demand for universal access to these services on the part of the public, and pressures for an increasing role of government at all levels to ensure that this access is made possible. The ways these demands should be met is a topic of considerable debate, particularly as it relates to governmental versus private provision of these services.

This leads to another important aspect of the numbers question; the distinction between legal practitioners, on the one hand, and those who, on the other, use their legal training to engage in some other form of

activity. When the question of the numbers of lawyers is raised, most people tend to think of those in private practice, and it is these numbers that are usually cited in studies of growth in the field. It is important to recognize that people with legal training work for a variety of organizations including industry and government, and that legal training is one of the most common forms of preparation for other fields such as politics. Thus, when one thinks of increasing or restricting numbers in this field, it is desirable to be aware of the opportunities that new entrants may discover, other than entering private practice. It is also important to realize that controls regarding numbers being trained may make it more difficult for women and native peoples, or members of other groups, to gain the preparation needed for effective competition in politics or other areas of endeavor.

It also should be recognized that the needs and demands for professionals are not static, but vary with changing conditions in the economy and in the society. The legal profession can be included under the description given by Illich and others of "need-makers". This implies that, to some extent, they are in a position to create the demands for their services by their own actions. The legal profession, by helping to produce the laws, changing them from time to time, develops the need for lawyers who will interpret these laws, and those who can provide advice to clients who either wish to benefit from the new laws or to avoid their implications.

Lastly, and probably most importantly, the question will be answered differently by people taking different perspectives on the issue, both from inside and from outside the field. Of these perspectives, a key difference will depend on one's particular ideological stance. For example, those of conservative persuasion will tend to view the legal profession as the guarantor of individual rights and privileges and the bulwark of the established system; the more lawyers, the more law. More liberally minded persons will emphasize the contribution of legal institutions to civil rights, opportunities for minorities, and a democratic system of government, and would favour an increase in lawyers provided that these new entrants are not too traditionally prepared. Lastly, more radical members of the society, while supporting the need for lawyers who are prepared to challenge and reform the system, will oppose the expansion of a profession that they view as basically a defender of the status quo.

It seems clear from the available statistics that the numbers entering the legal field are growing and so are the numbers in private practice. Studies suggest that most established lawyers are busy, but that some of the younger people in the profession are reported to be out of work and are drawing unemployment insurance. The concern appears to be a lack of legal business due to present economic conditions, rather than a demonstrated over-supply of lawyers. One needs to examine the changing role of lawyers in our society to understand the factors of greatest importance in deciding on the appropriate number of lawyers at this period in

our socio-economic development.

III. THE CHANGING ROLE OF THE LEGAL PROFESSION

From a historical perspective, the first major increase in demand for legal practitioners was brought about by the growth of industrialization. This helped to transform the society from one dependent for its authority on traditional sources such as custom and religion to one based on laws and a bureaucratic form of organization. Some theorists view the courts and the legal system as an integral part of the modern industrial state complicated, in Canada's case, by the existence of a dual legal system. This transition to a legal basis of authority also explains why there is such a high proportion of legally trained people in positions of power in government and industry, in addition to those practicing in the legal system itself. Until recently, law and the other established professions have grown in numbers and prestige, and many other occupations have sought to improve their own status and rewards by becoming more professional.

The professions were granted a mandate by society for the exclusive performance of important functions. These included the curing of illness, the provision of justice, and the instruction of the young. Furthermore, they strove to upgrade their educational requirements, establish strict codes of ethics, and concern themselves with monitoring the practices of their members. As a result of those developments, the public was disposed to place their trust in professionals as those best able to administer to their needs and advance their welfare.

However, most people are aware that this seemingly idyllic situation for the professions has begun to change drastically. They have now reached a position where they are *'under siege'*. Both their competence and their ethics are being seriously questioned and critics are labelling them as monopolistic, mercenary and "disabling". They are often seen as actually creating problems for their clients rather than solving them. In the last decade or more considerable attention has been devoted to the activities of the professions by commissions and other public inquiries, and the result has been new legislation and other developments designed to regulate their conduct.

This turn of events has clearly impacted on the legal profession. Watergate and other revelations in various countries, have shaken the public's confidence in the legal profession to the point where John Turner, a former Justice Minister, stated in an address that "confidence in the (legal) system must be re-established and the idea that there is one code of justice for the rich and another for the poor "must be dissipated", and concluded with the observation that "the legal profession must work toward a better definition of their role in society".

Those of us who study professions refer to these and other developments as "de-professionalization", and it is a process which is leading many spokesmen to advocate a return to greater self-dependence on the

part of the public, a departure from the growing reliance of most people on a series of experts to solve their various problems. It is also encouraging people to turn to government to provide improved monitoring of professional activities and to demand lay involvement in regulatory agencies. De-professionalization has resulted in increases in malpractice suits and a growing interest in training less qualified people to do many of the jobs now performed by professionals. All of these developments have clear implications for the question of numbers in all professions, including that of law.

This concern for the changing role and image of the legal profession leads me to examine a key related issue; that of the relationship of the legal profession to government at various levels in the system. This relationship is crucial in that it determines the extent to which the legal profession will remain self-governing, and, as a result, the degree to which it will continue to control the numbers and practices of its members.

In a recent address by Bette Stephenson, the present Minister of Education of this province, on the topic of the "Self-Governing Professions", she observed that, due to growing concerns on the part of the public regarding the activities of the established professions, the society is inclined to re-open negotiations on their "contracts" with these professions; contracts which have given professions their existing rights of self-determination. Should this occur, the public is likely to demand greater control over numbers, education and conditions of practice than have existed in the past. This will lead to what Terence Johnson, in his analysis of the relations between government and the professions, has labelled the 'mediation model'; one in which government "bargains" with professional bodies over remuneration levels, conditions of practice, with a resulting diminution of power for the legal profession.

Of course, there is also a third party involved in the decision processes; the law schools. Since they control the intellectual content of the preparation of practicing lawyers in close collaboration with the professional bodies and have close contacts with influential practitioners, they are able to exercise considerable power in the bargaining which takes place. This leads then, to a more detailed consideration of how the number of new lawyers is determined.

IV. FACTORS AFFECTING THE NUMBER OF LAWYERS

As with the manpower levels in other professional fields, the numbers in the legal profession are most affected by three factors: the demand for legal services by the public, the numbers desiring to enter the profession, taking into account their preferred areas of practice and the intervening role of the law schools in determining class sizes, admission, and graduation standards and levels of financial support to students. The government plays a mediating role regarding all these forces. It does this through its decisions concerning the financial support of students and

universities, and its provision of encouragement and assistance to potential employing institutions such as legal aid schemes. It also has an input through its activities involving litigation, and by its legislation supporting the efforts of various groups in the society to improve their social rights, since all these activities affect either the supply or the demand side of the numbers equation. In addition, the attitudes of existing members of the profession regarding expansion, and their related willingness to provide opportunities for apprenticeship of new entrants, will have an important impact.

What are some of the observations that can be made regarding the potential effects of these various forces on future members? Contrary to earlier predictions based on what is referred to as the "human capital" theory, as industrialization has progressed, the number of highly trained manpower required by advanced societies has levelled off rather than increased, leading to what one author has labelled "the great training robbery". A relatively small number of very highly trained people are in fact necessary to plan, operate and monitor the system. The over-all result has been one of de-skilling rather than upgrading the work force as a whole. This industrialization is now affecting the service sector. Health, education and other services have become increasingly automated. This trend seems bound to affect areas such as the legal system.

As the level of unemployment in the economy increases, and opportunities in traditional fields such as education are drying up, growing numbers of students are looking to occupations such as business and law for job opportunities, and the demand for places in professional schools is likely to remain high.

Planners have not yet come up with what they believe to be an optimal ratio of lawyers to population, as they have done in medicine. It is also clear that manpower planning, as its critics claim, does not have an impressive record in either forecasting changes or arriving at solutions to problems. There is certainly a trend, particularly in the Province of Quebec with its new Office of the Professions, to seek greater public control over training and practice in various professional fields. The threatened cuts in "Established Program Funding" by the Federal Government may force universities to trim their budgets even more closely, and while professional fields will probably be favoured in the re-allocations which take place, they are also likely to feel the pinch to some extent.

As far as students are concerned, studies of legal education suggest that most law students are aiming to enter private practice, and they view legal training as a challenging way of making a comfortable living rather than as a useful preparation for contesting or changing the system. In making their choices among available specialties, their concerns are with career potentials; whether they believe they can meet the demands which come in practice, rather than the opportunities for crusading or rescuing oppressed citizens.

Understandably, the profession itself is resisting attempts to impose

controls from outside which would restrict its autonomy. It generally rejects what one critic has labelled the "static character" of its educational system, and the changes which have been made in reports like that of the Wright Commission which suggest that the needs of the public are being subordinated to the interests of the profession. In short the legal profession claims that it is still in the best position to exercise controls over its own activities, including the question of the numbers of its members.

V. INSIGHTS FROM EXAMINING OTHER PROFESSIONS

In deciding on the factors which one should consider in determining the appropriate growth of a particular profession such as Law, it would seem useful to look for possible parallels in what has taken place in other professions who have had to deal with this issue. For example, a useful warning might be derived from experiences in medicine and engineering, where decisions to reduce members have led to subsequent shortages, and difficult problems have arisen associated with re-building to meet new demands.

In examining the failure of medical practitioners in France to keep up with scientific and technological developments in their field, two French sociologists raised questions concerning the perceived authority of various professionals on the public. They posed the question of the extent to which authority is based on the amount of knowledge professionals are assumed to possess as opposed to a relatively undefined "art" or sophistication which they display in practice. The sociologists felt that the latter was related to their social position and derived, in part, from their close association with their brethren in the field, or resulted from a sort of "laying on of hands". From these considerations, they proposed an I/T ratio from "indeterminancy" to "technicality", which could be determined for each profession, and suggested that it might provide a useful indication of the degree to which the professionalization or de-professionalization of an occupation could take place. These reflections raise interesting questions about the nature of legal training. Is it largely technical in character, and thus subject, in part, to codification and computerization? Or is legal training more in the cultural realm, such that the average educated person would be able to function fairly effectively as his own lawyer, given the appropriate technical back-up? These questions seem obviously related to the need for different kinds of legal personnel, including lawyers.

Some writers on the professions have questioned whether the traditional "scientific model of the professions which is derived from occupations like medicine is particularly applicable to those occupations dealing largely with human behaviour, such as law and social work. In a recent issue of the journal *Social Work*, the author examined orientations of various professions in terms of the degree of autonomy which they claim in relation to the people they are assumed to serve. Questions included is-

sues of responsibilities to individual clients as opposed to responsibilities to the public at large. The conclusion was that a new "public" model of a profession was more appropriate for both law and social work. This distinction, of course, is also related to the extent to which members of the profession are self-employed, as opposed to being employed by government or other organizations.

Whereas the question of immigration from other countries is usually associated with the numbers debate in occupations like medicine and the professorate, it would appear that this is not a major factor in the legal profession, where only 10% of practitioners are drawn from outside the country, and net migration is fairly minimal.

Another issue which faces many professionals is the extent to which they should move from the single practitioner, or firm of associated practitioners model to a more complex "industrial" form of organization with more developed administrative and technical components, as an aid to productivity. Many doctors have moved from private practice to group practices to large clinics with an administrative staff, and dentists have raised their productivity significantly by utilizing a number of chairs operated part of the time by trained technicians. Can it be that the "legal factory" will become a model of the future?

Finally, the question of the role of what, in medicine, is called para-professionals, is one which could affect the numbers issue in the legal profession as it has in other fields. Just where the line should be drawn between professionals and para-professionals is hotly debated in librarianship, social work and nursing as well as in medicine. Proposals have been made for more training of law clerks, legal secretaries and others in the legal field. The question is whether to choose the industrial model, as dentists have done, and become supervisors and managers of an increasing number of para-professionals, or whether to oppose this form of development.

The examples which I have cited are only some of the developments that are occurring in other professional fields. Whether they offer useful suggestions or warnings regarding the possible future state of affairs in any profession is a matter of individual judgment.

VI. A LOOK AT THE FUTURE

While the question of prospective increases in the numbers of persons with legal training in our society is clearly a matter of debate for those currently practicing in the field, it is also a topic of concern to the public at large and to those involved in formulating social policy. Depending, in part, on a number of subsidiary issues such as where these new entrants will practice, and the composition of the new in-take in terms of gender, ethnic background and other factors, growth in numbers of lawyers will have an important affect on the provision of legal services to the society in general.

Those currently engaged in the private practice of law can be expected to emphasize the existing and probable future demands for legal services and their relationship to a changing supply of practitioners. Potential recipients of service are more likely to be concerned with possible changes in the methods of practice and the quality of services that will be provided. As with other professions in the society, the public is becoming increasingly disturbed by what they perceive as a deterioration in both the quality and ethics of legal practice.

One result of this concern may well be an expansion in the role of government in an attempt to influence both the training of lawyers and the provision of legal services, and to support the extension of "judicare". Enquiries into the field are revealing not only the need for reforms in the legal system, but inequities and injustices in the ways in which legal institutions function as control mechanisms in the society. These are also likely to lead to pressures on the part of the public for significant changes, as the field appears to be moving towards de-professionalization, while retaining the stance of professionalism.

When one looks at other changes that are beginning to take place in the legal profession and also at some parallel changes in other established professions, additional trends seem likely. One thrust is towards an increasing division of function within the field, accompanied by a greater use of para-professionals. A second development is a move toward more self-involvement on the part of clients in the legal process, through the use of standardized legal forms and other aids. A third is the increased impact of technological developments such as computer-based information systems. Finally, there is likely to be a growth in demand for low-cost services to the disadvantaged, such as legal aid.

All of these developments can be expected to influence the decisions about the desirability of increasing numbers in the field. Since they suggest different answers to the question, their joint impact is difficult to assess. Whatever their effects, these further observations reinforce the contention that it is important to consider a range of factors in responding to the pressing question; "Are there too many lawyers?"